

LOCAL GOVERNMENT INDIGENT POLICIES IN THE PURSUIT OF SOCIAL JUSTICE IN SOUTH AFRICA THROUGH THE LENSES OF FRASER

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1 Introduction

The Constitution of the Republic of South Africa, 1996 (“the Constitution”) is committed to correcting the injustices of the past and to the establishment of a society based on social justice.¹ This commitment is firmly rooted both in the vision of transformative constitutionalism² and the constitutional obligation on government to promote sustainable development.³ The constitutional commitment to establishing a society based on social justice translates into a mandate which must be pursued by the government of South Africa. Mindful of the fact that government in South Africa is constituted by three distinct, interrelated and independent spheres (national, provincial and local),⁴ this mandate by default becomes a shared mandate which must be executed within the constitutional framework of co-operative government.⁵ As a co-responsible

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¹ See Preamble to the Constitution.

² Elsewhere, I have given a detailed account of the concept of transformative constitutionalism. This includes its origin, the extent to which it is understood by some South African scholars and jurists and my understanding of the concept. See O Fuo “The Transformative Potential of the Constitutional Environmental Right Overlooked in *Grootboom*” (2013) 34 *Obiter* 77 77-82.

³ S 24 of the Constitution provides:

“Everyone has the right – (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that – (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) *secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.*” (Emphasis added.)

Although the concept of sustainable development often has conflicting definitions, it is a shared view that it seeks to *inter alia* promote the achievement of social justice. See P Urquhart & D Atkinson *A Pathway to Sustainability: Local Agenda 21 in South Africa* (2002) 20-21; M Burns & J Hattingh “Locating Policy within the Taxonomy of Sustainable Development” (2007) 14 *SAJELP* 1 3-5; J de Visser *Institutional Framework for Developmental Local Government: Making Good on the Promise of Development* (2001) 2-3; World Commission on Environment and Development (“WCED”) *Report of the World Commission on Environment and Development (WCED): Our Common Future* (1987) paras 27-30.

⁴ See s 40(1) of the Constitution.

⁵ For details on the principles of co-operative government and intergovernmental relations, see ss 40(2) and 41 of the Constitution; W du Plessis “Legal Mechanism for Cooperative Governance in South Africa: Successes and Failures” (2008) 23 *SAPL* 87 90-92; T Layman *Intergovernmental Relations and Service Delivery in South Africa: A Ten Year Review* (2003) 8; Community Law Centre *Institutional Subsidiarity in the Constitution: Slapstick Asymmetry or a “Rights-based” Approach to Powers?* (2008) 2-3, 11-12; B de Villiers & J Sindane *Cooperative Government: The Oil in the Engine* (2011); J de Visser *Developmental Local Government: A Case Study of South Africa* (2005) 209-254; C Kirkby, N Steytler & J Jordan “Towards a More Cooperative Local Government: The Challenge of District Intergovernmental Forums” (2007) 22

sphere of government,⁶ local government is equally obliged to contribute towards the pursuit of social justice in South Africa.⁷ Despite the above-mentioned constitutional mandate, the Constitution does not expressly articulate what social justice entails. Although the concept of social justice and the means of realising it remain a contentious issue for modern jurisprudence,⁸ scholars and jurists agree that, in basic terms, social justice is primarily concerned with the eradication of poverty and extreme inequalities in access to material resources in order to ensure that all citizens command the resources needed to equally participate in socio-political life.⁹ In this regard, Chaskalson explains that a society in which “there will be social justice” is one in which “the basic needs of all our people will be met, in which we will live together in harmony, showing respect and concern for one another”.¹⁰

It should be noted that, in line with the obligation to contribute towards the realisation of constitutional objectives, municipalities have powers to adopt and implement by-laws, plans and policies in respect of the matters listed in Schedules 4B and 5B of the Constitution.¹¹ The Local Government: Municipal Systems Act¹² (“Systems Act”) provides that, in governing a municipality, a municipal council could exercise its executive and legislative authority by developing and implementing policies and by-laws.¹³ In this regard, policy is arguably one of the legally prescribed governance instruments which should be used by municipalities to realise their developmental mandate.¹⁴ In order to assist local government to better respond to the basic needs of indigent households such as water, electricity and sanitation, the national government adopted the National Framework for Municipal Indigent Policies (“NIP”) in 2006.¹⁵ The NIP guarantees a basic level of water, electricity and sanitation

⁶ SAPL 143 144; B Bekink *Principles of South African Local Government Law* (2006) 89-94.

⁷ See A du Plessis “Local Environmental Governance and the Role of Local Government in Realising Section 24 of the South African Constitution” (2010) 21 *Stell LR* 265 265-267; A Christmas & J de Visser “Bridging the Gap between Theory and Practice: Reviewing the Functions and Powers of Local Government in South Africa” (2009) *CJLG* 107 107; J de Visser “Developmental Local Government in South Africa: Institutional Fault Lines” (2009) *CJLG* 712-714.

⁸ See P Langa “Transformative Constitutionalism” (2006) 17 *Stell LR* 351 358; K Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146 150; M Pieterse “What do we mean when we Talk about Transformative Constitutionalism” (2005) 20 *SAPL* 155 164-165; A Chaskalson “The Third Bram Fisher Memorial Lecture: Human Dignity as a Foundational Value of our Constitution” (2000) 16 *SAJHR* 193 204-205.

⁹ A van Blerk *Jurisprudence: An Introduction* (1998) 127; Y Sooka “Transforming our Society” in J Handmaker & R Berkout (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 193 193.

¹⁰ See Pieterse (2005) *SAPL* 164-165; Chaskalson (2000) *SAJHR* 204-205; N Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in N Fraser & A Honneth (eds) *Redistribution or Recognition* (2003) 7 36.

¹¹ Chaskalson (2000) *SAJHR* 205.

¹² See s 156(1) of the Constitution read with Schedules 4B and 5B. By virtue of these provisions, municipalities have legislative and executive authority in the areas of: electricity and gas reticulation, municipal health services, municipal public transport, stormwater management in built-up areas, water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems, refuse removal, refuse dumps and solid waste disposal and cemeteries, among others.

¹³ Local Government: Municipal Systems Act 32 of 2000.

¹⁴ See s 11(3)(a).

¹⁵ See s 11(3)(a).

¹⁶ See DPLG (now CoGTA) *National Framework for Municipal Indigent Policies* (2006) (“*National Indigent Policy*”).

services to indigent households and obliges municipalities to adopt and implement municipal indigent policies that are suited to local contexts and capable of meeting the basic needs of indigent households.¹⁶

Against this background, the purpose of this article is to explore and critically investigate the relevance and potential of local government indigent policies in contributing towards the pursuit of social justice in South Africa through the lenses of political theorist and philosopher, Nancy Fraser. An analysis of this nature is important because it provides an opportunity to distil benchmarks and assess the extent to which local government is on course in the pursuit of social justice. The choice of Fraser's multi-dimensional theory on social justice based on "participatory parity" as the basis for this analysis is justified in part 2.3 below. In order to achieve this objective, this article is divided into three main parts: The first part begins by concisely discussing and motivating the adoption of Fraser's theory on social justice based on "participatory parity". This part distils theoretical benchmarks from Fraser's "affirmative" policy reform strategies that will be used in exploring the relevance and potential of local indigent policies in the pursuit of social justice. The second part provides a legal and policy context to local government indigent policies in South Africa. Based on the theoretical benchmarks distilled from Fraser's "affirmative" policy reform strategies, the third part explores the relevance and potential of local government indigent policies in contributing towards the pursuit of social justice in South Africa. This entails a critical analysis of the content and process for designing and implementing indigent policies to the extent that they relate to the benchmarks distilled from Fraser's "affirmative" policy reform strategies. The article uses the indigent policies of some municipalities to support some of the arguments raised. In order to be concise, despite the broad range of services guaranteed in the NIP, the analysis will focus on the provision of free basic water and electricity. The last part of the article is the conclusion.

2 Fraser's theory of justice based on "participatory parity"

2.1 A multi-dimensional conception of social justice

Fraser's multi-dimensional conception of social justice integrates claims for (re)distribution¹⁷ and recognition¹⁸ into a broader, overarching political framework.¹⁹ The core of her bivalent conception of social justice is what Fraser refers to as the notion of "parity of participation". Fraser argues that a society based on social justice is one where there is "participatory parity".²⁰

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¹⁷ The politics of redistribution primarily advocate for the redistribution of resources from the rich to the poor. See Fraser "Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation" in *Redistribution or Recognition* 10.

¹⁸ The politics of recognition typically covers those claims which seek to challenge norms of cultural dominance as rooted in, for example, sexual, gender, ethnic and race differences. Fraser "Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation" in *Redistribution or Recognition* 7.

¹⁹ Fraser *Social Justice in the Age of Identity Politics* 30; Fraser "Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation" in *Redistribution or Recognition* 34-37.

²⁰ Fraser *Social Justice in the Age of Identity Politics* 30; Fraser "Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation" in *Redistribution or Recognition* 36.

This norm (participatory parity) requires that for social justice to be achieved, social arrangements in society must permit all (adult) members of that society to interact with one another as “peers” or equals, especially in decision-making.²¹ Participatory parity presupposes the equal moral worth of human beings.²² Fraser argues that the notion of participatory parity must be applied through democratic processes in resolving issues related to redistribution and recognition. According to Fraser:

“[T]he norm of participatory parity must be applied dialogically and discursively, through democratic processes of public debate. In such debates, participants argue about whether existing institutionalised patterns of cultural value impede parity of participation and about whether proposed alternatives would foster it – without unjustifiably introducing or exacerbating other disparities. For the status model, then, participatory parity serves as an idiom of public contestation and deliberations about questions of justice. More strongly, it represents *the principal idiom of public reason*, the preferred language for conducting democratic political argumentation on issues of both distribution and recognition.”²³

The above extract demonstrates that Fraser’s norm of participatory parity provides an essentially democratic approach to the pursuit of social justice. Her call for public contestation and deliberation in resolving issues related to claims for redistribution and recognition recognises that human beings must decide the conditions necessary to their flourishing, through robust engagement with government authorities.²⁴ Emphasis on an essentially democratic approach in dealing with issues of redistribution and recognition arguably requires that conditions needed for genuine public deliberations must be present to sustain parity of participation.²⁵

Fraser argues that for participatory parity to be possible, at least two prerequisites must be met:²⁶ Firstly, material resources must be distributed in such a manner as to ensure participants’ independence and “voice”. This is what Fraser calls “the ‘objective’ precondition of participatory parity”.²⁷ This precondition requires that all forms and levels of material inequality and economic dependence that impede parity of participation should be eradicated. In this regard, any social arrangements that institutionalise deprivation, exploitation and gross disparities in wealth and income should be eliminated because they deny some people the means and opportunities to interact with others as peers.²⁸ This objective precondition addresses concerns traditionally associated with distributive justice.

Secondly, Fraser argues that institutionalised cultural value patterns must express equal respect for all members of society and ensure equal opportunities

²¹ Fraser *Social Justice in the Age of Identity Politics* 30; Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in *Redistribution or Recognition* 36.

²² Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in *Redistribution or Recognition* 45.

²³ 43 (original emphasis).

²⁴ 43-44.

²⁵ See 43-45.

²⁶ See Fraser *Social Justice in the Age of Identity Politics* 30-32.

²⁷ 30-31; Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in *Redistribution or Recognition* 36.

²⁸ Fraser *Social Justice in the Age of Identity Politics* 31; Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in *Redistribution or Recognition* 36.

for achieving social esteem.²⁹ Fraser refers to this condition for participatory parity as “intersubjective”.³⁰ According to Fraser, this condition precludes cultural patterns that systematically depreciate some categories of people and the qualities associated with them.³¹ To Fraser, institutionalised value systems that deny some people the status of full-partners in socio-political interactions should be prohibited.³² Fraser’s intersubjective condition addresses concerns associated with claims for recognition and presupposes the equal moral worth of human beings. The intersubjective condition therefore requires that standard forms of legal equality must be established.

2.2 Policy reform proposals for achieving participatory parity

Fraser identifies two policy reform strategies – which can either be affirmative or transformative – used by governments to pursue social justice. According to Fraser, government’s means-tested social welfare programmes that specifically target the people living in poverty constitute the main affirmative, redistributive reform strategy.³³ She refers to such reforms as “affirmative redistribution” reforms because they seek to redress the maldistribution of resources by altering “end-state patterns of allocation, without disturbing the underlying mechanisms that generate them”.³⁴ Fraser argues that because such means-tested affirmative action programmes do not alter the deep political-economic structures that generate injustice, such reform programmes must make repeated allocations to beneficiaries.³⁵ The need for repeated allocations suggests that beneficiaries of means-tested programmes should have sustainable access to basic needs. She argues that the result of such repeated allocations is to mark the beneficiaries as “different” and “lesser”, therefore reinforcing existing group divisions.³⁶ This means that where government, for example, adopts and administers means-tested welfare programmes that seek to redistribute resources to impoverished people, it could adopt and implement strategies that seek to eliminate the stigma usually attached to beneficiaries of welfare programmes. Government must persistently focus on changing the stigma associated with welfare beneficiaries by seeking approaches that provide material help in forms that promote the

²⁹ Fraser *Social Justice in the Age of Identity Politics* 31; Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in *Redistribution or Recognition* 36.

³⁰ Fraser *Social Justice in the Age of Identity Politics* 31; Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in *Redistribution or Recognition* 36.

³¹ Fraser *Social Justice in the Age of Identity Politics* 31; Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in *Redistribution or Recognition* 36.

³² Fraser *Social Justice in the Age of Identity Politics* 31; Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in *Redistribution or Recognition* 36.

³³ Fraser *Social Justice in the Age of Identity Politics* 48; Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in *Redistribution or Recognition* 65, 74. In implementing a means-tested welfare programme, governments use criteria such as a basic income threshold to determine eligibility. This ensures that only poor households or individuals can be beneficiaries of means-tested welfare programmes.

³⁴ Fraser *Social Justice in the Age of Identity Politics* 45; Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in *Redistribution or Recognition* 74.

³⁵ Fraser *Social Justice in the Age of Identity Politics* 45-46.

³⁶ 45-46.

standing of recipients as full partners in social interaction.³⁷ In this regard, for government welfare reform programmes to succeed, as per Fraser's line of argument, they must be joined by struggles for cultural change.³⁸

Fraser argues that although welfare programmes are branded as affirmative, they can play a transformative role (change the economic and political structures that generate inequalities) in particular contexts, especially if consistently and persistently pursued by government.³⁹ According to Fraser, this can be the case with a basic income grant, for example, which ensures that certain basic living standards are guaranteed without fundamentally altering the market structure. Fraser argues that transformation is also possible where there are multiple government social welfare programmes providing multiple forms of assistance to beneficiaries.⁴⁰ For example, this will be the case where a basic income grant is accompanied by other government welfare programmes that provide free access to education, water, electricity and health care services for impoverished households. Cumulatively, if applied over a long period of time, such reform initiatives that are multi-pronged can have positive ripple effects in other areas. For example, multi-pronged welfare programmes can lead to an increase in access to health care, education and capacity building. These changes may set in motion more radical changes in future such as the reform of social, institutional and cultural patterns that generate or reinforce injustice.⁴¹ This potential to trigger radical long-term structural and institutional change that will promote social justice is what Fraser describes as "non-reformist reforms".⁴² To Fraser, "non-reformist reforms" seek to transform inequalities directly through institutional intervention and indirectly by gradually changing the political environment to facilitate future struggles for recognition.⁴³

Fraser suggests that participatory parity can be hindered by exclusionary political practices that prevent a majority of people from participating in decision-making processes. Exclusionary political processes which leave policy formulation and implementation at the hands of bureaucrats can, for example, systematically lead to marginalisation and further subordination of some people.⁴⁴

Importantly, Fraser argues that due to the multi-layered nature of the state, deliberations about institutionalising social justice can take place at the national, regional and local levels of government, depending on the matters that are best suited for each level.⁴⁵ This deliberative approach that

³⁷ 48; Fraser "Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation" in *Redistribution or Recognition* 76-77.

³⁸ Fraser *Social Justice in the Age of Identity Politics* 49.

³⁹ Fraser "Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation" in *Redistribution or Recognition* 78-79.

⁴⁰ 79.

⁴¹ 79.

⁴² 79-80; S Liebenberg "Needs, Rights and Transformation: Adjudicating Social Rights" (2006) 17 *Stell LR* 5 10.

⁴³ Fraser "Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation" in *Redistribution or Recognition* 82.

⁴⁴ 68.

⁴⁵ See 87-88.

puts citizens at the centre of political decision-making has the potential of increasing democratic legitimacy. In addition, it gives citizens the opportunity to choose options that are context specific.⁴⁶ Fraser cautions that if dialogical deliberations were to be reduced to mere formalism, policies geared towards realising the objectives of social justice may be deprived of any meaningful substantive content.⁴⁷ The overall effect would be failure to achieve social justice, arising from a mismatch between social justice objectives and substantive policy content. Therefore, abstract insistence on democratic procedures may lead to a miscarriage of social justice.

Broadly speaking, from Fraser's affirmative policy reform proposals discussed above, four benchmarks can be distilled to guide local government to contribute towards the pursuit of social justice: Firstly, where possible, local government should implement multiple means-tested welfare policies and programmes that meet the needs of impoverished people. Secondly, means-tested welfare policies and programmes must be implemented on a long-term basis in order to achieve their objectives. Thirdly, local government must promote public deliberations in the design and implementation of means-tested welfare policies. Finally, local government must work in close partnership with other spheres of government.

2 3 Motivation for adopting Fraser's theoretical framework for analysis

Fraser's views on social justice are well suited to the South African context for a number of reasons. Firstly, her theory is multi-dimensional (it seems to identify all possible causes of current socio-economic inequalities) and offers practical suggestions at the policy and institutional level on what should be done by state authorities to pursue social justice. Fraser's sources of injustice, captured in the politics of recognition and distribution, are true to almost every society and resonate with the values of the South African Constitution – human dignity, the achievement of equality, freedom, non-racialism, non-sexism, social justice and participatory democracy.⁴⁸ Secondly, because Fraser's theory focuses on ensuring that all adult members of society are able to interact with one another as true equals in socio-political life, it is generally well suited for divergent opinions regarding "the good life".⁴⁹ Thirdly, Fraser provides all embracing suggestions as to what can be done to address inequalities arising from diverse sources in the short to long run. She *inter alia* suggests that governments should adopt multiple welfare programmes that target various forms of socio-economic inequalities and eliminate institutionalised cultural

⁴⁶ 71.

⁴⁷ 71.

⁴⁸ Liebenberg (2006) *Stell LR* 5-7. These sources have been identified as driving inequalities in South Africa. See Pieterse (2005) *SAPL* 160-161; C Albertyn & B Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 *SAJHR* 248 249; Liebenberg (2006) *Stell LR* 5-7.

⁴⁹ Liebenberg (2006) *Stell LR* 7.

patterns that reinforce inequalities.⁵⁰ Fourthly, her conception of social justice as “participatory parity” advocates the eradication of socio-economic inequalities through sustained and equal participatory democratic processes. The emphasis on inclusive decision-making processes is important in the South African context given its recent transition, and constitutional commitment, to democracy.⁵¹ Worth noting is her precondition for establishing a society based on social justice – the (re)distribution of material resources to satisfy basic needs of those living in poverty. Fraser argues that a society based on social justice can only be established and maintained where individuals and marginalised groups have sufficient resources and substantive protection to participate in decision-making processes as true equals. Equality in decision-making goes beyond day-to-day social interactions and extends to the process of conceiving and practically implementing what they conceive as “the good life”. Finally, Fraser’s comprehensive policy proposals recognise that social justice cannot be pursued by one sphere of government in isolation.⁵² The pursuit of social justice therefore requires a partnership between all spheres of government and organs of state.

3 Legal and policy context of indigent policies in South Africa

The Constitution expressly and implicitly guarantees a range of socio-economic rights, including the right of access to, *inter alia*, sufficient water, sanitation and electricity.⁵³ The Constitution obliges government to adopt “legislative and other measures, within its available resources” to progressively realise socio-economic rights.⁵⁴ This obligation has been interpreted to mean, *inter alia*, that in addition to legislation, the executive arm of government in all spheres can adopt “policies” to give effect to socio-economic rights.⁵⁵ This means that policies fall within the range of “other measures” contemplated by the Constitution as necessary to give effect to

⁵⁰ For similar reform proposals see: Albertyn & Goldbatt (1998) *SAJHR* 249; Liebenberg (2006) *Stell LR* 5-36.

⁵¹ See s 1(d) of the Constitution; *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) paras 107-116; D Brand “Judicial Deference in Socio-Economic Rights Cases in South Africa” (2011) 22 *Stell LR* 614 622-625.

⁵² See Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in *Redistribution or Recognition* 87-88.

⁵³ See s 27(1) of the Constitution; D Bilchitz “Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*” (2010) 127 *SALJ* 591 591; A du Plessis “South Africa’s Constitutional Environmental Right (Generously) Interpreted: What is in it for Poverty?” (2011) 27 *SAJHR* 279 285, 294, 298; A du Plessis “A Government in Deep Water? Some Thoughts on the State’s Duties in Relation to Water Arising from South Africa’s Bill of Rights” (2010) 19 *RECIEL* 316 319; J Dugard “Power to the People? A Rights-based Analysis of South Africa’s Electricity Services” in D McDonald (ed) *Electric Capitalism: Recolonising Africa on the Power Grid* (2010) 264 266-268; *Joseph v City of Johannesburg* 2010 3 BCLR 212 (CC) paras 34-47.

⁵⁴ See ss 24(b), 25(5), 26(2), 27(2) and 29(1)(b) of the Constitution.

⁵⁵ See D Brand “Introduction to Socio-economic Rights in the South African Constitution” in D Brand & C Heyns (eds) *Socio-economic Rights in South Africa* (2005) 1 12, 14; *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC) para 66; *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 42.

socio-economic rights.⁵⁶ Furthermore, as part of its socio-economic rights obligations, government is required to prioritise and attend to the needs of those in desperate situations.⁵⁷ In addition, the Constitution and legislation mandate municipalities to prioritise and meet the needs of especially impoverished community residents, as part of local government's expanded developmental mandate.⁵⁸

In order to assist local government to meet the basic needs of impoverished community residents, as required by the Constitution and legislation, the national government adopted several sector-specific policies and guidelines in the area of water, electricity and sanitation between 2001 and 2005.⁵⁹ In 2005, a Draft Municipal Indigent Policy Framework was designed to consolidate fragmented basic services policies, thereby providing a single framework for the provision of free basic services to people living in poverty.⁶⁰ In 2006, the Draft Municipal Indigent Policy Framework was replaced by the National Indigent Policy which has effectively replaced "former indigent policies and free basic services policies".⁶¹ The NIP aims at "including those currently excluded from access to basic services, through the provision of a social safety net" that will facilitate their "productive and healthy engagement in society".⁶² The overall objective of the NIP is to ensure that all indigent households have access to, *inter alia*, prescribed levels of basic water and electricity supply.⁶³ The NIP defines an indigent to include anyone who does not have access to the following services: sufficient water; basic sanitation; refuse removal in

⁵⁶ See *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC) para 66; *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 42. See Brand "Introduction to Socio-economic Rights" in *Socio-economic Rights in South Africa* 12, 14.

⁵⁷ *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 44.

⁵⁸ Unlike the previous system of local government where municipalities played a mere service delivery role and were subject to strict control by national and provincial governments, municipalities now have an expanded mandate which requires them to promote sustainable development and contribute, together with other spheres of government, to the realisation of the socio-economic rights guaranteed in the Constitution. For details, see ss 152 and 153 of the Constitution; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 paras 1, 28-37; De Visser *Developmental Local Government* 58-59; R Cameroon "Central-Local Financial Relations in South Africa" (2010) 28 *Government Studies* 113 118; RSA "Section B: Developmental Local Government" in *White Paper on Local Government* (1998); *City of Cape Town v Robertson* 2005 2 SA 323 (CC) para 60; and ss 4(2)(j) and 23(1)(c) of the Systems Act.

⁵⁹ These include: Regulations Relating to Compulsory National Standards and Measures to Conserve Water (2001) GGR 509 in GG 22355 of 08-06-2001; DWAF *White Paper on Basic Household Sanitation* (2001); DME *Free Basic Electricity Policy* (2001); DWAF *Strategic Framework for Water Services: Water is Life, Sanitation is Dignity* (2003); DPLG (now CoGTA) *Draft Framework for a Municipal Indigent Policy* (2005) 2. For a detailed historical account on developments prior to the adoption of the DPLG (now CoGTA) *National Indigent Policy*, see T Mosdell "Free Basic Services: The Evolution and Impact of Free Basic Water Policy in South Africa" in U Pillay, R Tomlinson & J du Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) 283 283-289; M Muller "Free Basic Water – A Sustainable Instrument for a Sustainable Future in South Africa" (2008) 20 *Environment and Urbanisation* 67 67, 72-74.

⁶⁰ DPLG (now CoGTA) *National Indigent Policy* 2.

⁶¹ 6-7.

⁶² 3, 9; DPLG (now CoGTA) *Guidelines for the Implementation of Municipal Indigent Policies* (2006) 10.

⁶³ DPLG (now CoGTA) *National Indigent Policy* 8. For a complete breakdown of the figures of households who do not have access to basic services, see Statistics South Africa *Census 2011: Highlights of Key Results* (2012) 12-19.

denser settlements; environmental health; basic energy; health care; housing; food and clothing.⁶⁴

The NIP requires each municipality to provide, *inter alia*, the following essential services to indigent households: water supply, sanitation, basic energy and refuse removal.⁶⁵ In relation to these services, the following basic service levels apply across the country:⁶⁶

Table 1: Range and levels of services in the NIP⁶⁷

Range of services	Service levels
Basic water supply facility	The infrastructure required to supply 25 litres of potable water per person per day supplied within 200 metres of a household and with a minimum flow of 10 litres per minute (in the case of communal points) or 6000 litres of potable water supplied per formal connection per month (in the case of a yard or house connections).
Basic water supply service	The provision of a basic water supply facility, the sustainable operation of the facility (available for at least 350 days per year and not interrupted for more than 48 consecutive hours per incident) and the communication of good water use, hygiene and related practices.
Basic energy service	The provision of sufficient energy to allow for lighting, access to media and cooking - fixed at 50kWh per household per month.
Basic sanitation facility	The infrastructure needed to provide a sanitation facility, which is safe, reliable, private, protected from the weather and ventilated, keeps smells to the minimum, is easy to keep clean, minimises the risks of the spread of sanitation-related diseases by facilitating the appropriate treatment and/or removal of human waste and wastewater in an environmentally sound manner.
Basic sanitation service	The provision of basic sanitation facility which is easily accessible to a household, the sustainable operation of the facility, including the safe removal of human waste and waste water from the premises where this is appropriate and necessary, and the communication of good sanitation, hygiene and related practices.
Basic refuse removal service	The disposal of refuse from a property where housing densities permit this or the removal of refuse from each property located within a municipality and the disposal of this waste in a landfill site. Refuse should be disposed in a manner that ensures the health of the community is maintained and no diseases are propagated, or pests allowed to breed due to refuse which is not properly removed and disposed of.

⁶⁴ See DPLG (now CoGTA) *National Indigent Policy* 13.

⁶⁵ 21.

⁶⁶ The basic service level refers to the level of services required to maintain basic health and safety. See DPLG (now CoGTA) *National Indigent Policy* 21.

⁶⁷ Table 1 is based on information obtained from the NIP. See DPLG (now CoGTA) *National Indigent Policy* 21-23.

Basic housing assistance	Ensure that sufficient land is identified within the municipal boundary, in appropriate locations, for all residents in the municipality and that the necessary planning is undertaken to ensure that this land can be properly developed. Further, ensure that funding available from the province for housing is properly allocated to assist the indigent with access to serviced plots and assistance with providing “top structure” through the “people’s housing process”. In the case of inner city locations, to ensure that the indigent can gain access to some form of shelter.
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Despite the broad range of services in Table 1, this discussion is limited to the provision of free basic water and electricity. The NIP provides that the range and levels of essential services captured in Table 1 remain basic service levels which ought to be periodically revised.⁶⁸ The government’s 2003 Strategic Framework for Water Services⁶⁹ acknowledges that 25 litres of water per person per day is a bare minimum which is insufficient for domestic use and it expresses government’s commitment to continuously and progressively revise the quantity of basic water supply.⁷⁰ Unfortunately, the basic national standards giving effect to the constitutional right of access to sufficient water have not been revised to date.⁷¹ As suggested by expert evidence and as confirmed by the High Court and Supreme Court of Appeal in the *Mazibuko* cases,⁷² the sufficient amount of water for purposes of the section 27(1)(b) constitutional right should vary between 42 and 50 litres of water per person per day.⁷³ However, both the High and Supreme Court decisions were set aside by the Constitutional Court, where the Court stressed that it is the constitutional duty of the legislature and executive to give content to socio-economic rights.⁷⁴ The Court rejected the view that section 27(1) of the Constitution imposes a directly enforceable obligation on the state to provide sufficient water on demand to every person.⁷⁵

In terms of electricity, a quantitative survey conducted by Earthlife Africa Johannesburg in 2009 found that the nationally prescribed minimum standard was inadequate in meeting its objective.⁷⁶ In view of this finding,

⁶⁸ 23.

⁶⁹ DWAF *Strategic Framework for Water Services: Water is Life, Sanitation is Dignity*.

⁷⁰ 45-47; S Heleba “The Right of Access to Sufficient Water in South Africa: How Far Have we Come?” (2011) 15 *LDD* 1 15.

⁷¹ Heleba (2011) *LDD* 15.

⁷² The judgments of the High Court, Supreme Court of Appeal and the Constitutional Court are respectively cited as *Mazibuko v City of Johannesburg* 2008 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 3 SA 592 (SCA); and *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC). For a discussion of the various court judgments, see for example: L Jansen van Rensburg “The Right of Access to Adequate Water [Discussion of *Mazibuko v The City of Johannesburg* Case No 13865/06]” (2008) 19 *Stell LR* 415; J Dugard & S Liebenberg “Muddying the Waters: The Supreme Court of Appeal’s Judgment in the *Mazibuko* Case” (2009) 10 *ESR Review* 11; L Kotze “Phiri, the Plight of the Poor and the Perils of Climate Change: Time to Rethink Environmental and Socio-economic Rights in South Africa?” (2010) *Journal of Human Rights and the Environment* 135 156-160; L Stewart “Adjudicating Socio-Economic Rights Under a Transformative Constitution” (2010) 28 *Penn St Int’l L Rev* 487-512.

⁷³ Jansen van Rensburg (2008) *Stell LR* 417.

⁷⁴ *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC) para 67.

⁷⁵ Paras 48-49. For a critique of the Court’s methodology in this case, see Stewart (2010) *Penn St Int’l L Rev* 487 506-508.

⁷⁶ F Adam *Free Basic Electricity: A Better Life for All* (2011) 29.

the study suggested that 200kWh of electricity was adequate to address the needs of especially urban households living in poverty.⁷⁷ Earthlife Africa Johannesburg argues that the initial study that led to the allocation of 50kWh of free electricity as the basic level of electricity needed by impoverished households did not consider whether such households used this quantity of electricity because it was sufficient for their household needs or because they could not afford to pay more.⁷⁸

The inadequacy of the level of free essential services in addressing the basic needs of indigent households has been the subject of significant criticism.⁷⁹ Critics argue that the low levels of essential services in the areas of water and electricity were informed by the misconception that low-income households use less water and electricity due to their low-income status and that the basic levels of electricity and water fail to take into account the real needs of impoverished households, taking into consideration a range of factors, including household size and number of dependents.⁸⁰ There is the view that although the government professes to be pro-poor, its provision of water and electricity is market-driven and places more weight on meeting the interests of large-scale commercial and industrial users rather than those of people living in poverty.⁸¹ It has been argued that the minimalist approach to the level of free basic services adopted by national government maintains rather than alleviates social hardships occasioned by poverty.⁸² When applied in its current form, the NIP fails to redistribute resources to meet the basic needs of impoverished people. This limits the independence and voice of the impoverished and constrains their ability to engage in socio-political debate. This, in turn, reinforces their subordination in society as “lesser” citizens and fails to meet Fraser’s objective precondition for establishing a society based on social justice. In its current form, the implementation of the NIP without modifications to suit the actual needs of local communities reinforces existing socio-economic inequalities. This is inimical to the pursuit of social justice because it amounts to a denial of recognition.

⁷⁷ 29.

⁷⁸ 15.

⁷⁹ Mosdell “Free Basic Services: The Evolution and Impact of Free Basic Water Policy in South Africa” in *Democracy and Delivery* 296; Muller (2008) *Environment and Urbanisation* 76; G Ruiters “Free Basic Electricity in South Africa: A Strategy for Helping or Containing the Poor?” in D McDonald (ed) *Electric Capitalism: Recolonising Africa on the Power Grid* (2009) 248 248; Dugard “Power to the People? A Rights-based Analysis of South Africa’s Electricity Services” in *Electric Capitalism* 276; Adam *Free Basic Electricity: A Better Life for All* 15.

⁸⁰ Mosdell “Free Basic Services: The Evolution and Impact of Free Basic Water Policy in South Africa” in *Democracy and Delivery* 296, 298; Ruiters “Free Basic Electricity in South Africa: A Strategy for Helping or Containing the Poor?” in *Electric Capitalism* 251; Dugard “Power to the People? A Rights-based Analysis of South Africa’s Electricity Services” in *Electric Capitalism* 276; Adam *Free Basic Electricity: A Better Life for All* 15.

⁸¹ Ruiters “Free Basic Electricity in South Africa: A Strategy for Helping or Containing the Poor?” in *Electric Capitalism* 248-249; Dugard “Power to the People? A Rights-based Analysis of South Africa’s Electricity Services” in *Electric Capitalism* 265.

⁸² Ruiters “Free Basic Electricity in South Africa: A Strategy for Helping or Containing the Poor?” in *Electric Capitalism* 252; Dugard “Power to the People? A Rights-based Analysis of South Africa’s Electricity Services” in *Electric Capitalism* 276.

However, the NIP stresses that it is the responsibility of each municipality to effectively address the needs of indigent households within its jurisdiction.⁸³ For municipalities to effectively confront this challenge, they require “local understanding and local initiative”.⁸⁴ In view of this, the NIP provides a framework which should be used by municipalities to design and implement their own context-specific indigent policies.⁸⁵

4 Relevance and potential of local government indigent policies in contributing towards the pursuit of social justice

The discussion that follows specifically explores the relevance and potential of municipal indigent policies in contributing towards the pursuit of social justice in South Africa based on the theoretical benchmarks distilled from Fraser’s theory of social justice. The discussion draws from the indigent policies of some municipalities to support the arguments raised.

4 1 Welfare objectives and scope of municipal indigent policies

The “objective” precondition for “participatory parity” requires that government should redistribute resources to ensure that impoverished people have access to basic needs.⁸⁶ This entails the eradication of extreme socio-economic inequalities through the implementation of means-tested welfare programmes that specifically target the people living in poverty – “affirmative redistribution” reforms.⁸⁷ As evident from the discussion on the legal and policy context of local government indigent policies in South Africa, the NIP has defined welfare objectives and specifically seeks to assist indigent households by providing them with free basic services in order to facilitate their “productive and healthy engagement in society”.⁸⁸ From this angle, one can argue that there is a commonality between local government indigent policies in South Africa and the type of affirmative redistribution policy reform strategy canvassed by Fraser. Their commonality lies in the fact that they share the same welfare objectives and specifically seek to redistribute resources in order to enable impoverished people to have access to basic needs that would enable them to participate in socio-political life as equals. Despite a commonality of purpose, as already indicated, there is the shared view that the level of free basic services guaranteed in the NIP is inadequate to meet

⁸³ DPLG (now CoGTA) *National Indigent Policy* 6.

⁸⁴ 6.

⁸⁵ 6.

⁸⁶ Fraser *Social Justice in the Age of Identity Politics* 30-31; Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in *Redistribution or Recognition* 36.

⁸⁷ Fraser *Social Justice in the Age of Identity Politics* 48; Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in *Redistribution or Recognition* 65, 74. In implementing a means-tested welfare programme, governments use criteria such as a basic income threshold to determine eligibility. This ensures that only poor households or individuals can be beneficiaries of means-tested welfare programmes.

⁸⁸ DPLG (now CoGTA) *National Indigent Policy* 3, 9; DPLG (now CoGTA) *Guidelines for the Implementation of Municipal Indigent Policies* 10.

the actual needs of the poor.⁸⁹ Some believe that if the current levels of free basic services guaranteed in the NIP are not augmented, this may reinforce rather than alleviate social hardships currently suffered by people living in poverty.⁹⁰ This undermines the quest for social justice.

The NIP encourages municipalities that have the necessary resources to provide service levels higher than those outlined at the national level.⁹¹ It seems that this constitutes a flexible mechanism which allows municipalities to implement levels of free basic services to indigent households that are consistent with context-specific needs and available resources. Despite the degree of flexibility enjoyed by municipalities in setting the range and levels of free basic services that should be provided to indigents, the indigent policies of some metropolitan and local municipalities show that their range and levels of free basic services are similar to those outlined in the NIP. For example, the following municipalities have adhered to the inadequate national standards and currently provide indigent households with 6kl water free of charge per month and 50kWh of electricity per month: Tlokwe City Council;⁹² Tswaing Local Municipality;⁹³ City of Cape Town;⁹⁴ Mangaung Metropolitan Municipality;⁹⁵ and Tswelopele Local Municipality.⁹⁶ In terms of electricity, the City of Tshwane provides free basic electricity of 100kWh.⁹⁷ The differences in the levels of free basic water and electricity services provided by different municipal indigent policies are minimal.

The above paragraphs suggest that the flexibility mechanism in the NIP is under-utilised even by municipalities with arguably more resources. This defeats the welfare objectives of the NIP at the local level. If an indigent is defined as anyone without access to sufficient water or access to basic electricity, providing indigent households with potable water and electricity supply that are inadequate in meeting their basic needs does not remove them from the indigent bracket. This contradicts the *raison d'être* of the NIP and reinforces socio-economic inequalities and stigmatisation rather than alleviating them. The failure to address the actual needs of people facing poverty amounts

⁸⁹ Mosdell "Free Basic Services: The Evolution and Impact of Free Basic Water Policy in South Africa" in *Democracy and Delivery* 296; Muller (2008) *Environment and Urbanisation* 76; Ruiters "Free Basic Electricity in South Africa: A Strategy for Helping or Containing the Poor?" in *Electric Capitalism* 248; Dugard "Power to the People? A Rights-based Analysis of South Africa's Electricity Services" in *Electric Capitalism* 276; Adam *Free Basic Electricity: A Better Life for All* 15.

⁹⁰ Ruiters "Free Basic Electricity in South Africa: A Strategy for Helping or Containing the Poor?" in *Electric Capitalism* 252; Dugard "Power to the People? A Rights-based Analysis of South Africa's Electricity Services" in *Electric Capitalism* 276.

⁹¹ DPLG (now CoGTA) *National Indigent Policy* 23; DPLG (now CoGTA) *Guidelines for the Implementation of Municipal Indigent Policies* 19.

⁹² See Tlokwe City Council *Draft Service Delivery and Budget Implementation Plan 2012-2013* (2012) 88, 92; *An Indigent Policy for Potchefstroom* Potchefstroom City Council Credit Control, Debt Collection and Indigent By-laws GN 270 in *NWP GG 6315* of 19-09-2006.

⁹³ Tswaing Local Municipality *Amended Integrated Development Plan 2007-2011* (2009) 44-46.

⁹⁴ See M Pollack "City's Indigent Policy" (14-11-2008) *City of Cape Town* <<http://www.capetown.gov.za/en/Pages/Indigentpolicy.aspx>> (accessed 25-03-2013).

⁹⁵ The Mangaung Metropolitan Municipality is still using the indigent policy that was approved by its council on 16 May 2008. See Mangaung Local Municipality *Indigent Policy* (2008) 4 <<http://www.mangaung.co.za/legal-services/documents/Indigent%20Policy.pdf>> (accessed 25-03-2013).

⁹⁶ See Tswelopele Local Municipality *2011-2012 Tswelopele Local Municipality Annual Report* (2012) 25-32.

⁹⁷ See City of Tshwane *Indigent Policy Review 2010* (2010) 8.

to a denial of social recognition or denial of access to the social resources needed to facilitate participatory parity. This reinforces (economic) class subordination.⁹⁸ Therefore, in their current form, the potential of the indigent policies considered in this study in contributing towards the pursuit of social justice is minimised by virtue of the fact that they are incapable of adequately responding to the basic needs of impoverished households. They gloss over rather than address the actual needs of those living in intolerable conditions. In this manner, they reinforce rather than alleviate social hardships occasioned by poverty. It is submitted that they generally fail to meet what Fraser refers to as the objective precondition for achieving social justice.

4.2 Obligations to ensure sustainable access to free basic services

Fraser argues that for means-tested welfare programmes to contribute towards the pursuit of social justice, government must make repeated allocations to beneficiaries.⁹⁹ This suggests that impoverished people must have sustainable access to basic needs if means-tested welfare programmes are to achieve their defined objectives in the long term. In order to ensure that indigent households have sustainable access to basic services, the NIP requires that a “well-functioning” municipal indigent policy must have three components: Indigent households must be able to gain physical access to free basic services; maintain access to basic services; and municipalities must specifically target indigent households.¹⁰⁰

The NIP indicates that a “well-functioning” indigent policy is one that provides free basic services to indigent households on a continuous and long-term basis so as to achieve their desired effect.¹⁰¹ This requires that municipalities should be able to sustainably manage acquired and developed infrastructure so that indigent households can maintain access to the essential services over an extended period of time. Without continuous access, indigents will be forced to live without the basic necessities of life.¹⁰²

However, it is reported that the need to sustainably manage water and electricity infrastructure has led some municipalities to intensify cost recovery programmes which has often led to disconnections and disruption of supply in some indigent households.¹⁰³ As part of the cost recovery programme, some municipalities introduced the installation of prepaid meters.¹⁰⁴ For example, in Tlokwe City, after an indigent is approved as eligible for free basic services, a prepaid meter must be installed in the indigent household

⁹⁸ See S Liebenberg “Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of Meaningful Engagement” (2012) 12 *AHRLJ* 19.

⁹⁹ Fraser *Social Justice in the Age of Identity Politics* 45-46.

¹⁰⁰ DPLG (now CoGTA) *National Indigent Policy* 19.

¹⁰¹ 20; DPLG (now CoGTA) *Guidelines for the Implementation of Municipal Indigent Policies* 13.

¹⁰² Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in *Redistribution or Recognition* 78-79.

¹⁰³ Dugard “Power to the People? A Rights-based Analysis of South Africa’s Electricity Services” in *Electric Capitalism* 272, 277-278; *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC) paras 10-18.

¹⁰⁴ See J Dugard “Civic Action and Legal Mobilisation: The Phiri Water Meters Case” in J Handmaker & R Berkhout (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 71 81-83; *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC) paras 10-14.

within fourteen days prior to the registration of the indigent on the system.¹⁰⁵ A similar position is adopted by the Johannesburg Metropolitan Municipality, which “may install prepaid meters for all registered indigents”.¹⁰⁶ The use of prepaid meters compels the poor to accept “substandard services” because some prepaid electricity meters have a limited supply of between ten to thirty ampere, making it impossible for several appliances to be used concurrently.¹⁰⁷

Dugard argues that cost recovery principles are intensified as municipal distributors increasingly function as “corporatised entities according to business plans”. According to Dugard, the main problem with this commercialised model of providing basic services is that private market mechanisms distribute basic social services based on the willingness and ability of consumers to pay.¹⁰⁸ She argues that the failure of this approach to give special attention to the needs of low-income households is at odds with transformative constitutional commitments.¹⁰⁹ The need for cost recovery therefore raises a dilemma between the redistributive potential of indigent policies and the long-term financial sustainability of municipalities.¹¹⁰ With the use of prepaid meters, poor households that cannot purchase additional electricity credits are cut-off from supply after consuming their free basic levels.¹¹¹ This means that some poor households continue to live without continuous access to basic needs such as water and electricity.¹¹² This approach to cost recovering therefore reinforces existing socio-economic inequalities. As per Fraser’s line of argument, institutionalised arrangements that reinforce socio-economic inequalities and gross disparities in access to social services should be eliminated because they deny impoverished people the means to interact with others as peers. The current approach to cost recovery denies impoverished people social recognition.

Furthermore, the NIP requires that in implementing municipal indigent policies, municipalities should target poor households that do not have access to basic services and ensure that people who can afford such services pay for them.¹¹³ However, as the *Mazibuko* cases demonstrate, what constitutes a household in the South African context can be complex.¹¹⁴ According to the NIP, targeting indigent households will ensure that municipalities remain

¹⁰⁵ See *An Indigent Policy for Potchefstroom* Potchefstroom City Council Credit Control, Debt Collection and Indigent By-laws GN 270 in *NWP GG 6315* of 19-09-2006.

¹⁰⁶ See City of Johannesburg *Credit Control and Debt Collection Policy* (2009) “9. Prepaid Meters”.

¹⁰⁷ Ruiters “Free Basic Electricity in South Africa: A Strategy for Helping or Containing the Poor?” in *Electric Capitalism* 249. In the City of Tshwane, a 30 ampere circuit breaker is used to control electricity usage in indigent households. See City of Tshwane *Indigent Policy Review 2010* 8.

¹⁰⁸ Dugard “Power to the People? A Rights-based Analysis of South Africa’s Electricity Services” in *Electric Capitalism* 265.

¹⁰⁹ 265.

¹¹⁰ 272.

¹¹¹ 272, 277-278.

¹¹² The use of pre-paid meters in the provision of water to Phiri residents by the City of Johannesburg was the centre of litigation in *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC).

¹¹³ DPLG (now CoGTA) *National Indigent Policy* 20; DPLG (now CoGTA) *Guidelines for the Implementation of Municipal Indigent Policies* 13.

¹¹⁴ In this case, 20 people lived on a stand. See *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC) para 4.

financially viable, thereby strengthening the long-term sustainability of municipal indigent policies.¹¹⁵

The NIP provides a range of options that can be used by municipalities to specifically target indigent households.¹¹⁶ However, some municipalities in the country prefer using the means test as the most effective way of tracking and targeting indigent households.¹¹⁷ Van Ryneveld argues that the area where the biggest difficulty is experienced in designing and implementing an indigent policy is around the extent to which it is practicable to administratively apply the means test.¹¹⁸ Even though the implementation of the means test is often seen as a method of ensuring that those who can afford to pay for services do not unduly benefit from indigent policies, it is also criticised for promoting the exclusion of some indigents who either fear stigmatisation or are unable to engage with administrative systems.¹¹⁹ This means that although means testing aims at targeting indigent households and ensuring long-term financial sustainability of municipal services, it often promotes the exclusion of some indigent households.¹²⁰ This suggests that municipalities should also implement measures that specifically seek to address the stigmatisation of indigents as “lesser” citizens. Fraser suggests that unless means-tested welfare programmes address the stigma usually associated with beneficiaries, they may undermine rather than enhance the capacity of the poor to participate as true equals in socio-political life.¹²¹ In this regard, she argues that government should equally focus on changing the stigma associated with beneficiaries of means-tested welfare policies through strategies that promote their recognition as full partners in socio-political and cultural interactions.¹²² The denial of social recognition reinforces class subordination which is inimical to local government’s pursuit of social justice.¹²³ Contrary to Fraser’s policy proposals for state authorities’ pursuit of social justice, the indigent policies reviewed do not contain any specific strategy on how to address the stigma usually associated with welfare beneficiaries. It is argued that failure to address stigma that is borne by repeated allocations amounts to a denial of social recognition

¹¹⁵ DPLG (now CoGTA) *National Indigent Policy* 20.

¹¹⁶ See 26.

¹¹⁷ 28-30; DPLG (now CoGTA) *Guidelines for the Implementation of Municipal Indigent Policies* 12, 22-23; *An Indigent Policy for Potchefstroom* Potchefstroom City Council Credit Control, Debt Collection and Indigent By-laws GN 270 in NWP GG 6315 of 19-09-2006; City of Tshwane *Indigent Policy Review 2010* 5-6.

¹¹⁸ P van Ryneveld “The Development of Policy on the Financing of Municipalities” in U Pillay, R Tomlinson & J du Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* 157-179. See Mosdell “Free Basic Services: The Evolution and Impact of Free Basic Water Policy in South Africa” in *Democracy and Delivery* 298.

¹¹⁹ See DPLG (now CoGTA) *National Indigent Policy* 28-30; Van Ryneveld “The Development of Policy on the Financing of Municipalities” in *Democracy and Delivery* 179; Ruiters “Free Basic Electricity in South Africa: A Strategy for Helping or Containing the Poor?” in *Electric Capitalism* 253-254.

¹²⁰ Van Ryneveld “The Development of Policy on the Financing of Municipalities” in *Democracy and Delivery* 179; Ruiters “Free Basic Electricity in South Africa: A Strategy for Helping or Containing the Poor?” in *Electric Capitalism* 253-254.

¹²¹ Fraser *Social Justice in the Age of Identity Politics* 48; Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in *Redistribution or Recognition* 76-77.

¹²² Fraser *Social Justice in the Age of Identity Politics* 49.

¹²³ See Liebenberg (2012) *AHRLJ* 9.

which reinforces socio-economic inequalities. This minimises the potential of the indigent policies under consideration to achieve social justice.

4 3 Provision for intergovernmental partnership

Fraser also suggests that social justice can only be pursued through a partnership between the various levels of government, taking into consideration their different areas of competence.¹²⁴ The NIP “recognises the need for intergovernmental co-operative government in the process of dealing with indigents” and identifies various key players at the level of national and provincial government.¹²⁵ This is in line with the broader constitutional obligation which requires that all spheres of government and organs of state should adhere to the principles of co-operative government and intergovernmental relations.¹²⁶ Co-operation between the various spheres of government and organs of state is important in ensuring that the objectives of municipal indigent policies are met, especially since the establishment of infrastructure that can be used to provide electricity and potable water to communities is not the responsibility of municipalities.¹²⁷ For example, without the necessary infrastructure, impoverished households that are not connected to the electricity grid will not qualify for the 50 kWh free basic electricity supply.¹²⁸ This means that impoverished households which are not connected to the electricity grid will continue to rely on candles and paraffin lamps for lighting. Without access to electricity, for example, “poor households cannot sufficiently respond to aspects of health, welfare, education and safety”.¹²⁹ Co-operative government provides an opportunity for national and provincial governments to monitor the progress made by municipalities in implementing context-specific indigent policies and to provide financial and technical support to struggling municipalities.

Although the NIP recognises the importance of, and promotes co-operative government as a vehicle for, realising the objectives of municipal indigent policies, in practice the degree of co-operation between municipalities and other spheres of government can be questioned given the fact that various

¹²⁴ See Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in *Redistribution or Recognition* 87-88.

¹²⁵ DPLG (now CoGTA) *National Indigent Policy* 6; DPLG (now CoGTA) *Guidelines for the Implementation of Municipal Indigent Policies* 14-18.

¹²⁶ For details on the principles of co-operative government, see ss 40(2) and 41 of the Constitution; Du Plessis (2008) *SAPL* 90-92; Layman *Intergovernmental Relations and Service Delivery in South Africa* 8; Community Law Centre *Institutional Subsidiarity in the Constitution* 2-3, 11-12; De Visser *Developmental Local Government* 209-254.

¹²⁷ When the Infrastructure Development Bill becomes law, the development of such infrastructure will be managed by the Presidential Infrastructure Co-ordinating Commission. See s 7 read with Schedule 1 of the Infrastructure Development Bill (draft) GN 99 *GG* 36143 of 08-02-2013.

¹²⁸ Mosdell “Free Basic Services: The Evolution and Impact of Free Basic Water Policy in South Africa” in *Democracy and Delivery* 298.

¹²⁹ Adam *Free Basic Electricity: A Better Life for All* 8.

spheres of government are often at war with each other, resulting in litigation.¹³⁰ The decision to engage in expensive litigation procedures in settling government differences often leads to the dissipation of scarce resources that could have been used to implement projects that would have improved the living conditions of people living in poverty.¹³¹ In order to establish socially just communities, there is a need for more intergovernmental partnership.

4 4 Obligations toward public participation

Fraser argues that in order for government to achieve social justice, it must create conditions that will enable citizens to participate in decision-making processes as true equals.¹³² This implies that apart from guaranteeing the right to public participation in public governance processes, government must create conditions and structures needed to sustain genuine public deliberations.¹³³ Consistent with local government's obligation to promote public participation in local governance,¹³⁴ the Guidelines for the Implementation of Municipal Indigent Policies oblige municipalities to promote public participation in the indigent policy-making process.¹³⁵ Each municipality is required to: undertake "planning activities" that will enable it to understand its capabilities, resources and the needs of its constituencies; define formal structures and processes through which the indigent policy will be designed and implemented; use existing communication channels such as ward committees to ensure public participation; establish a process for verifying residents/households that are eligible for free basic services where targeting methods are used; and monitor and assess the extent to which the implementation of its indigent policy meets its defined objectives.¹³⁶

It should be noted that the main vehicles for public participation envisaged by the Systems Act include councillors, ward committees and advisory committees.¹³⁷ Ward committees are very important because they create a formal and direct communication channel through which residents can interact with their ward councillors as well as forward complaints and

¹³⁰ There are numerous cases involving various spheres of government that were settled in court. See for example: *Maccsand (Pty) Ltd v City of Cape Town* 2012 7 BCLR 690 (CC); *Executive Premier of the Province of the Western Cape v Minister of Provincial Affairs and Constitutional Development, Executive Council of Kwa Zulu-Natal v President of the Republic of South Africa* 1999 12 BCLR 1360; *National Gambling Board v Premier of KwaZulu-Natal* 2002 2 BCLR 156 (CC); *Beja v Premier of the Western Cape* 2011 10 BCLR 1077 (WCC).

¹³¹ See *Beja v Premier of the Western Cape* 2011 10 BCLR 1077 (WCC) paras 162-172.

¹³² Fraser "Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation" in *Redistribution or Recognition* 68.

¹³³ See 43-45.

¹³⁴ See s 152(1)(a) and (e) of the Constitution; Ch 4 of the Systems Act.

¹³⁵ See DPLG (now CoGTA) *Guidelines for the Implementation of the National Indigent Policy by Municipalities* 23-24. For details on the process for designing, adopting and implementing municipal indigent policies, see 23-39.

¹³⁶ See 23-24.

¹³⁷ See s 17(1)(d) and (4) of the Systems Act; A du Plessis *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* LLD thesis NWU- Potchefstroom (2008) 458-459.

recommendations on matters affecting them to the council.¹³⁸ In this manner, they can influence decisions made by the municipality. It is argued that given their proximity to community residents, ward committees could be used to influence the content of municipal indigent policies in order to ensure that they reflect actual community needs. In practice, some ward committees are dysfunctional and this has been attributed to resource constraints faced by some municipalities and the fact that some community residents do not take an interest in the functioning of ward committees either because they have lost confidence in the potential of such committees to defend their interests or because they are not sufficiently capacitated to engage with ward committee members.¹³⁹ Generally, it is believed that promoting public participation in the process of designing and implementing policies may ensure that the actual needs of the poor are taken into consideration.¹⁴⁰

Despite the elaborate legal and policy framework that obliges municipalities to generally promote public participation in local governance,¹⁴¹ the potential impact of such provisions in terms of policy formulation and implementation is doubtful given the absence of quality public participation at the local government level.¹⁴² As De Visser points out, the thinking amongst municipal officials that Chapter 4 of the Systems Act outlines “*the process of public participation*” has led to a mechanical application of the requirements for public participation.¹⁴³ It is argued that this mechanical approach to public participation is inimical to the pursuit of social justice and the “thick” conception of democracy envisaged by the Constitution.¹⁴⁴ Davis argues that the concept of a “thick” democracy involves the empowerment of all citizens to partake in decisions crucial to the outcome of their life choices.¹⁴⁵ This is because abstract insistence on compliance with the legal and policy framework for public participation without due consideration of the inputs generated in the process may lead to the implementation of policies that do not reflect the actual needs of communities. This undermines the dignity of participants in

¹³⁸ Ss 72(3) and 74(a) of the Municipal Structures Act 117 of 1998. See P Reddy “Democratic Decentralisation and Local Democracy in South Africa Re-examined: Quo vadis?” (2010) 29 *Politeia* 66-72. See ss 73 and 74 of the Municipal Structures Act for establishment, composition, functions and powers of ward committees.

¹³⁹ See CoGTA *State of Local Government in South Africa* (2009) 13-15; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 460.

¹⁴⁰ See Pieterse (2005) *SAPL* 159; M Pieterse “Eating Socio-economic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited” (2007) 29 *Hum Rts Q* 796-819-821; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 29-34; Langa (2006) *Stell LR* 354; J Cloete *South African Public Administration and Management* (1998) 139, 143.

¹⁴¹ See De Visser *Developmental Local Government* 105-106; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* 476.

¹⁴² De Visser *Developmental Local Government* 106; W Holness “Equality in the Graveyard: Participatory Democracy in the Context of Housing Delivery” (2011) 26 *SAPL* 1 11; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 477.

¹⁴³ De Visser *Developmental Local Government* 106 (original emphasis). See also L Chenwi “Meaningful Engagement in the Realisation of Socio-economic Rights: The South African Experience” (2011) 26 *SAPL* 128-129; Holness (2011) *SAPL* 9.

¹⁴⁴ See Brand (2011) *Stell LR* 614, 622-625.

¹⁴⁵ See D Davis “The Relationship Between Courts and other Arms of Government in Promoting and Protecting Socio-Economic Rights in South Africa: What About Separation of Powers?” (2012) 15 *PER* 2-3.

the deliberative process and reinforces social subordination which limits the potential of local government's indigent policies in the pursuit of social justice.

5 Conclusion

The purpose of this article was to explore and critically investigate the relevance and potential of local government indigent policies in contributing towards the pursuit of social justice in South Africa through the lenses of Fraser's multi-dimensional theory based on "participatory parity". At face value, while it appears that the generic features of local government indigent policies are consistent with Fraser's affirmative policy reform proposals, a close examination of municipal indigent policies indicates deeper fault lines that undermine their potential to achieve social justice.

It was established that whereas local government indigent policies and Fraser's affirmative policy reform proposals have the same welfare objectives, the minimalist nature of the levels of free basic services prescribed by the NIP in the areas of water and electricity is inadequate to meet the actual needs of indigent households. An examination of the indigent policies of specific municipalities revealed that although the NIP provides basic guidelines which could be improved by municipalities in providing free basic services, this flexibility mechanism is underutilised even by municipalities with arguably more resources. The result is that the inadequate levels of basic services guaranteed in the NIP have been adopted at the local level by almost all the municipalities reviewed *mutatis mutandis*. This defeats the welfare objectives of the NIP at the local level. It was argued that providing indigent households with potable water and basic electricity supply that are inadequate in meeting their basic needs does not remove them from the indigent bracket. This reinforces socio-economic inequalities, which is detrimental to the pursuit of social justice. The failure of local government indigent policies to address the actual needs of impoverished people amounts to a denial of social recognition and access to the social resources needed to facilitate participatory parity. This reinforces class subordination. In their current form, the potential of all the indigent policies considered in this article to contribute towards the pursuit of social justice is minimised by virtue of the fact that they are incapable of adequately responding to the basic needs of impoverished households. They gloss over rather than address the actual needs of those in desperate need. In this manner, they reinforce rather than alleviate social hardships occasioned by poverty. It is submitted that they generally fail to meet what Fraser refers to as the objective precondition for achieving social justice.

Contrary to Fraser's policy proposals for state authorities' pursuit of social justice, the indigent policies reviewed do not contain any specific strategies on how to address the stigma usually associated with welfare beneficiaries. It is argued that failure to address stigma that is borne by repeated allocations amounts to a denial of social recognition which reinforces socio-economic inequalities. This minimises the social justice potential of the municipal indigent policies considered for this research.

In line with Fraser's suggestion, the legal and policy framework for municipal indigent policies obliges the various spheres of government to work in partnership in the pursuit of social justice. However, the extent of co-operation between municipalities and other spheres of government in the pursuit of social justice can be questioned given the fact that they are often at war with each other, resulting in litigation. Engaging in expensive intergovernmental litigation leads to the dissipation of limited resources that could be used to meet the needs of impoverished people.

Finally, although the legal and policy frameworks underpinning municipal indigent policies in South Africa make expansive provision for public participation in the design and implementation of local indigent policies, their potential to contribute towards the pursuit of social justice is undermined by the absence of any quality public participation at the local level. The lack of quality public participation in the design and implementation of municipal indigent policies undermines the dignity of participants in the deliberative process and reinforces social subordination which limits the potential of such policies in the pursuit of social justice.

SUMMARY

The Constitution of the Republic of South Africa, 1996 is committed to addressing the injustices of the past and to establishing a society based on social justice. This constitutional commitment is now firmly rooted both in the vision of transformative constitutionalism and the constitutional obligation on government to promote sustainable development. Scholars and jurists agree that social justice is primarily concerned with the eradication of poverty and extreme forms of inequalities in order to ensure that impoverished people have the basic needs required to function as true equals in socio-political life. The constitutional commitment to pursue social justice translates into a mandate which must be realised by the government of South Africa. As a co-responsible sphere of government, scholars and other experts share the view that local government is equally obliged to contribute towards the pursuit of social justice. The purpose of this article is to explore and critically investigate the relevance and potential of local government indigent policies in contributing towards the pursuit of social justice in South Africa through the lenses of Fraser's theory of social justice based on "participatory parity". Based on benchmarks distilled from Fraser's "affirmative" policy reform proposals, this article argues, *inter alia*, that, although the framework of local government indigent policies incorporates features that could enable municipalities to contribute towards advancing social justice in South Africa, their inability to adequately address the actual needs of impoverished people amounts to a denial of social recognition that is inimical to the pursuit of social justice.