

Local Government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa

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DEDICATION

*To my parents, wife and lovely children: Robert and Denning,
thank you for your prayers.*

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PUBLICATIONS AND CONFERENCE CONTRIBUTIONS EMANATING FROM DOCTORAL STUDIES

Articles

Fuo ON 'The transformative potential of the constitutional environmental right overlooked in Grootboom' 2013 34(1) *Obiter Law Journal* 77-95.

Fuo ON 'Constitutional basis for the enforcement of 'executive' policies that give effect to socio-economic rights in South Africa' 2013 16(4) *Potchefstroom Electronic Law Journal* (forthcoming).

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Conference contributions

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Fuo ON 'The right of access to sufficient water in South Africa: Comments on *Federation for Sustainable Environment and Others v Minister of Water Affairs and Others*', Environmental Law Association Postgraduate Annual Law Conference, North West University, Potchefstroom Campus, September 2012.

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Fuo ON 'The significance of the constitutional values of human dignity, equality and freedom in the realisation of the right to social protection in South Africa', African Network for Constitutional Lawyers Annual Conference, Rabat, Morocco, February 2011.

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
AHRLJ	African Human Rights Law Journal
ANC	African National Congress
ANCL	African Network for Constitutional Lawyers
AQMPs	Air Quality Management Plans
AU	African Union
ASGISA	Accelerated Shared Growth Initiative - South Africa
CBOs	Community Based Organisations
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CIIR	Catholic Institute for International Relations
CoGTA	Department of Cooperative Governance and Traditional Affairs
COSATU	Congress of South African Trade Unions
CERD	Convention on the Elimination of all forms of Racial Discrimination
CPRD	Convention on the Rights of Persons with Disabilities
CRC	Convention on the Right of the Child
DA	Democratic Alliance
DEAT	Department of Environmental Affairs and Tourism
DDP	Decentralised Development Planning
DHP	District Health Plan
DWAF	Department of Water Affairs
DPLG	Department of Provincial and Local Government
DME	Department of Minerals and Energy
ELA	Environmental Law Association
ESKOM	Electricity Supply Commission of South Africa
GEAR	Growth Employment and Redistribution
GTZ	German Agency for Technical Cooperation

HDI	Human Development Index
IBM	International Business Machines
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDP	Integrated Development Plan
IFAD	International Fund for Agricultural Development
IGRFA	Intergovernmental Relations Framework Act
IIP	Infrastructure Investment Plan
KAF	Konrad Adenauer Foundation
LED	Local Economic Development
LGNF	Local Government Negotiation Forum
LUPO	Land Use Planning Ordinance
MDB	Municipal Demarcation Board
MEC	Member of the Executive Council
MDGs	Millennium Development Goals
MIG	Municipal Infrastructure Grant
MPAC	Municipal Public Accounts Committee
MPRDA	Mineral and Petroleum Resources Development Act
MTSF	Medium Term Strategic Framework
NEMA	National Environmental Management Act
NCOP	National Council of Provinces
NGOs	Non Governmental Organisations
NIP	National Indigent Policy
NPC	National Planning Commission
OAU	Organisation of African Unity
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administrative Justice Act
PGDS	Provincial Growth and Development Strategy

RDP	Reconstruction and Development Programme
PER	Potchefstroom Electronic Law Journal
PICC	Presidential Infrastructure Co-ordinating Commission
SA	South Africa
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law
SALGA	South African Local Government Association
SABS	South African Bureau of Standards
SDF	Spatial Development Framework
SERAC	Social and Economic Rights Centre
SERI	Socio-Economic Rights Institute of South Africa
SPLUMA	Spatial Planning and Land Use Management Act
UCLGA	United Cities and Local Governments of Africa
UDHR	Universal Declaration of Human Rights
UN	United Nations
US	United States
UWC	University of Western Cape
WCED	World Commission on Environment and Development
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation
WPLG	White Paper on Local Government
WMPs	Waste Management Plans
WSDP	Water Services Development Plan

ABSTRACT

South Africa's transition to constitutional democracy marked the end of a system of government that perpetuated injustice on the basis of race. The previous system of government, underpinned by the principle of parliamentary supremacy, did not only exclude the majority of the population from public governance processes, it also economically exploited the majority of the population. As such, it laid the foundation for widespread poverty and inequalities in access to basic services. The Constitution of the Republic of South Africa, 1996 (the Constitution), is committed to correcting these past injustices and aims to establish a society based on social justice. This constitutional vision finds expression in the notion of transformative constitutionalism. Klare introduced the notion of transformative constitutionalism over a decade ago. For purpose of this thesis, the notion represents the socio-economic and political vision of post-apartheid South Africa to eradicate extreme poverty and inequalities in access to basic services as well as establish a democratic system of government that is inclusive, caring, participatory, representative and accountable. It captures the constitutional commitment to establish and maintain a society based on social justice by *inter alia*, eradicating poverty and inequalities in access to social services. The realisation of the socio-economic rights entrenched in the Bill of Rights of the Constitution (by all organs of state) is one of the ways in which to contribute towards meeting this transformative constitutional mandate, and by extension, striving towards the attainment of social justice. Although transformative constitutionalism and the achievement of a socially just society remain an ideal, the Constitution as the supreme law in the country, obligates the state, constitutive of public and private entities, to work towards its realisation, to the fullest extent possible.

As part of post-apartheid institutional transformation, the Constitution established three spheres of government – national, provincial and local - which are distinct, interrelated and interdependent. All three spheres are obliged to operate in accordance with the principles of co-operative government and intergovernmental relations and are co-responsible for realising a number of constitutional objectives. Since 1996, the Constitution obliges local government (municipalities) to play an expanded "developmental" role. This has marked a move away from local government being regarded as merely a service delivery arm of government.

The extended function of local government that came about with the constitutional dispensation finds expression in the notion of "developmental local government".

This study is based on the premise that developmental local government must and can, together with the authorities in the other two spheres, contribute to transformative constitutionalism and social justice. Primarily, this study questions the extent to which the legal and policy framework on local government in South Africa enable local government (municipalities) to contribute towards realising the constitutional socio-economic rights underpinning the mandate of transformative constitutionalism.

This study presents a review of relevant literature in order to establish links between the theoretical concepts underpinning this thesis. It examines the legal and policy framework on "developmental" local government in South Africa and analyses the central legal framework for the realisation of socio-economic rights at the local government level. In addition, the study explores the relevance and potential of local government indigent policies and Integrated Development Plans (IDPs) - as legally prescribed governance instruments - in contributing towards a more just society by examining their underlying legal and policy framework. It further distils from the theories and perspectives of social justice, benchmarks to guide local government towards achieving the transformative constitutional mandate aimed at social justice. Based on the legal, policy and other gaps identified, recommendations are made on how to optimise the potential of IDPs and municipal indigent policies in contributing towards achieving social justice.

Key Words

Transformative constitutionalism, social justice, local government, developmental local government, socio-economic rights, procedural rights, local governance instruments, indigent policies, strategic planning and integrated development plans.

OPSOMMING

Suid-Afrika se oorgang na 'n grondwetlike demokrasie het 'n einde gebring aan 'n regeringstelsel wat ongeregtighede op grond van ras perpetueer het. Die vorige regeringstelsel wat onderlê is deur die beginsel van parlementêre oppergesag het die meerderheid van die bevolking uitgesluit in openbare bestuursprosesse. Die meerderheid van die bevolking is ekonomies uitgesluit wat die grondslag vorm van die wydverspreide armoede en ongelykhede in toegang tot basiese dienste. Die Grondwet van die Republiek van Suid-Afrika, 1996 (die Grondwet) is verbind tot die regstelling van die ongeregtighede van die verlede en is gerig op die daarstelling van 'n samelewing wat gebaseer is op sosiale geregtigheid. Dit grondwetlike visie vind uitdrukking in die idee van transformerende grondwetlikheid. Alhoewel die idee van transformerende grondwetlikheid in Suid-Afrika se grondwetlike regsfilosofie reeds 'n dekade gelede deur Klare, voorgestel is, word daar algemeen aanvaar dat die sosiale, ekonomiese en politieke visie van post-apartheid Suid-Afrika is om uiterste armoede en ongelykhede in toegang tot basiese dienste aan te spreek insluitend die daarstel van 'n demokratiese regeringstelsel wat inklusief is, wat omgee vir die sosio-ekonomiese welstand van almal en wat deelnemende, verteenwoordigende en toerekenbare regering daarstel. Dit ondervang die grondwetlike verbintenis om 'n samelewing wat gebaseer is op sosiale geregtigheid tot stand te bring en in stand te hou deur die uitwissing van armoede en ongelykhede in toegang tot maatskaplike dienste. Juriste en staatsreggeleerdes is van mening dat die realisering van die sosio-ekonomiese regte in die Handves van Regte van die Grondwet (deur alle organe van die staat) een van die wyses is om die idee van transformerende grondwetlikheid te bevorder en aldus ook 'n wyse is waarop sosiale geregtigheid bevorder kan word. Alhoewel transformerende grondwetlikheid 'n ideaal is, verbind die Grondwet die staat en openbare en private entiteite om konstruktiewe stappe te neem ten einde uiting te gee aan die grondwetlike mandaat. In meer praktiese terme, transformerende grondwetlikheid is 'n mandaat wat deur die hele Suid-Afrikaanse regering verwesenlik moet word.

As deel van die post-apartheid institusionele verandering, het die Grondwet drie vlakke van regering – nasionaal, provinsiaal en plaaslik – wat duidelike, interafhanklik en onafhanklik van mekaar is, gevestig. Al drie regeringsfere is verplig om in ooreenstemming met die beginsels van samewerkende regering en

interregeringsverhoudings te funksioneer en is mede-verantwoordelik vir die verwesenliking van die grondwetlike doelwitte. Sedert 1996, verplig die Grondwet plaaslike regerings (soos munisipaliteite) om 'n uitgebreide "ontwikkelingsrol" te speel – dit kenmerk 'n verskuiwing van plaaslike regering as bloot 'n dienslewering arm van die regering. Die uitgebreide funksie van plaaslike regering wat tot stand gebring is met die Grondwetlike bestel vind uitdrukking in die idee van "ontwikkende plaaslike regering".

Hierdie studie is gebaseer op die veronderstelling dat ontwikkelende plaaslike regering tesame met die owerhede in die ander twee sferes van die regering, moet bydra tot transformerende grondwetlikheid en maatskaplike geregtigheid. Hierdie studie bevraagteken primêr die mate waarin die statutêre raamwerk op plaaslike regering in Suid-Afrika, plaaslike regering (munisipaliteite) in staat stel om by te dra tot die verwesenliking van die grondwetlike sosio-ekonomiese regte wat ondersteun word deur die transformerende grondwetlike mandaat.

Hierdie proefskrif bied 'n oorsig van die relevante literatuur om verbande te vestig tussen die teoretiese konsepte onderliggend aan hierdie studie. Dit ondersoek die regs- en beleidsraamwerk op "ontwikkende" plaaslike regering in Suid-Afrika en ontleed die sentrale statutêre raamwerk vir die realisering van sosio-ekonomiese regte op plaaslike regeringsvlak. Daarbenewens stel hierdie proefskrif ondersoek in oor die relevansie en potensiaal van 'n plaaslike regeringhulpbehoewende beleid en geïntegreerde ontwikkelingsplanne – as statutêr voorgeskrewe bestuursinstrumente – ten einde by te dra tot transformerende grondwetlikheid deur ondersoek in te stel in hierdie instrumente se onderliggende wetlike en beleidsraamwerke. Voorts word teorieë en perspektiewe rakende sosiale geregtigheid geanaliseer ten einde konstruktiewe maatstawwe te vorm wat plaaslike regerings kan bystaan in die streef en bereiking van die transformerende grondwetlike mandaat gemik op sosiale geregtigheid. Die proefskrif maak aanbevelings gebaseer op die reg, beleidsmaatreëls en die identifisering van ander leemtes om die potensiaal van geïntegreerde ontwikkelingsplanne en plaaslike regeringhulpbehoewende beleide te optimaliseer ten einde by te dra tot die bereiking van die transformerende grondwetlike mandaat.

Sleutelwoorde

Transformatiewe grondwetlikheid, maatskaplike geregtigheid, plaaslike regering, ontwikkelings-plaaslike regering, sosio-ekonomiese regte, prosedurele regte, plaaslike bestuursinstrumente, hulpbehoewende beleid, strategiese beplanning en geïntegreerde ontwikkelingsplan.

CONTENTS

Dedication	i
Acknowledgements	ii
Publications and conference contributions emanating from this study	iv
List of abbreviations	viii
Abstract	xi
Key words	xii
Opsomming	xiii
Sleutelwoorde	xv

CHAPTER 1 INTRODUCTION

1.1	Background	2
1.2	Area of focus	16
1.2.1	<i>Central research question</i>	17
1.2.2	<i>Aims of the study</i>	17
1.2.3	<i>Hypothesis and assumptions</i>	18
1.2.3.1	Hypothesis	18
1.2.3.2	Assumptions	18
1.3	Research methodology	19
1.4	Study outline	22

CHAPTER 2 THEORETICAL PERSPECTIVES ON TRANSFORMATIVE CONSTITUTIONALISM, SOCIAL JUSTICE AND LOCAL GOVERNMENT

2.1	Introduction	24
2.2	Transformative constitutionalism	24
2.2.1	<i>Introduction</i>	24
2.2.2	<i>Definition: transformative constitutionalism</i>	25
2.3	Social justice as an objective of transformative constitutionalism	36
2.3.1	<i>Introduction</i>	36
2.3.2	<i>Definition: social justice</i>	37
2.3.3	<i>Theories and scholarly perspectives: social justice</i>	40
2.3.3.1	Rawls	40

2.3.3.2	Sen and Nussbaum	43
2.3.3.3	Fraser	46
2.3.3.4	Main observations on social justice as an objective of TC	58
2.4	Preferred conception of and generic benchmarks for the pursuit of social justice	59
2.4.1	<i>Background</i>	59
2.4.2	<i>Preferred conception of social justice</i>	60
2.4.3	<i>Generic benchmarks for pursuing social justice</i>	62
2.4.4	<i>Implications for state authorities</i>	64
2.5	Social justice through the lens of local government	66
2.5.1	<i>Government and governing in the local sphere in South Africa</i>	70
2.5.2	<i>Historical development in South Africa</i>	70
2.5.3	<i>Significant features of pre-1993 local government</i>	78
2.5.4	<i>Local government in a new constitutional dispensation</i>	82
2.5.4.1	Local government as a distinct sphere of government	86
2.5.4.2	"Developmental local government"	89
2.5.4.3	Powers and functions of local government	101
2.5.4.4	Impact of institutional subsidiarity on local government	106
2.5.4.5	An expanded mandate for local government	109
2.5.4.6	Observations on local government's constitutional mandate	117
2.6	Chapter summary	119

CHAPTER 3 CONSTITUTIONAL RIGHTS AS A MECHANISM FOR LOCAL GOVERNMENT'S PURSUIT OF SOCIAL JUSTICE

3.1	Introduction	125
3.2	Constitutional rights as a mechanism for pursuing social justice	127
3.2.1	<i>Introduction</i>	127
3.2.2	<i>Constitutional socio-economic rights</i>	136
3.2.2.1	"Basic" socio-economic rights	136
3.2.2.2	Socio-economic rights prohibiting the state or private parties to interfere with the realisation thereof	139
3.2.2.3	Textually qualified socio-economic rights	142
3.2.2.4	The general limitation clause	150
3.2.3	<i>Socio-economic rights obligations from national legislation and policies</i>	152
3.2.3.1	Legislation and policies on the right to water	153

3.2.3.2	Legislation and policies on the right to health care	160
3.2.3.3	Legislation and policies on the right to housing	165
3.2.3.4	Legislation and policies on the environmental right	174
3.2.3.5	Legislation and policies on the right to sanitation	184
3.2.3.6	Legislation and policies on the right to electricity	186
3.2.3.7	Observation on constitutional socio-economic rights	188
3.3	Procedural constitutional rights for the pursuit of social justice	190
3.3.1	<i>The right of access to courts</i>	191
3.3.2	<i>Locus standi</i>	193
3.3.3	<i>The right to administrative justice</i>	195
3.3.4	<i>The right of access to information</i>	199
3.3.5	<i>The right to public participation</i>	200
3.3.6	<i>The right to vote</i>	202
3.4	Constitutional rights-based duties of municipalities	204
3.4.1	<i>The obligation to respect</i>	205
3.4.2	<i>The obligation to protect</i>	205
3.4.3	<i>The obligation to promote</i>	206
3.4.4	<i>The obligation to fulfil</i>	207
3.4.5	<i>Obligation to adopt reasonable legislative and other measures</i>	211
3.5	Reflection on the challenges of rights as a mechanism for social justice	215
3.6	Chapter summary	217

CHAPTER 4 LOCAL GOVERNMENT AND THE PURSUIT OF SOCIAL JUSTICE

4.1	Introduction	223
4.2	Democratic local government	226
4.2.1	<i>Introduction</i>	226
4.2.2	<i>Public participation in the activities of local government</i>	229
4.2.3	<i>Election of local leaders</i>	246
4.2.4	<i>Observations on local democracy</i>	250
4.3	Local government structures	252
4.3.1	<i>Introduction</i>	252
4.3.2	<i>Metropolitan municipalities</i>	253
4.3.3	<i>District municipalities</i>	255
4.3.4	<i>Local municipalities</i>	261

4.3.5	<i>District management areas</i>	263
4.3.6	<i>Municipal councils and committees</i>	264
4.3.7	<i>Observations on local government structures</i>	268
4.4	Local government role players	271
4.4.1	<i>Introduction</i>	271
4.4.2	<i>Municipal councillors</i>	271
4.4.3	<i>Municipal managers</i>	273
4.4.4	<i>Traditional authorities</i>	276
4.4.5	<i>Local community</i>	280
4.4.6	<i>External service providers</i>	285
4.4.7	<i>National and provincial government</i>	288
4.4.7.1	Support from national government	291
4.4.7.2	Support from provincial government	294
4.4.8	<i>SALGA</i>	298
4.4.9	<i>International donors</i>	299
4.4.10	<i>Observations on local role players</i>	300
4.5	Local government's instrumentation	302
4.5.1	<i>Introduction</i>	302
4.5.2	<i>Policies</i>	304
4.5.2.1	Types of policies	305
4.5.2.2	Policy-making and implementation	309
4.5.3	<i>Strategic plans</i>	313
4.5.3.1	Meaning of strategic planning	314
4.5.3.2	Strategic planning and implementation	315
4.5.4	<i>Observations on local government's instrumentation</i>	325
4.6	Chapter summary	326

CHAPTER 5 INTEGRATED DEVELOPMENT PLANS AS A LOCAL GOVERNANCE INSTRUMENT FOR PURSUING SOCIAL JUSTICE

5.1	Introduction	336
5.2	Background to integrated development planning in South Africa	339
5.3	Legal and policy framework for IDPs	347
5.3.1	<i>Constitutional and legislative basis</i>	347
5.3.2	<i>Relevant generic features of IDPs</i>	353
5.3.2.1	Sector specific components	353

5.3.2.2	Interconnected and cooperative strategic planning	357
5.3.2.3	Implementation, monitoring and performance management	362
5.3.2.4	Public participation	366
5.4	Legal status of IDP	368
5.5	Potential of IDPs in local government's pursuit of social justice	369
5.6	Critical perspectives	372
5.7	Chapter summary	375

CHAPTER 6 INDIGENT POLICIES AS A LOCAL GOVERNANCE INSTRUMENT FOR PURSUING SOCIAL JUSTICE

6.1	Introduction	380
6.2	Background to indigent policies in South Africa	382
6.3	Legal and policy framework to indigent policies	384
6.3.1	<i>Relevant generic features of municipal indigent policies</i>	391
6.3.1.1	Gaining access to free basic services	391
6.3.1.2	Maintaining access to free basic services	393
6.3.1.3	Targeting methods	396
6.3.1.4	Design and implementation of municipal indigent policies	402
6.4	Legal status of municipal indigent policies	405
6.5	Critical perspectives	409
6.6	Chapter summary	411

CHAPTER 7 CONCLUSION AND RECOMMENDATIONS

7.1	General background	416
7.2	Definitions, concepts and categories of rights	418
7.2.1	<i>Transformative constitutionalism</i>	418
7.2.2	<i>Social justice: Objective of transformative constitutionalism</i>	419
7.2.3	<i>Developmental local government</i>	421
7.2.4	<i>Social justice as a mandate of local government</i>	422
7.2.5	<i>Socio-economic rights responsibilities of local government</i>	424
7.2.6	<i>Categorisation of rights</i>	425
7.2.7	<i>Local governance instrumentation</i>	426
7.3	Elements for pursuing social justice at the local sphere	428
7.4	Main findings	429
7.4.1	<i>Social justice</i>	430

7.4.2	<i>Socio-economic rights</i>	431
7.4.3	<i>Developmental local government</i>	432
7.4.4	<i>Generic measures towards pursuing social justice</i>	433
7.4.5	<i>Local governance instrumentation</i>	433
7.4.6	<i>Relevance and potential of IDPs</i>	434
7.4.7	<i>Relevance and potential of indigent policies</i>	435
7.4.8	<i>The role of public participation</i>	437
7.5	Recommendations	437
7.5.1	<i>Means and methods to optimise the role and place of local government in the pursuit of social justice</i>	437
7.5.2	<i>Optimising the potential of IDPs</i>	439
7.5.3	<i>Optimising potential of local government indigent policies</i>	439
7.5.4	<i>Promoting public participation</i>	440
7.6	Limitations and needs for future research	441
7.7	Conclusion	441
8	BIBLIOGRAPHY	443

LIST OF TABLES

Table 1:	Generic benchmarks for state authorities' pursuit of social justice	63
Table 2:	Original powers of local government	103
Table 3:	Rights-based duties of local government	213
Table 4:	Range and levels of services in the NIP	386

CHAPTER 1

INTRODUCTION

1.1	Background	2
1.2	Area of focus	16
1.2.1	<i>Central research question</i>	17
1.2.2	<i>Aims of the study</i>	17
1.2.3	<i>Hypothesis and assumptions</i>	18
1.2.3.1	Hypothesis	18
1.2.3.2	Assumptions	18
1.3	Research methodology	19
1.4	Study outline	22

1.1 Background

The quest for, and most appropriate means of pursuing social justice has pre-occupied the minds of legal and political philosophers for ages.¹ It only became an explicit commitment of nation states towards the end of the 20th century.² In this context, and primarily, social justice refers to the commitment to eradicate poverty and extreme forms of inequalities in access to basic needs in order to ensure that impoverished people command the material resources required to enable them interact in socio-political life as true equals.³ Due to the fact that social justice represents an elusive ideal, state authorities can pursue this commitment but cannot completely achieve it.⁴

The Copenhagen Summit on Social Development (1995) represents one concrete example of the commitment of nation states to promote the pursuit of social justice.⁵ In order to address growing global poverty and extreme inequalities within and between nations and to establish a more just society, nation states met in Copenhagen at the United Nations (UN) Summit on Social Development in 1995 and adopted the *Copenhagen Declaration on Social Development*.⁶ At the Copenhagen Summit, nation states expressed the view that social development aims at promoting social justice⁷ and the conviction that "social justice cannot be attained...in the absence of respect for all human rights and fundamental freedoms."⁸ This collective conviction highlights the importance and place of human rights in the pursuit of social

1 See Harvey *Social Justice and the City* 98; Clayton and Williams 'Introduction' in Clayton and Williams *Social Justice* 1; National Pro Bono Resource Centre *What is Social Justice* 4-7.

2 See UN *Copenhagen Declaration on Social Development* (1995) par 29 and the UN *Millennium Declaration* (2000), par 6. See UN *Social Justice in an Open World* 1.

3 See the discussion in 2.3 to 2.4 below. In South Africa, the government considers the following as basic needs: sufficient water, basic sanitation, refuse removal in denser settlements, environmental health, basic energy, healthcare, housing, food and clothing. See DPLG (now CoGTA) *Guidelines for the Implementation of Municipal Indigent Policies* (2006) 17.

4 See Van der Walt 'A South African Reading of Frank Michelman's Theory of Social Justice' in Botha *et al Rights and Democracy* 163-164; Langa 2006 *Stell LR* 354; Pieterse 2005 *SAPL* 159.

5 The World Summit on Social Development took place from the 6-12 of March 1995 in Copenhagen, Denmark.

6 See UN *Report of the UN Summit for Social Development* (1995) A/CONF.166/9 at par 2.

7 See UN *Report of the UN Summit for Social Development* (1995) at par 29.

8 See UN *Report of the UN Summit for Social Development* (1995) at par 5; UN *Social Justice in an Open World* 57.

justice. In addition, the meeting stressed the interdependent and mutually reinforcing nature of human rights in the pursuit of social justice⁹ and pledged to create a framework for action at national levels that would promote social justice and ensure the protection of human rights.¹⁰ Furthermore, nation states committed themselves to providing stable domestic legal frameworks, in accordance with their constitutions and consistent with international law obligations, that will *inter alia*, promote respect for human rights and freedoms.¹¹ Moreover, they committed to adopt and implement policies that would address the root causes of poverty and provide for the basic needs of impoverished people, especially.¹² In particular, paragraph (b) of Commitment II provided that these policies focus on the elimination of hunger and malnutrition, the provision of food security, education, employment and livelihood, primary healthcare services including reproductive health care, safe drinking water and sanitation as well as adequate shelter.¹³ The meeting stressed that the pursuit of social justice requires, amongst other efforts, the adoption and implementation of redistributive policies that will ensure that people living in poverty have access to basic services.¹⁴ Nation states further expressed the conviction that democracy, transparent and accountable governance and administration were indispensable to the pursuit of social justice.¹⁵ Nation states emphasised that the ideals of the Summit could only be realised if international partners, national governments, local authorities and civil society organisations "positively contribute their own share of efforts and resources."¹⁶ This demonstrates that national governments had to take the global commitment to pursue social justice further by adopting and

9 UN *Report of the UN Summit for Social Development* (1995) at par 5.

10 UN *Report of the UN Summit for Social Development* (1995) at par 26(f) and (j).

11 See UN *Report of the UN Summit for Social Development* (1995) at par 29, Commitment 1(a).

12 See UN *Report of the UN Summit for Social Development* (1995) at par 29, Commitment 2.

13 In order to foster the ideals of the World Summit on Social Development, the UN General Assembly adopted the 20th of February as World Day of Social Justice in 2007. See UN *General Assembly Resolution A/RES/62/10* of 18 December 2007.

14 See par 26(g), Commitment 2(a), (b) and (e) of the *Copenhagen Declaration* (1995); UN *Social Justice in an Open World* 54; Ghai "Human Rights and Social Development: Towards Democratisation and Social Justice" 33.

15 See UN *Report of the UN Summit for Social Development* (1995) at pars 3-4.

16 See UN *Report of the UN Summit for Social Development* (1995) at pars 7, 26(c) and 27.

implementing country specific measures to combat poverty and extreme inequalities in access to basic services.

At the dawn of the new millennium, alarmed by persisting poverty and inequalities exacerbated by internationally relevant factors such as globalisation, nation states adopted the *Millennium Declaration and Millennium Development Goals* (MDGs) to promote the pursuit of social justice.¹⁷ Nation states, at this point, committed themselves to freeing over one billion men, women and children trapped in "abject and dehumanising conditions of extreme poverty" in various parts of the world.¹⁸ In order to give effect to the *Millennium Declaration*, certain resolutions were taken (relating to poverty alleviation targets)¹⁹ that were incorporated into the MDGs.²⁰ The MDGs represent eight priority areas and specific targets to be achieved by 2015.²¹ For example, Goal 1 on extreme poverty and hunger indicates the commitment of State parties to halve by 2015, the proportion of people suffering from hunger and those earning less than one dollar a day. Goal 2 aims to ensure that by 2015, children everywhere will be able to complete a full course of primary education. Goal 7 on environmental sustainability seeks to *inter alia*, halve the proportion of people without sustainable access to drinking water by 2015 and to significantly improve the lives of at least one hundred million slum dwellers by 2020.²²

The *Millennium Declaration* acknowledged the importance of human rights protection, democracy and good governance in the pursuit of social justice.²³ Based on their recognition of the role of human rights in pursuing social justice,²⁴ State parties resolved to: fully respect and uphold the *Universal*

17 The need for social justice was identified in the UN *Millennium Declaration* as driving force for the achievement of the *Millennium Development Goals*. See generally, par 6 of the UN *Millennium Declaration* (2000).

18 See par 11 of the UN *Millennium Declaration* (2000).

19 See pars 19-27 of the UN *Millennium Declaration* (2000).

20 For details, see <http://www.undp.org/content/undp/en/home/mdgoverview.html> [date of use 20 July 2012].

21 The eight goals are: eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce child mortality; improve maternal health; combat HIV/AIDS, malaria and other diseases; ensure environmental sustainability; and develop a global partnership for development.

22 See <http://www.cesvi.eu/UserFiles/File/Mdgs.pdf> [date of use 20 July 2012].

23 See par 24 of the UN *Millennium Declaration* (2000).

24 See par 24 of the UN *Millennium Declaration* (2000).

Declaration of Human Rights (UDHR), 1948;²⁵ strive for the full protection and promotion of civil, political, economic, social and cultural rights in all countries; implement the *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW), 1979;²⁶ encourage ratification and full implementation of the *Convention on the Rights of the Child* (CRC), 1989;²⁷ and to strive for more inclusive political processes in public decision-making.²⁸

At the regional level, Africa has also shown commitment towards the pursuit of social justice. In order to drive the agenda of the UN Summit on Social Development and promote the achievement of the MDGs, the African Union (AU) adopted the *Social Policy Framework for Africa* in 2008.²⁹ The *Social Policy Framework for Africa* does not contain binding legal obligations but provides a broad range of recommendations to guide and assist AU Member States in formulating and implementing national social policies.³⁰ The *Social Policy Framework for Africa* acknowledges that governments (national, regional and local authorities), civil society and community-based organisations, marginalised populations, the private sector and development partners must play an active role in realising its objectives.³¹ As a guiding principle, the *Social Policy Framework for Africa* suggests that social policy formulation must include "bottom-up approaches to allow the participation of beneficiaries and recipients in decision-making".³²

Apart from commitments at the international and regional levels, some countries have adopted measures in the form of constitutions, legislation and/or policies that expressly seek to promote the pursuit of social justice.³³

25 The UDHR was proclaimed by the UN General Assembly on 10 December 1948.

26 The CEDAW was adopted by the UN General Assembly on 18 December 1979.

27 The CRC was adopted by the UN General Assembly on 20 November 1989.

28 See par 25 of the UN *Millennium Declaration* (2000).

29 AU *Social Policy Framework for Africa* (2008) 5-51; AU *Draft Social Policy Framework for Africa* ((2005) 6-7. The AU *Social Policy Framework for Africa* was adopted at the First Session of the AU Conference of Ministers In-Charge of Social Development, Windhoek, Namibia – 27-31 October 2008.

30 AU *Social Policy Framework for Africa* (2008) 6.

31 AU *Social Policy Framework for Africa* (2008) 11.

32 For a complete list of guiding principles, see AU *Social Policy Framework for Africa* (2008) 10.

33 See Preamble and article 10(2)(b) of the Constitution of Kenya (2010); Preamble to the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution); Preamble to the Constitution of Egypt (2012); Preamble to the Constitution of India (Updated upto the Ninety-Seventh Amendment) Act, 2011; HM Government *Social*

For example, the Government of the United Kingdom (UK) recently adopted a policy document expressly committed to pursuing social justice³⁴ with clearly defined anticipated outcomes.³⁵ The UK policy document recognises that "central government is only one part of the broader partnership needed to make social justice a reality" and that "the most effective solutions will often be designed and delivered at a local level."³⁶ This suggests that, government planning about making social justice a reality, takes into consideration what should be done and where it should/could be done best.

It is trite noting that South Africa actively participated in the adoption of the *Copenhagen Declaration on Social Development* and the *Millennium Declaration* and is committed to realising the ideals in these declarations.³⁷ In line with the international, regional and national trends described above, the *Constitution of the Republic of South Africa, 1996* (the Constitution) expressly commits to establish a society based on democratic values, human rights and social justice.³⁸ Although this constitutional commitment may have been influenced by international developments,³⁹ it was also necessary to address the "great levels of poverty" and "extreme inequalities" in access to basic services that were the consequences of the apartheid system of government⁴⁰ as well as the sharp economic decline that the country experienced between

Justice: Transforming Lives (2012); HM Government *Social Justice Outcomes Framework* (2012).

34 See *Social Justice: Transforming Lives* (2012).

35 See *Social Justice Outcomes Framework* (2012).

36 See *Social Justice: Transforming Lives* (2012) 4, 10 and 60-61.

37 See ch 2 "Attendance and Organisation at Work" in UN *Report of the World Summit on Social Development* (1995) at 92; South Africa *Millennium Development Goals: Country Report 2010* (2010).

38 See Preamble to the Constitution.

39 See Venter 2010 *SAJHR* 45-65; Venter 2008 *Verfassung und Recht in Übersee* 16-31.

40 Through a series of discriminatory laws, the apartheid system economically exploited the majority of South Africans and denied them basic human rights. Through discriminatory spatial planning, the majority of South Africans were forcefully uprooted from land and often relocated to areas with limited access to basic services. See Liebenberg *Socio-economic Rights* 2-5; Ackermann 2004 *New Zealand Law Review* 644-645; Klug *Constituting Democracy* 85; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (8) BCLR 786 (CC) par 36; *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC), par 6; *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 4 BCLR 312 (CC), par 1; *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) (hereafter, *Doctors for Life International*) par 112; Liebenberg *Socio-Economic Rights* 2-5; Mafunganyika 2011 *SAPL* 202.

1970 and 1990.⁴¹ At the dawn of constitutional democracy, it was estimated that only about 38 percent of South African households were electrified,⁴² about 42 percent lacked access to basic sanitation services,⁴³ and less than 60 percent had access to clean drinking water.⁴⁴ In addition, about 18 million South Africans lived in poverty.⁴⁵ Socio-economic inequalities led to widespread poverty, high rates of unemployment, gross income inequalities, inadequate provision of basic services, social displacement and other related social ills.⁴⁶ This has had a direct negative impact on the quality of life of millions of South Africans who continue to live without or significantly lack access to basic services such as potable water, sanitation, electricity, food, shelter, education and healthcare services.⁴⁷ It should be noted that in addition to reinforcing socio-economic inequalities, the apartheid system also excluded the majority of South Africans from public decision-making processes.⁴⁸ The constitutional mandate to rectify and address poverty and inequality shows a clear commitment to pursue social justice to the benefit of all South Africans which can only be achieved by co-operative governance between the national, provincial and local spheres of government.⁴⁹ This

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- 41 Pieterse 2005 *SAPL* 157; Klug *Constituting Democracy* 85. For a detailed description of the socio-economic situation in South Africa at the dawn of constitutional democracy, see "Chapter 1: South African Social Welfare Context" in the *White Paper for Social Welfare* (1997).
- 42 Ruiters 'Free basic electricity in South Africa: a strategy for helping or containing the poor?' in McDonald *Electric Capitalism* 249.
- 43 Water Research Commission *Review of Sanitation Policy and Practice in South Africa 2001-2008* (2010) 1.
- 44 See Algotsson and Murombo *Water Supply and Sanitation in South Africa: Environmental Rights and Municipal Accountability* (2009) 8.
- 45 See ch 1 of the *White Paper for Social Welfare* (1997).
- 46 See ch 1 of the *White Paper for Social Welfare* (1997).
- 47 National Planning Commission (NPC) *National Development Plan: Vision for 2030* (2011) 1-3. Hereafter, *National Development Plan* (2011).
- 48 See Ackermann 2004 *New Zealand Law Review* 644-645; Klug *Constituting Democracy* 85; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (8) BCLR 786 (CC) par 36; *Grootboom*, par 6; *Nokotyana and Others v Ekurhuleni Metropolitan*, par 1; *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) (hereafter *Doctors for Life International*) par 112; Liebenberg *Socio-Economic Rights* 2-5; Mafunganyika 2011 *SAPL* 202.
- 49 See Brand 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa* 12-20; Pieterse 2007 *Human Rights Quarterly* 796-822; Van der Walt 'A South African Reading of Frank Michelman's Theory of Social Justice' in Botha *et al Rights and Democracy* 163-165; Stewart 2011 *Diritto Pubblico Comparato ed Europeo* 1510; Langa 2011 *Stell LR* 446-451; Solange 2011 *Stell LR* 542-546; Pieterse 2005 *SAPL* 155-166; Klare 1998 *SAJHR* 153-155; Langa 2006 *Stell LR* 351-352.

constitutional mandate is embedded in the vision of transformative constitutionalism.⁵⁰

The pursuit of social justice as a global, regional and domestic (national) imperative is regarded as a prominent function of local or municipal authorities, specifically. This is evident from *inter alia*, the international and regional instruments discussed above and in current practice in some countries.⁵¹ For example, as already indicated above, in the United Kingdom, the Government's recent policy document adopted in pursuit of social justice recognises that local government authorities are better placed to design and implement the most effective solutions to tackle poverty at the community level.⁵² The emphasis that local authorities should contribute towards the pursuit of social justice (and social development) is generally consistent with the principle of institutional subsidiarity which dictates that political decisions and their implementation should be carried out by the level of government closest to the people, except where it is unreasonable to do so.⁵³ This means that due to their closeness to local communities, local authorities should preferably address community problems, including meeting their basic needs. In governing local communities and responding to their needs, local government authorities generally rely on a variety of governance instruments such as by-laws, policies and strategic plans.⁵⁴

50 The vision of transformative constitutionalism is discussed in detail in 2.2 below. Hereafter, reference to the transformative constitutional mandate should be understood to encapsulate the pursuit of social justice.

51 See UN *Report of the UN Summit for Social Development* (1995) at par 27; AU *Social Policy Framework for Africa* (2008) 11; *Social Justice: Transforming Lives* (2012) 4, 10 and 60-61; Fainstein 2001 *International Journal of Urban and Regional Research* 884-888.

52 See *Social Justice: Transforming Lives* (2012) 4, 10 and 60-61.

53 De Visser *Institutional Subsidiarity in the Constitution: Slapstick asymmetry or a 'right-based' approach to powers?* (2008) 7; De Visser *Developmental Local Government: A Case Study* 142; Carpenter *Cooperative Government, Devolution of Powers and Subsidiarity: The South African Perspective* (1999) 45. For details on the origins of the subsidiarity principle and the manner in which it is articulated in some domestic and international instruments, see: De Visser 2010 *Stell LR* 92-93 and 95-100.

54 See Steytler 2011 *SAPL* 484-496; Harrison 'The Origin and Outcomes of South Africa's Integrated Development Plans' in Van Donk *et al Consolidating Developmental Local Government* 321-337; Salamon 'The New Governance and the Tools of Public Action: An Introduction' in Salamon *The Tools of Government: A Guide to New Governance* 1-41; Gordon *Strategic Planning for Local Government* 1-11.

In South Africa, the Constitution was negotiated and adopted by the Constitutional Assembly, certified by the Constitutional Court in 1996 and entered into force on 4 February 1997.⁵⁵ According to some constitutional law scholars, the Constitution is considered to be different from liberal classic constitutions or bills of rights in other parts of the world in that it is an engagement with the future that it will partly shape.⁵⁶ It is a constitutional text with a transformative vision aimed at correcting the injustices of the past and to establishing a society based on social justice.⁵⁷ This study is based on the premise that this transformative vision should be understood as a constitutional commitment and that it translates into an implicit yet omnipresent constitutional mandate to pursue social justice.⁵⁸ The execution of this mandate is in large part dependent on authorities' respect for and the realisation of a range of rights entrenched in the Bill of Rights.⁵⁹ As such, the constitutional mandate places the obligation on the three spheres of government to realise the rights entrenched in the Constitution to benefit the needs of impoverished people.⁶⁰ All of the rights in the Constitution have the same status in that they are all justiciable.⁶¹

55 For details on the constitution-making process, see *Liebenberg Socio-Economic Rights* 7-22.

56 Stewart 2011 *Diritto Pubblico Comparato Ed Europeo* 1510. By virtue of globalisation, the future of South Africa will equally be shaped by regional and international trends and developments with respect to economic growth and job creation, for example. See *National Development Plan* (2011) 7-8.

57 Klare 1998 *SAJHR* 146-188 at 153; Pieterse 2005 *SAPL* 156-161; Brand *Courts, Socio-Economic Rights and Transformative Politics* 70; De Vos 2001 *SAJHR* 260; Stewart 2011 *Diritto Pubblico Comparato ed Europeo* 1513.

58 This researcher understands that social justice remains an ideal which will never be completely achieved in the true sense. However, because social justice is grounded on constitutional rights, it should also be understood as not to be a hollow aspiration but a constitutional mandate or commitment which must be pursued in accordance with constitutional obligations and requirements. See Van der Walt 'A South African Reading of Frank Michelman's Theory of Social Justice' in Botha *et al Rights and Democracy* 163-164; Langa 2006 *Stell LR* 354; Pieterse 2005 *SAPL* 159.

59 See Van der Walt 'A South African Reading of Frank Michelman's Theory of Social Justice' in Botha *et al Rights and Democracy* 163-164; Langa 2006 *Stell LR* 354; De Vos 2001 *SAJHR* 264; Pieterse 2005 *SAPL* 159-163.

60 See Brand 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa* 12-20; Pieterse 2007 *Human Rights Quarterly* 796-822; Van der Walt 'A South African Reading of Frank Michelman's Theory of Social Justice' in Botha *et al Rights and Democracy* 163-165; Stewart 2011 *Diritto Pubblico Comparato ed Europeo* 1510; Langa 2011 *Stell LR* 446-451; Solange 2011 *Stell LR* 542-546; Pieterse 2005 *SAPL* 155-166; Klare 1998 *SAJHR* 153-155; Langa 2006 *Stell LR* 351-352.

61 *Certification of the Constitution of the Republic of South Africa*, 1996 4 SA 744 (CC) pars 76-78; *Grootboom*, par 20.

The concept of social justice and the means of pursuing it remains a contentious issue for modern jurisprudence.⁶² In South Africa, scholars and jurists nevertheless, agree that, the variety of human rights entrenched in the Bill of Rights represent at least one mechanism through which the transformative constitutional mandate and social justice can be pursued.⁶³ Although the rights in the Constitution are interrelated, interdependent and mutually reinforcing,⁶⁴ scholars agree that socio-economic rights⁶⁵ similarly are critical in the pursuit of social justice because they seek to secure a basic quality of life for all members of society and afford entitlements to the material conditions required for human welfare.⁶⁶ Socio-economic rights are specifically considered to have transformative potential because the duties they impose convey the idea that the state must refrain from interfering with the enjoyment of such rights and must take positive action to protect, enhance and realise the enjoyment of socio-economic rights.⁶⁷ By refraining from interfering with the enjoyment of socio-economic rights, and by implementing measures that enhance their enjoyment, it becomes possible for right-holders to gain and maintain access to basic services such as food, healthcare services, electricity and potable water. In addition, it is suggested that without realising socio-economic rights and by extension combating extreme socio-economic inequalities, the constitutional guarantees of equality, dignity and freedom would have a hollow ring for millions of impoverished South

62 Van Blerk *Jurisprudence: An Introduction* 127; Sooka 'Transforming our Society' in Handmaker and Berkout *Mobilising Social Justice in South Africa* 193; North 2006 *Review of Educational Research* 507. Theories and perspectives on social justice are reviewed in 2.3 and 2.4 below.

63 Albertyn and Goldblatt 1998 *SAJHR* 249; Liebenberg *Socio-Economic Rights* 29; Van Der Walt 'A South African Reading of Frank Michelman's Theory on Social Justice' in Botha *et al Rights and Democracy* 163-165; Langa 2006 *Stell LR* 354; Pieterse 2005 *SAPL* 159.

64 *Grootboom*, par 83.

65 This researcher believes in the interrelated, interdependent and mutually reinforcing nature of human rights and the view that the classical division of rights into different categories based on the nature of the so-called positive and negative obligations they impose is artificial. See Liebenberg *Socio-Economic Rights* 54-59 and 219.

66 Brand 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa* 3; Du Plessis 2011 *SAJHR* 282.

67 See Brand 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa* 9-12; Liebenberg *Socio-Economic Rights* 54-59. Apart from the duties to respect, protect, promote and fulfil socio-economic rights, the state is obliged to implement legislative and other measures to ensure their realisation. See s 7(2), 26(2) and 27(2) of the Constitution.

Africans.⁶⁸ The socio-economic rights entrenched in the Bill of Rights include *inter alia*, the rights of access to housing,⁶⁹ healthcare services, including reproductive health care; sufficient food and water; social security and social assistance;⁷⁰ further education;⁷¹ and access to land on an equitable basis.⁷²

In addition to socio-economic rights, scholars agree that there are other constitutional rights that are not directly concerned with the material dimensions of social welfare but which may also promote the pursuit of social justice⁷³ because these rights can be used by interested and affected persons to, *inter alia*, influence decision-making in government.⁷⁴ In this regard, the constitutional right of access to information,⁷⁵ the right to just administrative action,⁷⁶ the broad right on *locus standi*,⁷⁷ the right of access to courts,⁷⁸ the right to public participation,⁷⁹ and the right to vote⁸⁰ are important.

The Constitution also influenced post-apartheid institutional change.⁸¹ The result of this institutional change at the government level is a unique, multi-spherical constitutional system of government.⁸² The Constitution established three spheres (national, provincial and local spheres) of government, which are distinctive, interdependent and interrelated and obliged to function in accordance with, *inter alia*, the constitutional principles of co-operative

68 See De Vos 2001 *SAJHR* 258-276; Liebenberg *Socio-Economic Rights* 27-28; Klare 1998 *SAJHR* 153-156. Apart from the commitment to establish a society based on the values of human dignity, equality and freedom (as evident from s 1 of the Constitution), the Constitution also guarantees the rights to equality, dignity and freedom in sections 9, 10 and 12 respectively.

69 See s 26 of the Constitution.

70 See s 27 of the Constitution.

71 See s 29(1)(b) of the Constitution.

72 See s 25(5) of the Constitution.

73 See Solange 2011 *Stell LR* 545-546; Liebenberg *Socio-Economic Rights* 88; Pieterse 2007 *Human Rights Quarterly* 806, 820-821.

74 See Liebenberg *Socio-Economic Rights* 34-36; Solange 2011 *Stell LR* 545-546.

75 See s 32 of the Constitution on the right of access to information.

76 See s 33 of the Constitution on the right to just administrative action.

77 See s 38 of the Constitution on *locus standi*.

78 See s 34 of the Constitution.

79 See s 1(d) and Preamble of the Constitution.

80 See s 19(3)(a) of the Constitution.

81 To borrow from Brand, institutional change in this context refers to a radical change of institutions and systems that produced social injustice to the extent that their defining features are fundamentally altered. See Brand *Courts, Socio-Economic Rights and Transformative Politics* 4.

82 Hattingh *Governmental Relations: A South African Perspective* 3; Simeon and Murray 2001 *Publius: The Journal of Federalism* 65-92. See ch 3 of the Constitution on co-operative government, especially s 40.

government.⁸³ The three spheres consist of a number of different line functionaries while the local sphere of government is constituted by 279 municipalities.⁸⁴

Local government specifically, as the sphere of government closest to communities, has been given legislative and executive powers by the Constitution which speaks to several of the socio-economic rights of local communities.⁸⁵ Unlike other spheres of government, local government is also expressly mandated by the Constitution to fulfil a "developmental" role.⁸⁶ This developmental role is captured in the notion of "developmental local government" which over time, permeated South Africa's local government law and policy frameworks.⁸⁷ According to De Visser, the notion of "developmental local government" could be used to describe three fundamental characteristics of local government: it must promote intergenerational and intra-generational equity in its development efforts; community residents should be able to make development choices through public participation; and local government is expressly mandated to satisfy the material needs of local communities with special attention given to impoverished residents.⁸⁸ Part B of Schedule 4 and Part B of Schedule 5 of the Constitution outlines the areas where local government has "original" executive and legislative powers including *inter alia*: water and sanitation

83 See Edwards 2008 *Politeia* 65-85; Du Plessis 2008 *SAPL* 90-92; Kirkby *et al* 2007 *SAPL* 144; Simeon and Murray 2001 *Publius: The Journal of Federalism* 71-72; Malan 2005 *Politeia* 226-243.

84 According to s 151(1) of the Constitution, the local sphere of government comprises of municipalities (metropolitan, district and local) in South Africa. Based on this, the terms local government and municipalities will be used interchangeably. For a complete list of municipalities in the country, see: <http://www.demarcation.org.za/> [date of use 5 March 2013]. See also: <http://www.localgovernment.co.za/> [date of use 06 October 2013].

85 See De Visser 2009 *CJLG* 11-12; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 141-150, 363; De Visser 2003 *Law, Democracy and Development* 201-203.

86 S 153(1) of the Constitution states that "a municipality must structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community".

87 See par 1 of "Section B: Developmental Local Government" in the *White Paper on Local Government* (1998); Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 461-462. The notion of "developmental local government" is fully discussed in 2.5.4.2 below.

88 De Visser *Developmental Local Government: A Case Study* 10-13; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 461-462.

services limited to potable water supply systems and domestic waste-water and sewage disposal systems, electricity and gas reticulation, municipal health services, air pollution, building regulations, municipal public transport, and childcare facilities.⁸⁹ This means that local government is responsible for areas of government authority directly linked to the needs of local communities. In addition, in line with the principle of institutional subsidiarity, national and provincial governments can assign additional (new) responsibilities to municipalities.⁹⁰ This means that the range of services provided by municipalities is not confined to the lists contained in Schedules 4B and 5B of the Constitution.⁹¹ In this regard, the Pietermaritzburg High Court indicated in *R A Le Sueur and Others* that, the functional areas of constitutional competence as set out in Schedules 4 and 5 are not the only provisions dealing with government responsibilities and duties.⁹²

In order to address the socio-economic challenges inherited from the old order, the ANC led government has for the past 18 years, committed itself to increasing social expenditure through various socio-economic policies such as the *Reconstruction and Development Programme*,⁹³ the *Growth, Employment and Redistribution Policy*,⁹⁴ the *Accelerated Shared Growth Initiative*,⁹⁵ and the *National Development Plan (NDP)*,⁹⁶ as a major part of its developmental strategy.⁹⁷ The drive towards large scale social spending continues to be driven by the country's constitutional commitment towards

89 See s 156 read with Schedules 4B and 5B of the Constitution. The original powers of local government are fully discussed in 2.5.4.3 below.

90 See s 156(4) of the Constitution; De Visser *Institutional Subsidiarity in the Constitution* (2008) 3 and 20; De Visser 2010 *Stell LR* 90.

91 See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) BCLR 150 (CC) at pars 21-97; *R A Le Sueur and Others v Ethekwini Municipality and Others* (2013) Case No 9714/11 at pars 19-29.

92 See *R A Le Sueur and Others*, par 19.

93 See ch 2: "Meeting Basic Needs" in *Presidency Reconstruction and Development Programme: A Policy Framework* (1994). Hereafter, RDP (1994).

94 See Department of Finance *Growth, Employment and Redistribution: A Macroeconomic Strategy* (1996) 15-16. Hereafter, GEAR (1996)

95 See *Presidency Accelerated and Shared Growth Initiative - South Africa* (2006) 9-10. Hereafter, ASGISA (2006).

96 NPC *National Development Plan* (2011) 326-328.

97 Hassim 'Social Justice, Care and Developmental Welfare in South Africa' in Freund and Harold *Development Dilemmas in Post-Apartheid South Africa* 327-328. For a detailed discussion of post-apartheid economic policies, see Gelb 'Macroeconomic Policy and Development: From Crisis to Crisis' in Freund and Witt *Development Dilemmas* 32-61.

social justice.⁹⁸ The guiding objectives of the *National Development Plan* (2011) are the elimination of poverty and reduction of inequalities in access to education, water, health services, sanitation, housing, electricity and social security by 2030.⁹⁹ The NDP recognises that the success of this plan is dependent on the ability of all spheres of government to effectively implement government strategies.¹⁰⁰

Despite the constitutional mandate, socio-economic policies and legislative measures, poverty and socio-economic inequalities persist across South Africa. This is evident from, amongst other indicators, widespread protests over the lack or inadequate provision of social services at the grass root level,¹⁰¹ increasing rural-urban migration,¹⁰² and widespread unemployment.¹⁰³ According to various government sources, South Africa is one of the most unequal countries in the world.¹⁰⁴ This in effect means that millions of South Africans do not have access to basic services such as water, electricity, sanitation and healthcare services. Therefore, the commitment to social justice still remains a dream for millions of South Africans. Recent statistics from the 2011 Census corroborate the challenges faced in realising the transformative constitutional mandate. According to key highlights of the 2011 census, 5.2 percent of South African households do not have access to any form of toilet; 15 percent do not use (have access to) electricity for lighting; 26 percent do not use (have access to) electricity for cooking; and about 32 percent reside in traditional and informal dwellings.¹⁰⁵ In the third quarter of 2012, 25 percent of South Africans were unemployed.¹⁰⁶

98 See NPC *National Development Plan* (2011) 3 and 342; Hassim 'Social Justice, Care and Developmental Welfare in South Africa: A Capabilities Perspective' in Freund and Harold *Development Dilemmas* 327-335.

99 NPC *National Development Plan* (2011) 3.

100 See generally, NPC *National Development Plan* (2011) 363-399.

101 Alexander 2010 *Review of African Political Economy* 40.

102 Louw 'Rural-Urban Migration in South Africa' in Falola and Salm *Globalisation and Urbanisation in South Africa* 109.

103 Langa 2011 *Stell LR* 446-447; Sibanda 2011 *Stell LR* 485.

104 NPC *National Development Plan* (2011) 3; NPC *Development Indicators* (2010) 25; Gelb 'Macroeconomic Policy and Development: From Crisis to Crisis' in Freund and Witt *Development Dilemmas* 33.

105 See Statistics South Africa *Census 2011: Highlights of Key Results* (2012) 12-19.

106 See Statistics South Africa *Quarterly Labour Force Survey: Quarter 3 2012* (2012) xiv.

In addition to the statistics in the preceding paragraph, the frequency of local protests over the lack or inadequate provision of social services since 2004 suggests the complex problems presented, in some parts of the country, by failing government policies and non-responsive politicians, especially at the local government level.¹⁰⁷ Another indicator of the failure of some municipalities to effectively implement policies that combat poverty and inequality and by extension, the non-realisation of constitutional rights, is the growing number of court cases on socio-economic and procedural rights directed against municipalities.¹⁰⁸

As discussed in greater detail in chapter 2, experts hold the view that, if all spheres of government comply with their constitutional socio-economic rights obligations, this will contribute to the pursuit of the transformative constitutional mandate.¹⁰⁹ Some argue that, if persisting poverty and socio-economic inequalities are not adequately resolved by all spheres of government, it may potentially reduce the transformative constitutional mandate to a distant dream, thereby, creating a feeling of despair amongst citizens which may further degenerate into public-private conflicts, economic instability and underdevelopment, for example.¹¹⁰ This scenario highlights the

107 Alexander 2010 *Review of African Political Economy* 40.

108 *Grootboom; Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC); *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others* 2011 7 BCLR 723 (CC); *Occupiers of 51 Olivia Road, Berea Township, and Others v City of Johannesburg and Others* 2008 5 BCLR 475 (CC); *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* 2010 2 BCLR 99 (CC); *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC); *Mazibuko and Others v City of Johannesburg and Others* 2010 3 BCLR 239 (CC); *Nokotyana and Others; Joseph and Others v City of Johannesburg and Others* 2010 3 BCLR 212 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties; Pheko and Others v Ekurhuleni Metropolitan Municipality* (CCT 19/11) [2011] ZACC 34 (6 December 2011); *Occupiers of Portion R25 of the Farm Mooipaats 355 JR v Golden Thread Ltd and Others* (CCT 25/11) [2011] ZACC 35 (7 December 2011); *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd and Others* (CCT 26/11) [2011] ZACC 36 (7 December 2011); *Beja and Others v Premier of the Western Cape and Others* [2011] ZAWCHC 97; *Bhushula v Ukhahlamba District Municipality* (2200/09) [2012] ZAECGHC 1 (12 January 2012); *City of Cape Town v Strümpher* (104/2011) [2012] ZASCA 54 (30 March 2012).

109 Albertyn and Goldblatt 1998 *SAJHR* 249; Liebenberg *Socio-Economic Rights* 29; Pieterse 2007 *Human Rights Quarterly* 796-822. This features prominently in 2.2 below.

110 Langa 2011 *Stell LR* 446-447; Liebenberg and Tilley 1998 "Poverty and Inequality Hearings" 3-4; Jansen van Rensburg 'A Human Rights-Based Approach to Poverty' in Siber and Kakwani *The Many Dimensions of Poverty* 169.

need to explore legal and other solutions that could assist the various spheres of government to pursue the transformative constitutional mandate.

1.2 Area of focus

In line with the need to explore solutions that could assist the various spheres of government to realise the entrenched constitutional mandate to pursue social justice, this study focuses on understanding local government's role in social justice and transformative constitutionalism from the perspective of the fact that South Africa has a Bill of Rights with enforceable socio-economic rights, which if realised, would contribute to the pursuit of social justice and transformative constitutionalism. Against the backdrop of a Bill of Rights with enforceable socio-economic and other rights – the fulfilment of which is the function of the entire South African government, this thesis examines and analyses how local government in particular, could contribute to the pursuit of the transformative constitutional mandate and social justice.

This research differs from existing accounts on transformative constitutionalism in South Africa, generally, to the extent that it focuses on a deeper understanding of the role of local government (that is, municipalities) in the pursuit of the transformative constitutional mandate and social justice. This is achieved through a socio-economic rights lens with reference to the socio-economic areas that are part of local government's functional and jurisdictional competencies.

1.2.1 Central research question

What role could local government play in realising the constitutional socio-economic rights underpinning social justice and transformative constitutionalism in South Africa?

1.2.2 Aims of the study

The aims of the study are to:

1. define and unpack the notion of social justice in the South African context with reference specifically, to transformative constitutionalism;

2. distil benchmarks from theories and perspectives on social justice and transformative constitutionalism that can hypothetically guide government's pursuit thereof;
3. critically analyse the meaning and implication of the transformative constitutional mandate to establish and maintain a society based on social justice, generally;
4. critically analyse the meaning and implication of the transformative constitutional mandate, for local government specifically;
5. question and conceptually unpack the interconnectedness between "developmental local government", the benchmarks for government's pursuit of transformative constitutionalism and social justice as per the second aim above;
6. explore and critically investigate the relevance of integrated development planning as a local planning instrument in establishing and maintaining a socially just local community;
7. explore and critically investigate the relevance of local government indigent policies as a local governance instrument in establishing and maintaining a socially just local community; and
8. suggest proposals aimed at optimising the role of local government in realising the constitutional socio-economic rights underpinning social justice and transformative constitutionalism in South Africa with specific reference to the instruments in aims 6 and 7.

1.2.3 Hypothesis and assumptions

1.2.3.1 Hypothesis

1. The Constitution expresses the state's commitment of establishing and maintaining a society based on social justice.
2. The Bill of Rights is part of the Constitution and affords everyone the right to a variety of socio-economic and other rights.

3. The realisation of socio-economic rights constitutes one of the mechanisms for establishing and maintaining a socially just society.
4. The South African government must respond to its rights obligations in terms of the Constitution by means of relevant legislation and other reasonable measures such as policies.
5. The Constitution guarantees other rights that could be used by interested and affected persons to influence decision-making in government.
6. As part of its developmental mandate, the local sphere of government is co-responsible for the realisation of the socio-economic rights entrenched in the Constitution.
7. A national legal and policy framework exists that obliges the local sphere of government to use local governance instruments such as policies and IDPs to realise its developmental mandate.

1.2.3.2 Assumptions

- 1 Transformative constitutionalism captures the objective of the Constitution to establish a society based on social justice.
- 2 The local sphere of government has a role to play in realising the constitutional objective of establishing a socially just society.
- 3 A national legal and policy framework exist that mandates local government to contribute to the realisation of constitutional socio-economic rights.
- 4 National legislation and policies exist that oblige municipalities to use local governance instruments such as policies and IDPs to realise their "expanded" developmental mandate.

1.3 Research methodology

This research is conducted by critically synthesising literature review of the purport of transformative constitutionalism, the meaning of the constitutional objective to pursue social justice, the central legal framework for the realisation of socio-economic and other rights at the local government level as well as the legal framework for developmental local government. Furthermore, existing normative and other theories that constitute the theoretical base of this study are critically reviewed. Generic benchmarks that could hypothetically guide government's pursuit of the transformative constitutional mandate are distilled from the theories and perspectives of social justice and transformative constitutionalism. In terms of the transformative constitutional mandate, this research draws largely from the perspectives of some leading constitutional law scholars and jurists. In addition, although different perspectives and theories on social justice are discussed, this study demonstrates that Nancy Fraser's multi-dimensional conception of social justice based on "participatory parity" and her policy/institutional reform proposals are generally consistent with the values of South Africa's Constitution and the views of South African scholars and jurists who have commented on transformative constitutionalism. Against this backdrop, this study motivates and adopts her theory for purposes of understanding the meaning of social justice as an objective of transformative constitutionalism.

Due to the fact that municipalities can only achieve defined constitutional/public objectives through the use of governance instruments, this study also explores the theoretical foundation of two governance instruments prescribed for South African municipalities – integrated development planning and local policies. IDPs and local policies are flexible instruments that could be used by local authorities to respond to the dynamic needs of society.¹¹¹ In addition, it is relevant to focus on a planning instrument such as the IDP because planning cuts across all processes of local

111 Cloete *Public Administration and Management: New Constitutional Dispensation* 104; Craythorne *Municipal Administration* 401.

governance.¹¹² Recently, courts in South Africa have dealt with a series of cases relating to the planning functions of municipalities.¹¹³ A planning instrument enables municipalities to be goal-oriented, make choices between various alternatives, and to devise programmes and strategies to achieve defined objectives.¹¹⁴ On the other hand, the diverse functions of different policies enable local government authorities to achieve different objectives.¹¹⁵ For example, a municipal indigent policy could be used by a municipality, as part of its overall poverty alleviation strategy, to specifically meet some of the basic needs of people living in poverty.¹¹⁶ In order to provide a basis for understanding the nature of, and estimate the potential of IDPs and municipal indigent policies in promoting local authorities' pursuit of social justice, this study explores the theoretical base of "strategic planning" and policy-making. This may also facilitate a better understanding of the legal and policy frameworks on IDPs and local indigent policies. In addition, in the process of defining local government's role, a number of semi-structured interviews were conducted to estimate some challenges faced by municipalities in designing and implementing IDPs and indigent policies.¹¹⁷ Moreover, this research

112 See Bain 'Aspects of Planning in the Public Sector' in Hanekom *et al Key Aspects of Public Administration* 49.

113 See *R A Le Sueur and Others; Lagoon Bay Lifestyle Estate (Pty) Ltd v The Minister of Local Government and Others* (2011) Case No 10751/2011 (Western Cape High Court, Cape Town); *Minister of Mineral Resources v Swartland Municipality and Others* 2012 (7) BCLR 712 (CC); *Body Corporate of Dolphin Cove v Kwadukuza Municipality and Another* (2012) Case No 8513/10 (Kwazulu Natal High Court, Durban); *City of Johannesburg v Gauteng Development Tribunal* (335/08) [2009] ZASCA 106 (22 September 2009); *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (9) BCLR 859 (CC).

114 See Gordon *Strategic Planning for Local Government* 8. See Clarke and Stewart *Planning for Change: Strategic Planning for Local Government* 6; Mercer *Strategic Planning for Public Managers* 17-18; Cloete and Thornhill *South African Municipal Government and Administration* 111; Bain 'Aspects of Planning in the Public Sector' in Hanekom *et al Key Aspects of Public Administration* 46;

115 See 2.7.3 below; Hanekom 'Public Policy-Making and Public Policy Analysis' in Hanekom *et al Key Aspects of Public Administration* 25; Cloete *Public Administration and Management: New Constitutional Dispensation* 91.

116 For example, see DPLG (now CoGTA) *National Framework for Municipal Indigent Policies* (2006).

117 The semi-structured interviews were conducted with local government officials from various municipalities in the North-West Province during two local government capacity building workshops organised by the North-West University (Potchefstroom Campus) in March 2011 and August 2012. However, it should be noted that several attempts to specifically interview IDP managers in various municipalities in the North West Province in 2011 were evaded. During a research visit to the Tlokwe Municipality in 2012, the IDP Manager, Mr. Dolos Luka, was able to shed light on some issues relating to IDPs and indigent policies.

draws from the indigent policies and IDPs of seven municipalities that were obtained electronically (Tshwane Metropolitan Municipality (TMM);¹¹⁸ Johannesburg Metropolitan Municipality (JMM);¹¹⁹ Mangaung Metropolitan Municipality (MMM);¹²⁰ Cape Town Metropolitan Municipality;¹²¹ Tswelopele Local Municipality;¹²² Tlokwe City Council;¹²³ and Tswaing Local Municipality)¹²⁴ in order to assess the extent to which they speak to the benchmarks required for local government's pursuit of social justice – as mentioned in the second aim above. These municipalities reflect the urban, semi-urban and rural matrix of municipalities in the country. However, it should be emphasised that these municipalities do not constitute representative "case studies".¹²⁵

118 TMM is part of the Gauteng Province. It covers the country's administrative capital – Pretoria - and many surrounding previously disadvantaged areas. It has a vibrant economic base, a modern infrastructure and is experiencing a rapidly growing population. For a detailed background, see *City of Tshwane Integrated Development Plan 2011-2016* (2011) 16-100.

119 JMM is situated in the Gauteng Province. It is considered "the most advanced commercial city in Africa and the engine room" of the South African economy. It is home to 8 percent of the country's population. For a detailed background, see *City of Johannesburg: 2013/16 Integrated Development Plan* (2013) 9-32.

120 MMM is located in the Free State Province and is composed of 3 main urban centres (Bloemfontein, Botshabelo and Thaba Nchu) which are surrounded by extensive rural areas. For a detailed situational analysis of MMM, see *Mangaung Metropolitan Municipality: Integrated Development Plan 2012-2016* (2012) 22-45.

121 The City of Cape Town is located in the Western Cape Province. It is a relatively small city with "better infrastructure, excellent service provision and sophisticated higher education network". See *City of Cape Town Integrated Development Plan (RDP) 2012-2013 Review* (2012) 5.

122 Tswelopele Local Municipality is part of the Lejweleputswa District Municipality in the Free State Province. The municipality is largely rural and agriculture constitutes its main economic activity. Due to lack of job opportunities, the population is sharply declining. For a detailed background, see *Tswelopele Local Municipality: Integrated Development Plan 2012-2017* (2011) 17-26.

123 Tlokwe City Council is a local municipality in the North West Province. It is made up of Potchefstroom town, four surrounding townships and the hinterlands. The main economic activities of the area are mining and agriculture. For details, see *Integrated Development Plan of the Tlokwe City Council* (2011) 16.

124 Tswaing Local Municipality is found in the North West Province. It is predominantly rural with about 75 percent of its population living in farms and rural areas. The main economic activity is farming. For details, see *Tswaing Local Municipality: Amended Integrated Development Plan 2007-2011* (2009) 1.

125 For the meaning of "case study" in research, see: Van Wynsberghe and Khan 2007 *International Journal of Qualitative Methods* 1-10; Gerring 2004 *American Political Science Review* 341-354.

1.4 Study outline

To address the research question posed in this study, chapter 2 begins by analysing conceptual and theoretical perspectives on transformative constitutionalism and social justice in the developmental local government context. It defines and unpacks transformative constitutionalism and critically analyses the meaning and implications of the transformative constitutional mandate to pursue social justice generally, and specifically in the sphere of local government. The chapter also critically explores the duty to realise constitutional socio-economic rights of impoverished communities as forming a critical link between transformative constitutionalism and developmental local government.

Chapter 3 analyses the constitutional dimension informing transformative constitutionalism and social justice in order to establish the rights-based obligations that inform the role of local government in the said effort.

Chapter 4 focuses on the nature of local democracy, relevant functions, powers, structures of, and role players in local government to question and unpack the relationship between developmental local government, local governance, and the realisation of socio-economic rights as a necessary element/benchmark of transformative constitutionalism and social justice. It also explores the theoretical base of local government strategic (integrated development) planning and policy-making as local governance instruments.

Chapters 5 and 6 respectively, specifically explore and critically investigate the relevance and potential of integrated development planning and local government indigent policies as (local) governance instruments in the pursuit of social justice.

Chapter 7 offers recommendations aimed at optimising the role of local government in realising the constitutional socio-economic rights underpinning social justice and transformative constitutionalism with specific reference to IDPs and local government indigent policies.

CHAPTER 2
THEORETICAL PERSPECTIVES ON TRANSFORMATIVE
CONSTITUTIONALISM, SOCIAL JUSTICE AND LOCAL
GOVERNMENT

2.1	Introduction	24
2.2	Transformative constitutionalism	24
2.2.1	<i>Introduction</i>	24
2.2.2	<i>Definition: transformative constitutionalism</i>	25
2.3	Social justice as an objective of transformative constitutionalism	36
2.3.1	<i>Introduction</i>	36
2.3.2	<i>Definition: social justice</i>	37
2.3.3	<i>Theories and scholarly perspectives: social justice</i>	40
2.3.3.1	Rawls	40
2.3.3.2	Sen and Nussbaum	43
2.3.3.3	Fraser	46
2.3.3.4	Main observations on social justice as an objective of TC	58
2.4	Preferred conception of and generic benchmarks for the pursuit of social justice	59
2.4.1	<i>Background</i>	59
2.4.2	<i>Preferred conception of social justice</i>	60
2.4.3	<i>Generic benchmarks for pursuing social justice</i>	62
2.4.4	<i>Implications for state authorities</i>	64
2.5	Social justice through the lens of local government	66
2.5.1	<i>Government and governing in the local sphere in South Africa ..</i>	<i>70</i>
2.5.2	<i>Historical development in South Africa</i>	<i>70</i>
2.5.3	<i>Significant features of pre-1993 local government</i>	<i>78</i>
2.5.4	<i>Local government in a new constitutional dispensation</i>	<i>82</i>
2.5.4.1	Local government as a distinct sphere of government	86
2.5.4.2	"Developmental local government"	89
2.5.4.3	Powers and functions of local government	101
2.5.4.4	Impact of institutional subsidiarity on local government	106
2.5.4.5	An expanded mandate for local government	109
2.5.4.6	Observations on local government's constitutional mandate	117
2.6	Chapter summary	119

2.1 Introduction

This study examines and analyses the role of local government in achieving the transformative constitutional mandate aimed at the pursuit of social justice. The aim of this chapter is to analyse conceptual and theoretical perspectives on transformative constitutionalism, some of the theories on social justice and local government, in order to set the normative basis from which to explore local government's role in pursuit of the transformative constitutional mandate.

The first part of the chapter defines and reviews existing descriptions and understandings of transformative constitutionalism and explains how social justice is perceived to be a central outcome of transformative constitutionalism. The second part of the chapter critically examines some theories and perspectives of social justice. It further develops generic benchmarks on what is required of government to pursue social justice. This part of the chapter also examines the implications of the constitutional commitment to pursue social justice for government in general and for local government in particular. The last part of the chapter analyses the meaning and relevance of developmental local government in order to establish the extent to which a connection exists between the pursuit of developmental local government and social justice at the local level.

2.2 Transformative constitutionalism

2.2.1 Introduction

The notion "transformative constitutionalism" was designed and introduced into South Africa's constitutional jurisprudence over a decade ago in a seminal article by Klare.¹²⁶ Informed by his reading of the country's "post-liberal" Constitution, Klare described transformative constitutionalism as:

126 Klare 1998 *SAJHR* 146-188. Transformative constitutionalism is referred to in different ways by different writers. For example, it is varyingly referred to as a project (Liebenberg *Socio-Economic Rights* 24); a vision (Pieterse 2005 *SAPL* 155; De Vos 2001 *SAJHR* 258; Albertyn and Goldblatt 1998 *SAJHR* 248); and as a concept (Langa 2006 *Stell LR* 351; Sibanda 2011 *Stell LR* 487). This researcher shall refer to transformative constitutionalism as a mandate because as a constitutional commitment, the state is obliged to pursue it.

...a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. *Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law... In the background is an idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes...*¹²⁷

From Klare's point of view, achieving this long term transformative constitutional commitment could result in a society based on social justice, with people having the social resources needed to meaningfully exercise their rights.¹²⁸ He makes it clear also that, the establishment of an egalitarian and caring society can be achieved through participatory, democratic political processes rooted in law.¹²⁹

2.2.2 Definition: transformative constitutionalism

Following Klare's introduction of transformative constitutionalism into South Africa's constitutional jurisprudence, academic literature on the subject has steadily increased.¹³⁰ In what follows, an overview is provided of existing descriptions and understandings of transformative constitutionalism. However, it is acknowledged that even with a "post-liberal" reading of the Constitution, it is impossible for a discussion of this nature to produce "single neutral and objective truths" due to the open-endedness of legal texts.¹³¹

127 Klare 1998 *SAJHR* 150. Own emphasis. See also De Vos *SAJHR* 2001 260; Pieterse 2005 *SAPL* 165.

128 See Klare 1998 *SAJHR* 153.

129 See De Vos *SAJHR* 2001 260; Pieterse 2005 *SAPL* 165.

130 This constitutional project has caught the interest of academics in South Africa and abroad as well as judges who have written articles, chapters in books and books on issues related to transformative constitutionalism. Examples of such articles include: Langa 2006 *Stell LR* 351-360; Moseneke 2002 *SAJHR* 309-319; Albertyn and Goldblatt 1998 *SAJHR* 248-276; Roux 2009 *Stell LR* 258-285; Stewart 2010 *Penn State International Law Review* 487-512; Liebenberg 2006 *Stell LR* 5-36; Pieterse 2005 *SAPL* 155-165; De Vos 2001 *SAJHR* 258-276; Botha 2002 *JSAL* 612-627; Van Marle 2009 *Stell LR* 286-301; Sibanda 2011 *Stell LR* 482-500; Solange 2011 *Stell LR* 542-565. In terms of books on this subject, see for example: Botha *et al Rights and Democracy in a Transformative Constitution*; Liebenberg *Socio-Economic Rights*; Liebenberg and Quinot *Law and Poverty*.

131 See Van Marle 2009 *Stell LR* 289; Van Marle 2003 *TSAR* 551.

Although the entire Constitution is transformative,¹³² the vision of transformative constitutionalism is situated in the Postamble to the Interim Constitution,¹³³ now reflected in the Preamble to the Constitution.¹³⁴ The Preamble to the Constitution unequivocally states that it was adopted:

... as the supreme law of the Republic so as to – Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations of a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law; Improve the quality of life of all citizens and free the potential of each person...

This suggests that a transformative goal lies in the Constitution's commitment to remedy the country's past and to guide South Africa towards the establishment of a society based on social justice, democracy and human rights.¹³⁵

No single definition of transformative constitutionalism exists.¹³⁶ In addition, there is diversity of opinion on the ultimate objective and to an extent, the means of pursuing transformative constitutionalism.¹³⁷ Generally, scholars on this subject appear to be cautious to postulate a prescriptive understanding of transformative constitutionalism and it is difficult and at times, impossible to formulate an understanding of this concept without running into debates as to whether the Constitution demands a liberal or more critical approach to interpretation and adjudication.¹³⁸ Like any legal text, the Constitution is open for interpretation and the generation of different plausible interpretations.¹³⁹

132 See Roederer 'Transitional/Transformative Jurisprudence: Law in a Changing Society' in Roederer and Moellendorf *Jurisprudence* 623; Klare 1998 *SAJHR* 152-156. The Constitution is considered transformative because it is committed to correcting the injustices of the past and guiding South Africa to a better future that is based on values such as human dignity, equality, freedom, democracy, social justice and human rights.

133 According to the Postamble: "This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex". See Postamble to the *Constitution of the Republic of South Africa*, Act 200 of 1993.

134 Pieterse 2005 *SAPL* 158; Langa 2006 *Stell LR* 352; Liebenberg 2006 *Stell LR* 6.

135 See Pieterse 2005 *SAPL* 158-159; Klare 1998 *SAJHR* 153; Liebenberg 2006 *Stell LR* 6; Langa 2006 *Stell LR* 353.

136 Langa 2006 *Stell LR* 351; Pieterse 2005 *SAPL* 156.

137 Albertyn and Goldblatt 1998 *SAJHR* 248-249; Roux 2009 *Stell LR* 258-285.

138 Langa 2006 *Stell LR* 351; Pieterse 2005 *SAPL* 155-156.

139 See Van Marle 2009 *Stell LR* 289; Van Marle 2003 *TSAR* 551.

The intention of this section is not to focus on every variance that has arisen from the rich body of literature on the subject of transformative constitutionalism but rather, to provide a short analysis of literature dealing conceptually with transformative constitutionalism in the context of the subject matter at hand.¹⁴⁰

As already indicated, transformative constitutionalism was coined by Klare to describe South Africa's constitutional commitment to large-scale socio-economic and political transformation.¹⁴¹ Klare's Critical Legal Studies-approach has spurred the interest of progressive legal scholars and jurists in South Africa, who have continuously explored how law (and particularly constitutionalism)¹⁴² could be used as a tool to achieving social transformation.¹⁴³ According to Klare, transformative constitutionalism entails large-scale egalitarian social transformation to ensure that all South Africans have the social resources (such as land, water, electricity, healthcare services, food, social security, sanitation, and a healthy environment) needed for them to meaningfully exercise their rights.¹⁴⁴ He explains why in addition to negative constitutional rights duties placed on the state (and in some instances private parties), the Constitution also imposes positive duties in terms of constitutional rights on the state to *inter alia*, fight poverty, promote social welfare and pursue social justice.¹⁴⁵ Klare argues that the result of large-scale social transformation should be the establishment of a highly egalitarian and caring society, underpinned by participatory democratic processes at public and private levels.¹⁴⁶ He further argues that because the Constitution is open and committed to large-scale, egalitarian social transformation, it essentially requires a "post-liberal" reading.¹⁴⁷ He asserts

140 See for example, Albertyn and Goldblatt 1998 *SAJHR* 249.

141 Klare 1998 *SAJHR* 150.

142 Constitutionalism "is the idea that government should derive its powers from a written constitution and its powers should be limited to those set out in the constitution." See Currie and De Waal *The Bill of Rights Handbook* 8.

143 Good examples include: Liebenberg *Socio-Economic Rights*; Liebenberg and Quinot *Law and Poverty*; Brand *Courts, Socio-Economic Rights and Transformative Politics*; Stewart 2011 *Diritto Pubblico Comparato ed Europeo* 1510-1526; Pieterse 2007 *Human Rights Quarterly* 796-822.

144 Klare 1998 *SAJHR* 150-153.

145 Klare 1998 *SAJHR* 154.

146 Klare 1998 *SAJHR* 150.

147 Klare 1998 *SAJHR* 150-156.

that, unlike classical liberal constitutions, a reading of the values and variety of constitutional rights entrenched in the Constitution indicate that it is "social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural", conscious of its historical roots and transformative role and mission.¹⁴⁸

Klare's contribution focuses on judicial adjudication¹⁴⁹ and is dedicated to developing a post-liberal method of interpreting the Constitution that is best suited to foster the transformative vision of the Constitution.¹⁵⁰ The biggest barrier Klare identifies to the pursuit of transformative constitutionalism *via* adjudication is the conservatism of South Africa's legal culture.¹⁵¹ Klare suggests that the realisation of socio-economic rights represents a mechanism through which social transformation may occur¹⁵² and envisaged that transformative constitutionalism can only take place through non-violent political processes grounded in law.¹⁵³ Transformative constitutionalism therefore requires, a political environment that is conducive for the active involvement of all spheres of government, organs of state, community-based organisations and private individuals.¹⁵⁴

According to former Chief Justice Langa the central idea of transformative constitutionalism is the constitutional commitment to heal the wounds of the past and guide South Africans to a better future.¹⁵⁵ Langa asserts that transformative constitutionalism is constitutional commitment that requires the provision of services to all and the levelling of the economic environment that was fundamentally skewed by the system of apartheid.¹⁵⁶ For Langa,

148 Klare 1998 *SAJHR* 153-156. See also Pieterse 2005 *SAPL* 157-158.

149 Klare 1998 *SAJHR* 147; Van Marle 2009 *Stell LR* 289.

150 Klare 1998 *SAJHR* 156-188. Klare has been criticised on his argument that a particular method of constitutional interpretation, a "post-liberal" approach, is best suited to achieving the transformative vision of the Constitution. See Roux 2009 *Stell LR* 258-285. Van Marle cautions against a utopic conception of transformative constitutionalism which does not project the aspirations of the Constitution as an ideal image while acknowledging current realities. See Van Marle 2009 *Stell LR* 286-301, for detailed arguments.

151 See Klare 1998 *SAJHR* 157-188.

152 This is a central theme that runs across Klare's article. See Klare 1998 *SAJHR* 152-156.

153 Klare 1998 *SAJHR* 150.

154 Klare 1998 *SAJHR* 150.

155 Langa 2006 *Stell LR* 352.

156 Langa 2006 *Stell LR* 352.

transformative constitutionalism is not limited to the realisation of socio-economic rights but also includes the provision of greater access to education and opportunities through various mechanisms, including affirmative action measures.¹⁵⁷ The focus on combating poverty and socio-economic inequalities, *inter alia*, characterises transformative constitutionalism as an unending economic and social revolution.¹⁵⁸ Langa argues that realising the transformative constitutional commitment requires *inter alia* the creation of conducive space needed for robust political dialogue and contestation.¹⁵⁹ However, Langa acknowledges that transformative constitutionalism remains a permanent ideal of which achievement is constrained by persisting traditional (or conservative) legal cultures.¹⁶⁰ In addition, like Klare, Langa concedes that transformative constitutionalism is not a responsibility which must be borne by the courts alone.¹⁶¹ Langa argues that the transformative constitutional mandate "is a task for all three arms of Government to perform in partnership."¹⁶² In sum, Langa argues that for government to foster the pursuit of the transformative constitutional mandate, it should: fulfil its socio-economic rights obligations; implement any other measures that will reduce poverty and extreme inequalities in access to housing, food, water, education, healthcare and electricity; and facilitate public participation in government's decision-making processes.¹⁶³

Pieterse defends "an essentially social democratic understanding" of the vision of transformative constitutionalism as mandating the achievement of social justice and substantive equality; the extension of human rights norms into private relationships; and the requirement that any exercise of public power must be justified in accordance with the Constitution.¹⁶⁴ He argues that transformative constitutionalism entails *inter alia*: the dismantling of the formal structures of apartheid; the targeting and ultimate eradication of the social structures that cause and reinforce inequality; the "redistribution of social

157 Langa 2006 *Stell LR* 352.

158 Langa 2006 *Stell LR* 352.

159 Langa 2006 *Stell LR* 352-354.

160 Langa 2006 *Stell LR* 354-358.

161 Langa 2006 *Stell LR* 358.

162 Langa 2006 *Stell LR* 358.

163 Langa 2006 *Stell LR* 352-358.

164 Pieterse 2005 *SAPL* 155-156.

capital" along egalitarian lines; a robust engagement with issues of poverty and vulnerability in all legislative, executive and judicial action; and the empowerment of poor, historically marginalised sectors of society through pro-active and context sensitive measures that validate human dignity.¹⁶⁵ According to Pieterse, one of the three ways in which the Constitution contributes to transformation is by mandating government to fulfil constitutional rights, including socio-economic rights, through measures adopted by the legislature and the executive.¹⁶⁶ The emphasis by Pieterse on the need for concerted legislative, executive and judicial measures to achieve transformation is consistent with the views of Klare and Langa canvassed in the preceding paragraphs.¹⁶⁷

Pieterse further argues that for socio-economic rights to be able to advance the pursuit of social justice, their entitlements should be uncovered at the stage of definition through meaningful public participation.¹⁶⁸ According to Pieterse, meaningful public participation may assist in socio-economic rights being translated into "more concrete needs-linked notions of entitlement" capable of fostering the pursuit of social justice.¹⁶⁹ The approach to transformative constitutionalism adopted by Pieterse demonstrates that, unlike Klare's suggestion, it is not compulsory for one to adopt a so-called "post-liberal" reading of the Constitution in order to understand the central elements of transformative constitutionalism because the Constitution is expressly committed to transforming the country's troubled history. Like Klare and Langa, Pieterse supports the view that the precise end-product of transformative constitutionalism cannot be rigidly dictated because the transformative commitment remains an ideal which is subject to constant but unpredictable change.¹⁷⁰

165 Pieterse 2005 *SAPL* 159.

166 See Pieterse 2005 *SAPL* 164-165.

167 See also Brand 2011 *Stell LR* 614-638; Davis 2012 *PER* 2-14; Davis 2010 *SAJHR* 85-101 at 85-88.

168 Pieterse 2007 *Human Rights Quarterly* 819; Pieterse 2005 *SAPL* 159.

169 See Pieterse 2007 *Human Rights Quarterly* 819-820; Liebenberg *Socio-Economic Rights* 31; Brand *Courts, Socio-Economic Rights and Transformative Politics* 23-26.

170 Pieterse 2005 *SAPL* 156-159; Langa 2006 *Stell LR* 354. See Davis 2010 *SAJHR* 85-88.

From Pieterse' arguments above, it appears that for government to pursue social justice, it should use its legislative and executive powers to design and implement measures (such as laws and policies) that will promote the redistribution of resources and empower impoverished people; implement the socio-economic rights in the Constitution; and promote the participation of people living in poverty in the design and implementation of measures that seek to combat poverty and extreme forms of inequalities.¹⁷¹ Pieterse's argument that transformative constitutionalism could be pursued through legislative and executive action,¹⁷² suggests that municipalities could use their executive and legislative powers to take action that would foster socio-economic transformation, for example.

Albertyn and Goldblatt acknowledge that although the values in the Constitution represent the type of society that South Africa is committed to establishing, this is an elusive constitutional commitment.¹⁷³ Acknowledging that the ultimate end or means of achieving transformative constitutionalism is highly contested, they posit as follows:

We understand transformation to *require a complete reconstruction of the state and society, including redistribution of power and resources along egalitarian lines*. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantages based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full potential within positive social relations.¹⁷⁴

Although the above position adopted by Albertyn and Goldblatt also projects the pursuit of social justice as an objective of transformative constitutionalism, their account on transformation identifies the achievement of substantive equality as central to transformative constitutionalism.¹⁷⁵ The commitment to substantive equality requires that in addition to entrenching the right to equality in the Constitution, there should be a complete transformation of the social and state structures (the judiciary, legislature, executive and other organs of state) that previously generated and sustained injustices (on the

171 Pieterse 2005 *SAPL* 159.

172 Pieterse 2005 *SAPL* 159.

173 Albertyn and Goldblatt 1998 *SAJHR* 248.

174 Albertyn and Goldblatt 1998 *SAJHR* 249. Own emphasis.

175 Albertyn and Goldblatt 1998 *SAJHR* 249-250.

basis of race, gender and class) and demands the redistribution of power and resources along egalitarian lines.¹⁷⁶ The commitment to substantive equality also seeks to address and remedy material inequalities – unequal access to basic services such as housing, food, water, electricity, land, sanitation, education, social security, and a healthy environment.¹⁷⁷ Transformative constitutionalism therefore requires a radical transformation of the socio-economic and political landscape that will ensure that impoverished South Africans have the material resources needed to allow them engage in social relations.¹⁷⁸ The commitment to substantive equality also addresses structural and entrenched disadvantage while at the same time, aspiring to maximise human development.¹⁷⁹ This commitment requires government to create an environment that will allow people to develop and realise their full potential.¹⁸⁰ The remainder of their work examines the extent to which the Constitutional Court's jurisprudence on the right to equality meets the "lofty objectives of substantive equality".¹⁸¹

The account of transformative constitutionalism articulated by Albertyn and Goldblatt suggests that, apart from transforming state institutions (at the national, provincial and local level) to be more responsive to the needs of all South Africans, government should also adopt and implement redistributive measures that specifically address and remedy material inequalities. Thus, government should promote transformation by implementing measures that ensure that people living in poverty have access to basic needs such as housing, land, water, food, electricity, sanitation, healthcare services, social security and a healthy environment.

For former Chief Justice Chaskalson, the transformative nature of the Constitution is manifested in its commitment to move away from the country's racist authoritarian past to a transformed democratic society underpinned by respect for human rights and foundational constitutional values.¹⁸²

176 Albertyn and Goldblatt 1998 *SAJHR* 249.

177 Albertyn and Goldblatt 1998 *SAJHR* 250.

178 Albertyn and Goldblatt 1998 *SAJHR* 249.

179 Albertyn and Goldblatt 1998 *SAJHR* 250.

180 Albertyn and Goldblatt 1998 *SAJHR* 249.

181 Albertyn and Goldblatt 1998 *SAJHR* 251-276.

182 Chaskalson 2000 *SAJHR* 195-205.

Chaskalson argues that the long-term mandate of the Constitution is to establish a "society in which there will be social justice and respect for human rights".¹⁸³ This constitutional commitment will only be realised when socio-economic conditions that continue to impoverish millions of South Africans are transformed.¹⁸⁴ 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."¹⁸⁵ Although this is a long-term commitment, the transformative constitutional mandate obliges all spheres of government and the courts, in the meantime, to continuously strive towards meeting the basic needs of impoverished persons.¹⁸⁶ This requires that the state should adopt and implement measures to ensure the realisation of socio-economic rights and create space for equitable access to the country's resources.¹⁸⁷

Like Klare, Langa and Pieterse, Chaskalson acknowledges that the responsibility to pursue the transformative constitutional mandate is shared by all branches of government and organs of state, including municipalities in the local government sphere. In addition, the position taken by Chaskalson also confirms that all spheres of government could contribute towards the pursuit of the transformative constitutional mandate by complying with their socio-economic rights obligations and by implementing any other measures that will ensure that the basic needs of impoverished people (such as housing, water, electricity, food, sanitation, health services and a clean environment) are met.

Transformative constitutionalism envisages the active involvement of the citizenry in public decision-making processes.¹⁸⁸ This is evident from the nature of the country's constitutional democracy which Brand refers to as a "thick" conception of democracy.¹⁸⁹ According to Brand, the type of democracy envisaged by the Constitution requires government to create and

183 Chaskalson 2000 *SAJHR* 205.

184 Chaskalson 2000 *SAJHR* 204-205.

185 Chaskalson 2000 *SAJHR* 205.

186 Chaskalson 2000 *SAJHR* 204-205.

187 Chaskalson 2000 *SAJHR* 203-205.

188 See Brand 2011 *Stell LR* 624-625; Davis 2012 *PER* 2-3.

189 See Brand 2011 *Stell LR* 614 and 622-625. Klare describes it as an "empowered" model of democracy. See Klare 1998 *SAJHR* 153.

maintain institutions and structures that will facilitate representative and participatory democracy as well as enable interested persons to participate in decision-making outside those institutions and in between elections at the national, provincial and local levels.¹⁹⁰ Transformative constitutionalism requires the "fostering and maintenance of democratic substance" and the practice of democracy.¹⁹¹ Davis argues that the concept of a "thick" democracy requires the empowerment of all citizens to partake in decisions crucial to the outcome of their life choices.¹⁹² Brand and Davis acknowledge that for the state to achieve the transformative objectives of the Constitution, all branches of government must share the responsibility of protecting and realising constitutional rights.¹⁹³ Although the shared responsibility of promoting and protecting human rights composes an often problematic/adversarial relationship between the courts and the other branches of government (which may result in an uneven outcome between democratic will and constitutional reason), South Africa's constitutional model of democracy and separation of powers oblige all branches of government to work together in realising constitutional objectives.¹⁹⁴

The outline above serves to show that, although there are central elements of agreement on transformative constitutionalism, there is no unanimous or prescriptive understanding.¹⁹⁵ Firstly, South African scholars and jurists agree that transformative constitutionalism describes the constitutional commitment to establish a society based on social justice, human rights and democracy - as evident from the Preamble to the Constitution - and that this translates into a constitutional/legal mandate, albeit elusive, which must be pursued by the state.¹⁹⁶ In addition, it appears that the pursuit of social justice is the central (although only one) objective of transformative constitutionalism.¹⁹⁷ In addition, scholars and jurists agree that the transformative constitutional

190 See Brand 2011 *Stell LR* 624-625.

191 See Brand 2011 *Stell LR* 624-625.

192 See Davis 2012 *PER* 2-3.

193 Davis 2012 *PER* 4; Brand 2011 *Stell LR* 621-624.

194 See Brand 2011 *Stell LR* 614-628 at 621-624; Davis 2012 *PER* 2-14.

195 Langa 2006 *Stell LR* 351.

196 See Klare 1998 *SAJHR* 153-154; Langa 2006 *Stell LR* 352; Pieterse 2005 *SAPL* 155-156; Albertyn and Goldblatt 1998 *SAJHR* 249; Chaskalson 2000 *SAJHR* 205.

197 The pursuit of social justice is considered the central commitment of transformative constitutionalism. See Liebenberg 2006 *Stell LR* 6; Moseneke 2002 *SAJHR* 309.

mandate to pursue social justice is informed by the constitutional commitment to correct the injustices of the past and to *inter alia*, eradicate extreme forms of poverty and inequalities in access to basic needs such as housing, food, water, sanitation, electricity, healthcare services, education, and access to land.¹⁹⁸ This explains the argument that transformative constitutionalism requires *inter alia*, the provision of services to all South Africans.¹⁹⁹ Moreover, there appears to be consensus that government's fulfillment of the socio-economic rights entrenched in the Constitution provides a mechanism for pursuing transformative constitutionalism.²⁰⁰ Moreover, scholars argue that transformative constitutionalism requires the transformation of state and societal institutions so that they can be more responsive to the needs of all South Africans and that government should eliminate all discriminatory practices that are based on race, sex or gender.²⁰¹ Furthermore, there is also agreement that in the pursuit of transformative constitutionalism, government must facilitate public participation in processes of governance.²⁰² Finally, there seems to be broad agreement that the responsibility of pursuing transformative constitutionalism is shared by the judicial, executive and legislative branches of government.²⁰³

The broad consensus that the legislative and executive arms of government must play a role in the pursuit of transformative constitutionalism suggests that *local* government is generally included. Local government's functional areas of competence²⁰⁴ and the principle of institutional subsidiarity²⁰⁵ suggest that municipalities should contribute towards the pursuit of transformative constitutionalism. In addition, because local government is co-

198 See Klare 1998 *SAJHR* 153-154; Langa 2006 *Stell LR* 352; Pieterse 2005 *SAPL* 155-156; Albertyn and Goldblatt 1998 *SAJHR* 249; Chaskalson 2000 *SAJHR* 205.

199 Langa 2006 *Stell LR* 352.

200 Pieterse 2005 *SAPL* 164-165; Chaskalson 2000 *SAJHR* 203-205; Brand 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa* 5-12; Liebenberg *Socio-Economic Rights* 54-59; Langa 2006 *Stell LR* 352.

201 See Albertyn and Goldblatt 1998 *SAJHR* 249-250; Klare 1998 *SAJHR* 150; Pieterse 2005 *SAPL* 150.

202 See Klare 1998 *SAJHR* 150; Langa 2006 *Stell LR* 352-354; Pieterse 2005 *SAPL* 159.

203 Klare 1998 *SAJHR* 150; Langa 2006 *Stell LR* 358; Pieterse 2005 *SAPL* 159; Albertyn and Goldblatt 1998 *SAJHR* 249; Chaskalson 2000 *SAJHR* 204-205.

204 See 2.5.4.3 below.

205 See 2.5.4.4 below.

responsible for the realisation of constitutional socio-economic rights,²⁰⁶ it appears that municipalities could also contribute towards social transformation by complying with their constitutional obligations.

2.3 Social justice as an objective of transformative constitutionalism

This section unpacks the pursuit of social justice as an objective of transformative constitutionalism.

2.3.1 Introduction

It has emerged from the above²⁰⁷ that one of the objectives of transformative constitutionalism is the pursuit of social justice. This section reviews theories and perspectives on social justice within the context of transformative constitutionalism.

The discussion proceeds on the assumption that theories on social justice (embedded in social sciences generally) are subjective or at best relative, political and most often, products of their time.²⁰⁸ In addition to other theories and perspectives, this section discusses in-depth, Nancy Fraser's theory on social justice from the perspective of transformative constitutionalism. The objective is to understand the meaning of social justice as an objective of transformative constitutionalism. Together with proposals of other scholars and experts, Fraser's recommendations on how state authorities (inclusive of local government) should pursue social justice at the state level are later used to distil hypothetical benchmarks on possible manners in which municipalities can pursue social justice at the local sphere. The need for benchmarks that can guide state authorities to pursue social justice is justifiable given the fact that the Constitution does not expressly prescribe how the state should establish a socially just society.

206 See s 4(2)(j) of the *Local Government Municipal Systems Act* No 32 of 2000. Hereafter, the *Systems Act*; De Visser 2003 *Law Democracy and Development* 201-215.

207 See 2.2 above.

208 See Allmendinger *Planning Theory* ix and 2.

2.3.2 Definition: social justice

Most often, theories on social justice do not expressly define this term because a universally acceptable definition is difficult and almost impossible.²⁰⁹ This section nonetheless, briefly examines some of the existing definitions on social justice.²¹⁰

Shookner defines social justice as the "[d]istribution of the social and economic resources of society for the benefit of all people."²¹¹ This concise definition of social justice does not offer more than an indication that social justice describes the process of (re)distributing resources. The US National Committee for Responsive Philanthropy is of the view that:

Social justice might be thought of as *the process through which society attains a more equitable distribution of power in the political, economic and social realms*. Although *social justice is an ideal* towards which we can strive, a completely just society (a utopian state) is unachievable. However, when society is made fairer in economic, social and political realms, when the opportunity for a more equitable distribution of power is achieved, we can say that a society is in the process of becoming a more socially just.²¹²

The above definition has two main features which connect with the descriptions of transformative constitutionalism above: like scholars and jurists commenting on transformative constitutionalism, the above definition suggests that social justice is primarily a process concerned with the (re)distribution of socio-economic resources in order to promote a certain degree of balance in political power amongst citizens. In addition, it indicates that the pursuit of social justice remains an ideal which cannot be completely realised. However, unlike transformative constitutionalism, the above definition is not explicit about role-players (governments, for example), does not prescribe public participation nor suggest the use of human rights as a

209 Van Blerk *Jurisprudence: An Introduction* 127. See also Sooka 'Transforming our Society'in Handmaker and Berkout *Mobilising Social Justice in South Africa* 193; North 2006 *Review of Educational Research* 507; Novak 'Defining Social Justice' (2000) at: <http://www.firstthings.com/article/2007/01/defining-social-justice-29> [date of use 21 January 2013].

210 In 2.4.2 below, this researcher offers a preferred conception of social justice that takes into consideration South Africa's context.

211 See Shookner *An Inclusion Lens: Workbook for Looking at Social and Economic Exclusion and Inclusion 2*.

212 National Committee for Responsive Philanthropy *Understanding Social Justice Philanthropy* 9.

mechanism for pursuing social justice. In addition, it does not expressly suggest the need to restructure state institutions to enable them become more responsive to community needs. This definition suggests that although there are central elements of agreement on what social justice means, there is lack of consensus on how this ideal can be pursued/realised.

In 2012, the following definition of social justice was adopted for the University of Berkeley's *Sixth Annual Social Justice Symposium*:

Social justice is a process, not an outcome, which (1) seeks fair (re)distribution of resources, opportunities, and responsibilities; (2) challenges the roots of oppression and injustice; (3) empowers all people to exercise self-determination and realise their full potential; (4) and builds social solidarity and community capacity for collaborative action.²¹³

This definition seems broader than that provided by the National Committee for Responsible Philanthropy (US) in terms of the explicit objectives of social justice. However, both definitions see social justice as a *process* which is pursued in order to redistribute resources to people living in poverty. The definition of social justice adopted by the University of Berkeley (above) connects with the descriptions on transformative constitutionalism above in several ways: like transformative constitutionalism, the definition sees social justice as a process which seeks to eliminate the roots of injustices and redistribute resources to enable (empower) people to realise their full potential. The need to build community capacity for "collaborative action" may also suggest that the underlying desire is to promote community participation in the pursuit of social justice. However, unlike scholars and jurists who have commented on transformative constitutionalism, the definition adopted by the University of Berkeley does not suggest the use of human rights as a possible mechanism for pursuing social justice. In addition, the definition is mute on the role of state authorities.

213 <http://socialwelfare.berkeley.edu/sjs/> [date of use 21 January 2013].

A United Nations Report expresses the view that the pursuit of social justice "is not possible without strong and coherent redistributive policies" conceived and implemented by public authorities²¹⁴ and argues that:

Social justice may be broadly understood as the fair and compassionate distribution of the fruits of economic growth; however, it is necessary to attach some important qualifiers to this statement. Currently, maximising growth appears to be the primary objective, but it is also essential to ensure that growth is sustainable, that the integrity of the natural environment is respected, and that the use of non-renewable resources should be rationalised, and that future generations should be able to enjoy a beautiful and hospitable earth. The conception of social justice must integrate these dimensions, starting with the right of all human beings to benefit from a safe and healthy environment... Social justice will only flourish if environmental preservation and sustainable development constitute an integral part of growth strategies now and in the future.²¹⁵

Although the UN conception of social justice argues that the pursuit thereof entails redistribution of resources, it is different from those proffered by Shookner, the US National Committee for Responsive Philanthropy and Berkeley University above in that, it is rooted in the principle of sustainable development.²¹⁶ Although the principle/concept of sustainable development is generally accepted as requiring the promotion of socio-economic growth and environmental protection,²¹⁷ it also seeks to ensure that governments facilitate public participation in decision-making processes and implement measures that will reduce extreme socio-economic inequalities in access to basic services.²¹⁸ In addition, although the need to promote sustainable development does not explicitly feature in the descriptions of transformative constitutionalism above, the UN conception of social justice is connected to the latter in at least two aspects: it asserts that the pursuit of social justice requires the redistribution of resources and that it is primarily the responsibility of public authorities to implement redistributive policies that further the pursuit of social justice.

214 UN *Social Justice in an Open World* 6.

215 UN *Social Justice in an Open World* 7-8.

216 The principle/concept of sustainable development is discussed in 2.5.4.2 and 2.5.4.5 below.

217 See Bossel *Indicators for Sustainable Development* 2-3; Burns and Hattingh 2007 SAJELP 3-5.

218 See Urquhart and Atkinson *A Pathway to Sustainability: Local Agenda 21 in South Africa* 20-21; De Visser 'Institutional Framework for Developmental Local Government' 2-3; Burns and Hattingh 2007 SAJELP 3-5.

Even though the above definitions may slightly differ in their areas of emphasis, their shared commonality with transformative constitutionalism lies in the recognition that the pursuit of social justice is an unending process which requires the implementation of (re)distributive measures (including legislative and policy measures) that will minimise poverty and extreme inequalities in access to material resources and its consequences on vulnerable groups and individuals.

2.3.3 Theories and scholarly perspectives: social justice

To understand what the state (inclusive of local government) should and could do in the pursuit of social justice as an element of transformative constitutionalism, it is necessary to understand the underlying theory of social justice.

2.3.3.1 Rawls

Rawls is considered to be one of the most influential legal philosophers on social justice.²¹⁹ He popularised the debate on this subject following his publication of *A Theory of Justice* in 1971.²²⁰ His theory of social justice is captured in what he refers to as "justice as fairness".²²¹ According to Rawls, the basic structure of a liberal society – the political, social and legal institutions - is the primary source of socio-economic inequalities and therefore, the subject of social justice.²²² This is because the basic structure of society, including the political system, has a profound effect on the distribution of rights and duties and determines the division of benefits that accrue from social cooperation.²²³ In order to address these structural sources of inequality (those rooted in the legal, political and social institutions), Rawls constructs a theory of justice based on two principles (explained below).²²⁴

219 See National Pro Bono Resource Centre *What is Social Justice* 6; <http://www.pscj.appstate.edu/socialjustice/whatisocialjustice.html> [date of use 22 January 2013].

220 Rawls *A Theory of Justice*. See Clayton and Williams 'Introduction' in Matthew Clayton and Williams *Social Justice* 1.

221 Rawls *A Theory of Justice* 3.

222 Rawls 'On Justice as Fairness' in Clayton and Williams *Social Justice* 49.

223 Rawls 'On Justice as Fairness' in Clayton and Williams *Social Justice* 49-50.

224 Rawls 'On Justice as Fairness' in Clayton and Williams *Social Justice* 50.

Based on a higher level of abstraction of the social contract theory,²²⁵ Rawls argues that, the principles of justice which will ensure a perfectly just society are the object of a hypothetical "original agreement" between free and rational persons.²²⁶ These principles are those that free and rational persons, shrouded in a veil of ignorance, "concerned to further their mutual interests would accept in an initial position of equality as defining the fundamental terms of their association."²²⁷ Rawls argues that these principles should constitute the basis of all further agreements; specify the types of social cooperation that individuals may enter into; and the forms of government that can be established. These principles must clearly assign basic rights and duties and determine the division of social benefits.²²⁸ Rawls refers to the principles of justice accepted under the veil of ignorance as "justice as fairness" because it puts across the idea that the principles of justice are contracted in an initial situation that is fair to all involved.²²⁹ In this context, since all persons are similarly placed prior to the hypothetical agreement, no person is able to design principles that favour his particular conditions.²³⁰ Following this hypothetic agreement, it is believed that there is a collective choice of a constitution and a legislature to enact laws that are consistent with initially agreed principles of justice.²³¹ Rawls' emphasis on a collective agreement contracted by free equal individuals suggests that equal public participation is central to his theory of social justice.

Rawls argues that people in the initial position of ignorance would choose two different principles of justice.²³² The first principle, referred to as the basic

225 Rawls *A Theory of Justice* 3.

226 Rawls 'On Justice as Fairness' in Clayton and Williams *Social Justice* 52; Rawls *A Theory of Justice* 3.

227 Rawls 'On Justice as Fairness' in Clayton and Williams *Social Justice* 52; Rawls *A Theory of Justice* 11-12.

228 Rawls 'On Justice as Fairness' in Clayton and Williams *Social Justice* 52; Rawls *A Theory of Justice* 11.

229 Rawls 'On Justice as Fairness' in Clayton and Williams *Social Justice* 52-53; Rawls *A Theory of Justice* 11.

230 Rawls 'On Justice as Fairness' in Clayton and Williams *Social Justice* 52.

231 Rawls 'On Justice as Fairness' in Clayton and Williams *Social Justice* 53; Rawls *A Theory of Justice* 11-13, 60.

232 Rawls *A Theory of Justice* 14.

liberty principle, is supposed to guide the design of the political constitution and as a matter of priority, guarantees a set of civil liberties to all.²³³

The second principle, that of democratic equality is supposed to guide economic institutions in a liberal society and holds that socio-economic inequalities "are just only if they result in compensating benefits for everyone"²³⁴ especially for the least advantaged members of society. The principle of democratic equality is further divided into two sub-principles: the principle of fair equality of opportunity and the difference principle.²³⁵

The sub-principle of fair equality of opportunity requires the elimination of formal discrimination and certain inequalities that hinder access to equal opportunities.²³⁶ On the other hand, the sub-principle of equality of difference is used to justify income and wealth inequalities arising from productive capacities. It requires that inequalities should be arranged to benefit the least advantaged members of society as much as possible.²³⁷

According to Rawls, the basic liberty and democratic equality principles are sequentially structured with the basic liberty principle prior to the democratic equality principle.²³⁸ This implies that the basic liberty principle cannot be compromised in favour of the democratic equality principle (which includes the fair equality of opportunity sub-principle and the equality of difference sub-principle). In the same hierarchical fashion, the sub-principle of equality of difference cannot be initially jointly pursued with the basic liberty principle.²³⁹ Therefore, attempts to satisfy basic needs can only be jurisprudentially valid if the application of the basic liberty principle and the principle of equality of opportunity has failed to address socio-economic inequalities. Put differently, this will suggest, for example that, after guaranteeing basic liberties (such as the rights to freedom of association, freedom of speech, equality before the

233 Rawls 'On Justice as Fairness' in Clayton and Williams *Social Justice* 3-4 and 60; Rawls *A Theory of Justice* 14 and 60.

234 Rawls *A Theory of Justice* 14-15.

235 See Rawls 'On Justice as Fairness' in Clayton and Williams *Social Justice* 54, 60, 67-74; Rawls *A Theory of Justice* 60, 65-83.

236 For details see Rawls *A Theory of Justice* 83-89.

237 Rawls 'On Justice as Fairness' in Clayton and Williams *Social Justice* 3-4; 59

238 Rawls 'On Justice as Fairness' in Clayton and Williams *Social Justice* 3-4 and 60; Rawls *A Theory of Justice* 60-61.

239 Rawls 'On Justice as Fairness' in Clayton and Williams *Social Justice* 3-4 and 60.

law, and the right to vote), government cannot provide free social services to a specific community – to the exclusion of others - as a means of promoting local economic development in that community (as this will violate the right (principle) of fair equality of opportunity) except if generally all those who are worst-off stand to benefit the most from such action.

Although Rawls' theory is based on a fictitious contract, it revolves around the need to establish and maintain a liberal society based on substantive equality. This explains why in addition to the guarantee of basic liberties, Rawls' principle of fair equality of opportunity requires that the basic structure of society should ensure that irrespective of backgrounds, all persons with the same potential can have the same life prospects. Rawls' theory, suggests that governments cannot pursue social justice without protecting basic liberties. In addition, his theory suggests that in the pursuit of social justice, government authorities cannot avoid redistribution of resources – albeit the constraints imposed on this by his hierarchical principles. Moreover, Rawls' point of departure that the two principles of justice are arrived at through mutual consent suggests that he recognises the value of public participation in the process of pursuing social justice.

2.3.3.2 *Sen and Nussbaum*

Sen's theory on social justice is based on what he calls the "capabilities approach".²⁴⁰ Sen's understanding of social justice merges human rights and human capabilities without subsuming one into the other.²⁴¹ According to Sen's capabilities approach, human rights can be seen as rights to certain freedoms with correlating obligations on others to safeguard and ensure that right holders enjoy those freedoms. According to the capabilities approach, human rights serve as a powerful mechanism through which human beings acquire the requisite capabilities needed to lead the lives they value and to enhance the chances they have.²⁴² This implies that apart from satisfying

240 Sen 2005 *Journal of Human Development* 151-166; Nussbaum 2003 *Feminist Economics* 33.

241 Sen 2005 *Journal of Human Development* 151-166.

242 Sen 2005 *Journal of Human Development* 152-155; Hassim 'Social Justice, Care and Developmental Welfare in South Africa' in Freund and Witt *Development Dilemmas* 329.

material needs, the realisation of human rights equips individuals with the capabilities needed by human beings to lead a dignified right. Sen's theory recognises people's entitlement to "a certain level of rough material and social equality" but he puts emphasis on the need to develop human capabilities required to achieve these.²⁴³ This implies that local authorities, for example, should for instance, bridge extreme inequalities in access to social services through welfare programmes while developing the capability of impoverished people to eventually eliminate extreme inequalities or extricate themselves from extreme poverty. However, Sen refrains from developing a "cementing list" of human capabilities that should be developed in order to establish a society based on social justice on the ground that the identification of these capabilities is best suited to "public reasoning" or participatory democratic processes.²⁴⁴ He identifies *inter alia*, the freedom to be well nourished, educated, move around freely, live disease-free lives, and participate in public life as important capabilities.²⁴⁵

Nussbaum further developed Sen's capability theory by identifying a list of what she considers as central human capabilities' necessary for the pursuit of social justice in general, from a gender dimension.²⁴⁶ For Nussbaum, these capabilities are life; bodily health; bodily integrity; senses, imagination, thought; emotions; practical reason; affiliation (friendship and respect); concern for and ability to relate to other species; play; and control over one's environment (political and material control).²⁴⁷ Nussbaum argues that these capabilities are equal and indispensable components which should be the

243 Nussbaum 1997 *Fordham Law Review* 279.

244 Sen 2005 *Journal of Human Development* 157-160; Solange 2011 *Stell LR* 546.

245 See Sen 2005 *Journal of Human Development* 157-160; Nussbaum 1997 *Fordham Law Review* 275. Sen's list of capabilities is also compatible with the UNDP's Human Development Index. The Human Development Index (HDI) is used by the UNDP to measure the level of development in a country. The HDI embodies Sen's capabilities approach to understanding human well-being and uses key capabilities such as access to health, education, nutrition and goods, to measure the level of development. Just like Sen's capabilities approach, the HDI suggests that using key capabilities, individuals can be capacitated to achieve their desired state of well-being. See Stanton *The Human Development Index: A History* 3; Des Gasper 2002 *Review of Political Economy* 435-461; Nussbaum 1997 *Fordham Law Review* 285.

246 Nussbaum 2003 *Feminist Economics* 33-59; Nussbaum 1997 *Fordham Law Review* 285-288; Hassim 'Social Justice, Care and Developmental Welfare in South Africa' in Freund and Witt *Development Dilemmas* 330.

247 For a detailed explanation of these capabilities, see Nussbaum 1997 *Fordham Law Review* 285-288.

focus of political planning because they are central to the pursuit of individual well-being (in general).²⁴⁸

The capabilities approach implies that the guarantee of formal equality *per se* is insufficient for the pursuit of social justice and stresses the need for material conditions to be met, which will enable individuals with varying capacities to further develop them and therefore, enable such individuals to be able to pursue the type of life choices they desire. The capabilities approach seeks to shift away focus from needs-based assistance such as income and other basic primary goods that constitute a major element of theories on social justice,²⁴⁹ enveloped in the principle of need.²⁵⁰ The capabilities approach requires that human rights and social development policies should be tailored to further develop human capabilities, taking into consideration varying abilities to convert resources into actual functioning and the need for social justice.²⁵¹

From Sen's capabilities approach, it emerges that for government to pursue social justice, it must fulfil its human rights obligations. This could ensure that individuals have access to basic goods and services as well as enjoy the freedom to pursue options considered appropriate for their well-being as provided for in human rights. In addition, the capabilities approach suggests that although measures should be adopted to satisfy the material needs of impoverished individuals, government authorities must focus on developing individual capabilities required to pursue individual life choices and well-being. Lastly, Sen's capabilities approach suggests that state authorities must engage, through the process of public reasoning or public participation, with citizens/communities to identify a list of capabilities that should be developed to facilitate the pursuit of social justice.

248 See Nussbaum 1997 *Fordham Law Review* 286-288.

249 See Hassim *Social Dynamics: A Journal of African Studies* 105-108; Hassim 'Social Justice, Care and Developmental Welfare in South Africa' in Freund and Witt *Development Dilemmas* 329-330.

250 For further discussion on the principle of "need", see Miller *Social Justice* 122; Harvey *Social Justice and the City* 99-105, 126-142.

251 See Sen 2005 *Journal of Human Development* 153-154; Hassim 'Social Justice, Care and Developmental Welfare in South Africa' in Freund and Witt *Development Dilemmas* 329-330; Nussbaum 2003 *Feminist Economics* 35.

2.3.3.3 Fraser

Fraser has developed a multi-dimensional conception of social justice based on "participatory parity" and has specifically proffered some institutional and policy reform strategies that could be used by governments to pursue social justice. Before venturing into details, it may be necessary to briefly indicate that, according to Fraser, a society based on social justice is one where there is "participatory parity".²⁵² This means that a society based on social justice is only established when the social arrangements in that society permits all (adult) members to interact with one another as true equals, especially in decision-making processes.²⁵³

2.3.3.3.1 A multi-dimensional conception of social justice

According to Fraser, claims for social justice have increasingly manifested themselves from two dimensions: Firstly, there are claims for the just redistribution of resources from the rich to the poor, from the owners of industry to workers, or from the North to the South.²⁵⁴ These claims are embedded in what Fraser calls the politics of redistribution.²⁵⁵ Secondly, there are those claims which seek to challenge norms of cultural dominance as rooted in, for example, sexual, gender, ethnic and race differences.²⁵⁶ Fraser identifies these claims as falling under the politics of recognition and includes movements that advocate and aim at re-valuing "unjustly devalued identities" such as feminists, gays, racial groups and other "deconstructive tendencies" (such as post-colonial and feminist studies) which reject crucial aspects of

252 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.

253 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.

254 See Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 3.

255 Fraser identifies the philosophical basis for redistribution to be grounded on theories by liberal philosophers such as Rawls which justified socio-economic redistribution within the framework of traditional liberties. See Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in Fraser and Honneth *Redistribution or Recognition* 10.

256 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 7.

traditional identity politics.²⁵⁷ According to Fraser, the politics of recognition asserts an "ideal reciprocal relation between subjects in which each sees the other as its equal".²⁵⁸ In essence, the politics of recognition mainly seeks to challenge attempts to assimilate certain identities or ideologies into dominant cultural norms.²⁵⁹ For example, a challenge by gender activists of women under representation in decision-making structures in patriarchal societies will fall under the politics of recognition.

In addition to the definitions on the politics of redistribution and recognition above, Fraser identifies four traditional distinctions between the politics of redistribution and the politics of recognition.²⁶⁰ She acknowledges that the distinctions between these forms of politics have traditionally centred on: area of focus, remedies, victims and different understandings of group differences.²⁶¹ Fraser argues that, based on the above grounds of distinction, it appears as if one (inclusive of governments and individuals interested in promoting the pursuit of social justice) is compelled to make a choice between two mutually exclusive alternatives: Whether to embrace a politics of redistribution that seeks to redress economic injustices by abolishing class-like differentials or a politics of recognition that seeks to redress cultural injustices by celebrating cultural variations or deconstructing cultural dominance.²⁶² She argues that this picture of mutual exclusivity is a false

257 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 3-6; Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 12.

258 See Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in Fraser and Honneth *Redistribution or Recognition* 10.

259 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' 6; See Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 12.

260 These differences are artificial and could be integrated. For details, see Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' 6-10. Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 11-16.

261 For details on these differences see: Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' 6-10; Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 12-15.

262 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 15-16.

antithesis.²⁶³ She states with the use of examples²⁶⁴ that, in between extreme modes of collectivities that fall within the spectrums of redistribution and recognition politics, are difficult cases that do not fit both extreme paradigms exclusively.²⁶⁵ According to Fraser, a collectivity located in the centre of redistribution and recognition spectrum creates a hybrid form of collectivity which is neither exclusive to redistribution or recognition. Fraser refers to this collectivity as a "bivalent".²⁶⁶ The bivalent therefore suffers injustices that can be traced to the political economic structure of a country and "status order of society/culture."

The argument raised by Fraser relating to bivalent collectivity is relevant to the South African context. For example, the political economic structure of apartheid which relied on influx control and low wages for blacks, coupled with the social status order based on race, jointly led to the general impoverishment of the black majority.²⁶⁷ In addition, despite the equality guarantee in section 9 of the Constitution, pervasive socio-cultural practices continue to expose women to different forms of injustice, for example.²⁶⁸

263 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 10; Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in Fraser and Honneth *Redistribution or Recognition* 8-9 and 16.

264 She uses the examples of gender, race, sexuality and the exploited Marxist working class to demonstrate how a collectivity can be rooted in both the politics of recognition and redistribution. See Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 15-20; Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 16-26.

265 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 10-15; Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 11-12.

266 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' 15. In her revised 2003 paper, she refers to this group as "two-dimensional". See Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 19.

267 See Ackermann 2004 *New Zealand Law Review* 644-645; Klug *Constituting Democracy* 85; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (8) BCLR 786 (CC) par 36; *Grootboom*, par 6; *Nokotyana and Others v Ekurhuleni Metropolitan*, par 1; Liebenberg *Socio-Economic Rights* 2-5; Mafunganyika 2011 SAPL 202.

268 Bentley 2004 *Review of African Political Economy* 247-244; Hassim 2008 *Social Dynamics* 104.

Today, women especially in rural areas in South Africa remain a particularly vulnerable group,²⁶⁹ in terms of *inter alia*, access to and ownership of land.²⁷⁰

In sum, bivalent collectivities may suffer both socio-economic maldistribution and cultural recognition "in forms where neither of these injustices is an indirect effect of the other, but where both are primary and co-original".²⁷¹ Based on her demonstration that gender, class, race and sexuality are bivalent collectivities,²⁷² she argues that "all people who care about social justice, regardless of their own personal social location" must integrate claims for redistribution and recognition.²⁷³ The same applies to all individuals who suffer injustices.²⁷⁴ This suggests that state (and local government authorities) should, for example, adopt both redistributive and recognition remedies for bivalent collectivities. One set of remedies will not suffice.

2.3.3.3.2 Social justice as "participatory parity"

Given failures to subsume the politics of recognition into redistribution and *vice versa*,²⁷⁵ Fraser proposes the adoption of a bivalent/two-dimensional conception of social justice that integrates distribution and recognition into a broader, overarching political framework.²⁷⁶ The core of this bivalent

269 Hassim 2008 *Social Dynamics* 104.

270 Walker 2003 *Journal of Agrarian Change* 113-148 at 114.

271 See Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 15; Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 19.

272 See Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' 15-20; See Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 19-25.

273 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' 23; Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 26.

274 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' 23; Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 26.

275 'Introduction' in Fraser and Honneth *Redistribution or Recognition* 3. For details of Honneth's arguments see 'Redistribution as Recognition: A Response to Nancy Fraser' in Fraser and Honneth *Redistribution or Recognition* 110-197.

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

conception 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".²⁷⁷ This norm (participatory parity) requires that for a society based on social justice to be established, 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.²⁷⁸ Participatory parity presupposes the equal moral worth of human beings.²⁷⁹ 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:

...the 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.²⁸⁰

Fraser's notion of participatory parity therefore, provides an essentially democratic perspective and approach to pursuing 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.²⁸¹ Emphasis on an essentially deliberative approach in dealing with issues of redistribution and recognition arguably requires that

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

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

279 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 45.

280 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 43.

281 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 43-44.

conditions needed for genuine public deliberations must be present to sustain parity of participation.²⁸² Fraser's emphasis on a collective democratic struggle (through policy formulation and implementation) towards social justice has resonance with the value of *ubuntu*, whose central feature is care for one another.²⁸³

2.3.3.3.3 Prerequisites of participatory parity

Fraser argues that for participatory parity to be possible, at least two prerequisites must be met:²⁸⁴ Firstly, material resources must be distributed in order to ensure participants' independence and "voice". This is what Fraser calls "the 'objective' pre-condition of participatory parity".²⁸⁵ This pre-condition 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.²⁸⁶ For example, some patriarchal arrangements that deprive women of land ownership as well as social stigma against recipients of social welfare benefits may limit their economic prospects and further impact negatively on their ability to function as peers in society. This objective pre-condition therefore 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

282 See Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 43-45.

283 See Mokgoro J in *David Dikoko v Thupi*, par 68; Madala J in the *Makwanyane* Case, par 237; Sachs J in *David Dikoko v Thupi*, pars 113 and 115.

284 See Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 30-32.

285 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 30-31; Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 36.

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

opportunities for achieving social esteem.²⁸⁷ Fraser refers to this condition for participatory parity as "intersubjective".²⁸⁸ According to Fraser, this condition precludes cultural patterns that systematically depreciate some categories of people and the qualities associated with them.²⁸⁹ To Fraser, institutionalised value systems that deny some people the status of full-partners in socio-political interactions should be prohibited.²⁹⁰ An example of a cultural value pattern which should be prohibited will include any attempt to link the right to political participation in local government matters to ethnic or racial origins. Fraser's intersubjective condition addresses concerns associated with claims for recognition and presupposes the equal moral worth of human beings. The intersubjective condition suggests that standard forms of legal equality should be established.

2.3.3.3.4 A policy and institutional reform proposal

Fraser argues that institutional and policy reforms can facilitate the realisation of the "objective" and "intersubjective" conditions of participatory parity. Her argument is based on the following:

a) Policy reform

Fraser identifies two policy reform strategies which can either be affirmative or transformative. According to Fraser, a government's means-tested social welfare programmes²⁹¹ that specifically target the poor constitute the main

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

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

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

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

291 A means-tested welfare programme is a social programme that is implemented by any government in order to help impoverished people to access the basic necessities of life. It can either be assistance in cash or in kind. However, in implementing such a

affirmative, redistributive reform strategy.²⁹² She refers to such reforms as "affirmative redistribution" reforms because they seek to redress maldistribution of resources by altering "end-state patterns of allocation, without disturbing the underlying mechanisms that generate them."²⁹³ 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 be consistently implemented over an extended period of time. She argues that the result of such constant allocations is to mark the beneficiaries as "different" and "lesser", therefore, reinforcing existing group divisions.²⁹⁴ Fraser cautions that because redistributive affirmative policies may lead to the stigmatisation of beneficiaries thereby reducing them to "lesser" citizens, it is necessary in every case for governments to trace the negative effects of such policies on beneficiaries, and address them. Failure to address these effects may fuel misrecognition in the process of remedying maldistribution.²⁹⁵ In this regard, she argues that government welfare proposals, for example, should be evaluated taking into consideration their redistributive and recognition effect. Government must persistently focus on changing the stigma associated with welfare beneficiaries by seeking approaches that provide material help in forms that promote the standing of recipients as full partners in social interaction. In this regard, for a government's welfare reform programmes to succeed, as per

programme, governments use defined criteria (means test) such as a basic income threshold to determine eligibility. This ensures that only impoverished households or individuals can be beneficiaries of such welfare programmes.

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

293 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 45; Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in Fraser and Honneth *Redistribution or Recognition* 74.

294 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 45-46.

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

Fraser's line of argument, they must be joined by reform initiatives directed towards cultural change.²⁹⁶

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) if a government consistently and persistently pursues them.²⁹⁷ 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.²⁹⁸ 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 healthcare services for poor households. Cumulatively, if applied over a long period of time, Fraser argues that such multiple reform initiatives can have positive ripple effects in other areas.²⁹⁹ For example, multiple welfare programmes can lead to increase in access to healthcare, education and capacity building. Fraser argues that 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.³⁰⁰ This potential to trigger radical long-term structural and institutional change that will promote social justice is what Fraser describes as "non-reformist reforms."³⁰¹ To Fraser, "non-reformist reforms" seek to transform inequalities directly through institutional intervention and indirectly

296 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 49.

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

298 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 79. See UN *Social Justice in an Open World* 7.

299 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 79.

300 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 79. See UN *Social Justice in an Open World* 7.

301 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 79-80; Liebenberg 2006 *Stell LR* 10.

by gradually changing the political environment to facilitate future struggles for recognition.³⁰²

Apart from the type of non-reformist reform described above, Fraser identifies what can be referred to as deconstructive transformative reform initiatives. Such initiatives seek to "redress end-state injustices precisely by altering the underlying framework that generates them."³⁰³ In essence, transformative reform seeks to deconstruct the underlying structures that cause injustice.³⁰⁴ Examples of such deconstructive transformative reform initiatives include introducing changes in labour and property laws so as to ensure a more equitable redistribution of income and land ownership.³⁰⁵ Deconstructive transformative reform initiatives may also include overriding fundamental aspects of neo-liberalism such as privatisation in order to ensure equitable access to social services. However, Fraser argues that the collapse of socialism in the former Union of Soviet Socialist Republic suggests that the viability of deep economic institutional deconstruction can be extremely challenging.³⁰⁶

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 a political clique may, for example, systematically lead to marginalisation and further subordination of some people.³⁰⁷ In essence, Fraser's policy reform proposals on how governments can pursue social justice entail two sets of reform initiatives. Firstly, government may pursue social justice - "participatory parity" - through

302 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 82.

303 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 46, 62-63; Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 74.

304 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 62-63.

305 See Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 75 and 78.

306 See Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 75 and 78.

307 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 68.

multiple government welfare programmes that provide assistance in cash and in kind (for example, free basic services) to poor people. This does not automatically address the underlying economic and political structural causes of injustice but creates a favourable environment for long-term changes in the future. Secondly, as per Fraser's argument above, a government can embark on deconstructive reform proposals that radically alter the structural causes of injustice by, for example, introducing reform on labour and property laws to ensure equitable access to land and fair wages.

b) Institutional reform proposal

Fraser argues that institutionalised patterns (such as societies that discriminate on the basis of gender, race or sex) that disadvantage some people should be eliminated so that social actors would be able to engage with each other as peers.³⁰⁸ This requires that policies be adopted that de-institutionalise cultural value patterns that serve as obstacles to parity of participation. An example of such cultural value patterns includes practices that exclude women or other races from political decision-making processes. Institutional policy reform proposals require a deconstructive transformation of deep structural patterns of differentiation and eliminating blanket acknowledgment of equality without attention to concrete differences.³⁰⁹ Furthermore, institutionalised cultural patterns must express equal respect for all participants in decision-making and ensure equal opportunity for achieving social esteem, for example.³¹⁰ Once the status order is free of pervasive biases, social actors would be able to engage with each other as peers.³¹¹

In addition to the above, Fraser recommends an essentially democratic approach to pursuing social justice which will ensure active deliberation by

308 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 55. The need to pay attention to concrete differences is borne by the fact that, a mere guarantee of equality without measures to ensure, for example, that indigents have access to the basic necessities of life may further help in undermining their ability to function as true equals in decision-making processes.

309 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 63-64.

310 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 54.

311 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 55.

citizens on, for example, policy design and implementation.³¹² 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.³¹³ This deliberative approach that puts citizens at the centre of political decision-making has the potential of increasing democratic legitimacy. In addition, it gives citizens the opportunity to make policy choices that are suited to their needs.³¹⁴ 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.³¹⁵ The overall effect would be failure to achieve the objectives for the pursuit of social justice, arising from a mismatch between social justice objectives and substantive policy content.

The essentially democratic approach to pursuing social justice advocated by Fraser, which revolves on equal public participation in the formulation and implementation of policies addressing issues of redistribution and recognition, is consistent with the notion on transformative constitutionalism³¹⁶ and values underpinning South Africa's Constitution.³¹⁷ The right to public participation in government decision-making processes is an important component of South Africa's democracy.³¹⁸

Fraser's theory suggests that state authorities can pursue social justice by implementing means-tested policies that specifically target and respond to the needs of the poor. In addition, it also indicates that ordinary citizens must participate in both the design and implementation of policies that seek to

312 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 70.

313 See Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 87-88.

314 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 71.

315 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 71. Pieterse shares a similar view. See 2.2 above

316 See Langa 2006 *Stell LR* 352; Pieterse 2005 *SAPL* 159; Klare 1998 *SAJHR* 155; Liebenberg *Socio-Economic Rights* 29; Ackermann 2004 *New Zealand Law Review* 643; Solange 2011 *Stell LR* 543.

317 See Preamble and s 1(d) of the Constitution.

318 See Davis 2012 *PER* 2-3; Brand 2011 *Stell LR* 622-625.

promote the pursuit of social justice. Moreover, Fraser's theory suggests that social justice cannot be pursued by national governments alone – it requires concerted action from national, regional and local authorities, taking into consideration their competences.

2.3.3.4 Main observations on social justice as an objective of transformative constitutionalism

The above theories suggest that there are central elements of understanding about the meaning of social justice. There is consensus that the pursuit of social justice is primarily concerned with eradicating poverty and extreme forms of inequalities in access to basic needs and that this requires some form of redistribution of resources in order to ensure that impoverished people have access to basic services. In practical terms, this suggests that state authorities should implement measures such as policies that will ensure that the basic needs of people living in poverty (such as food, water, electricity, sanitation, housing, health services, education, and a healthy environment) are met. Moreover, the theories suggest that public participation in governance is indispensable to state authorities' pursuit of social justice. In this context, governance refers to the processes of decision-making in government as well as the processes by which government decisions are implemented.³¹⁹

Despite the similarities above, the theories reviewed also reveal some differences on how state authorities should pursue social justice. For example, while Sen and Fraser make clear proposals on how government could meet the basic needs of impoverished people, Rawls' difference principle fails to provide a clear proposal on how wealth and other goods should be redistributed.³²⁰ In addition, while Rawls' theory emphasises the need for state authorities to protect civil liberties, Sen's capabilities theory suggests that government (inclusive of local government) could pursue social justice by guaranteeing, protecting and fulfilling all variety of human rights.

319 See Du Plessis 2010 *Stell LR* 274-275; Binder *et al Towards an EU Approach to Democratic Local Governance, Decentralisation and Territorial Development* 16; Lynn *et al Studying Governance and Public Management: Challenges and Prospects* 2.

320 See Miller *Social Justice* 44.

Finally, unlike Rawls and Sen whose theories see the guarantee, protection and fulfilment of human rights as an indispensable component for state authorities' pursuit of social justice, Fraser's theory is not expressly linked to human rights.

2.4 Preferred conception of and generic benchmarks for the pursuit of social justice

This section of the chapter ventures into what the theories and scholarly perspectives on social justice mean for the South African government in general and local government in particular. Drawing from the scholarly perspectives of transformative constitutionalism, the theories and other perspectives on social justice discussed above, this section distills generic benchmarks that could guide the three spheres of government in pursuing social justice in South Africa. In line with the commitments of transformative constitutionalism, this part of the chapter motivates for the adoption of Fraser's multi-dimensional conception of social justice based on "participatory parity" as generally consistent with the values of the Constitution and transformative constitutionalism. Against this backdrop, it is demonstrated that Fraser's theory based on "participatory parity", should be used for purposes of understanding the meaning of social justice as an objective of transformative constitutionalism in South Africa.

2.4.1 Background

The theories of Rawls, Sen and Fraser on social justice,³²¹ provide an opportunity to understand what the commitment to pursue social justice means in practical terms to the South African government. In this regard, these theorists provide direction to state authorities on what should be done in order to pursue a socially just society. The three theorists share the view that in order to establish a society based on social justice, state authorities should eradicate extreme forms of poverty and socio-economic inequalities.³²² In

321 See 2.3.3.1, 2.3.3.2 and 2.3.3.3 respectively.

322 See Rawls *A Theory of Justice* 83-89; Nussbaum 1997 *Fordham Law Review* 279; Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 30-31; Fraser 'Social Justice in the Age of Identity Politics:

practical terms, this would typically mean that the government of South Africa should identify and address the structural roots of socio-economic inequalities and where necessary, implement redistributive measures such as policies that will ensure that the basic needs of people living in poverty (such as water, electricity, shelter, health services, sanitation, food, land, education and a healthy environment) are met. The structural roots of socio-economic inequalities may include discriminatory practices³²³ that are based on race, sex or gender, for example. In addition, Rawls, Sen and Fraser share the view that equal public participation in decision-making processes is central to the pursuit of social justice.³²⁴

Although these theorists provide a common understanding of what the ideal of social justice means for state authorities, the challenge that remains is the lack of consensus on how state authorities should pursue social justice. However, the lack of consensus on how social justice should be pursued by state authorities should not be interpreted to mean the absence of some common grounds amongst these theorists. Table 1 below provides a summary of the generic benchmarks on how state authorities could pursue social justice.

2.4.2 Preferred conception of social justice

Fraser's views on social justice may be best suited to understand the relevance of social justice for public authorities and governance³²⁵ in South Africa for several 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

Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 36.

323 Such as cultural practices that restrict the right of women to own land or inherit property.

324 See Rawls 'On Justice as Fairness' in Clayton and Williams *Social Justice* 53; Rawls *A Theory of Justice* 11-13, 60; Sen 2005 *Journal of Human Development* 157-160; Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 30; Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 36.

325 In plain terms, governance describes the processes through which government achieves public goals or objectives. See Bovaird 2005 *International Review of Administrative Sciences* 220-225; Du Plessis 2010 *Stell LR* 274-275;

done by state authorities to pursue social justice. Fraser's sources of injustice, captured in the politics of misrecognition and maldistribution are true to almost every society and resonates with the values of the South African Constitution - human dignity, the achievement of equality, freedom, non-racialism, non-sexism, social justice and participatory democracy.³²⁶ Moreover, Fraser's theory which focuses on ensuring that all adult members of society are able to interact with one another as true equals in socio-political life, is relevant to South Africa because it is generally well-suited with different opinions regarding "the good life".³²⁷ In addition, 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 to deconstruct institutionalised cultural patterns that reinforce inequalities.³²⁸

Thirdly, 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 to, and constitutional commitment to democracy.³²⁹ Worth noting is her pre-condition for establishing a society based on social justice – the (re)distribution of material resources to satisfy basic needs of impoverished people. 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".

326 Liebenberg 2006 *Stell LR* 7. These sources have been identified as driving inequalities in South Africa. See Pieterse 2005 *SAPL* 160-161; Albertyn and Goldblatt 1998 *SAJHR* 249; Liebenberg 2006 *Stell LR* 5-7.

327 Liebenberg 2006 *Stell LR* 7.

328 For similar reform proposals see: Sibanda 2011 *Stell LR* 497-498; Albertyn and Goldblatt 1998 *SAJHR* 249; Liebenberg 2006 *Stell LR* 5-36.

329 See s 1(d) of the Constitution; *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) *BCLR* 1399 (CC) pars 107-116; Brand 2011 *Stell LR* 622-625.

In addition, Fraser's comprehensive policy proposals recognise that social justice should only be pursued through political processes at the national, regional and local levels of government, depending on the competencies best suited for each level.³³⁰

2.4.3 Generic benchmarks for pursuing social justice

As indicated above,³³¹ the theories on social justice discussed in this chapter help in providing practical meaning to what the pursuit of social justice (as an objective of transformative constitutionalism) entails. In addition, despite some differences, the theories also help in suggesting how state authorities should pursue social justice. Table 1 below draws from all the theories and perspectives of social justice discussed above, in order to provide generic benchmarks on how social justice may have to be pursued by state authorities.

330 See Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 87-88.

331 See 2.4.1 above.

Table 1: Generic benchmarks for state authorities' pursuit of social justice

		Benchmark 1	Benchmark 2	Benchmark 3	Benchmark 4	Benchmark 5	Benchmark 6	Benchmark 7	Benchmark 8	Benchmark 9	Benchmark 10
	Theories and definitions	Redistribute resources (through measures such as policies)	Promote public participation	Address structural causes of inequalities	Build capacity	Guarantee, protect and fulfil human rights	Promote sustainable development	Address stigma associated with welfare beneficiaries	Avoid privatisation of basic services	Share responsibility between all levels of government	Promote group solidarity
1	Shookner	X									
2	US National Committee for Responsible Philanthropy	X									
3	Definition adopted for the University of Berkeley's Sixth Annual Social Justice Symposium	X	X	X	X						X
	Theories and definitions	Benchmark 1	Benchmark 2	Benchmark 3	Benchmark 4	Benchmark 5	Benchmark 6	Benchmark 7	Benchmark 8	Benchmark 9	Benchmark 10
		Redistribute resources through measures such as policies	Promote public participation	Address structural causes of inequalities	Build capacity	Guarantee/fulfil human rights	Promote sustainable development	Address stigma associated with welfare beneficiaries	Avoid privatising basic services	Share responsibility between all levels of government	Promote group solidarity
4	UN 'Social Justice in an Open World' (2006)	X	X				X				
5	Rawls	X	X	X		X					
6	Sen and Nussbaum	X	X			X					
7	Fraser	X	X	X				X	X	X	

2.4.4 Implications for state authorities

Table 1 reveals some areas of agreement on what state authorities should do to pursue social justice. The definitions and theories unanimously illustrate that for state authorities to establish socially just societies, they must adopt and implement measures such as policies that will ensure some form of redistribution of material resources in order to ensure that the basic needs of people living in poverty are catered for. Secondly, out of the seven views summarised in Table 1, five agree that state authorities must facilitate public participation in the design and implementation of policies that promote the pursuit of social justice.

Table 1 also demonstrates that, although the extent to which the benchmarks overlap vary, there is agreement that in the pursuit of social justice, state authorities should: address the structural causes of socio-economic inequalities; guarantee, protect and fulfil human rights; build the capacity of impoverished people so as to enable them to eventually become self-sufficient; and promote group solidarity.

Despite the overlaps, Table 1 also illustrates that there are benchmarks which are exclusive. For example, Fraser is the only theorist to: caution against the privatisation of basic services; advocate that state authorities address the stigma associated with welfare beneficiaries; and expressly argues that national, regional and local levels of government should share the responsibility of establishing a society based on social justice.³³² In addition, the UN Report - *Social Justice in an Open World* (2006) – is the only source considered which requires that sustainable development should underpin the pursuit for social justice.

The above discussion demonstrates that good national/local governance³³³ has a direct link with state authorities' pursuit of social justice. This is because

332 See Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 87-88.

333 According to Du Plessis, "Local governance collectively embraces the duties of local government 'to govern' and 'to represent'. In this context, 'to govern' means to exercise authority and to have the power to enact and enforce legislation, to make policy, to take decisions that can affect the rights of other persons, and to exercise

the characteristics of good governance include promoting: the enjoyment of all human rights; public participation in government decision-making and implementation; sustainable development; transparency, accountability and responsiveness; efficiency and effectiveness in the delivery of public services; equity and respect for the rule of law; and general poverty alleviation and improvement of the quality of life of local communities.³³⁴ Through good public/local governance, state authorities can work towards establishing socially just societies. However, for state authorities to govern, they need "tools or instruments through which" they can pursue public purposes or defined objectives.³³⁵ Literature indicates that, generally, legislation (including by-laws), "policies", "strategic planning", "public participation", "financial management and control", and "public-private partnerships", *inter alia*, are public governance instruments.³³⁶ From the list of governance instruments, it seems that "instrument" describes "a means for accomplishing a particular objective", or set of objectives.³³⁷ This suggests that public authorities can use governance instruments to pursue social justice.

discretion in public administration matters... relates to policy-making and implementation and that it is 'a continuous process of discussion, debate, decision-making, implementation and administration, as well as a regular review of these activities.' See Du Plessis 2010 *Stell LR* 274-275.

334 Office of the UN High Commissioner for Human Rights *Good Governance Practices for the Protection of Human Rights* (2007) 1-2; Grindle 2004 *Governance: An International Journal of Policy, Administration, and Institutions* 525-548; Binder *et al Towards an EU Approach to Democratic Local Governance, Decentralisation and Territorial Development* 14.

335 Salamon 2000-2001 *Fordham Urban Law Journal* 1624.

336 See De Bruijn and Hufen 'The traditional approach to policy instruments' in Peters and Van Nispen *Public Policy Instruments: Evaluating the Tools of Public Administration* 13-14; Salamon 'The New Governance and the Tools of Public Action: An Introduction' in Salamon *The Tools of Government: A Guide to New Governance* 1-41; Gordon *Strategic Planning for Local Government* 1-11; Salamon 2000-2001 *Fordham Urban Law Journal* 1623-1641; Patel 'Tools and Trade-offs in Environmental Decision making' in Van Donk *et al Consolidating Developmental Local Government* at 363-368; Du Plessis 2010 *Stell LR* 274-275; Bovaird 2005 *International Review of Administrative Sciences* 217-221.

337 See De Bruijn and Hufen 'The traditional approach to policy instruments' in Peters and Van Nispen *Public Policy Instruments: Evaluating the Tools of Public Administration* 13; Linder and Peters 'The study of policy instruments: Four schools of thought' in Peters and Van Nispen *Public Policy Instruments: Evaluating the Tools of Public Administration* 35.

2.5 Social justice through the lens of local government

Over the past three decades, there have been several initiatives to promote decentralisation³³⁸ in different parts of the world.³³⁹ The commitment towards reinforcing decentralisation can be understood against the background of some of the difficulties faced by central governments to provide public services and adequately meet the diverse needs of citizens in especially far-flung areas.³⁴⁰ It has been generally argued that in all cases, decentralisation is expressly or implicitly driven by the need to improve the delivery of basic services such as water, sanitation, health services and education to communities.³⁴¹

Decentralisation in government refers to the restructuring of state authority, in accordance with the principle of (institutional) subsidiarity,³⁴² in order to create a system of governance that ensures co-responsibility between institutions of government at the central, regional and local levels, in meeting the needs of citizens.³⁴³ In other words, central governments relinquish certain functions

338 Generally, three forms of decentralisation can be distinguished based on the degree of local government's autonomy in decision-making. These are: deconcentration, delegation and devolution. For details, see De Visser *Developmental Local Government: A Case Study* 14-15; Bird and Vaillancourt 'Fiscal Decentralisation in Developing Countries: An Overview' in Bird and Vaillancourt *Fiscal Decentralisation in Developing Countries* 3-4; Cameroon 2010 *Government Studies* 114. This study focuses on devolution. Devolution refers to the situation where central government transfers powers to local government to elect its leaders/representatives, make policy decisions on local matters and implement them. For details on devolution, see Yulani "Decentralisation, deconcentration and devolution: What do they mean?" (2011), accessed at: http://www.cifor.org/publications/pdf_files/interlaken/Compilation.pdf [date of use: 10 March 2012].

339 See Reddy 'Local Government Democratisation and Decentralisation: Theoretical Considerations, and Recent Trends and Developments' in Reddy *Local Government Democratisation and Decentralisation* 9-10; Cloete and Thornhill *South African Municipal Government and Administration* 57. The following instruments/guidelines have been adopted to promote decentralisation: The *European Charter on Local Self-Government* (1985), signed in Strasbourg on 15 of October 1985; UN-HABITAT *International Guidelines on Decentralisation and Access to Basic Services for All* (2009); See 'Final Declaration of the Second Ordinary Session of the All Africa Ministerial Conference on Decentralisation and Local Development', done at Maputo on 12 August 2011.

340 Cloete and Thornhill *South African Municipal Government and Administration* 57; Ahmed *et al* 'Decentralisation and Service Delivery' 1.

341 Ahmed *et al* 'Decentralisation and Service Delivery' 1.

342 The principle of subsidiarity is considered the underlying rationale of decentralisation. See UN-HABITAT *International Guidelines on Decentralisation and Access to Basic Services for All* (2009), par 15.

343 UNDP 'Decentralised Governance Programme: Strengthening Capacity for People-Centred Development' 4.

and powers to lower-level units such as local authorities that are legally constituted as separate governance bodies.³⁴⁴ Decentralisation of powers and functions to local government authorities generally seeks to improve allocative efficiency, develop the capacity of local communities to participate in socio-economic and political decision-making and enhance responsiveness, productivity and accountability in government.³⁴⁵

At the international level, the UNDP has identified five fundamental characteristics of (political) decentralisation.³⁴⁶ Firstly, local units of local government have legislative and executive powers and are seen as "autonomous" levels of government over which central governments exercise little or no direct control.³⁴⁷ As "autonomous" units of government, local government authorities generally exercise legislative and executive powers and are expected to use their own initiatives to find localised solutions to community problems. Secondly, local governments have clear and legally recognised geographical boundaries within which they exercise authority and execute their functions.³⁴⁸ Thirdly, local governments have the power to generate resources in order to be able to perform their functions.³⁴⁹ Fourthly, and closely interrelated with the second and third characteristics, local governments serve as institutions in the sense that they are seen by local residents as providing services that satisfy their needs and as a unit of government over which they have some influence.³⁵⁰ Finally, decentralisation provides for a relationship of partnership and coordination between central, regional and local governments.³⁵¹ These five fundamental characteristics of decentralisation identified by the UNDP are generally in line with the core principles on local government contained in the *European Charter on Local*

344 UNDP 'Decentralisation: A Sampling of Definitions' 6.

345 UNDP 'Decentralised Governance Programme: Strengthening Capacity for People-Centred Development' 4; Kauzya 'Political decentralisation in Africa: Experiences of Uganda, Rwanda, and South Africa' 3; Bosire 2010 *Local Government Bulletin* 23-25.

346 See UNDP 'Decentralisation: A Sampling of Definitions' 6.

347 UNDP 'Decentralisation: A Sampling of Definitions' 6.

348 UNDP 'Decentralisation: A Sampling of Definitions' 6.

349 UNDP 'Decentralisation: A Sampling of Definitions' 6.

350 UNDP 'Decentralisation: A Sampling of Definitions' 6.

351 UNDP 'Decentralisation: A Sampling of Definitions' 6; UN-HABITAT *International Guidelines on Decentralisation and Access to Basic Services for All* (2009), par 18.

Self-Government.³⁵² However, although the five characteristics listed above may be generally acceptable, the details of decentralisation may look different from one country to the other.

The general trend towards decentralisation³⁵³ suggests that local government authorities will increasingly be required to contribute towards realising broad national objectives,³⁵⁴ including the pursuit for social justice. As already indicated above,³⁵⁵ in countries such as the United Kingdom, there is growing recognition of the need for local government authorities to contribute towards the pursuit of social justice.³⁵⁶ The Indian Constitution expressly obliges the legislature to devolve appropriate powers and responsibilities to local government authorities in order to enable local authorities to contribute toward the pursuit of social justice.³⁵⁷ Generally, in Africa, Kauzya observes that:

Decentralised governance is increasingly been favoured by many African countries as the most suitable mode of governance through which *poverty reduction interventions can be conceived, planned, implemented, monitored and evaluated*. Many hope that the process of decentralisation will facilitate greater participation of communities in problem analysis, project identification, planning, implementation as well as oversight which in turn will increase ownership and the likelihood of sustainability of such initiatives.³⁵⁸

Kauzya's observation suggests that local government authorities throughout Africa will in the near future, continue to play an important role in conceiving, planning and implementing measures that seek to combat poverty and extreme forms of socio-economic inequalities. This observation is also evident from the guiding principles of the AU *Social Policy Framework for Africa*

352 See articles 3-4 of the *European Charter on Local Self-Government* (1985). See also De Visser 'Institutional Framework for Developmental Local Government: Making Good on the Promise of Development' 11-12.

353 Kauzya 'Political decentralisation in Africa: Experiences of Uganda, Rwanda, and South Africa' 3; Bosire 2010 *Local Government Bulletin* 23; Reddy 'Local Government Democratisation and Decentralisation: Theoretical considerations, Recent Trends and Developments' in Reddy *Local Government Democratisation and Decentralisation* 9-10.

354 See UN *Report of the UN Summit for Social Development* (1995) at par 27; *Social Justice: Transforming Lives* (2012) 4, 10 and 60-61; Fainstein 200 *International Journal of Urban and Regional Research* 884-888.

355 See 1.1 above.

356 See 1.1 above.

357 See ss 243G and 234W of the Constitution of India Act (2011).

358 Kauzya 'Political decentralisation in Africa: Experiences of Uganda, Rwanda, and South Africa' 3. See Bosire 2010 *Local Government Bulletin* 23.

(2008) which lay emphasis on "bottom-up approaches" to the design and implementation of policies that drive the agendas of the Copenhagen and Millennium Development Summits.³⁵⁹ During the 1995 Copenhagen Summit, State parties expressed the conviction that decentralisation is an indispensable foundation for the pursuit of social justice because it creates a favourable socio-political environment for local authorities and communities to jointly formulate and implement socio-economic policies as well as allocate and manage their own resources.³⁶⁰ In addition, it is believed that decentralisation promotes the transparent management of public institutions.³⁶¹

The views on transformative constitutionalism discussed above³⁶², and Fraser's theory on social justice also acknowledge that local governments should play a role in the pursuit of social justice.³⁶³ In line with the increasing decentralisation of powers to local government authorities and the generic benchmarks outlined above³⁶⁴, it seems local government authorities could adopt and implement a variety of measures to ensure that impoverished people have access to their basic needs in local communities. In order to fully understand the responsibility of local government in the pursuit of social justice in South Africa, specifically, it is necessary to understand the current status, objects, "developmental" mandate, human rights duties as well as legislative and executive powers of local government. In addition, it is important to understand the notion of "developmental local government". Mindful of this need, the section below examines the current status, objects, developmental mandate, legislative and executive powers, as well as the human rights obligations of local government in South Africa in order to provide a solid basis for a critical discussion of the responsibility of local government in contributing towards the pursuit of social justice in the country.

359 AU *Social Policy Framework for Africa* (2008) 11.

360 See UN *Report of the UN Summit for Social Development* (1995) at pars 4, 26(n) and 29 Commitment 1(c).

361 See UN *Report of the UN Summit for Social Development* (1995), Commitment 1(c).

362 See 2.2 above.

363 See Langa 2006 *Stell LR* 358; Klare 1998 *SAJHR* 150; Pieterse 2005 *SAPL* 164-165; Chaskalson 2000 *SAJHR* 204-205; Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 87-88.

364 See 2.4.3 above.

2.5.1 Government and governing in the local sphere in South Africa

This section specifically examines the general background, current status, executive and legislative powers of local government in South Africa, in relation to the other spheres of government, so as to eventually be able to assess the responsibility of local government in contributing to the pursuit of social justice in South Africa. This section starts to unpack in a critical fashion local government's role in social justice and transformative constitutionalism from the perspective of the fact that it is *inter alia*, mandated to realise constitutional socio-economic rights to benefit the needs of impoverished people.

This section is divided into two main parts: The first part traces the evolution of local government in South Africa. Consideration is given to the history and nature of the previous system of local government in order to put into context the changes that have taken place following the country's democratic transition.³⁶⁵ The nature, powers and functions of post-apartheid local government as well as the historical move towards "developmental local government", are subsequently discussed.

2.5.2 Historical development in South Africa

Without venturing into the context specific factors that accelerated the growth of what is today generally referred to as "local self-government"³⁶⁶ in various parts of the world,³⁶⁷ it is safe to say that, the need for basic local self-

365 *Doctors for Life International*, par 112.

366 Local self-government denotes the (legal) guarantee and practical implementation of the right of citizens to participate in the conduct of public affairs directly affecting their well-being, within the structures of local governing units such as a municipality. In addition, it further denotes the right of legally established and locally elected governing units such as municipalities to conduct their affairs within specified geographic and legal parameters without arbitrary influence from regional and national governments. See Pejanovick 'Local Self-Government: A Must for Democracy, Civil Society and EU Integration' in Fisher *Peacebuilding and Civil Society in Bosnia-Herzegovina: Ten Years after Dayton* 215; Art 3 of the *European Charter of Local Self-Government*.

367 For details on the origins and evolution of local government in Europe, with particular reference to Greece, the Roman Empire, Britain, France, Germany and others, read: Hattingh 'Historical Development of Local Government and Administration' in Hanekom *et al Key Aspects of Public Administration* 105-111; Wollmann 2000 *Environment and Planning: Government and Policy* 34; Floyd *Better Local Government for South Africa* 1-140; Craythorne *Municipal Administration* 2.

government came with the end of nomadic life practiced by *Homo sapiens* for ages.³⁶⁸ The end of nomadic life led to the construction of dwellings and the subsequent establishment of small communities, villages, and eventually towns and cities.³⁶⁹ Gradually, persons and families in these new setups lost their self-sufficiency and became interdependent on the services and goods provided by others.³⁷⁰ The need therefore arose for local leaders to put in place reliable structures to ensure regular access to basic services and deal with local matters such as local hygiene and sanitation, disease control, waste removal, and street lighting.³⁷¹ The newly established community structures provided an authoritative basis for administering local matters.³⁷² The increasing importance of these community structures in the provision of basic services to communities led to the formation of early informal local authorities.³⁷³ With rapid urbanisation in the 20th century, local authorities became more necessary for the provision and management of basic services to different urban areas. Each urban area established a local authority to provide basic services and these local authorities became known as "municipalities".³⁷⁴

In South Africa, although municipalities developed in the Cape of Good Hope after the arrival of Jan van Riebeeck in 1652, local government remained confined to the Cape until the middle of the 19th century following the growth of interior settlements.³⁷⁵ In 1862, the governor of the Cape appointed four retired soldiers of the Dutch East India Company (*heemraden*) to sit with a

368 Bekink *Principles of South African Local Government* 19; Cloete and Thornhill *South African Municipal Government and Administration* 1, 3-4; Cloete *South African Local Government and Administration* 1.

369 Bekink *Principles of South African Local Government* 19; Cloete and Thornhill *South African Municipal Government and Administration* 1; Cloete *South African Local Government and Administration* 1.

370 Meyer *A Constitutional and Administrative Law Inquiry into Local Government in South Africa* 1-3; Cloete and Thornhill *South African Municipal Government and Administration* 1, 3-4; Cloete *South African Local Government and Administration* 1.

371 See Cloete and Thornhill *South African Municipal Government and Administration* 1; Cloete *South African Local Government and Administration* 1; Bekink *Principles of South African Local Government* 19.

372 See Meyer *A Constitutional and Administrative Law Inquiry into Local Government in South Africa* 1-4; Bekink *Principles of South African Local Government* 19.

373 See Meyer *A Constitutional and Administrative Law Inquiry into Local Government in South Africa* 1-4; Bekink *Principles of South African Local Government* 19.

374 Bekink *Principles of South African Local Government* 20.

375 Green *History of Local Government in South Africa* 1; Floyd *Better Local Government for South Africa* 97; Bekink *Principles of South African Local Government* 20-21.

local magistrate (the *landdrost*), to constitute a jury and settle disputes amongst residents of Stellenbosch.³⁷⁶ In 1685, a *landdrost* was appointed for the Stellenbosch area. The *landdrost* and the *heemraden* formed a council, the College of *Landdrost* and the *Heemraden* of Stellenbosch, which is considered the first South African local authority when compared to present day municipal councils.³⁷⁷

During British colonial rule, English systems of local government were introduced in the Cape and subsequently extended to other parts of the Union of South Africa.³⁷⁸ In terms of the *Cape Municipal Ordinance* of 1836, all towns in the Cape Colony, with the exception of Cape Town, were given municipal councils.³⁷⁹ Despite the British introduction of concepts such as mayor, councillors, town clerk, council committees and by-law powers, there was no uniformity in the system of local government.³⁸⁰ The British system of indirect rule allowed for the continuation of local law in conquered territories and therefore, the survival of the Roman-Dutch legal system.³⁸¹

In 1909, the British Parliament enacted the *South Africa Act* which reunited the colonies and led to the establishment of the Union of South Africa in 1910. The *South Africa Act* created a Westminster system of government with a sovereign parliament and introduced a legislature for each of the four provinces.³⁸² Under this system, parliament was supreme and the judiciary

376 Cloete and Thornhill *South African Municipal Government and Administration* 12-13; Bekink *Principles of South African Local Government* 21; Ismail *et al Local Government Management* 39.

377 Cloete and Thornhill *South African Municipal Government and Administration: A New Dispensation* 13; Craythorne *Municipal Administration* 1; Bekink *Principles of South African Local Government* 21.

378 The British took over the Cape in 1798 and 1806. For details, see Craythorne *Municipal Administration* 1-2; Cloete and Thornhill *South African Municipal Government and Administration* 14; Cloete *South African Local Government and Administration* 11.

379 Cloete and Thornhill *South African Municipal Government and Administration* 14; Ismail *et al Local Government Management* 41-42.

380 Craythorne *Municipal Administration* 1-2; Ismail *et al Local Government Management* 42-43.

381 Craythorne *Municipal Administration* 1-2; Cloete and Thornhill *South African Municipal Government and Administration* 14.

382 See De Visser *Developmental Local Government: A Case Study* 49; Craythorne *Municipal Administration* 2; Craythorne *Municipal Administration* 2-3.

had no powers to invalidate legislation enacted by parliament.³⁸³ However, this arrangement did not alter the distinct system of local authorities that had evolved in the provinces but placed municipal affairs under the control and supervision of the provinces.³⁸⁴ Coloureds received limited representation at the provincial and local government levels but nothing at the national level. Through national legislation, advisory committees were established under white municipalities for black townships. This means that authorities that administered black townships were neither elected by the black population nor answerable to them.³⁸⁵ These advisory committees were responsible for municipal services such as accommodation and access to cities until 1971 when they were replaced by Administration Boards.³⁸⁶

In order to better manage townships which could not be incorporated into homelands (such as Soweto) and to contain growing uprisings, the state granted such townships full municipal status in 1982.³⁸⁷ This means that black local authorities were entitled to manage themselves and Administration Boards were expected to guide them to lead the development of their areas. However, structures established to manage black townships such as Administration Boards and Community Councils, lacked political credibility and were often rejected through violent community protests.³⁸⁸ Elections to black local authorities in 1983 ignited a serious wave of urban protests against the policy of apartheid.³⁸⁹ In addition, black local authorities lacked substantial

383 Bekink *Principles of South African Local Government* 15; De Visser *Developmental Local Government: A Case Study* 49; Wittenberg 'Decentralisation in South Africa' 10.

384 Wittenberg 'Decentralisation in South Africa' 10; Cloete and Thornhill *South African Municipal Government and Administration* 14; Cloete *South African Local Government and Administration* 11; Bekink *Principles of South African Local Government* 21.

385 Vosloo 'South Africa: Local government in White Areas' in Vosloo *et al Local Government in Southern Africa* 39.

386 Craythorne *Municipal Administration* 2-6; Wittenberg 'Decentralisation in South Africa' 10-13; Vosloo 'South Africa: Local government in White Areas' in Vosloo *et al Local Government in Southern Africa* 26-27; Ismail *et al Local Government Management* 50.

387 Ismail *et al Local Government Management* 46, 50-51; Wittenberg 'Decentralisation in South Africa' 14.

388 See De Visser *Developmental Local Government: A Case Study* 59-60; "Section A: Current Reality" in the *White Paper on Local Government* (1998); Craythorne *Municipal Administration* 3; Ismail *et al Local Government Management* 50-51.

389 Wittenberg 'Decentralisation in South Africa' 14-15; Bekink *Principles of South African Local Government* 24.

powers and the resources needed to deliver services.³⁹⁰ Attempts by black local authorities to impose rates and charges for services were met with fierce opposition. Under these arrangements, local government in black townships lacked sufficient financial resources since they could not generate the revenue needed for service delivery.³⁹¹ One of the main reasons which continued to fuel uprisings was the very poor social and economic conditions and living standards prevailing in the black townships and communities.³⁹²

Following growing protests, boycott of rents and service charges and the imminent collapse of the system of local government in Bantustans and black townships, funds were redirected to these areas in order to calm tensions and sustain black local authorities.³⁹³ However, these interventions had come too late and most townships and Bantustans had become ungovernable in the late 1980s. Due to the lack of political legitimacy, administrative and financial constraints, the majority of local authorities established in areas reserved for 'Blacks', 'Indians' and 'Coloureds' could not effectively govern their areas and consequently, they were not in a position to address pressing development challenges.³⁹⁴ Local government authorities in these areas lacked sufficient financial and human resources as well as the full administrative and political powers needed to take control of the destinies of its people.

The general state of local government in South Africa between 1910 to 1983 has been described by Cloete as follows:

When the Union of South Africa was established on 31 May 1910, municipal affairs were made the responsibility of the provincial authorities. For many years the central government showed little interest in municipal affairs and contributed nothing to the development of local government and administration systems appropriate for South African urban areas. The legislation passed by Parliament on local government

390 See Craythorne *Municipal Administration* 3; Cloete *South African local government and administration* 6-7; Bekink *Principles of South African Local Government Law* 25. See also "Section A: Current Reality" in the *White Paper on Local Government* (1998). Hereafter, the *White Paper on Local Government* (1998) will be referred to as WPLG (1998).

391 Bekink *Principles of South African Local Government Law* 25; Craythorne *Municipal Administration* 2; Cloete *South African Local Government and Administration* 11.

392 Bekink *Principles of South African Local Government Law* 25.

393 See "Section A: Current Reality" in the WPLG (1998).

394 Reddy 'South Africa: Local Government Democratisation and Decentralisation Revisited' in Reddy *Local Government Democratisation and Decentralisation* 201.

affairs before 1983 dealt mostly with (i) specific matters affecting individual municipalities or local communities... (ii) the administration of Black urban areas...and (iii) financial affairs.³⁹⁵

The result of the afore mentioned state of affairs was that each of the provinces, *in terms of the provision of ordinances passed by provincial councils, developed its own system of local government administration.* These provincial systems of local government and administration could be developed only for the Coloureds, the Indians and the Whites. The government and the administration of the municipal affairs of blacks were not entrusted to the provincial councils before 1 October 1986.³⁹⁶

The above extract suggests that there was lack of a uniform system and legal framework for local government in South Africa up to 1983, and that local government was subject to the control and supervision of provinces.

It is worth noting that although the political ideology of apartheid is generally associated with the period when the National Party ruled (1948-1994), its foundations can be traced to a series of discriminatory laws dating back to the colonial period.³⁹⁷ Examples of discriminatory laws that were introduced before 1948 include: pass laws that restricted the movement of blacks into urban areas and the *Black Land Act* 27 of 1913 that prohibited Africans from renting and buying land out of designated areas and effectively restricted the African population to 13 percent of the total land area of South Africa; and the *Black Administration Act* 38 of 1927 which made proclaimed Black areas, subject to a separate political regime from the remainder of the country (Bantustans) and set up a separate legal system for the administration of African law.³⁹⁸ In order to reinforce the policy of "separate development", the National Party enacted *inter alia*, the *Group Areas Act* 41 of 1950, the *Group Areas Act* 36 of 1966, the *Black Local Authorities Act* 102 of 1982 and the *Black Communities Development Act* 4 of 1984. These series of legislation as well as existing political, legal, social and cultural institutions entrenched racial inequalities.³⁹⁹ The *Group Areas Act* is considered one of the key apartheid laws because it instituted strict residential segregation and the forceful

395 Cloete *South African Local Government and Administration* 13.

396 Cloete *South African Local Government and Administration* 14. Own emphasis.

397 De Visser *Developmental Local Government: A Case Study* 58; Liebenberg *Socio-Economic Rights* 2.

398 See Liebenberg *Socio-Economic Rights* 2.

399 See Liebenberg *Socio-Economic Rights* 2.

removal of Blacks, Indians and Coloureds to "own areas".⁴⁰⁰ Through the *Group Areas Act*, the permanent presence of blacks in urban areas was strictly restricted through the pass system.⁴⁰¹

It follows that the system of apartheid local government fostered socio-economic inequalities through the separation of people on the basis of race. There was lack of a uniform system of local government as municipalities were controlled and subject to different degrees of regulation by provincial authorities. Local government authorities in black townships lacked political legitimacy and the financial resources needed to effectively provide basic services to communities. The overall effect of the apartheid system of local government is that, it bequeathed a legacy of massive poverty, gross inequalities in access to municipal services, and disrupted the spatial, social and economic environments in the country.⁴⁰² The apartheid system of government (inclusive of spatial planning) therefore promoted social injustices on the basis of race.

By the late 1980s, there was a general realisation of the need to establish a new, uniform, all-inclusive system of local government, capable of responding to the needs of all South Africans.⁴⁰³ In 1986, all governing boards that were instrumental in the provision of services to black areas were abolished pursuant to the *Abolition of Development Bodies Act* of 1986.⁴⁰⁴ In 1986, the government established a Committee to investigate and make recommendations for a new system of local government for South Africa.⁴⁰⁵ On 28 May 1990, the Committee released its findings which served as the basis for the National Party's negotiation for an all-inclusive system of local government in the country.⁴⁰⁶ In 1991, the main legislation that underpinned

400 See "Section A: Current Reality" in the WPLG (1998); "A History of Local Government" in *Green Paper on Local Government* (1997).

401 See "Section A: Current Reality" in the WPLG (1998); "A History of Local Government" in *Green Paper on Local Government* (1997); Wittenberg 'Decentralisation in South Africa' 12.

402 Preamble to the *Systems Act*; *Fedsure Life Assurance*, par 1.

403 See "Section A: Current Reality" in the WPLG (1998); Ismail *et al Local Government Management* 58-61; Bekink *Principles of South African Local Government Law* 25.

404 *The Abolition of Development Bodies Act* 75 of 1986. See Cloete *South African Local Government and Administration* 7.

405 Ismail *et al Local Government Management* 58-59.

406 Ismail *et al Local Government Management* 59.

the policies of racial separation, the *Group Areas Act*,⁴⁰⁷ was also abolished.⁴⁰⁸ Following a series of negotiations between the National Party, the African National Congress, civil society organisations and other political parties, through the Local Government Negotiation Forum (LGNF), agreement was reached on the future of local government in South Africa.⁴⁰⁹ The principles of local government agreed upon by these parties found expression in *inter alia*, the *Local Government Transition Act* of 1993⁴¹⁰ and the *Interim Constitution* of 1993.⁴¹¹

Chapter 10 of the *Interim Constitution* afforded local government constitutional protection. It laid down *inter alia*, the status, powers and functions of local government while Schedule 4 laid the foundation for the further development of local government in accordance with a set of constitutional principles.⁴¹² On the other hand, the *Local Government Transition Act* *inter alia*, provided a set of interim measures, created negotiation forums and Provincial Demarcation Boards which ensured the planned and progressive restructuring of local government.⁴¹³ The *Local Government Transition Act* earmarked three phases of transition.⁴¹⁴

However, it should be noted that in 1996, the Constitution entrenched local government as a sphere of government⁴¹⁵ with the entire Chapter 7 dedicated to various aspects of local government such as the status of municipalities, the objects of local government, the "developmental" duties of municipalities and the powers and functions of municipalities, amongst others. In addition,

407 *Group Areas Act* 36 of 1966. See "Section A: Current Reality" in the WPLG (1998); Bekink *Principles of South African Local Government* 23.

408 De Visser *Developmental Local Government: A Case Study* 52.

409 De Visser *Developmental Local Government: A Case Study* 52; Bekink *Principles of South African Local Government Law* 25.

410 *Local Government Transition Act* 209 of 1993.

411 Interim Constitution of the Republic of South Africa.

412 For details on the constitutional principles of local government, see generally Schedule 4 of the Interim Constitution; Craythorne *Municipal Administration: A Handbook* 4; Bekink *Principles of South African Local Government Law* 32-37.

413 See Preamble to the *Local Government Transition Act* of 1993. For details of the transformation process, see Bekink *Principles of South African Local Government Law* 27-37; Ismail *et al Local Government Management* 58-62; De Visser *Developmental Local Government: A Case Study* 49-64.

414 For details on the three phases (pre-interim phase, interim phase and final stage), see "Section A: Current Reality" in the WPLG (1998); De Visser *Developmental Local Government: A Case Study* 61-63.

415 See s 40(1) of the Constitution.

various pieces of legislation such as the *Local Government: Municipal Structures Act*,⁴¹⁶ the *Systems Act* and the *Local Government: Municipal Finance Management Act*⁴¹⁷ completed the legal transformation of South Africa's system of local government in accordance with the framework laid down by the *Interim Constitution* and the *Local Government Transition Act*. It should be noted that as envisaged by the *Local Government Transition Act*, local government entered into its final phase of transformation with the local government general elections of 2000, which were conducted on the basis of the Constitution.⁴¹⁸ This marked the formal beginning of a democratically elected local government system for South Africa.

2.5.3 Significant features of pre-1993 local government

The history of local government in South Africa shows that the pre-1993 system had some major features which should be highlighted in order to lay a foundation for understanding the shift of focus to "developmental local government" as well as the institutional and legal transformation of local government that accompanied the country's transition to constitutional democracy. Overall, it shows that the previous system of local government perpetuated injustices along racial lines, thereby, accelerating inequalities in access to basic services such as water, sanitation, electricity, health care services and housing.

One of the major features of the pre-1993 system of local government is that it was based on a system of racial separation. Although by the time apartheid was officially introduced as a State policy in 1948, geographic, institutional and social separation had already been established at the local level, it persisted as a major feature of apartheid local government.⁴¹⁹ One of the

416 *Local Government: Municipal Structures Act* 117 of 1998. Hereafter, the *Structures Act*.

417 *Local Government: Municipal Finance Management Act* 53 of 2003. Hereafter, *Municipal Finance Management Act*.

418 For details, see Bekink *Principles of South African Local Government Law* 27-39; De Visser *Developmental Local Government: A Case Study* 61-62.

419 See De Visser *Developmental Local Government: A Case Study* 58; Vosloo 'South Africa: Local government in White Areas' in Vosloo *et al Local Government in Southern Africa* 31; "Section A: Current Reality" in the WPLG (1998); Craythorne *Municipal Administration* 1-2; Wittenberg 'Decentralisation in South Africa' 12; Bekink

most important pieces of apartheid legislation which instituted strict residential separation was the *Group Areas Act*. Through the *Group Areas Act*, Blacks, Indians and Coloureds were forcefully removed and assigned to "group own" areas, at the outskirts of metropolitan areas and required to manage their own areas.⁴²⁰ In Black areas, Black Advisory boards were largely appointed in order to advise White councils on matters relating to black townships.⁴²¹ In 1948, when the National Party came to power, there was an intensification of the commitment to institutionalise segregation along racial lines by establishing group areas for different races in order to ensure "own management for own areas".⁴²² The direct implication of apartheid spatial planning was that it deprived areas reserved for Blacks, Indians and Coloureds of any substantial revenue base which could be used to undertake and support development efforts in those areas.⁴²³ This means that local government authorities in areas reserved for Blacks, Indians and Coloureds could not generate sufficient resources to meet the needs of inhabitants.⁴²⁴ This promoted inequalities in access to basic services such as water, electricity, health services and housing along racial lines. Therefore, areas reserved for Blacks, Indians and Coloureds suffered social injustices as a direct result of racial discrimination.

In addition, the pre-1993 local government system was exploitative.⁴²⁵ Although Blacks contributed to the economy and tax base of white areas, they did not get any benefits from their contribution in terms of local government services due to a "deliberate lack of redistribution."⁴²⁶ The intention of the *Group Areas Act* was to ensure that through spatial separation and influx

Principles of South African Local Government 23; Ismail *et al Local Government Management* 45.

420 See "Section A: Current Reality" in the WPLG (1998); Wittenberg 'Decentralisation in South Africa' 12.

421 De Visser *Developmental Local Government: A Case Study* 58.

422 De Visser *Developmental Local Government: A Case Study* 58; Craythorne *Municipal Administration* 1-2; Wittenberg 'Decentralisation in South Africa' 12.

423 See *Fedsure Life Assurance* pars 1, 28-31; De Visser *Developmental Local Government: A Case Study* 59; "Section A: Current Reality" in the WPLG (1998); Wittenberg 'Decentralisation in South Africa' 14.

424 Wittenberg 'Decentralisation in South Africa' 13; Bekink *Principles of South African Local Government* 23.

425 De Visser *Developmental Local Government: A Case Study* 59; Ismail *et al Local Government Management* 45.

426 De Visser *Developmental Local Government: A Case Study* 59.

control, white municipalities should not bear the burden of servicing disadvantaged black areas.⁴²⁷ Through spatial separation and influx control, a viable municipal revenue base was reserved for the white areas.⁴²⁸ Local government bodies in historically white areas enjoyed developed infrastructure and a solid base for business and property taxes.⁴²⁹ The agendas of local government authorities in white areas "included no developmental issues whatsoever as their constituency comprised of the wealthy only."⁴³⁰ On the other hand, areas reserved for 'Coloureds', 'Blacks' and 'Indians' were plagued by underdevelopment, poor services and an almost non-existent tax bases.⁴³¹ The deprivation of a viable tax base in areas reserved for 'Blacks', 'Indians' and 'Coloured' means that municipalities in these areas lacked the means needed to provide basic services such as water, electricity, sanitation, housing and health services to the majority. This increased inequalities in access to these basic services along racial lines.

Furthermore, a central feature of apartheid local government was its strict control by provincial and national government.⁴³² As creations of higher authorities, local government did not enjoy constitutional protection.⁴³³ This meant that the powers and very existence of municipalities depended entirely on national and provincial legislatures. The elected institutions of local government could have been terminated at anytime by superior legislatures and their powers and functions handed over to administrators appointed by central or provincial government.⁴³⁴ This meant that the powers and functions of municipalities were determined and defined by national and provincial

427 See "Section A: Current Reality" in the *WPLG* (1998); Bekink *Principles of South African Local Government* 23; Ismail *et al Local Government Management* 46.

428 See De Visser *Developmental Local Government: A Case Study* 59; Ismail *et al Local Government Management* 46; "Section A: Current Reality" in the *WPLG* (1998).

429 De Visser *Developmental Local Government: A Case Study* 59; Wittenberg 'Decentralisation in South Africa' (2003) 11; Bekink *Principles of South African Local Government* 23.

430 De Visser *Developmental Local Government: A Case Study* 59.

431 For a detailed description of this situation, see *Fedsure Life Assurance* pars 1, 28-31; De Visser *Developmental Local Government: A Case Study* 58-59; Cameroon 2010 *Government Studies* 118; Wittenberg 'Decentralisation in South Africa' 13.

432 Cameroon 2010 *Government Studies* 117; Vosloo 'South Africa: Local government in White Areas' in Vosloo *et al Local Government in Southern Africa* 25; Craythorne *Municipal Administration* 9.

433 Vosloo 'South Africa: Local government in White Areas' in Vosloo *et al Local Government in Southern Africa* 26; Ismail *et al Local Government Management* 44.

434 See *Fedsure Life Assurance Ltd*, par 37.

governments according to their caprices. Local government served as an agent of the centralised apartheid state. Municipalities only had the powers to adopt by-laws and resolutions on matters entrusted to them by central government legislation and provincial ordinances.⁴³⁵ In addition, all provincial ordinances allocating powers to local authorities were subject to the approval of national government. In the same vein, by-laws passed by local authorities were subject to the approval of the provincial Administrator.⁴³⁶ To a great extent, local authorities therefore served as decentralised executive agencies for central government departments in fields such as housing, health and non-White affairs.⁴³⁷ This centralised system of control meant that the range of services provided by municipalities such as water and electricity supplies, refuse removal, public transport, clinics, public health, and the provision of housing for low income groups, could only be channelled to areas designated by national and provincial governments.⁴³⁸ As a result, most of the resources needed to establish socially just societies were out of the direct control of municipalities.

In addition, the apartheid government largely imposed illegitimate local government structures on the black population.⁴³⁹ Generally, non-Whites were excluded from political participation at the local government level.⁴⁴⁰ However, in the early 1980s, fully-fledged black local authorities were created for black urban areas.⁴⁴¹ The different racially-classified local government structures created to administer black townships such as Administrative Boards and Community Councils failed to gain political credibility from the majority and

435 Vosloo 'South Africa: Local government in White Areas' in Vosloo *et al Local Government in Southern Africa* 26; Wittenberg 'Decentralisation in South Africa' 12; Craythorne *Municipal Administration* 6.

436 Cameroon 2010 *Government Studies* 117; Vosloo 'South Africa: Local government in White Areas' in Vosloo *et al Local Government in Southern Africa* 25; Ismail *et al Local Government Management* 45.

437 Vosloo 'South Africa: Local government in White Areas' in Vosloo *et al Local Government in Southern Africa* 25.

438 Vosloo 'South Africa: Local government in White Areas' in Vosloo *et al Local Government in Southern Africa* 26-27.

439 Ismail *Local Government Management* 46; Vosloo 'South Africa: Local government in White Areas' in Vosloo *et al Local Government in Southern Africa* 39.

440 Vosloo 'South Africa: Local government in White Areas' in Vosloo *et al Local Government in Southern Africa* 39.

441 Ismail *et al Local Government Management* 46.

were often rejected through violent community protests.⁴⁴² This suggests the lack of any meaningful public participation by a majority of the Black population in the activities of local government in their areas of residence.

The previous system of local government was not all-inclusive and could not be sustained indefinitely because it revolved around the policy of racial separation. The policy of racial separation propagated and enforced by the previous system of government, under the guise of 'own' development for 'own areas', promoted extreme inequalities in access to basic services such as water, sanitation, electricity, healthcare services, housing and infrastructure development by creating a sound tax base in areas managed by white municipalities which were used to generate revenue for the provision of municipal services exclusively to white townships. Although Blacks contributed to the development of white areas by working and paying for taxes in these areas, there was a conscious effort to prevent the redistribution of resources to disadvantaged Black, Indian and Coloured municipal areas, which were deprived of any substantial tax base. In addition, the strict control of local government by provincial and national government meant that the latter had powers to direct the manner in which services were provided to communities. Attempts to decentralise the centralised system of government were perceived by the majority as a ploy to quell continuous disenchantment and to maintain the socio-economic and political state of affairs. Widespread poverty, poor living conditions and lack of access to basic services in black townships especially, triggered extensive revolt which led to the collapse and subsequent reform of the previous system of local government. It was a system of government which condoned and generated injustice based on race.

2.5.4 Local government in a new constitutional dispensation

When the Constitution came into effect on 4 February 1997, it finalised the

442 See Ismail *et al* *Local Government Management* 46; De Visser *Developmental Local Government: A Case Study* 59-60; "Section A: Current Reality" in the WPLG (1998); Craythorne *Municipal Administration* 3.

country's constitutional transition to a democratic non-racial state.⁴⁴³ The Preamble to the Constitution recognises the injustices of the past, expresses commitment to heal past divisions and to establish a society based on democratic values, social justice and fundamental human rights. It purports to lay the foundations for a democratic and open society in which government is based on the will of the people and in which every citizen is equally protected by law.⁴⁴⁴

The Constitution is also committed to institutional change.⁴⁴⁵ In this regard, the Constitution has established three spheres of government (national, provincial and local) which are distinct, interrelated and interdependent.⁴⁴⁶ As co-responsible organs of state, municipalities share the responsibility with national and provincial spheres of government to pursue constitutional objectives – including the Constitution's commitment to correct the injustices of the past and establish a society based on social justice.⁴⁴⁷ In discharging this constitutional responsibility, all spheres of government must comply with the constitutional principle of co-operative government⁴⁴⁸ and the constitutional values and principles governing public administration in South Africa.⁴⁴⁹

443 For details on the processes leading up to the adoption of the Constitution, see Liebenberg *Socio-Economic Rights* 7-22; De Visser *Developmental Local Government: A Case Study* 53; Bekink *Principles of South African Local Government Law* 31-37.

444 See Preamble to the Constitution.

445 Brand *Courts, Socio-Economic Rights and Transformative Politics* 4; Venter 2008 *Verfassung und Recht in Übersee* 16-31; Hattingh *Governmental Relations: A South African Perspective* 3.

446 S 40(1) of the Constitution outlines the three spheres of government.

447 Du Plessis has argued that as co-responsible organs of state, municipalities incur responsibility together with national and provincial spheres of governments. See Du Plessis 2010 *Stell LR* 261. This view can also be supported from a joint reading of several constitutional provisions. For example, s 41(1) of the Constitution provides that all spheres of government and all organs of state within each sphere must secure the well-being of the people of South Africa and be loyal to the Constitution. See also ss 2, 7(1)-(2) and 8(1) of the Constitution.

448 For details on the principle 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: A Ten Year Review* 8; De Visser 'Institutional Subsidiarity in the Constitution' 2-3 and 11-12.

449 According to s 195 of the Constitution, every sphere of government must ensure that public administration is: development oriented; provide services on a fair, equitable and impartial basis; respond to peoples' needs and encourage public participation in policy-making; accountable; transparent by providing the public with timely, accessible and accurate information; and promotes efficient, economic and effective use of resources. See s 195 of the Constitution for details.

The institutional transformation heralded by the Constitution led to a complete change of the face and overall mandate of local government in South Africa. Chapter 7 of the Constitution is dedicated to various aspects of local government, including *inter alia*, the status, objects, powers and functions, "developmental" duties of local government and the election of local government representatives.⁴⁵⁰ Local government, constituted by "wall-to-wall" municipalities,⁴⁵¹ is now constitutionally entrenched as a "fully-fledged sphere of government" with executive and legislative powers vested in democratically elected municipal councils.⁴⁵² The Constitution forbids national and provincial government from compromising or impeding the ability or right of a municipality from exercising its powers and functions.⁴⁵³ This means that as a sphere of government with constitutionally defined powers and functions, the powers of municipalities cannot be curtailed by provincial or national government legislation except as specified in the Constitution.⁴⁵⁴ This situation is different from the previous system of local government where municipalities were strongly controlled by national and provincial government.⁴⁵⁵ Municipalities no longer serve as mere administrative agencies of national or provincial governments.⁴⁵⁶ Their powers are entrenched in the Constitution and can only be restricted in accordance with the Constitution.⁴⁵⁷

450 For details, see ss 151-164 of the Constitution.

451 The notion of "wall-to-wall" municipalities simply describes the establishment of municipalities that cover the entire length and breadth of South Africa. This means that there is no geographic space which does not fall within the jurisdiction of a municipality. This is contrary to the fragmented system of municipalities that obtained in the past. See: De Visser *Developmental local government: A case study* 75; Du Plessis and Du Plessis 'Striking the Sustainability Balance in South Africa' in Faure and Du Plessis *The balancing of interests in environmental law in Africa* 423; Section 151(1) of the Constitution.

452 See ss 151(2), 157 and 158 of the Constitution; De Visser *Developmental local government: A Case Study* 61-65; *Fedsure Life Assurance Ltd*, pars 2-9; Cameroon 2010 *Government Studies* 119-120.

453 See s 151(3) and (4) of the Constitution.

454 De Visser *Developmental Local Government: A Case Study* 65-66; *Fedsure Life Assurance Ltd*, par 37; Bekink *Principles of South African Local Government Law* 63-66.

455 Cameroon 2010 *Government Studies* 117; Vosloo 'South Africa: Local government in White Areas' in Vosloo *et al Local Government in Southern Africa* 25; Craythorne *Municipal Administration* 9.

456 Steytler 'Local government in South Africa: Entrenching decentralised government' 183 and 187.

457 The status, powers and functions of local government are respectively further discussed in 2.5.4.1 and 2.5.4.4 below.

Furthermore, section 152 of the Constitution outlines the objects of local government. According to this section, each municipality must strive within its administrative and financial capacity to: provide democratic and accountable government for local communities; ensure the provision of services to communities in a sustainable manner; promote socio-economic development; promote a safe and healthy environment; and facilitate the involvement of communities in local government matters. In addition, section 153 of the Constitution and the *White Paper on Local Government* (1998)⁴⁵⁸ require local government to play a "developmental" role by *inter alia*, caring for and giving priority to the basic needs of community members.⁴⁵⁹ This new developmental role of municipalities has been unpacked in greater detail in the 1998 *White Paper on Local Government's* (WPLG) notion of "developmental local government",⁴⁶⁰ and this has subsequently infiltrated the main local government legislation.⁴⁶¹ This notwithstanding, a cursory look at the objects of post-apartheid local government and the generic benchmarks for state authorities' pursuit of social justice outlined in Table 1 suggest that the pursuit of social justice may be at the heart of the new mandate for South African municipalities. Obvious links between the objects of local government and the generic benchmarks for the pursuit of social justice relate to the obligation to provide services to and prioritise the basic needs of communities, facilitate public participation/democratic local governance and promote sustainable development.⁴⁶²

458 "Section B" of the WPLG (1998) is dedicated to the notion of "developmental local government". This is further discussed in 2.5.4.3.

459 For a description of the developmental role of local government, see De Visser *Developmental Local Government: A Case Study* 49; Bilchitz 2010 *Constitutional Court Review* 45, 48 62-67; De Visser 'Institutional Framework for Developmental Local Government: Making Good on the Promise of Development' 1; *Joseph*, pars 27, 34-40.

460 See "Characteristics of developmental local government" in "Section B: Developmental Local Government" in the WPLG (1998); Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 461-462; De Visser *Developmental Local Government: A Case Study* 72-73. The notion of developmental local government is discussed in 2.5.4.2 below.

461 This is evident from the preambles of key local government legislation. See for example: Par 3 of the Preamble of the *Systems Act*; Pars 4 and 6 of the Preamble of the *Municipal Structures Act*.

462 The linkages are further illustrated in 2.5.4.6 below.

It can be seen from the preceding paragraph that sections 152 and 153 of the Constitution provide a novel mandate for municipalities under the new dispensation. Firstly, apart from the provision of municipal services to communities, local government is expressly required to play a "developmental" role. This is different from the previous system in which local government lacked a developmental agenda and primarily played a service delivery role.⁴⁶³ Secondly, unlike the previous system of local government where most communities were excluded from local government administration,⁴⁶⁴ communities now have a right to directly participate in local government matters. Thirdly, because municipalities are equally obliged to be guided by the constitutional values and principles guiding public administration in South Africa, they must provide services "impartially, fairly, equitably and without bias" to communities.⁴⁶⁵ This means that, unlike the past where services were provided along racial lines,⁴⁶⁶ municipalities across South Africa can no longer provide services to communities along racial lines or in terms of other exclusionary arrangements.

2.5.4.1 *Local government as a distinct sphere of government*

The Constitution recognises local government as a distinct sphere of government.⁴⁶⁷ In addition, section 151 of the Constitution which outlines the current status of local government provides that:

- (1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.
- (2) The legislative and executive authority of a municipality is vested in its Municipal Council.
- (3) A municipality has the right to govern, on its own initiative the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution

463 De Visser *Developmental local government: A Case Study* 59.

464 Vosloo 'South Africa: Local government in White Areas' in Vosloo *et al Local Government in Southern Africa* 39.

465 See s 195(1)(d) of the Constitution.

466 See De Visser *Developmental Local Government: A Case Study* 58; Vosloo 'South Africa: Local government in White Areas' in Vosloo *et al Local Government in Southern Africa* 31; "Section A: Current Reality" in the WPLG (1998); Craythorne *Municipal Administration* 1-2; Wittenberg 'Decentralisation in South Africa' 12; Bekink *Principles of South African Local Government* 23; Ismail *et al Local Government Management* 45.

467 See s 40(1) of the Constitution.

- (4) The national or provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

Section 151 of the Constitution demonstrates *inter alia* that, local government has been "removed as a mere competence or functional area of another level of government" and has become "a level of government in its own right".⁴⁶⁸ The Constitutional Court has confirmed this in a number of cases.⁴⁶⁹ This elevated status means that municipalities at least jointly share the duties imposed on national and provincial government, except expressly stated otherwise.⁴⁷⁰ In addition, the elevation of local government to a sphere of government implies that municipalities cannot be subordinated by other spheres of government and must operate in cooperation with national and provincial spheres of government.⁴⁷¹

Section 153 of the Constitution further demonstrates that a municipal council is the heart of every municipality⁴⁷² because the legislative and executive powers of local government are vested in the municipal council.⁴⁷³ This suggests that the municipal council in effect, governs local communities since it can use its own initiative as well as legislative and executive powers to, for example, adopt laws (by-laws), policies, plans and programmes to govern local communities.⁴⁷⁴

468 De Visser *Developmental Local Government: A Case Study* 65. See also Craythorne *Municipal Administration* 10.

469 See for example: *Fedsure Life Assurance*, pars 35-38; *City of Cape Town and Other v Robertson and Other* 2005 (2) SA 323 (CC), pars 55-60.

470 See Du Plessis 2010 *Stell LR* 267; *Blue Moonlight*, pars 57 and 66; Simeon and Murray 2001 *Publius* 71-73.

471 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 431.

472 In terms of s 2 of the *Municipal Systems Act*, a municipality is defined as an organ of state within the local sphere of government exercising executive and legislative powers within a defined area. It is constituted by the community of the municipality, the political structures and administration of the municipality. The heart of a municipality is the municipal council.

473 The powers and functions of local government are discussed in 2.6.4.4.

474 See s 151(1), (2) and (3) of the Constitution; Ss 2 and 11 of the *Municipal Systems Act*. This feature emerges prominently in par 36 of *Fedsure Life Assurance* where the Court drew from relevant provisions of the Interim Constitution to emphasise the independence of the sphere of local government. See De Visser *Developmental Local Government: A Case Study* 87.

Furthermore, as a distinct sphere of government, the leaders of municipalities are democratically elected for a specified period.⁴⁷⁵ This suggests that community residents elect local representatives to represent their interests and to hold them accountable in realising the constitutional objects and duties of local government. In addition, as a distinct sphere of government, municipalities have powers to generate their own finances by charging rates on property and imposing surcharges on services provided.⁴⁷⁶ This suggests that local government can, for example, provide services to communities by internally generating revenue through municipal rates and taxes.⁴⁷⁷

Although section 40(1) of the Constitution recognises local government as a "distinct" sphere, it also asserts that all spheres are interrelated and interdependent. "Interdependence" in this context denotes *inter alia*, the supervision of local government by other spheres of government while their "interrelatedness" talks to the duty imposed on all spheres of government to co-operate with one another in order to promote the welfare objectives of the country in general.⁴⁷⁸

The "distinctiveness" of local government must be understood within the context of the system of co-operative government that was adopted in the Constitution.⁴⁷⁹ In order to ensure harmony and coordination in public governance, in general, section 40(2) of the Constitution compels all three spheres of government and organs of state within each sphere to observe and adhere to the principles of co-operative government and intergovernmental relations outlined in section 41 of the Constitution.⁴⁸⁰ The system of co-

475 See s 229(1) of the Constitution; Ss 22-24 of the *Municipal Structures Act*; *Fedsure Life Assurance*, par 41; De Visser *Developmental Local Government: A Case Study* 87. The election of local leaders is discussed in detail in 4.4.3 below.

476 See ss 277 and 299 of the Constitution. See further, ss 4(1)(c)(i)(ii) and 74 of the *Municipal Systems Act*; De Visser 2009 *CJLG* 12-13; *Fedsure Life Assurance*, par 38; De Visser *Developmental Local Government: A Case Study* 87.

477 The power of municipalities to generate internal revenue is further discussed in 2.5.4.3.

478 De Visser *Developmental Local Government: A Case Study* 214; De Visser 2009 *CJLG* 13-14; Layman *Intergovernmental Relations and Service Delivery in South Africa: A Ten Year Review* 8-9.

479 Chapter 3 of the Constitution is dedicated to co-operative government.

480 For details on co-operative government, see De Villiers and Sindane *Cooperative Government: The Oil in the Engine*; De Visser *Developmental Local Government: A Case Study* 209-254; Edwards 2008 *Politeia* 65-85; Du Plessis 2008 *SAPL* 90-92;

operative government compels all spheres of government to co-operate with one another in mutual trust and good faith by *inter alia*, assisting and supporting one another and avoiding legal proceedings against one another.⁴⁸¹ This means that where municipalities struggle to realise their objects, for example, national and provincial governments should assist and support struggling municipalities.⁴⁸²

The obligation imposed on all spheres of government to adhere to the principles of co-operative government, including mutual support and assistance suggests that local government should not function in isolation. When necessary, local government should seek the support and assistance of other spheres of government because everything that municipalities do should be seen as a microcosm of the state's overall effort to improve the lives of all South Africans.

2.5.4.2 "Developmental local government"

Following the transition to constitutional democracy, the term "developmental local government" has emerged as an adjective used to describe the current system of local government.

Although the constitutional and legislative provisions specify that local government should play a leading role in developing communities,⁴⁸³ the phrase "developmental local government" neither appears as such in the Constitution nor legislation. This phrase is found in the WPLG.⁴⁸⁴ However, De Visser indicates that the term "developmental local government" reflects the WPLG's translation of the objects and duties of local government entrenched respectively in sections 152 and 153 of the Constitution.⁴⁸⁵ The WPLG defines developmental local government as:

Kirkby *et al* 2007 22 *SAPL* 143-165 at 144; Bekink *Principles of South African Local Government Law* 89-94.

481 See Du Plessis and Du Plessis 'Striking the Sustainability Balance in South Africa' in Faure and Du Plessis *The Balancing of Interests in Environmental Law in Africa* 436.

482 See Du Plessis and Du Plessis 'Striking the Sustainability Balance in South Africa' *The Balancing of Interests in Environmental Law in Africa* 436.

483 The expanded role of local government is discussed in 2.5.4.5 below.

484 See par 1 of "Section B: Developmental Local Government" in the WPLG (1998).

485 De Visser *Developmental Local Government: A Case Study* 72.

Developmental local government is local government committed to working with citizens and groups within the community to find *sustainable ways to meet their social, economic and material needs and improve the quality of their lives*...In future, developmental local government must play a central role in representing our communities, protecting our human rights and meeting our basic needs. It must focus its efforts and resources on improving the quality of life of our communities, especially those members and groups within our communities that are most often marginalised or excluded, such as women, disabled people and very poor people.⁴⁸⁶

The above extract highlights a radical point of departure from the central features of the erstwhile system of local government described in 2.5.3 above in a number of ways that are discernable from *inter alia*, the WPLG's description of the characteristics of "developmental local government", the definitions and descriptions of "development" in legislation, the *National Framework for Sustainable Development in South Africa* (2008)⁴⁸⁷ and from De Visser's distilled understanding of development.⁴⁸⁸ The paragraphs that follow draw from these sources to explain "developmental local government". In this process, it shows what local government was, and what local government should now be.

2.5.4.2.1 White Paper's description

From the WPLG's definition of "developmental local government" above, it immediately appears that while the previous system of local government primarily played a service delivery role and failed to address the needs of the majority,⁴⁸⁹ "developmental local government" is expected to find "sustainable" ways of meeting the social, economic and material needs of all South Africans. "Developmental local government" is expected to focus its efforts and resources in meeting the basic needs of impoverished people in particular and in improving the quality of their lives.

Apart from the express definition of "developmental local government" quoted above, the term can also be understood by looking at its four "interrelated

486 See "Characteristics of developmental local government" in "Section B: Developmental Local Government" in the WPLG (1998).

487 Department of Environmental Affairs and Tourism (DEAT) *People - Planet - Prosperity: A National Framework for Sustainable Development* (2008).

488 See De Visser *Developmental Local Government: A Case Study* 9-13; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 461-462.

489 For main features of the previous system of local government, see 2.5.3 above.

characteristics" or defining features explained in the WPLG.⁴⁹⁰ The paragraphs that follow, explain the four characteristics of "developmental local government" identified by the WPLG that define what local government should now be.

One of the characteristics of "developmental local government" is that, municipalities are expected to utilise their powers and functions to maximise social development and economic growth.⁴⁹¹ In terms of social development, the WPLG specifically requires that local government should exercise its powers and functions in a manner that has "a maximum impact on the social development of communities – in particular, meeting the basic needs of the poor".⁴⁹² In this regard, local government should provide welfare services that specifically target people living in poverty. Local government could also provide child care facilities and grants to Non-Governmental Organisations (NGOs) for this purpose.⁴⁹³ On the other hand, the WPLG also requires that, as part of its "developmental" role, municipalities should use the numerous economic related activities they execute to stimulate economic growth in local communities.⁴⁹⁴ Economic activities include for example, the allocation and management of municipal land, the levying of tariffs and charges for municipal services, the support and training of community-based organisations and small businesses, the effective provision of municipal services such as water, housing, electricity and infrastructural development and the execution of its procurement policies.⁴⁹⁵ From this characteristic, it appears that, unlike the past where municipalities merely played a service delivery role,⁴⁹⁶

490 See "Characteristics of developmental local government" in "Section B: Developmental Local Government" in the WPLG (1998).

491 See "1.1 Maximising social development and economic growth" in "Section B: Developmental Local Government" in the WPLG (1998).

492 See "1.1 Maximising social development and economic growth" in "Section B: Developmental Local Government" in the WPLG (1998).

493 See "1.1 Maximising social development and economic growth" in "Section B: Developmental Local Government" in the WPLG (1998).

494 See "1.1 Maximising social development and economic growth" in "Section B: Developmental Local Government" in the WPLG (1998). See also DPLG (now CoGTA) *National Framework for Local Economic Development (LED) in South Africa: 2006-2011* (2006) 7.

495 See "1.1 Maximising social development and economic growth" in "Section B: Developmental Local Government" in the WPLG (1998). The range of activities that fall under local government's area of competence is discussed in detail in 2.5.4.3 below.

496 See De Visser *Developmental Local Government: A Case Study* 59.

municipalities are now expected to promote socio-economic development. In addition, unlike the past where municipalities were not concerned with poverty alleviation, the social development role of local government now require municipalities to combat poverty by specifically providing the basic needs of impoverished people.

The second characteristic of "developmental local government" contained in the WPLG is that, municipalities are expected to use their executive and legislative powers to integrate and coordinate development activities within their defined jurisdictions.⁴⁹⁷ Due to the fact that different actors, including national and provincial governments, participate in development activities at the local government level, it is necessary for municipalities to work closely with these actors and to guide development activities within their jurisdictions.⁴⁹⁸ This may assist in ensuring that municipalities are able to establish "sustainable and liveable settlements" which depends on the coordination and integration of a range of services such as transport, health, housing, education, safety and security, and environmental management, for example.⁴⁹⁹ The WPLG anticipates that integration and coordination could be achieved through integrated development planning.⁵⁰⁰ The requirement that municipalities should now engage in integrated development planning which seeks to ensure the establishment of "sustainable and liveable settlements" for all South Africans is different from the previous system of spatial planning that was based on race.

The third characteristic of "developmental local government" is captured under the theme "democratising development, empowering and redistribution."⁵⁰¹ This characteristic describes two broad sub-themes. Firstly, municipal councils are required to "play a central role in promoting local

497 See "1.2 Integrating and coordinating" in "Section B: Developmental Local Government" in the WPLG (1998).

498 See "1.2 Integrating and coordinating" in "Section B: Developmental Local Government" in the WPLG (1998); *IDP Guide Pack V* (2001) 8-10.

499 See "1.2 Integrating and coordinating" in "Section B: Developmental Local Government" in the WPLG (1998).

500 See "1.2 Integrating and coordinating" in "Section B: Developmental Local Government" in the WPLG (1998).

501 See "1.3 Democratising development, empowering and redistribution" in "Section B: Developmental Local Government" in the WPLG (1998).

democracy."⁵⁰² This means that apart from representing community interests in municipal councils, councillors should facilitate the involvement of community residents and groups in the design and implementation of municipal policies, by-laws, plans and programmes.⁵⁰³ In particular, municipalities are encouraged to promote the participation of marginalised and excluded groups such as women and impoverished people in community development processes.⁵⁰⁴ This includes the adoption of strategies that seek to remove obstacles, including values and norms, that hinder equal public participation as well as actively facilitating the participation of marginalised groups.⁵⁰⁵ On the other hand, the second sub-theme talks to the need for municipalities to empower impoverished people and redistribute resources to their benefit.⁵⁰⁶ According to the WPLG, municipalities could empower people living in poverty and redistribute resources to their benefit by: providing them subsidised services at below cost; providing skills and technical training to impoverished people or financial assistance to community-based organisations (CBOs) in order to enhance their ability to voice and meet their needs; adopting policies that require redistribution of the proceeds of economic growth to communities; and adopting and implementing poverty alleviation strategies and programmes that specifically target impoverished women, who constitute the majority.⁵⁰⁷ The third feature of "developmental local government" indicates that, unlike the past where the majority were excluded from government's decision-making processes, municipalities are obliged to facilitate public participation in local government and to ensure that the views of impoverished people are taken into consideration when public decisions are made. In addition, unlike the past where Blacks, Indians and Coloureds were exploited by working and paying taxes to white areas without

502 See "1.3 Democratising development, empowering and redistribution" in "Section B: Developmental Local Government" in the WPLG (1998).

503 See "1.3 Democratising development, empowering and redistribution" in "Section B: Developmental Local Government" in the WPLG (1998).

504 See "1.3 Democratising development, empowering and redistribution" in "Section B: Developmental Local Government" in the WPLG (1998).

505 See "1.3 Democratising development, empowering and redistribution" in "Section B: Developmental Local Government" in the WPLG (1998).

506 See "1.3 Democratising development, empowering and redistribution" in "Section B: Developmental Local Government" in the WPLG (1998).

507 See "1.3 Democratising development, empowering and redistribution" in "Section B: Developmental Local Government" in the WPLG (1998).

any form of redistribution, "developmental local government" requires that municipalities should adopt and implement measures that will ensure redistribution of resources to benefit the needs of impoverished people. "Developmental local government" embraces the redistribution of resources to ensure that the basic needs of all South Africans can be met.

The final characteristic of "developmental local government" described by the WPLG is that, municipalities should be "leading and learning".⁵⁰⁸ This requires that, due to the dynamic nature of society and the ever increasing impact of globalisation at the national, provincial and local level, in order to address emerging and existing development challenges, municipalities should be innovative and strategic in the way they govern communities and the manner in which they organise themselves.⁵⁰⁹ The WPLG suggests that municipalities can create a favourable environment for development by *inter alia*: building the type of political leadership required to bring together different stakeholders involved in the development of communities; developing public-private partnerships; being responsive to community needs; promoting easy and quick access to information; protecting the environment and developing environmental consciousness amongst communities; investing in youth development; actively empowering marginalised groups in society in order to facilitate their participation in socio-political life; and empowering ward councillors to play a pivotal role in community development.⁵¹⁰ The requirement that municipalities should be innovative in solving local development challenges suggests that solutions to local problems should not be dictated by national and provincial governments. This suggests that "developmental local government" requires municipalities to enjoy a degree of freedom in decision-making especially over local government matters. This is

508 See "1.4 Leading and Learning" in "Section B: Developmental Local Government" in the WPLG (1998).

509 See "1.4 Leading and Learning" in "Section B: Developmental Local Government" in the WPLG (1998).

510 See "1.4 Leading and Learning" in "Section B: Developmental Local Government" in the WPLG (1998).

unlike the past where local solutions were largely determined at the provincial and national level.⁵¹¹

Although the WPLG acknowledges that the outcomes which "developmental local government" seeks to achieve may differ over time, it envisages that the key outcomes are: the provision of infrastructure and services (such as water, sanitation, local roads, stormwater drainage, refuse collection and electricity) to communities; the establishment of "liveable", integrated cities, towns and rural areas; local economic development; and community empowerment and redistribution.⁵¹²

From the characteristics of the WPLG, it seems that "developmental local government" has emerged as a phrase that describes what the role of local government should be, in a manner that is fundamentally different from that of the previous system of local government. It puts emphasis on the fact that, unlike the previous system of local government, the current system of local government is expected to *inter alia*: promote social development and economic growth; protect the environment; promote representative and participatory democracy; coordinate and integrate development activities with those of the national and provincial spheres of government; and redistribute resources in order to meet the basic needs of impoverished people. In addition, unlike the past where municipalities were strongly controlled by national and provincial government, "developmental" local government requires that municipalities should be innovative in finding solutions to local problems. It is trite noting that both the definition and characteristics of "developmental local government" in the WPLG puts considerable emphasis on the need for municipalities to give special attention to the needs of communities, especially those living in poverty by *inter alia* adopting and implementing redistributive strategies. Municipalities are expected to be responsive to community needs.

511 See Cameroon 2010 *Government Studies* 117; Vosloo 'South Africa: Local government in White Areas' in Vosloo *et al Local Government in Southern Africa* (1974) 25; Craythorne *Municipal Administration* 9.

512 For details, see "Developmental outcomes of local government" in the WPLG (1998).

2.5.4.2.2 Description from legislation

The paradigm of development adopted in local government legislation and other relevant government policies may also shed light on the new "developmental" role of municipalities.⁵¹³ According to the *Systems Act*, development means:

... sustainable development, and includes integrated social, economic, environmental, spatial, infrastructural, institutional, organisational and human resources upliftment of a community aimed at: (a) improving the quality of life of its members with specific reference to the poor and other disadvantaged sections of the community; and (b) ensuring that development serves present and future generations.⁵¹⁴

The above definition is quite extensive and one may argue that it reflects both the constitutional objects and mandate of local government to the extent that it stresses the need for municipalities to pay special attention to the needs of impoverished community members in particular. In addition, informed by historical injustices, development at the local level must also correct the disadvantages of apartheid spatial planning, develop human resources and build infrastructure that will uplift communities.

The extensive nature of the definition of sustainable development contained in the *Systems Act* becomes clearer when compared to definitions in other legislation and policy documents. For example, according to the *National Environmental Management Act*,⁵¹⁵ sustainable development means the integration of socio-economic and environmental factors into planning, decision-making and implementation so as to ensure that development serves present and future generations.⁵¹⁶ This definition is equally adopted by the *National Framework for Sustainable Development in South Africa* (2008).⁵¹⁷ The differences in the above definitions notwithstanding, sustainable development in the context of local government suggests that, to be "developmental", municipalities must ensure that when they exercise their powers in the process of planning, decision-making and implementation of

513 See De Visser *Developmental Local Government: A Case Study* 9.

514 See ch 1 of the *Systems Act*.

515 *National Environmental Management Act* 107 of 1998. Hereafter, NEMA.

516 See "Definitions" in NEMA.

517 DEAT *People - Planet - Prosperity: A National Framework for Sustainable Development* (2008) 14.

development strategies, they should integrate socio-economic and environmental factors in order to ensure that development meets the needs of present and future generations.

Furthermore, it should be noted that although sustainable development has different and most often conflicting definitions,⁵¹⁸ it is a shared view that the principle emphasises *inter alia*, that, any pursuit of development must: integrate environmental, social and economic considerations; facilitate public participation in governance; address social and economic inequalities by for example, meeting the basic needs of impoverished people such as water, sanitation, energy and food; promote sustainable and equitable use of natural and cultural resources; and cater for the interests of future generations.⁵¹⁹ According to the World Commission on Environment and Development (WCED), the most important objectives of sustainable development are to: revive growth; change the quality of growth; meet essential needs for jobs, water, sanitation, energy and food; ensure a sustainable level of population growth; conserve and enhance the ecological resource base; re-orientate technology in order to promote sustainable patterns of trade and manage risk; and integrate the environment into economic decision-making.⁵²⁰ These areas of emphasis could also be seen as mutually reinforcing objectives of sustainable development.⁵²¹ This suggests that to be "developmental", municipalities should strive towards realising the mutually reinforcing objectives of sustainable development.⁵²² From this point of view, it seems

518 The Brundtland Report defined sustainable development as "development which meets the needs of the present without compromising the ability of future generations to meet their own needs". See par 1 of Chapter 2.1 The Concept of Sustainable Development in *Report of the World Commission on Environment and Development (WCED): Our Common Future* (1987). South Africa's definition of sustainable development is influenced by the definition in the *Brundtland Report* and is now couched in section 24(b) of the Constitution. See DEAT *People-Planet- Prosperity: A National Framework for Sustainable Development in South Africa* (2008) 14. For other definitions, see Bossel *Indicators for Sustainable Development* 2-3; Elliot *An Introduction to Sustainable Development* 7-14.

519 Urquhart and Atkinson *A Pathway to Sustainability: Local Agenda 21 in South Africa* 20-21; Burns and Hattings 2007 SAJELP 3-5; De Visser 'Institutional Framework for Developmental Local Government' 2-3.

520 WCED *Our Common Future* (1987) pars 27-30; Elliot *An Introduction to Sustainable Development* 13.

521 See Elliot *An Introduction to Sustainable Development* 11-14.

522 For key objectives of sustainable development, see: WCED *Our Common Future* (1987) pars 27-30; Elliot *An Introduction to Sustainable Development* 13.

that unlike the past where municipalities had no developmental issues on their agendas, "developmental local government" now requires that municipalities must promote sustainable development - the implications of which are quite vast.

2.5.4.2.3 De Visser's description

In addition to the meaning of "developmental local government" explained in the WPLG, De Visser has identified three elements of development which further shed light on the "developmental" role of municipalities.⁵²³ The first element of development distilled by De Visser is the "material element."⁵²⁴ Embedded in this element of development is the need to improve living standards and minimise absolute poverty.⁵²⁵ From this prism, it is evident that, unlike the past where local government's role was limited to service delivery and local authorities were not in a position to address development challenges for the majority,⁵²⁶ "developmental local government" requires municipalities to play a key role in promoting development by explicitly targeting poverty and improving the material well-being of all South Africans.⁵²⁷ However, De Visser cautions against the dangers of development efforts that solely focus on satisfying the material needs of impoverished people without involving beneficiaries in decision-making and further developing their capacities to eventually become self-sufficient.⁵²⁸

The second element De Visser distils from development is "choice":⁵²⁹ "Choice" captures the freedom to initiate and make policy choices affecting people's well-being which flows from their inherent dignity as human

523 De Visser *Developmental Local Government: A Case Study* 9-13.

524 De Visser *Developmental Local Government: A Case Study* 10. See also Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 461.

525 De Visser *Developmental Local Government: A Case Study* 10. See also Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 461.

526 Reddy 'South Africa: Local Government Democratisation and Decentralisation Revisited' in Reddy *Local Government Democratisation and Decentralisation* 201-217 at 201. See Dugard 'Power to the people? A rights-based analysis of South Africa's electricity services' in McDonald *Electric Capitalism* 269.

527 De Visser *Developmental Local Government: A Case Study* 10-11. See also Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 461.

528 De Visser *Developmental Local Government: A Case Study* 10-11.

529 De Visser *Developmental Local Government: A Case Study* 11.

beings.⁵³⁰ De Visser argues that for development to be able to improve the material conditions of people and develop their capabilities and optimal functioning, it must be initiated and sustained by the people themselves.⁵³¹ He argues that for people to be able to sustain development, they need to be equipped with choices and possibilities.⁵³² This possibly explains the commitment of developmental local government to work "with citizens and groups within the community to find sustainable" solutions to their development challenges. Thus, unlike the previous system of local government which excluded the majority from decision-making processes affecting their lives, amongst other impacts, developmental local government seeks to facilitate their active participation in making choices that affect their life.⁵³³

De Visser argues that although improving people's economic and financial status is an integral part of development, this cannot be achieved by economic growth alone.⁵³⁴ For De Visser, integral components of the development process such as poverty alleviation can only be achieved through economic growth and redistribution.⁵³⁵ In this regard, the third element of development identified by De Visser is "equity", which embraces the sub-elements of "intersocial" and "intergenerational" equity.⁵³⁶ Intersocial equity in the context of development emphasises the need for local government to ensure that "development must benefit everyone."⁵³⁷ In this regard, De Visser argues that if local government does not adopt and implement redistributive strategies, it is unlikely that economic growth will

530 De Visser *Developmental Local Government: A Case Study* 11. See also Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 461.

531 De Visser *Developmental Local Government: A Case Study* 10-11. See also Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 461.

532 De Visser *Developmental Local Government: A Case Study* 11.

533 The entire ch 4 of the *Systems Act* is dedicated to various aspects of community participation at the local government level. See also s151 (1)(a) and (e) of the Constitution.

534 De Visser *Developmental Local Government: A Case Study* 12.

535 De Visser *Developmental Local Government: A Case Study* 12.

536 De Visser *Developmental local government: A Case Study* 12-13. See also Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 461.

537 De Visser *Developmental Local Government: A Case Study* 12; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 461.

positively impact on the most vulnerable segments of society.⁵³⁸ On the other hand, intergenerational equity in the development context refers to the notion that "the development of one generation must not deny the development of the next generation."⁵³⁹ This suggests that because today's "natural resources are not the fruits of the present generation's labour", municipalities must ensure that their planning, decision-making and implementation processes, must give due regard "to the right to development of future generations."⁵⁴⁰ Intergenerational and intersocial equity constitute the bedrock of sustainable development.⁵⁴¹ The requirement that local government should work towards achieving development for everyone, including those to come, is in stark contrast to the old system of local government where municipalities generally had no developmental issues on their agendas.⁵⁴²

The discussion above⁵⁴³ suggests that, irrespective of the angle from which one looks at the meaning of "developmental local government", it captures a radical shift between the role that was played by municipalities before the adoption of the Constitution and the role that municipalities are expected to play under the current constitutional dispensation. The shift in focus to a "developmental" role for local government can better be understood in the context of the constitutional objects and developmental duties of local government respectively outlined in sections 152 and 153 of the Constitution.⁵⁴⁴ However, before examining the now expanded constitutional mandate of local government, it is necessary to have a clear picture of the current powers of municipalities.

538 De Visser *Developmental Local Government: A Case Study* 12. The main point made here is the link established by De Visser between "developmental" local government and intergenerational equity. This thesis does not venture into the details of intergenerational equity. For details, see Schneeberger 2011 *ELM* 20-29; Weiss 1990 *American Society of International Law* 198-207.

539 De Visser *Developmental Local Government: A Case Study* 13.

540 De Visser *Developmental Local Government: A Case Study* 13.

541 See Urquhart and Atkinson *A Pathway to Sustainability: Local Agenda 21 in South Africa* 10-11; De Visser *Developmental Local Government: A Case Study* 13.

542 De Visser *Developmental Local Government: A Case Study* 59.

543 See 2.5.4.2.

544 The new mandate for local government as entrenched in the Constitution is discussed in 2.5.4.5.

2.5.4.3 Powers and functions of local government

As indicated above,⁵⁴⁵ a central feature of the previous system of local government was its lack of self-governing powers. Local government was subjected to strict control by provincial and national governments and by-laws passed by local authorities were, for example, subject to the approval of the Provincial Administrator.⁵⁴⁶ This stringent control over local government's law-making powers reduced local authorities to decentralised executive agencies for relevant central government departments.⁵⁴⁷ However, as part of the democratic transformation, the self-governing power of local government is now entrenched in the Constitution.⁵⁴⁸ In *Fedsure Life Assurance*, the Court described the newly established constitutional powers of local government within the context of the *Interim Constitution* as follows:

The constitutional status of local government is thus materially different to what it was when parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures. The institution of elected local government could then have been terminated at any time and its functions entrusted to administrators appointed by central or provincial governments. That is no longer the position. Local governments have a place in the constitutional order...and are entitled to certain powers, including the power to make by-laws and impose rates.⁵⁴⁹

The significance of the above extract is that the core functions of local government as defined by the Constitution cannot be removed or amended by ordinary statute or provincial legislation. The powers and functions of local government can only be changed by a constitutional amendment.⁵⁵⁰

In *City of Cape Town and Other v Robertson and Other*,⁵⁵¹ the Court reiterated the extent of local government's transformation, powers and functions when it asserted that:

545 In 2.5.3

546 Vosloo 'South Africa: Local government in White Areas' in Vosloo *et al Local Government in Southern Africa* 25; Craythorne *Municipal Administration* 9.

547 Vosloo 'South Africa: Local government in White Areas' in Vosloo *et al Local Government in Southern Africa* 25.

548 S 151(2) and (3) of the Constitution.

549 *Fedsure Life Assurance*, par 36.

550 De Visser *Developmental Local Government: A Case Study* 114.

551 *City of Cape Town and Other v Robertson and Other* 2005 (2) SA 323 (CC). Hereafter, *City of Cape Town and Others v Robertson*.

The Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is *interdependent*, 'inviolable and possesses the constitutional latitude within which to define and express its unique character' subject to constraints permissible under our Constitution. A municipality under our Constitution is not a mere creature of statute otherwise moribund save if imbued with power by provincial and national legislation. A municipality enjoys 'original' and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits. *Now the conduct of the municipality is not always invalid only for the reason that no legislation authorises it. Its powers may derive from the Constitution or from legislation of a competent authority or from its own laws.*⁵⁵²

The above extract highlights the extent of constitutional transformation of local government in South Africa. It demonstrates *inter alia* that local government is entrenched in the Constitution as an interdependent sphere of government, enjoying a certain degree of autonomy. While demonstrating that the transformation established a co-relationship between local, provincial and national governments,⁵⁵³ it makes it clear that local government has "original" powers and functions that can only be constrained within the ambit of the Constitution.

The original powers and functions of local government are set out in section 156 of the Constitution which must be read together with section 11 of the *Systems Act*.⁵⁵⁴ According to the Constitution,⁵⁵⁵ a municipality has executive and legislative authority in respect of, and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution and any other matter assigned to it by national or provincial legislation. The matters listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution, which constitute the original powers of local government, are outlined in the table below.

552 *City of Cape Town and Other v Robertson*, par 60. Own emphasis.

553 See Malan 2005 *Politeia* 227; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 425.

554 See also s 83(1) of the *Structures Act* and s 8(1) of the *Systems Act*.

555 See s 156(1) and (2) of the Constitution, read together.

Table 2: Original powers of local government

Schedule 4(B) of the Constitution: Local government's areas of legislative competence	Schedule 5 (B) of the Constitution: Local government matters over which provinces have legislative competence
<p>Air pollution Building regulations Child care facilities Electricity and gas reticulation Fire-fighting services Local tourism Municipal airports Municipal planning Municipal health services Municipal public transport Municipal public works Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto stormwater management systems in built-up areas; trading regulations Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems</p>	<p>Beaches and amusement facilities Billboards and the display of advertisements in public places Cemeteries, funeral parlours and crematoria Cleansing Control of public nuisances Control of undertakings that sell liquor to the public Facilities for the accommodation, care and burial of animals Fencing and fences Licensing of dogs Licensing and control of undertakings that sell food to the public Local amenities; Local sport facilities Markets Municipal abattoirs Municipal parks and recreation Municipal roads Noise pollution Pounds Public places Refuse removal, refuse dumps and solid waste disposal Street trading Street lighting and Traffic and parking</p>

Although the Constitutional Court has indicated that section 156 and Schedules 4B and 5B of the Constitution are not the only source of local government's powers,⁵⁵⁶ these provisions show functional areas where municipalities have exclusive executive and legislative (law-making) powers and confirm local government's distinctiveness as a sphere of government.⁵⁵⁷ According to Steytler and Fessha, these provisions show that provincial and national governments "have only limited supervisory authority" with regard to the functional areas in Schedules 4B and 5B of the Constitution.⁵⁵⁸ This means that the other spheres of government retain the powers to support and monitor the extent to which municipalities perform their functions.⁵⁵⁹ Due to the fact the powers and functions of municipalities are rooted in the Constitution, they cannot be removed or amended by national or provincial legislation except by an amendment of the Constitution itself.⁵⁶⁰ To De Visser, this is the most significant and fundamental feature of the institutional integrity of local government.⁵⁶¹

The powers of local government become more extensive if section 156(4) of the Constitution is taken into consideration. Section 156(4) of the Constitution provides that national and provincial governments "must assign to a municipality", the administration of a matter listed in Part A of Schedule 4 and Part A of Schedule 5 which necessarily relates to local government, if that matter would most effectively be administered locally and if the municipality has the capacity to administer.⁵⁶² Besides, section 156(5) grants municipalities "the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions." De

556 See *Blue Moonlight Properties*, pars 21-29 and 46-67.

557 De Visser 2009 *CJLG* 12; Christmas and De Visser 2009 *CJLG* 111.

558 Steytler and Fessha 'Defining Provincial and Local Government Powers and Functions: The Management of Concurrency' 2.

559 Steytler and Fessha 'Defining Provincial and Local Government Powers and Functions: The Management of Concurrency' 2.

560 De Visser *Developmental Local Government: A Case Study* 113-114; *City of Cape Town and Other v Robertson*, par 60.

561 De Visser *Developmental Local Government: A Case Study* 114. See Christmas and De Visser 2009 *CJLG* 111.

562 See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 436.

Visser refers to powers derived from section 156(5) of the Constitution by municipalities as "incidental" powers.⁵⁶³

The executive and legislative powers of local government are supposed to enable each municipality to administer local communities and facilitate the realisation of the vision of "developmental local government" outlined in the WPLG. According to section 11 of the *Systems Act*, a municipality exercises its legislative and executive authority by *inter alia*: establishing and maintaining an administration; setting targets for service delivery; developing and adopting policies, plans and strategies to achieve service delivery targets; implementing applicable national and provincial legislation and its by-laws; providing municipal services to the community through its internal systems or by appointing appropriate service providers; monitoring provision of municipal services and where such services are provided by a service provider, ensuring their proper regulation; preparing, approving and implementing its budgets; imposing and recovering rates, taxes, levies, duties and service fees on surcharges; monitoring the impact and effectiveness of any services, policies, programmes or plans; promoting a safe and healthy environment; and by passing by-laws and taking decisions on any matter falling within its competence. It seems that section 11 of the *Systems Act* does not provide an exhaustive list of what municipalities could do to realise their constitutional mandate. In line with the distinguishing feature of "developmental local government" which requires municipalities to be "innovative" and "strategic" in solving local challenges, it is suggested that municipalities can adopt and implement measures not specifically mentioned in section 11 of the *Systems Act*, or anywhere else, for that matter provided this does not contravene the Constitution or legislation.

Apart from the power to, for example adopt and implement policies, by-laws and programmes, the Constitution accords municipalities the powers to generate revenue through rates and taxes in order to be able to finance its activities.⁵⁶⁴ The constitutional powers accorded municipalities to generate

563 De Visser *Developmental Local Government: A Case Study* 121-122.

564 See section 229(1)(a) and (b) of the Constitution. See the *Municipal Fiscal Powers and Functions Act* 12 of 2007 (hereafter referred to as the *Municipal Fiscal Powers*

internal revenue is given legislative effect by *inter alia*, the *Systems Act*.⁵⁶⁵ The power of municipalities to generate internal revenue by charging fees for services, imposing surcharges on fees, rates on property and other taxes, levies and duties has been confirmed by the Court in a number of cases.⁵⁶⁶ The constitutional and legislative power of municipalities to generate internal revenue seems to suggest that they could raise the finances needed to effectively exercise their legislative and executive powers and functions.

After discussing the original powers and functions of local government, it is necessary to briefly explain the impact of the principle of institutional subsidiarity before examining the now expanded mandate of local government. This is because the application of the principle of institutional subsidiarity makes it possible for additional powers and functions to be assigned to municipalities by national and provincial governments.

2.5.4.4 *Impact of institutional subsidiarity on local government*

Although the notion of subsidiarity originated in ancient times and was first applied by the Catholic Church as a social doctrine, it has evolved and increasingly become relevant in the area of public governance.⁵⁶⁷ The principle of institutional subsidiarity means that government decisions should be taken at the level appropriate to the type of decision.⁵⁶⁸ The principle also means that political decisions and their implementation should be carried out

and Functions Act) which seeks to clarify the powers and functions of municipalities in this regard. The Preamble provides that the Act seeks to "regulate the exercise by municipalities of their power to impose surcharges on fees for services provided under section 229(1)(a) of the Constitution; to provide for the authorisation of taxes, levies and duties that municipalities may impose under section 229(1)(b) of the Constitution; and for matters connected therewith".

565 See s 4(1)(c) and 71 of the *Systems Act*.

566 See *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (2) BCLR 150 (CC) at pars 61, 64 and 73; *Rates Action Group v City of Cape Town* [2007] 1 All SA 233 (SCA) at pars 1-20; *City of Cape Town Others v Robertson*, pars 61-71; *Joseph*, pars 53 and 54.

567 For details on the origins of the subsidiarity principle and the manner in which it is articulated in some domestic and international instruments, see: De Visser 2010 *Stell LR* 92-93, 95-100; Friesen 2003 *Federal Governance: A Graduate Journal of Theory and Politics* 5-6; Marquardt 1994 *Fordham International Law Journal* 619-622; Carpenter 'Cooperative Government, Devolution of Powers and Subsidiarity: The South African Perspective' 45-46.

568 UN-HABITAT *International guidelines on decentralisation and the strengthening of local authorities* (2007) 4, pars 1-6; De Visser *Developmental Local Government: A Case Study* 142.

by the level of government closest to the people, except where it is unreasonable to do so.⁵⁶⁹ According to du Plessis, the principle of institutional subsidiarity constrains any more encompassing or subordinate institution (such as an organ of state) to refrain from taking for its account, matters which a more particular, subordinate institution can appropriately dispose of.⁵⁷⁰ Local self-government is a form of governance which is based on the direct application of the principle of institutional subsidiarity.⁵⁷¹

One of the novel features that became applicable at the local government level following the process of constitutional transformation is the principle of institutional subsidiarity.⁵⁷² Although the Constitution does not make express reference to "subsidiarity", it is believed that this principle influenced its design in terms of allocating and safeguarding powers between the three spheres of government.⁵⁷³ In this context for example, De Visser has situated the subsidiarity principle within section 156(4) of the Constitution⁵⁷⁴ which provides that:

The national and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 and Part A of Schedule 5 which necessarily relates to local government, if –

- (a) that matter would most effectively be administered locally; and if
- (b) the municipality has the capacity to administer.

The above provision embodies the subsidiarity principle in that it requires national and provincial spheres of government to assign or allocate certain functions - that can be better discharged by municipalities – to municipalities, subject to the satisfaction of certain conditions.⁵⁷⁵ This is what De Visser refers to as allocative subsidiarity.⁵⁷⁶ What is important to note from section 156(4) of the Constitution is that, in addition to matters listed in Part B of

569 Friesen 2003 *Federal Governance: A Graduate Journal of Theory and Politics* 6; Marquardt 1994 *Fordham International Law Journal* 617; De Visser 'Institutional Subsidiarity in the Constitution' 7.

570 Du Plessis 2006 *Stell LR* 209-210.

571 UN-HABITAT *International guidelines on decentralisation and the strengthening of local authorities* (2007)10.

572 De Visser 'Institutional Subsidiarity in the Constitution' 2.

573 De Visser 'Institutional Subsidiarity in the Constitution' 2.

574 De Visser 'Institutional Subsidiarity in the Constitution' 3.

575 De Visser 'Institutional Subsidiarity in the Constitution' 7 and 12.

576 De Visser 'Institutional Subsidiarity in the Constitution' 11-12.

Schedule 4 and Part B of Schedule 5, there is an open window for more developmental functions contained in Part A of Schedule 4 and Part A of Schedule 5 to be assigned to local government.⁵⁷⁷

Academic literature suggests that the effective application of the principle of institutional subsidiarity has a number of advantages amongst others, with reference to social justice.⁵⁷⁸ Firstly, it is suggested that this can enable national, regional and local levels of government to design and implement policies that take into account what can be best handled at each level of government.⁵⁷⁹ Secondly, it enhances unity in diversity because it makes it possible for divergent socio-economic, cultural and political realities to be accommodated when political authority is exercised.⁵⁸⁰ Thirdly, it allows people in local communities to make political and socio-economic choices that affect their lives. This has the potential of preserving and enhancing grass root democracy and accountability, therefore, creating a legitimate connection between the state and citizens in constituent sub-units of the state.⁵⁸¹ Furthermore, it can enhance local capacity and allow government to be more responsive to local needs. Besides, it is believed that application of the principle of institutional subsidiarity can foster efficiency since some issues are best addressed at the local level.⁵⁸²

Having located the principle of institutional subsidiarity in the Constitution and highlighted its potential impact to local government, the section that follows examines the expanded mandate of local government with specific focus on sections 152 and 153 of the Constitution.

577 De Visser *Developmental Local Government: A Case Study* 142-143.

578 Friesen 2003 *Federal Governance: A Graduate Journal of Theory and Politics* 1-3 and 9; De Visser 'Institutional Subsidiarity in the Constitution' 10-11. See Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in Fraser and Honneth *Redistribution or Recognition* 87-88.

579 See Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in Fraser and Honneth *Redistribution or Recognition* 87-88.

580 Friesen 2003 *Federal Governance: A Graduate Journal of Theory and Politics* 1-3 and 9.

581 Friesen 2003 *Federal Governance: A Graduate Journal of Theory and Politics* 9-10.

582 Friesen 2003 *Federal Governance: A Graduate Journal of Theory and Politics* 9-10; De Visser 'Institutional Subsidiarity in the Constitution' 10-11.

2.5.4.5 *An expanded mandate for local government*

From the WPLG's defining features of "developmental local government", it seems that local government has been given a constitutional mandate that goes beyond service delivery, as was primarily the case in the old order.⁵⁸³ A combined reading of sections 152 and 153 of the Constitution confirms a shift from the pre-1993 service delivery role of local government to a developmental role.⁵⁸⁴ To fully understand the extent of this shift, this section unpacks the new mandate of local government by specifically discussing each of the sub-sections of sections 152 and 153 of the Constitution.

2.5.4.5.1 Sustainable provision of services

Just like the previous system of local government, municipalities are still obliged to play a "service delivery" role.⁵⁸⁵ Chapter 8 of the *Systems Act* is dedicated to different aspects of service delivery. Municipalities have a general duty to ensure that all members of the local community have access "to at least the minimum level of basic municipal services."⁵⁸⁶ According to the *Systems Act*, basic municipal services are those that are necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment.⁵⁸⁷ In the *Joseph* case, the Court emphasised that a central mandate of post-apartheid local government is to develop service delivery capacity in order to meet the basic needs of all inhabitants of South Africa.⁵⁸⁸ However, as the discussion below shows, the obligation to provide services to communities in the current constitutional dispensation is different from the previous era in that this obligation is qualified by the need to provide services in a "sustainable manner."

583 For a detailed discussion of the notion of "developmental local government" see 2.5.4.2.

584 De Visser *Developmental Local Government: A Case Study* 69; Zybrands 'Local Government' in Venter and Landsberg *Government and Politics in South Africa* 143-145.

585 See s 152(1)(b) of the Constitution.

586 See s 73(1)(c) of the *Systems Act*.

587 See s 1 of the *Systems Act*.

588 *Joseph*, pars 34-40.

Sections 152(1)(b) of the Constitution obliges local government to "ensure the provision of services to communities in a sustainable manner." A reading of the *Systems Act* suggests that there are two elements which must be satisfied by municipalities when they seek to realise the new obligation to provide municipal services in a "sustainable" manner: municipal services must be provided in an "environmentally sustainable manner" and in a "financially sustainable manner".⁵⁸⁹

The obligation to provide services in an environmentally sustainable manner means that municipalities should provide services in a manner that aims at ensuring that: the risk of harm to the environment and to human health and safety are minimised to the extent reasonably possible under the circumstances; the potential benefits to the environment and to human health and safety are maximised to the extent reasonably possible under the circumstances; and legislation intended to protect the environment and human health and safety is complied with.⁵⁹⁰ On the other hand, the obligation to provide municipal services in a "financially sustainable manner" requires that municipalities should provide services in a manner that aims at ensuring that the financing of that service from internal and external sources is sufficient to cover the cost of: the initial capital expenditure required for the service; operating the service; and maintaining, repairing and replacing the physical assets used in the provision of the service.⁵⁹¹ The provision of municipal services in a financially sustainable manner suggests that municipalities should apply efficient and cost effective measures to ensure that services are provided to tax-payers and end-users at an affordable rate and on a continuous or "ongoing" basis.⁵⁹²

The new requirement that local government must provide services to communities in a "sustainable" manner indicates a change from the previous system of local government where little legal emphasis was placed on the need to provide municipal services to the majority on an "ongoing" basis. In

589 S 1 of the *Systems Act*.

590 See s 1 of the *Systems Act*.

591 See s 1 of the *Systems Act*.

592 See Craythorne *Municipal Administration* 341; De Visser *Developmental Local Government: A Case Study* 70.

addition, the previous system of local government did not seriously integrate environmental considerations in implementing spatial separation policies.⁵⁹³

2.5.4.5.2 Democratic government

In contrast to the previous system of local government which largely imposed administrative structures on the majority and excluded them from decision-making processes at the local level, section 152(1)(a) of the Constitution obliges local government "to provide democratic and accountable government for local communities."⁵⁹⁴ The obligation to provide democratic and accountable government is reiterated by the *Systems Act*.⁵⁹⁵ This obligation means that, in addition to representing the interests of communities within municipal councils, councillors should facilitate the involvement of community residents, community-based organisations and all relevant stakeholders in processes of local governance, for example.⁵⁹⁶ From the position of the WPLG, it seems that the new duty imposed on local government to provide "democratic and accountable" government requires that in addition to facilitating public participation in local government matters, mechanisms must also be put in place to enable communities elect councillors to represent their interests in municipal councils.⁵⁹⁷ In this regard, local government must ensure "free, fair and regular" local elections.⁵⁹⁸

However, democratic accountability cannot be limited to mere elections and public participation.⁵⁹⁹ In addition to these components, it is suggested that democracy also requires *inter alia*, the protection of human rights and

593 See "2.2.Creation of liveable, integrated cities, towns and rural areas" in the WPLG (1998).

594 De Visser *Developmental Local Government: A Case Study* 70; Zybrands 'Local Government' in Venter and Landsberg *Government and Politics in South Africa* 143-144.

595 See s 4(2)(b) of the *Systems Act*.

596 See "1.3. Democratising development, empowering and redistributing" in the WPLG (1998).

597 Participatory and representative democracy is an intricate part of the nature of South Africa's democracy, see: *Doctors for Life International*, pars 73, 78, 110-147; *Occupiers of 51 Olivia Road*, par 14; Bilchitz 2010 *Constitutional Court Review* 45, 48, 62-67. De Visser 'Institutional Framework for Developmental Local Government' 1; Skweyiya J in the *Joseph* case, pars 27, 34-40.

598 De Visser *Developmental Local Government: A Case Study* 70; Zybrands 'Local government' in Venter and Landsberg *Government and Politics in South Africa* 143-144.

599 Sen 1999 *Journal of Democracy* 6-7.

fundamental freedoms, respect for the rule of law and the creation of an environment which enables the electorate to obtain information and consider the views of competing protagonists.⁶⁰⁰ From this point of view, it seems that for local government to be able to operate a democratic and accountable government, it must respect and promote the rights of communities including the right to public participation in local governance. In addition, local government must conduct regular democratic elections and promote access to information in order to enable communities make informed choices. The new duty imposed on municipalities to promote local democracy and accountability is in line with the broader constitutional commitment to establish a non-racial, democratic society that will ensure accountability, responsiveness and openness in government. The constitutional commitment to multi-party democracy is informed by the recognition that government must be based on the will of the people.⁶⁰¹ From this mandate, it seems clear that municipalities are constitutionally obliged to move away from undemocratic and exclusionary government practices that were defining features of the old system of local government.

2.5.4.5.3 Social and economic development

As part of the constitutional transformation process and contrary to the pre-democratic era, local government is expressly mandated by the Constitution to promote social and economic development.⁶⁰² This duty is reiterated by the *Systems Act* and the WPLG which requires that municipalities should use their executive and legislative powers and functions in a manner that maximise social development and economic growth.⁶⁰³

The WPLG envisages that local government can promote social development by *inter alia*: meeting the basic needs of communities such as water, sanitation, electricity and primary healthcare services; providing subsidies and other welfare services to impoverished households; managing and financially

600 Sen 1999 *Journal of Democracy* 6-7.

601 See *Doctors for Life International*, par 111; Preamble to the Constitution and s 1(d) of the Constitution.

602 See s 152(1)(c) and 153(a) of the Constitution.

603 See Preamble and s 4(2)(g) of the *Systems Act*; "1.1 Maximising social development and economic growth" in the WPLG (1998).

supporting childcare institutions; providing basic household infrastructure; adopting and implementing policies and programmes that specifically target poverty alleviation; and by adopting and implementing programmes that empower people living in poverty.⁶⁰⁴

Local government is also obliged to promote economic development.⁶⁰⁵ This simply means that, in discharging its multiple functions, local government should use its legislative and executive powers in a manner that creates an environment conducive to economic growth and employment creation.⁶⁰⁶ In promoting economic development, the responsibility of municipalities is limited to "creating a platform and environment to engage stakeholders in implementing strategies and programmes" that will stimulate economic growth.⁶⁰⁷ The realisation of economic growth at the local level depends heavily on the support of other spheres of government and private actors.⁶⁰⁸ The need to promote social and economic development is informed by the fact that economic growth does not always create enough jobs to ensure that people are able to meet their material needs.⁶⁰⁹

2.5.4.5.4 Safe and healthy environment

Another novelty introduced by the Constitution is the requirement that, as part of its development mandate, local government should promote a safe and healthy environment.⁶¹⁰ De Visser suggests that this aspect of local government's development mandate has two components: the first component relates to security issues such as combating crimes and traffic offences while the second relates to ensuring a healthy environment that is free from pollution.⁶¹¹ The general obligation that local government should

604 See "1.1 Maximising social development and economic growth" in the WPLG (1998); *Joseph*, par 36.

605 See s 152(1)(c) and 153(a) of the Constitution; "1.1 Maximising social development and economic growth" in the WPLG (1998).

606 See "1.1 Maximising social development and economic growth" in the WPLG (1998); DPLG (now CoGTA) *National Framework for Local Economic Development (LED) in South Africa: 2006-2011* (2006) 7.

607 *National Framework for Local Economic Development (LED) in South Africa* (2006) 9.

608 *National Framework for Local Economic Development (LED) in South Africa* (2006) 7.

609 See De Visser *Developmental Local Government: A Case Study* 10.

610 See s 152(d) of the Constitution.

611 See De Visser *Developmental Local Government: A Case Study* 71.

promote sustainable development⁶¹² arguably makes environmental protection a core mandate of local government.⁶¹³ Burns and Hattingh suggest that three central features of sustainable development are: social justice (equitable distribution of resources), participatory decision-making and environmental protection.⁶¹⁴

The novel duty imposed on local government to promote a healthy environment suggests that municipalities should strive to ensure that the inter-relationship between people and the natural environment is such that the environment is not and does not become harmful to human health.⁶¹⁵ Municipalities should manage the environment in such a manner that it can cater for peoples' dependence on resources such as drinking water, food and air to breathe.⁶¹⁶ Managing the environment goes beyond the conservation of natural resources and has much to do with peoples' health, access to water and sanitation, as well as land use.⁶¹⁷ The duty to promote a healthy environment also suggests that the natural environment should be managed in such a way that enables people to live and work under conditions that will not harm their mental and physical health.⁶¹⁸ In general, it seems that the protection of communities from increasingly life-threatening environmental trends such as pollution and floods, all fall within the ambit of the duty imposed on local government to ensure a healthy environment. Ineffective legal and other responses to these life threatening environmental trends have

612 See the discussion in 2.5.4.2.2.

613 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 10-13, 337-516; Urquhart and Atkinson *A Pathway to Sustainability: Local Agenda 21 in South Africa* 8; Du Plessis and Du Plessis 'Striking the Sustainability Balance in South Africa' in Faure and Du Plessis *The Balancing of Interest in Environmental Law in Africa* 424; De Visser *Developmental Local Government: A Case Study* 71. The general obligation on local government to promote sustainable development as part of local government's new developmental mandate flows from a joint reading of s 152(1)(c) and (d) of the Constitution.

614 Burns and Hattingh 2007 *SAJELP* 3-5. See De Visser 'Institutional Framework for Developmental Local Government' 2-3.

615 See Du Plessis 2011 *SAJHR* 293.

616 See Du Plessis 2011 *SAJHR* 293.

617 See Du Plessis 2011 *SAJHR* 285. See also Urquhart and Atkinson *A Pathway to Sustainability: Local Agenda 21 in South Africa* 20-21; Burns and Hattingh 2007 *SAJELP* 3-5.

618 See Du Plessis 2011 *SAJHR* 293-294. See Horsten *et al* 'Socio-economic rights' in Govindjee and Vrancken *Introduction to Human Rights Law* 170.

the potential to negatively affect peoples' health through for example, the spread of diseases.⁶¹⁹

2.5.4.5.5 Community participation

A new feature of "developmental" local government is the constitutional duty imposed on municipalities "to encourage the involvement of communities and community organisations in the matters of local government."⁶²⁰ This translates into a novel duty on local government to facilitate public participation in the matters of local government.⁶²¹ The fact that the entire Chapter 4 of the *Systems Act* is dedicated to enhancing community participation at the local government level indicates the importance of this duty. This emphasis should also be understood against the background that prior to democratisation, most South Africans were excluded from government's decision-making processes. It is trite noting that in *Doctors for Life International*, the Court indicated that participation in public affairs is not only a right citizens should enjoy but also imposes a duty on all spheres of government to facilitate public participation in the conduct of state affairs thereby ensuring the realisation of that right.⁶²² In *Mazibuko*, the Court held that the City of Johannesburg had complied with Chapter 4 of the *Systems Act* in implementing project "Operation *Gcin'amanzi*" because of the "thorough and comprehensive" consultations that had taken place between the residents of Greater Soweto and the City.⁶²³ In addition to ward committee meetings and workshops, the City had used 20 community workers to conduct house visits and explain the project to individual householders.⁶²⁴ However, the full extent of the obligations imposed on municipalities by this new duty is discussed in chapter 4.⁶²⁵

619 See Centre for International Governance Innovation *Climate Change in Africa: Adaptation, mitigation and governance challenges* (2009) 16-20.

620 See s 152(1)(e) of the Constitution.

621 See Bilchitz 2010 *Constitutional Court Review* 45, 48 62-67. De Visser 'Institutional Framework for Developmental Local Government' 1; Skweyiya J in *Joseph*, pars 27, 34-40.

622 See *Doctors for Life International*, pars 129-131.

623 *Mazibuko*, pars 133-134.

624 *Mazibuko*, par 133.

625 For details on the right to public participation at the local government level, see 4.4.2.

2.5.4.5.6 Partner in national and provincial development

Section 153(b) obliges local government to participate in national and provincial development programmes. De Visser argues that because local government no longer operates in the interests of a minority, it is necessary that it participates in broad national development agendas in order to contribute to the overall development objectives of government in the interests of everybody.⁶²⁶ In addition, it has been suggested that the participation of local government in provincial and national development programmes facilitates bottom-up and top-down development approaches which allows national and provincial policy to inform local policies and that "local needs inform national and provincial policy."⁶²⁷ The obligation to participate in national and provincial development programmes highlights the need to adhere to the principles of co-operative government especially since local government has to align its development policies with those of national and provincial government.⁶²⁸

2.5.4.5.7 Human rights mandate

Apart from Chapter 7 of the Constitution which brought about institutional change at the local government level, Chapter 2 contains the Bill of Rights which is also binding on local government.⁶²⁹ The Constitution obliges the state to respect, protect, promote and fulfil the rights in the Bill of Rights and further requires government to adopt reasonable legislative and other measures to realise socio-economic rights.⁶³⁰ These obligations apply to, and bind the legislative and executive arms of all spheres of government to implement measures that will contribute to the realisation of the relevant rights.⁶³¹ In the context of local government, sections 4(2)(j) and 23(1)(c) of the *Systems Act* explicitly compels municipalities to contribute, together with

626 See De Visser *Developmental Local Government: A Case Study* 72.

627 See De Visser *Developmental Local Government: A Case Study* 72.

628 See De Visser *Developmental Local Government: A Case Study* 72.

629 This flows from a joint reading of *inter alia* ss 2, 7(2), 25(5), 26(2) and (27(2) of the Constitution.

630 See ss 26(2) and 27(2) and 7(2) of the Constitution; Liebenberg *Socio-Economic Rights* 80-87.

631 Sections 7(2), 26(2) and 27(2) of the Constitution read jointly. See De Visser 2009 *Law Democracy and Development* 201-215; Ackermann 2004 *New Zealand Law Review* 678-679; Langa 2006 *Stell LR* 358; Solange 2011 *Stell LR* 542 and 545.

other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.⁶³² The direct implication of these statutory provisions is that, municipalities are legally bound to realise socio-economic rights that fall within their shared or exclusive areas of competence.⁶³³ Where local government, for example, fails to realise socio-economic rights, individuals, communities and other interested or affected persons can hold municipalities to account by, for example, approaching courts for redress.⁶³⁴

2.5.4.6 *Observation on local government's constitutional mandate*

The discussion in section 2.5.4.5 generally demonstrates that unlike the previous system of local government, the mandate of the current system of local government transcends the sale of municipal services to include the general development of people and areas within municipal jurisdictions.⁶³⁵ Judging from local government's multiple functions and developmental duties, it appears that for local government to be developmental, it must effectively use its legislative and executive powers to promote local democracy and accountability, socio-economic development, protect the environment, facilitate community participation in local government matters, effectively co-operate and participate in national and provincial development programmes and realise its human rights obligations. This explains the view that developmental local government embraces a holistic approach to development⁶³⁶ and that the objects of local government should be jointly

632 These sections respectively deal with rights related to the environment; property; housing; health care, water, food and social security; children; and education.

633 Steytler and De Visser *Local Government Law of South Africa* 9-12.

634 See Brand 'Introduction to socio-economic rights in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa* 2; Liebenberg *Socio-Economic Rights* 87-93. This idea is further discussed in 3.2.2 below.

635 See De Visser 'Institutional Framework for Developmental Local Government' 1; Robinson 'Continuities and Discontinuities in South African Local Government' in Van Donk *et al Consolidating Developmental Local Government* 37. Skweyiya J in the *Joseph* case stressed that service delivery was the "central mandate of local government". See *Joseph*, par 34; Tshishonga and Mafema 2008 *Journal of Public Administration* 360.

636 See Pieterse and Van Donk 'Developmental Local Government: Squaring the Circle Between Policy Intent and Impact' in Van Donk *et al Consolidating Developmental Local Government* 53-54; Address by the Acting Minister of Cooperative Governance and Traditional Affairs, Honourable Nathi Mthethwa, at the SALGA 2011 Elective Conference, 30 August 2011.

realised.⁶³⁷ In the *Joseph* case, the Court observed that the five constitutional objects of local government create an overarching set of constitutional obligations which must be achieved in tandem.⁶³⁸ This means that local government cannot focus on achieving some of its developmental duties to the exclusion of others. All the duties of local government must be given equal attention.

It is important to note that the developmental mandate of local government and the notion of "developmental local government" speak to each other. This explains the assertion that the WPLG "translated the objects of sections 152 and 153" of the Constitution into the term "developmental local government."⁶³⁹ Apart from the fact that sections 152 and 153 of the Constitution constitute the basis of the term "developmental local government", their interconnectedness lies in their shared areas of emphasis in the development process: satisfying the basic needs of all, improving general living standards and minimising absolute poverty; promoting democratic government in which a culture of public participation is encouraged; and promoting general socio-economic development and environmental protection. Apart from its developmental duties, local government is legally mandated to respect, protect, promote and fulfil the rights in the Bill of Rights and to take positive legislative and executive action to specifically realise socio-economic rights.

Furthermore, it appears that the basic meaning⁶⁴⁰ and most of the generic benchmarks for state authorities' pursuit of social justice summarised in Table 1 above, connects directly with some features of "developmental local government" and the objects of local government.⁶⁴¹ The complementarities can be located at least in the following areas of emphasis: the satisfaction of material needs through redistribution; the pursuit of sustainable development; the facilitation of public participation in local governance; the realisation of

637 See *Democratic Alliance and Another v Amos Masondo No and Another* 2003 (2) BCLR 128, par 17.

638 *Joseph*, par 35.

639 De Visser *Developmental Local Government: A Case Study* 72.

640 See 2.5.4.

641 See generally 2.6.4.2; De Visser *Developmental Local Government: A Case Study* 10.

human rights; and the sharing of developmental responsibilities between national, provincial and local government.⁶⁴² In addition, it is suggested that the generic benchmark on capacity building can be implied by the WPLG's requirement that municipalities should support and train small businesses and community development organisations and in the statutory obligation to contribute to building the capacity of local communities in order to enable them participate in the affairs of the municipality.⁶⁴³ Based on these complementarities, it is possible to argue that the pursuit of social justice could be read into the objects and developmental duties of local government. In addition, when these complementarities are considered against the wide-range of local government's legislative, executive and administrative powers and functions,⁶⁴⁴ it appears that municipalities have the potential, at least theoretically, to contribute towards the pursuit of social justice by using legally prescribed governance instruments such as policies and IDPs.⁶⁴⁵ The theoretical foundation to these instruments is discussed in 4.5 below.

2.6 Chapter summary

This chapter analysed conceptual and theoretical perspectives on transformative constitutionalism, social justice and developmental local government in order to establish the normative foundation from which to explore local government's role in the pursuit of the transformative constitutional mandate.

The chapter reviewed existing descriptions and understandings of transformative constitutionalism. It established that although there is no

642 See the generic benchmarks in 2.4.3 and the discussion in 2.5.4.2 and 2.5.4.5.

643 See 2.5.4.2.1; "1.1 Maximising social development and economic growth" in the WPLG (1998); and 16(1)(b)(i) of the *Systems Act*.

644 See *City of Cape Town and Other v Robertson and Other*, par 60; S 11(3) of the *Systems Act*; 2.5.4.3 and 2.5.4.4.

645 See s 11(3) of the *Systems Act*. See further: Steytler 2011 *SAPL* 484-496; Harrison 'The origin and outcomes of South Africa's Integrated Development Plans' in Van Donk M *et al Consolidating Developmental Local Government* 321-337; Patel 'Tools and Trade-offs in Environmental Decision-making' in Van Donk *et al Consolidating Developmental Local Government* 357-376; Berrisford and Kihato 'Local Government Planning Legal Frameworks and Regulatory Tools: Vital Signs?' in Van Donk *et al Consolidating Developmental Local Government* 377- 403; Du Plessis 2010 *Stell LR* 274-275. See also "Tools and approaches for developmental local government" in "Section B: Developmental Local Government" of the WPLG (1998).

unanimous or prescriptive understanding of transformative constitutionalism, there is the shared view that the central objective of this constitutional mandate is to establish a society based on social justice. It was established that the basis for this constitutional commitment is found in the Preamble of the Constitution which expressly commits the state to correct the injustices of the past and establish a society based on social justice, human rights and democratic values. Scholars and jurists commenting on this transformative constitutional mandate share the view that, the pursuit of social justice is primarily concerned with the eradication of poverty and extreme inequalities in access to basic needs such as water, electricity, sanitation, food, housing, health services and a healthy environment. Although the pursuit of social justice remains a timeless ideal, scholars and jurists agree that it a constitutional commitment which must be pursued by all branches of government and organs of state. This means that the national, provincial and local spheres of government as well as line departments and functionaries within each sphere are obliged to contribute towards the pursuit of this mandate. It also established that scholars and jurists share the view that government's realisation of the socio-economic rights entrenched in the Constitution constitutes one of the mechanisms through which a socially just society can be established. This view is based on the fact that the realisation of socio-economic rights has the potential to enable poor, disadvantaged and often marginalised people to access their basic needs.

Although the Constitution is committed to the pursuit of social justice, there is no universally prescribed understanding of what social justice entails and how it should be pursued by state authorities. However, based on theories and perspectives of social justice reviewed in this chapter, and against the backdrop of the notion of transformative constitutionalism, it was established that in practical terms, social justice is primarily concerned with the eradication of poverty and extreme forms of inequalities in order to ensure that impoverished people command the material resources needed to enable them participate in socio-political life as true equals. Although this conception of social justice takes into consideration the theories and perspectives of social justice discussed in the chapter, it largely draws from Fraser's theory

based on "participatory parity". In adopting her conception of social justice, it was argued that the foundation of her theory is multi-dimensional and generally consistent with the values of the Constitution. Through the theories and perspectives of social justice discussed in this chapter, ten hypothetical benchmarks were distilled on how state authorities can pursue social justice. These benchmarks were summarised in Table 1 above.

It was stressed that these generic benchmarks are not mutually exclusive. In brief, the chapter established that the pursuit of social justice requires: state authorities to implement (re)distributive measures (such as policies) that will enable poor, vulnerable and often marginalised citizens have access to their basic needs on an ongoing basis; promote the participation of citizens in the design and implementation of measures that seek to (re)distribute resources; protect and fulfil human rights obligations; promote sustainable development; address the structural causes of inequalities; avoid privatisation of basic services; address stigma associated with welfare programmes; build human capabilities/capacities; and promote group solidarity. In addition, the benchmarks suggest that social justice can only be pursued through joint efforts involving all levels of government and organs of state. This chapter also established that state authorities can only pursue social justice through the use of governance instruments at their disposal – such as policies and strategic plans.

Furthermore, the chapter analysed the meaning and relevance of "developmental local government" and established some complementarities between this notion and social justice as an objective of transformative constitutionalism. It was established that, following the transition to constitutional democracy, local government experienced fundamental transformation in terms of its status, mandate, powers and functions. Local government is currently entrenched in the Constitution as a distinct, interrelated and interdependent sphere of government which must work together with other spheres of government – national and provincial - to realise constitutional objectives. It was observed that because local government is now co-responsible for realising constitutional objectives, the

constitutional mandate to pursue social justice automatically becomes a joint mandate which municipalities must pursue, together with other spheres of government, in accordance with the principles of cooperative government. This means that, unlike the past where local government was an administrative arm of provincial and national governments, local government is now a co-responsible sphere of government with constitutionally defined "original" powers and functions which can only be reduced through a constitutional amendment. Local government is no longer subject to the whims of national and provincial governments. The Constitution expressly compels national and provincial governments to refrain from impeding or comprising the ability of local government to exercise its powers and functions.

Moreover, it was established that, as part of constitutional transformation, local government has also been given an expanded "developmental" mandate which goes beyond service delivery. This mandate obliges local government to: meet the needs of communities with special attention given to the basic needs of people living in poverty; promote public participation in local governance; enhance local democracy and accountability; promote socio-economic development; protect the environment; and contribute towards the realisation of the socio-economic rights entrenched in the Constitution. It was established that this expanded developmental mandate has some complementary links with the generic benchmarks that should guide state authorities' pursuit of social justice as an objective of transformative constitutionalism. Their common links centre on the need to: redistribute resources to meet the basic needs of impoverished people; facilitate public participation in governance; promote sustainable development; build human capacity; and fulfil human rights. It was argued that based on these complementarities, the pursuit of social justice can be read into the constitutional objects and expanded developmental mandate of local government.

CHAPTER 3
CONSTITUTIONAL RIGHTS AS A MECHANISM FOR LOCAL
GOVERNMENT'S PURSUIT OF SOCIAL JUSTICE

3.1	Introduction	125
3.2	Constitutional rights as a mechanism for pursuing social justice	127
3.2.1	<i>Introduction</i>	127
3.2.2	<i>Constitutional socio-economic rights</i>	136
3.2.2.1	"Basic" socio-economic rights	136
3.2.2.2	Socio-economic rights prohibiting the state or private parties to interfere with the realisation thereof	139
3.2.2.3	Textually qualified socio-economic rights	142
3.2.2.4	The general limitation clause	150
3.2.3	<i>Socio-economic rights obligations from national legislation and policies</i>	<i>152</i>
3.2.3.1	Legislation and policies on the right to water	153
3.2.3.2	Legislation and policies on the right to health care	160
3.2.3.3	Legislation and policies on the right to housing	165
3.2.3.4	Legislation and policies on the environmental right	174
3.2.3.5	Legislation and policies on the right to sanitation	184
3.2.3.6	Legislation and policies on the right to electricity	186
3.2.3.7	Observation on constitutional socio-economic rights	188
3.3	Procedural constitutional rights for the pursuit of social justice	190
3.3.1	<i>The right of access to courts</i>	<i>191</i>
3.3.2	<i>Locus standi</i>	<i>193</i>
3.3.3	<i>The right to administrative justice</i>	<i>195</i>
3.3.4	<i>The right of access to information</i>	<i>199</i>
3.3.5	<i>The right to public participation</i>	<i>200</i>
3.3.6	<i>The right to vote</i>	<i>202</i>
3.4	Constitutional rights-based duties of municipalities	204
3.4.1	<i>The obligation to respect</i>	<i>205</i>
3.4.2	<i>The obligation to protect</i>	<i>205</i>
3.4.3	<i>The obligation to promote</i>	<i>206</i>
3.4.4	<i>The obligation to fulfil</i>	<i>207</i>
3.4.5	<i>Obligation to adopt reasonable legislative and other measures</i>	<i>211</i>

3.5	Reflection on the challenges of rights as a mechanism for social justice	215
3.6	Chapter summary	217

3.1 Introduction

In the previous chapter, it was argued that the transformative constitutional mandate to establish a society based on social justice means *inter alia* that, in practice, government should combat poverty and extreme inequalities in access to basic needs in order to enhance the ability of all citizens to participate in socio-political life as true equals.⁶⁴⁶ It was further argued that, in order to establish a society based on social justice, state authorities should *inter alia*, adopt and implement (re)distributive measures such as policies that will ensure that impoverished people gain access to basic needs (such as water, food, electricity, healthcare services, housing, sanitation, education and a healthy environment) as well as guarantee, protect and realise human rights.⁶⁴⁷

Human rights constitute one mechanism that can be used by governments to pursue social justice.⁶⁴⁸ In South Africa, chapter 2 of the Constitution contains a Bill of Rights which guarantees a set of human rights and requires all spheres of government and all organs of state to respect, protect, promote and fulfil these rights.⁶⁴⁹

The purpose of this chapter is to critically analyse the constitutional rights that underpin the pursuit of transformative constitutionalism and social justice in order to establish concrete rights-based duties that inform the role of local government in the pursuit of social justice. Through this analysis, the chapter demonstrates how local government's realisation of specific constitutional rights could be one vehicle in the pursuit of social justice. It also ventures into the implications of the human rights duties for municipalities. Subsequent to

646 See Table 1 in 2.4.3.

647 See Table 1 in 2.4.3 above.

648 See Hassim 'Social Justice, Care and Developmental Welfare in South Africa' in Freund and Witt *Development Dilemmas* 330-331; Brand 'Introduction to socio-economic rights in the South African Constitution' in Brand and Heyns *Socio-economic Rights in South Africa* 12-20; Pieterse 2007 *Human Rights Quarterly* 796-822; Van der Walt 'A South African Reading of Frank Michelman's Theory of Social Justice' in Botha *et al Rights and Democracy* 163-165; Stewart 2011 *Diritto Pubblico Comparato ed Europeo* 1510.

649 The obligation to respect, protect, promote and fulfil human rights is contained in s 7(2) of the Constitution. These obligations are further discussed in 3.4 below.

this analysis, the chapter then explores the responsibilities of, and options for local government specifically in realising the rights that are important for the pursuit of social justice. In order to achieve the above objective, this chapter is structured into four parts:

It begins by discussing the importance of constitutional rights as a mechanism for state authorities' pursuit of social justice and therefore identifies and analyses those constitutional rights relevant to local government's pursuit of social justice. It analyses the possible normative meaning of identified constitutional socio-economic rights in order to determine the duties they impose and the entitlements they create. This part of the chapter demonstrates that, because constitutional socio-economic rights specifically oblige the state to adopt reasonable legislative and other measures to give them effect, local government authorities incur socio-economic rights obligations from the Constitution as well as legislation and policies adopted by different spheres of government. It is therefore necessary to also refer and examine relevant national legislation and policies that give effect to constitutional socio-economic rights and the additional obligations they impose on local government.

The second part discusses the so-called "procedural" rights⁶⁵⁰ entrenched in the Constitution which can be used by interested and affected persons to participate in local governance processes and to influence decision-making by local authorities. In addition, it shows how some of these rights are also directly linked to some of the generic benchmarks required for state authorities' pursuit of social justice.⁶⁵¹

The third part of the chapter explores the duties of municipalities in terms of the constitutional rights of local communities. It examines the meaning of what is required, from the perspective of local government, by the obligation to respect, protect, promote and fulfill human rights generally. In addition, it

650 Procedural rights are those that provide mechanisms for interested and affected persons to influence or participate in government's decision-making processes. See Olenasha *The Enforcement of Environmental Rights: A Case Study of the New South African Constitutional Dispensation* 22.

651 See Table 1 in 2.4.3.

explores the implication of the obligation on the state to take reasonable "legislative and other measures" to give effect to socio-economic rights with specific reference to local government. This part ends with a table that summarises the rights-based duties of municipalities in terms of the Constitution read with relevant national legislation and policies discussed in the chapter.

The final part reflects on the challenges of using human rights as a mechanism for pursuing social justice. It demonstrates that in order to contribute to the pursuit of social justice, municipalities must *de facto* comply with their human rights duties in terms of the Constitution, national legislation and policies.

3.2 Constitutional rights as a mechanism for pursuing social justice

3.2.1 Introduction

All rights in the Constitution represent a mechanism through which the type of society envisaged by the transformative constitutional mandate can be established.⁶⁵² However, although the realisation of all human rights contributes towards the pursuit of social justice, there is a shared view that socio-economic rights are the most relevant because they specifically seek to satisfy the basic needs of the impoverished people such as water, sanitation, food, housing, electricity, healthcare services and education.⁶⁵³ Socio-economic rights are those rights that "create entitlements to material conditions for human welfare."⁶⁵⁴ They create rights to social goods such as water, housing and food, for example.

652 De Vos 2001 *SAJHR* 264; Alibertyn and Goldblatt 1998 *SAJHR* 249; Liebenberg *Socio-Economic Rights* 34.

653 See Brand 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa* 12-20; Pieterse 2007 *Human Rights Quarterly* 796-822; Van der Walt 'A South African Reading of Frank Michelman's Theory of Social Justice' in Botha *et al Rights and Democracy* 163-165; Stewart 2011 *Diritto Pubblico Comparato ed Europeo* 1510; Langa 2011 *Stell LR* 446-451; Solange 2011 *Stell LR* 542-546; Pieterse 2005 *SAPL* 155-166; Klare 1998 *SAJHR* 153-155; Langa 2006 *Stell LR* 351-352.

654 See Brand 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa* 3; Stewart 2008 *SAJHR* 472. As indicated in 1.1, human rights are interrelated, interdependent and mutually reinforcing and the classical division of rights into different categories based on the

According to Pieterse, socio-economic rights were specifically entrenched in the Constitution to "underscore the constitutional commitment to address the social and economic legacies of apartheid" and to target the vulnerability of individuals by "requiring that the State ameliorates the consequences of such vulnerability in a variety of sectors."⁶⁵⁵ He argues that socio-economic rights hold great potential to improve the life of right-holders and that, if realised, socio-economic rights could contribute to the pursuit of social justice by specifically enabling the poor to gain access to basic needs and resources.⁶⁵⁶

Commenting on the effect of constitutionalising socio-economic rights in terms of the pursuit of social justice, Liebenberg argues that their entrenchment as justiciable rights in the Constitution imposes legal obligations on state authorities to meet the needs of impoverished people.⁶⁵⁷ This means that meeting the needs of impoverished communities in particular, is seen as a public matter which must be addressed by the state "and not simply to be relegated to the 'private' domestic or market sphere."⁶⁵⁸ The needs of rights-holders should be met as a matter of legal entitlement and cannot be seen as emanating from the largesse of state authorities. It is believed that the entrenchment of socio-economic rights as justiciable rights has the potential to contribute towards establishing a society based on social justice because they provide a legal basis for communities to demand their entitlements to basic services (such as water, food, health services, education, housing and a healthy environment).⁶⁵⁹ Pieterse argues in this respect that:

By awarding enforceable entitlements to goods and services that are essential for human survival and flourishing, socio-economic rights appear capable of effectively reconciling notions of right and need. Moreover, the language of socio-economic rights is empowering in that it depicts claims for subsistence as demands that the state must heed rather than as pleas for state philanthropy. *Accordingly, guaranteeing*

nature of the so-called positive and negative obligations they impose is artificial. Even the so-called civil and political rights impose positive duties. See *Liebenberg Socio-Economic Rights* 54-59 and 219; Liebenberg 2011 *SAPL* 37-59.

655 Pieterse 2005 *SAPL* 163.

656 Pieterse 2007 *Human Rights Quarterly* 799.

657 Liebenberg 2006 *Stell LR* 16-17.

658 Liebenberg 2006 *Stell LR* 16-17. See also Brand 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa* 2.

659 Frankovits 2002 *The Fletcher Journal of Development Studies* 12; Liebenberg 2006 *Stell LR* 17; Pieterse 2007 *Human Rights Quarterly* 803

*socio-economic rights contributes to the achievement of an ultimately more just society...*⁶⁶⁰

By imposing legal entitlements and obligations, the Constitution requires state authorities to adopt and implement measures (such as laws, policies and plans) to ensure that socio-economic entitlements are transformed into tangible goods and services. It is suggested that the entrenchment of socio-economic rights in the Constitution makes for accountability on the part of state authorities, which may improve their responsiveness to community needs.⁶⁶¹ In addition, where state authorities fail to adopt and implement measures (legislation, policies and plans) that promote the realisation of socio-economic rights, interested or affected persons can use redress mechanisms such as litigation to compel the state to respond to its legal obligations.⁶⁶²

The socio-economic rights entrenched in the Constitution include *inter alia*, the rights of access to housing,⁶⁶³ healthcare services, including reproductive health care; sufficient food and water; social security and social assistance;⁶⁶⁴ further education;⁶⁶⁵ access to land on an equitable basis,⁶⁶⁶ and environmental rights.⁶⁶⁷ The constitutional environmental right is considered a

660 Pieterse 2007 *Human Rights Quarterly* 803. Own emphasis.

661 Frankovits 2002 *The Fletcher Journal of Development Studies* 12.

662 Brand 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa* 2.

663 S 26 provides that: "(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions".

664 S 27 provides that: "(1) Everyone has the right to have access to- (a) healthcare services, including reproductive health care; (b) sufficient food and water; and (c) social security, including if they are unable to support themselves and their dependents, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. (3) No one may be refused emergency medical treatment".

665 S 29(1)(b) provides that: "Everyone has the right - to further education, which the state, through reasonable measures, must make progressively available and accessible".

666 S 25(5) provides that: "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis".

667 S 24 provides that: "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

socio-economic right because of the centrality of environmental considerations in basic needs satisfaction and poverty alleviation.⁶⁶⁸ The realisation of socio-economic rights is dependent on environmental resources.⁶⁶⁹ As it will become evident from the discussion below, the categorisation of socio-economic rights into access or basic rights, for example, determine the duties they impose and the entitlements they create.⁶⁷⁰

In the *Joseph and Others v City of Johannesburg and Others*,⁶⁷¹ the Court used existing constitutional and legislative provisions that oblige local government to provide basic services to community residents to establish an implicit constitutional right to receive electricity.⁶⁷² It is suggested that the methodology used by the Court in *Joseph* could also be applied to establish an implicit constitutional right to receive sanitation services, for example, independent of other related but self-standing constitutional rights.⁶⁷³ However, it is trite noting that the position taken by the Court in *Joseph* does not construct unenumerated constitutional rights to electricity and sanitation. These rights are implicit in other constitutional rights and the service delivery duties of local government.

Furthermore, although the Court has had opportunities to interpret the positive duties imposed by the socio-economic rights in the Constitution in a number of cases,⁶⁷⁴ it has evaded all requests to define their normative content and has refused to recognise a direct, immediately enforceable entitlement to

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".

668 For a detail discussion on this subject, see Du Plessis 2011 *SAJHR* 279-307; Fuo *Obiter* 77-95.

669 See Tomasevski 'Environmental Rights' in Eide *et al Economic, Social and Cultural Rights: A Textbook* 257-261; Du Plessis 2011 *SAJHR* 279-307; Fuo *Obiter* 77-95.

670 See 3.2.2 below; 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa* 3.

671 *Joseph and Others v City of Johannesburg and Others* 2010 (3) BCLR 212 (CC).

672 *Joseph*, pars 34-40.

673 See *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC) pars 46-49.

674 *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1696; *Grootboom*; *Khosa and Others v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC); *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC); *Mazibuko*; *Nokotyana and Others*; *Joseph*.

social goods.⁶⁷⁵ The Court continues to defer the responsibility of giving normative content to socio-economic rights to the legislative and executive branches of government.⁶⁷⁶ The Court's deference attitude has been attributed to its perceived lack of technical expertise, the need to maintain "constitutional comity" and its lack of institutional capacity to properly engage with socio-economic policy issues.⁶⁷⁷ Stewart sums up the approach of the Court in the various socio-economic rights cases where it was asked to define the content of a right in question as follows:

The Court immediately turned to an examination of the obligations on government by inquiring into the reasonableness of the measures that were adopted to give effect to these rights. It diverts to the "reasonableness review" to legitimise its own institutional incapacity to provide normative clarity to the content of the different socio-economic rights because of the complex nature of poverty related challenges and the need to show difference to the other branches of government.⁶⁷⁸

The Court's refusal to give normative content to constitutional socio-economic rights has been subject to intense criticism.⁶⁷⁹ Based on a detail study of the Court's jurisprudence, Brand observes that, in *Soobramoney*, *Treatment Action Campaign* and *Grootboom*, instead of engaging with the substantive content of socio-economic rights in the adjudication process, the Court used "interpretative manoeuvring" in order to depoliticise issues of poverty and direct away dependency from the state.⁶⁸⁰ According to Brand, the main depoliticising strategies used by the Court in socio-economic rights cases are the *proceduralisation* and *technicisation* of issues of poverty. Brand argues that *proceduralisation* occurs when the Court decides socio-economic rights

675 See *Grootboom*, pars 29-33; *Mazibuko*, pas 46-68; *Treatment Action Campaign*, pars 34-39; Stewart 2011 *Diritto Pubblico Comparato Ed Europeo*1511; Stewart 2010 *Penn State International Law Review* 492.

676 *Grootboom*, par 41; *B and Others v Minister of Correctional Services and Others* 1997(6) BCLR 789 (CC), pars 32-34.

677 See *Treatment Action Campaign* pars 37-38; *Mazibuko*, pars 61-65; Brand *Courts, Socio-Economic Rights and Transformative Politics* 150-151; Liebenberg 2012 *African Human Rights Law Journal* 4; Brand *Courts, Socio-Economic Rights and Transformative Politics* 151

678 Stewart 2011 *Diritto Pubblico Comparato Ed Europeo*1512-1513.

679 See Liebenberg *Socio-Economic Rights* 131-223; Pieterse 2007 *Human Rights Quarterly* 796-808; Bilchitz 2002 *SALJ* 485-501; Bilchitz 2003 *SAJHR* 1-26; De Vos 2001 *SAJHR* 258-276; Stewart 2010 *Penn State International Law Review* 487-512; Stewart 2008 *SAJHR* 472-494; Stewart 2010 *Penn State International Law Review* 492; Brand *Courts, Socio-Economic Rights and Transformative Politics*.

680 For details, see Brand *Courts, Socio-Economic Rights and Transformative Politics* 141-145.

cases on the basis of "structural good governance principles such as inclusivity, rationality, access to courts and rule of law" and not on the basis of their substantive content.⁶⁸¹ On the other hand, *technicisation* occurs when the Court invokes the principle of separation of powers and the lack of self-imposed institutional incapacity to defer decision-making on socio-economic rights issues to the legislative and executive branches of government.⁶⁸² Brand argues that by over relying on the logic of separation of powers, the Court "technicises issues of poverty, describing them as questions that impoverished people themselves – as opposed to the state – simply cannot engage with."⁶⁸³ He argues that through this logic, the Court depicts impoverished people as passive recipients of pre-determined services from the state rather than as active participants in the definition of their needs and in the fashioning of appropriate ways in which to address them.⁶⁸⁴ Through this approach, the Court discourages political engagement with issues of need and deprivation⁶⁸⁵ and privileging certain participants (such as technical experts and public administrators) in debates about impoverishment – depicting them as the only participants who may legitimately engage with issues of impoverishment.⁶⁸⁶ Through this approach, predetermined solutions are presented to people living in poverty as passive recipients who have no role in determining their fates.⁶⁸⁷

The failure of the Court to give substantive content to socio-economic rights has also been attributed to the conservative nature of some South African judges and the manner in which the Court interprets legal rules within the adjudication process.⁶⁸⁸ This trend is summarised by Davis when he argues that:

... the social and economic rights contained in the Constitution were open to multiple interpretations, one of which could have directed the

681 Brand *Courts, Socio-Economic Rights and Transformative Politics* 140-141.

682 Brand *Courts, Socio-Economic Rights and Transformative Politics* 140.

683 Brand *Courts, Socio-Economic Rights and Transformative Politics* 140.

684 Brand *Courts, Socio-Economic Rights and Transformative Politics* 140.

685 Brand *Courts, Socio-Economic Rights and Transformative Politics* 148.

686 Brand *Courts, Socio-Economic Rights and Transformative Politics* 148-149.

687 See Brand *Courts, Socio-Economic Rights and Transformative Politics* 148-149. For a similar argument, see Stewart 2011 *Diritto Pubblico Comparato Ed Europeo* 1525.

688 See Klare 1998 *SAJHR* 156-172; Stewart 2011 *Diritto Pubblico Comparato Ed Europeo* 1514-1515; Davis 2010 *SAJHR* 97.

societal journey towards the kind of social democracy envisaged in the key text. But the Court froze from engaging with the transformative potential posed by the express inclusion of second - and indeed third - generation rights because of its deferential attitude to the other two arms of the state. Traditional legal techniques sourced in administrative law, came to the aid of the Court in its election of the deference model. Reading the key judgments, it is now striking how reasonableness has become the norm for this area of law such that the Court has proceeded 'carefully constructing the facade of its being neutral interpreter of the Constitution.'⁶⁸⁹

As evident from the above extract, the Court's formalistic approach to legal interpretation (and the misconception that law has a fixed neutral meaning) limits the pliability of legal texts.⁶⁹⁰ As pointed out in the context of transformative constitutionalism, legal texts do not have a single neutral meaning and are open to interpretation and reinterpretation.⁶⁹¹ In view of this, Liebenberg argues that although constitutional rights are generally entrenched in constitutions and cannot be altered without extremely elaborate political and juridical procedures, their meaning, scope and application are subject to constant debate and contestation.⁶⁹² It has been argued that the transformative potential of the Constitution is severely limited without a substantive interpretation of entrenched socio-economic rights.⁶⁹³

Although the Court claims that its deference attitude is informed by the need to respect the democratic mandate of the other branches of government, some constitutional law experts argue that this is informed by a limited conception of democracy which undermines transformation.⁶⁹⁴ This is because the Court's approach equates politics with the formal institutions of democracy and "disregards the importance to transformative politics of the operation in particular of extra-institutional and extra-formal political action."⁶⁹⁵ The Court's focus on institution and process is described as a liberal

689 See Davis 2010 *SAJHR* 97.

690 Stewart 2011 *Diritto Pubblico Comparato Ed Europeo* 1514-1515; Davis 2010 *SAJHR* 97.

691 See 2.2.2; Van Marle 2009 *Stell LR* 289; Van Marle 2003 *TSAR* 551.

692 Liebenberg 2012 *African Human Rights Law Journal* 11.

693 Liebenberg 2006 *Stell LR* 36; Stewart 2011 *Diritto Pubblico Comparato Ed Europeo* 1514-1515; Stewart 2010 *Penn State International Law Review* 488-489.

694 For details, see Brand *Courts, Socio-Economic Rights and Transformative Politics* 153-154; Davis 2012 *PER* 2-12.

695 See Brand *Courts, Socio-Economic Rights and Transformative Politics* 154.

understanding of politics⁶⁹⁶ which is contrary to the "thick" conception of democracy envisaged by transformative constitutionalism.⁶⁹⁷ Liebenberg points out that democracy and constitutional rights mutually support one another and create space for debate and continuous revision or reformulation of the contents of rights.⁶⁹⁸

In view of its self-imposed limited institutional incapacity and growing tendency towards deference, Brand argues that:

Rather than differ to the political branches of government...courts should simply acknowledge the complexity of the issues at hand (decline to conclusively decide them) and then find ways in which to reopen the issues to broad political consultation (by for example issuing orders for mediation of socio-economic rights disputes).⁶⁹⁹

Brand argues in favour of a democratised approach to socio-economic transformation in which impoverished people are able to participate in a meaningful fashion in the decisions that affect them and the society of which they are a part.⁷⁰⁰

The democratised approach to the realisation of socio-economic rights is equally shared by some constitutional law scholars.⁷⁰¹ Stewart argues that because of "the limits of law to fully recognise, realise and advance human rights", public/political participation becomes "a necessary requisite for the recognition, realisation and advancement of all human rights."⁷⁰² Liebenberg equally argues that a "deliberative model of democracy" can enhance the realisation of human rights norms.⁷⁰³ This model of democracy does not pretend to seek consensus through public reasoning in decision-making processes but rather gives opportunities for parties to understand each others' concerns and make mutually acceptable trade-offs or mutual

696 See Brand *Courts, Socio-Economic Rights and Transformative Politics* 154.

697 See 2.2.2.

698 Liebenberg 2012 *African Human Rights Law Journal* 28.

699 Brand *Courts, Socio-Economic Rights and Transformative Politics* 18. See also Stewart 2011 *Diritto Pubblico Comparato Ed Europeo* 1525-1526.

700 Brand *Courts, Socio-Economic Rights and Transformative Politics* 30; Brand 2011 *Stell LR* 622-625.

701 See Liebenberg 2012 *African Human Rights Law Journal* 7-10; Stewart 2011 *Diritto Pubblico Comparato Ed Europeo* 1515

702 Stewart 2011 *Diritto Pubblico Comparato Ed Europeo* 1515.

703 Liebenberg 2012 *African Human Rights Law Journal* 7-10.

accommodation.⁷⁰⁴ She argues that deliberative democracy seeks to complement representative democracy because it expands opportunities for people to actively participate in a broad range of decision-making processes.⁷⁰⁵ She describes this as "a more substantive conception of democracy."⁷⁰⁶ According to Liebenberg, the approach of the Court in the adjudication of socio-economic rights in a deliberative democracy should be to "prod communities, state officials and private landowners to find tailored solutions to the myriad complex issues which arise through deliberative engagement."⁷⁰⁷

In addition to the enumerated and implicit socio-economic rights outlined above, there are procedural rights in the Constitution which are equally important for the state's pursuit of social justice because they can be used by interested and affected persons to participate in, and influence decision-making in local government, for example.⁷⁰⁸ In this regard, the following constitutional rights are considered important for purposes of this study: the right of access to information;⁷⁰⁹ the right to just administrative action;⁷¹⁰ the right of access to courts;⁷¹¹ the right on *locus standi*;⁷¹² and the right to vote.⁷¹³ Unlike socio-economic rights which guarantee entitlement to defined social goods, procedural rights provide guarantees and mechanisms for interested and affected persons to influence decision-making in government. Protection and fulfilment of procedural rights fosters good governance because this creates mechanisms to promote public participation in decision-making processes and enhances transparency and accountability in government.⁷¹⁴

704 Liebenberg 2012 *African Human Rights Law Journal* 9-10 and 25.

705 Liebenberg 2012 *African Human Rights Law Journal* 10.

706 Liebenberg 2012 *African Human Rights Law Journal* 10.

707 Liebenberg 2012 *African Human Rights Law Journal* 28-29.

708 See Solange 2011 *Stell LR* 545-546; Liebenberg *Socio-Economic Rights* 88; Pieterse 2007 *Human Rights Quarterly* 820-821; Brand 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa* 2.

709 See s 32 of the Constitution.

710 See s 33 of the Constitution.

711 See s 34 of the Constitution.

712 See s 38 of the Constitution.

713 See s 19(3) of the Constitution.

714 See the characteristics of good governance in 2.4.4 above.

3.2.2 Constitutional socio-economic rights

Having identified the constitutional socio-economic rights underpinning social justice, this section discusses the possible normative meaning of these rights and their implications for local government authorities. In its textual setting in the Constitution, socio-economic rights may be divided into three categories that may assist in explaining the nature of the obligations imposed on government. Furthermore, this section demonstrates that in addition to specific constitutional obligations imposed by these rights on all spheres of government, municipalities incur additional socio-economic rights obligations from legislation and policies adopted by other spheres of government.

3.2.2.1 Basic socio-economic rights

Some socio-economic rights are referred to as "basic" socio-economic rights because of their textual setting in the Constitution.⁷¹⁵ They are neither phrased as rights of "access" nor subject to the state taking reasonable legislative and other measures to progressively realise them within available resources.⁷¹⁶ The socio-economic rights framed as basic socio-economic rights include the section 29(1) right of everyone to basic education (including adult basic education); the section 28(1)(c) socio-economic rights of children; and the section 35(2)(e) rights of detained persons to adequate accommodation, nutrition, reading material and medical treatment.⁷¹⁷ The textual setting of these rights suggests that they guarantee a basic level of services needed for a dignified survival and place a direct and immediate duty on the state to provide beneficiaries with basic social services.⁷¹⁸

715 See Brand 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa* 4; Liebenberg *Socio-Economic Rights* 81; Stewart 2008 *SAJHR* 473.

716 See Brand 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa* 4; Liebenberg *Socio-Economic Rights* 81; McConnachie and McConnachie 2012 *SALJ* 554-590. For a detailed discussion on the difference between the "right of access to" and the "right to", see *Grootboom*, pars 35-38.

717 See Brand 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa* 4; Van Rensburg 2007 *SAJHR* 1-31; Liebenberg *Socio-Economic Rights* 82.

718 See Stewart 2008 *SAJHR* 473; Pieterse 2007 *Human Rights Quarterly* 806; Jansen van Rensburg 2007 *SAJHR* 2.

In *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others*,⁷¹⁹ the Court confirmed that unlike the socio-economic rights in sections 26(1) and 27(1) of the Constitution, the section 29(1)(a) right to basic education "is immediately realisable."⁷²⁰ This position of the Court informs the argument that the section 29(1)(a) right to basic education affords an unqualified right to adequate school facilities (that are conducive to effective teaching and learning and that do not threaten the health, safety and dignity of the learners and teachers) and not "merely a right to have the state take reasonable steps over time and within its available resources to progressively realise this right."⁷²¹ This right requires education with a substantive content and not merely a place in a school for a prescribed period of time.⁷²² The unqualified right to a basic education does not mean that the state would be required to provide "adequate" facilities immediately, irrespective of budgetary and other resource constraints.⁷²³ Where the state fails to provide adequate facilities, this will be a limitation of the right subject to justification under section 36 of the Constitution.⁷²⁴ This means that basic socio-economic rights do not necessarily translate into an immediate obligation on the state to provide adequate facilities.⁷²⁵

The decision of the Court in *Governing Body of the Juma Masjid Primary School* can be contrasted with its earlier jurisprudence in *Grootboom*, where the Court relied on the reasonableness standard in section 26(2) of the Constitution to assess state compliance with the section 28(1)(c) basic socio-economic rights of children in order to avoid making children "stepping stones to housing for their parents."⁷²⁶ The Court declined to define the substantive content of the section 28(1)(c) rights and held that parents/and the family of the child have the duty and primary responsibility to provide for the socio-economic needs of children under their care and that this duty is only shifted

719 *Governing Body of the Juma Masjid Primary School and Others v Ahmed Asruff Essay NO and Others* 2011 (8) BCLR 761

720 *Governing Body of the Juma Masjid Primary School*, par 37.

721 *McConnachie and McConnachie* 2012 SALJ 554-557.

722 *McConnachie and McConnachie* 2012 SALJ 557.

723 *McConnachie and McConnachie* 2012 SALJ 557.

724 *McConnachie and McConnachie* 2012 SALJ 557; Stewart 2008 SAJHR 485-486.

725 *McConnachie and McConnachie* 2012 SALJ 557.

726 *Grootboom*, pars 70-71; Stewart 2008 SAJHR 473.

to the state where there is lack of family or parental care.⁷²⁷ It has been argued that the current jurisprudence of the Court suggests that only children without parents and children living under extreme poverty may have a direct immediate claim to socio-economic rights.⁷²⁸ As indicated above, the Court has been criticised for its failure to define the substantive content of all categories of socio-economic rights.⁷²⁹

The main advantage basic socio-economic rights have over other textually qualified socio-economic rights is that: they are defined as entitlements to socio-economic goods rather than as entitlements to (reasonable) state action; and secondly, any limitation of these rights should be justified in accordance with section 36 of the Constitution which imposes a higher burden of justification.⁷³⁰

Local government is co-responsible for the realisation of the right to basic education.⁷³¹ However, the Constitution indicates that the competency of municipalities in the area of education is limited to child-care facilities.⁷³² Despite this position, the WPLG (1998) suggests that, as part of their developmental mandate, local government authorities should empower communities by *inter alia*, providing skills and technical training to the poor.⁷³³ Due to the fact that education is not expressly a municipal competency, local government authorities can only play a supportive role by guiding national and provincial governments to equip impoverished people (adults) in communities with the basic skills and capacity needed to provide for their own basic needs.⁷³⁴ As the generic benchmarks indicate, by guiding national and

727 See *Grootboom*, pars 74-79; Stewart 2011 *Diritto Pubblico Comparato Ed Europeo* 1516.

728 See Stewart 2008 *SAJHR* 478.

729 See 3.2.1; Stewart 2008 *SAJHR* 479-483.

730 See McConnachie and McConnachie 2012 *SALJ* 565 and 577; Stewart 2008 *SAJHR* 485-493.

731 See s 4(2)(j) of the *Systems Act*.

732 See Schedules 4B and 5B of the Constitution. However, the Schedules of the Constitution are not the only source of local government's powers and functions. See *Blue Moonlight*, pars 21-29 and 46-67; *R A Le Sueur and Others*, pars 19-29.

733 See "1.3 Democratising development, empowering and redistribution" in "Section B: Developmental Local Government" in the WPLG (1998).

734 See *IDP Guide V* (2001) 48-49.

provincial governments to build local capacity/capabilities for self-sufficiency, municipalities arguably also contribute to the pursuit of social justice.⁷³⁵

3.2.2.2 *Socio-economic rights prohibiting the state or private parties to interfere with the realisation thereof*

Another group of socio-economic rights entrenched in the Constitution are those contained in sections 26(3) and 27(3). They are formulated in a manner that prohibits certain forms of conduct rather than creating rights to particular things.⁷³⁶ Specifically, section 26(3) provides that no one may be evicted from their home or have their home demolished, without an order of court made after consideration of all the relevant circumstances. Although this provision has been enforced by the Court in a number of cases,⁷³⁷ the obligations of municipalities regarding evictions will become clear following the discussion of housing legislation in 3.2.3.3 below. However, it should be noted that the jurisprudence of the Court suggests that it has adopted a strong stance against evictions and in a number of cases, has established that a key factor for determining the fairness of an eviction from private or public property by state authorities is whether there was meaningful engagement.⁷³⁸ This means that even for unlawful occupiers, human rights law provides them with substantive and procedural protection against arbitrary evictions.⁷³⁹ This minimises social hardships and conflicts that usually accompany arbitrary evictions because the need for alternative accommodation is one of the factors considered in the engagement process.⁷⁴⁰

735 See Table 1.

736 See Brand 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa* 4; Liebenberg *Socio-Economic Rights* 82.

737 See the facts of the following cases: *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* 2010 (2) BCLR 99 (CC) at pars 1-10 and 87-91; *Port Elizabeth Municipality*, pars 1-7; *Occupiers of 51 Olivia Road*, pars 1-6.

738 See *Port Elizabeth Municipality*, pars 39-43; *Occupiers of 51 Olivia Road*, pars 5, 14-21. The Court's jurisprudence on meaningful engagement is discussed in detail in 4.2. For a detailed discussion on this subject, see: Chenwi 2011 *SAPL* 128-156; Muller 2011 *Stell Law Rev* 742-758; Holness 2011 *SAPL* 1-36

739 Liebenberg 2012 *African Human Rights Law Journal* 13-14.

740 See Liebenberg 2012 *African Human Rights Law Journal* 16.

On the other hand, section 27(3) provides that no one should be refused emergency medical treatment.⁷⁴¹ In *Soobramoney*, the main question was whether the appellant who suffered from ischaemic heart disease which caused him kidney failure was entitled to renal dialysis treatment at state expense under section 26(3) of the Constitution.⁷⁴² The Court held that patients suffering from terminal illnesses do not fall within the ambit of emergency medical treatment because the occurrence of their illness was not sudden.⁷⁴³ According to the Court, section 26(3) contemplates urgent situations where patients need treatment to stabilise their condition.⁷⁴⁴ The Court held that accepting the appellant's argument would have the consequence of prioritising the treatment of terminal illnesses over other forms of medical care and reducing the resources available to the state for other purposes such as preventive health care.⁷⁴⁵ The Court held that:

Section 27(3) itself is couched in negative terms – it is a right not to be refused emergency medical treatment. The purpose of the right seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities. A person who suffers from a sudden catastrophe which calls for immediate medical attention ... should not be refused ambulance or emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment. What the section requires is that remedial treatment that is necessary and available be given immediately to avert that harm.⁷⁴⁶

Apart from the above pronouncements, the Court did not define the substantive content of the right to emergency medical treatment. It proceeded to explain that right is subject to available resources and explained its self-imposed institutional incapacity to deal with socio-economic policy issues and the need to respect decisions taken in good faith by medical authorities and political organs.⁷⁴⁷ The Court held that the appellant had failed to show that the state was in breach of its constitutional duty.⁷⁴⁸

741 See Brand 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa* 4.

742 See *Soobramoney*, pars 1-12.

743 See *Soobramoney*, pars 12-18.

744 See *Soobramoney*, pars 18.

745 See *Soobramoney*, pars 19.

746 See *Soobramoney*, pars 20.

747 See *Soobramoney*, pars 23-35.

748 See *Soobramoney*, par 36.

As already indicated above, the Court has been criticised for its methodology in *Soobramoney*.⁷⁴⁹ Instead of dealing with the substantive content of the right to emergency medical treatment, the Court engaged in interpretative manoeuvring in order to depoliticise issues of poverty and direct away dependency from the state.⁷⁵⁰ As Liebenberg indicates, a major weakness of the *Soobramoney* judgment is the suggestion that the scope of the right to emergency medical treatment is limited to the denial of access to existing medical facilities.⁷⁵¹ This suggests that no positive duty is imposed on state authorities to expand medical services in areas where there are no medical facilities thereby limiting the potential positive impact of this right.⁷⁵²

However, it should be noted that the rights in sections 26(3) and 27(3) impose an immediate negative duty on local government authorities and other third parties to refrain from infringing them.⁷⁵³ What is required of local government authorities in terms of these rights is to refrain from taking measures that will negatively affect their enjoyment and to also implement measures that will restrict third parties from infringing existing access.

Where local government authorities and third parties comply with the negative duty imposed by sections 26(3) and 27(3) of the Constitution, this could contribute towards the pursuit of social justice since this entails, for example, that people are not deprived enjoyment to existing access to housing and other social services. If government and third parties fail to comply with the negative obligation, it may increase existing inequalities, especially in cases where people are illegally evicted from their homes. Illegal evictions often result in situations where mostly impoverished people are left homeless and without access to basic needs such as water and sanitation.⁷⁵⁴ In their pursuit

749 See 3.2.1.

750 See Brand *Courts, Socio-Economic Rights and Transformative Politics* 141-145. See also: Stewart 2011 *Diritto Pubblico Comparato Ed Europeo* 1513, 1518-1520; Liebenberg *Socio-Economic Rights* 137-138

751 See Liebenberg *Socio-Economic Rights* 138

752 See Liebenberg *Socio-Economic Rights* 138

753 See Pieterse 2007 *Human Rights Quarterly* 806; Liebenberg *Socio-Economic Rights* 82.

754 See *Port Elizabeth Municipality* at pars 1-7 and 18; *Blue Moonlight*, pars 1-9; *Pheko and Others v Ekurhuleni Metropolitan Municipality and Another* 2012 (4) BCLR 388 (CC), pars 2-15.

of social justice, municipalities should minimise socio-economic inequalities and ensure that the basic needs, especially impoverished people are met.⁷⁵⁵

3.2.2.3 *Textually qualified socio-economic rights*

Most of the socio-economic rights in the Constitution are formulated as "access" rights rather than rights to specific social goods.⁷⁵⁶ These include: the section 25(5) right of access to land; the section 26(1) right of everyone to have "access" to adequate housing and the section 27(1) rights of everyone to have "access" to healthcare services, including reproductive healthcare; sufficient food and water; and social security, including social assistance, if they are unable to support themselves or their dependants. Although the nature of the positive duties imposed on the state by these rights have been interpreted by the Court in a number of cases such as *Grootboom*, *Treatment Action Campaign*, and *Mazibuko*, the bedrock of its current socio-economic jurisprudence with regard to these positive duties was laid in *Grootboom*.

Mrs. *Grootboom* and most of the respondents (adults and children) lived under "lamentable conditions" in Wallacedene, an informal settlement on the edge of the Oostenberg municipal area. A quarter of the households of Wallacedene had no income at all, more than two thirds earned less than R500 per month and about half of the population were children. The residents had no water, sewage or refuse removal services and only 5% of the shacks had electricity. The settlement was "partly waterlogged and lies dangerously close to a main thoroughfare."⁷⁵⁷ The respondents had applied for low-cost housing from the municipality and had been on the waiting list for about 7 years. Tired of waiting, and faced with the prospects of remaining in intolerable conditions indefinitely, the respondents moved out of Wallacedene and erected their shacks and shelters on vacant privately-owned land that had been earmarked for low-cost housing, without the consent of the owner. They called their new found home "New Rust".⁷⁵⁸ The owner of "New Rust", after

755 See Table 1 in 2.4.3.

756 See Brand 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa* 4; Liebenberg *Socio-Economic Rights* 80.

757 See par 7 of *Grootboom*.

758 See *Grootboom*, par 8.

obtaining an eviction order, evicted the respondents from his property "prematurely and inhumanely" in the winter of 1999.⁷⁵⁹

Upon eviction, the respondents could not return to their former sites at Wallacedene which had been occupied by strangers. Faced with these events, they went and sheltered on the Wallacedene sports field "under such temporary structures as they could muster." Worried about their intolerable conditions, the respondents launched an urgent application in the Western Cape High Court (Cape Town) to force the municipality and other spheres of government to provide temporary accommodation pending their obtaining permanent accommodation. The High Court held there was no violation of section 26(1) of the Constitution. On appeal, Constitutional Court held that the nationwide housing programme fell short of obligations imposed by section 26(1) and (2) because it failed to recognise that the state must provide relief for those in desperate need but found that there was no violation of the right of children to basic shelter under section 28(1)(c) of the Constitution.⁷⁶⁰

Before the Court, the *amici curiae* argued that all of the respondents (adults and children) were entitled to shelter by virtue of the minimum core obligation incurred by the state in terms of section 26 of the Constitution.⁷⁶¹ The Court was of the view that the rights guaranteed in section 26 needed to be considered in the context of the cluster of socio-economic rights enshrined in the Constitution.⁷⁶² Based on a number of "principled, textual, pragmatic and institutional objections", the Court rejected arguments for a minimum core entitlement to the socio-economic rights in the Constitution.⁷⁶³ The Court rejected the minimum core concept on the basis of the diverse socio-economic and environmental background of the country; the lack of adequate information on which it could determine the minimum core of socio-economic rights; the textual setting of the rights per se; the lack of requisite institutional capacity; and fears that application of this concept will impose unreasonable

759 See *Grootboom*, pars 9-10.

760 See *Grootboom*, pars 66-69.

761 See *Grootboom*, par 18.

762 See *Grootboom*, par 19.

763 For details, see *Grootboom*, pars 21-22; 24-79; Liebenberg *Socio-Economic Rights* 148-151.

demands on the state.⁷⁶⁴ The Court rejected any interpretation of sections 26 and 27 that would create self-standing rights that can be enforced by individuals in view of the considerations in sections 26(2) and 27(2). The Court indicated that in any challenge where it is argued that the state has not complied with its obligations in terms of sections 26(1) and 27(1), the enquiry would focus on whether the legislative and other measures adopted in accordance with sections 26(2) and 27(2) are reasonable.⁷⁶⁵

In *Grootboom*, the Court distinguished the meaning of the right of "access to" housing as opposed to the "right to" housing.⁷⁶⁶ The Court stressed that the textual formulation of the constitutional right of access to housing "recognises that housing entails more than bricks and mortar" and that "it is not only the state that is responsible for the provision of houses, but that other agents" in society, including individuals themselves, must be enabled by legislation and other measures to provide housing.⁷⁶⁷ According to the Court, the textual setting of "access" rights indicate that the obligation of all spheres of government is to create a conducive (legal, socio-economic and political) environment so that individuals can provide for themselves, houses, water, healthcare services, food and social security.⁷⁶⁸ This also means that, legal, administrative, operational and financial obstacles should be examined and where possible, removed promptly so that individuals can access social goods.⁷⁶⁹ However, the Court indicated that, after creating a favourable environment, government must prioritise and satisfy the needs of impoverished and vulnerable individuals who cannot cater for their needs.⁷⁷⁰ According to the Court, the "poor are particularly vulnerable and their needs require special attention."⁷⁷¹ From this explanation of the Court, it appears that except for those in desperate need, the majority of community residents cannot request municipalities to provide them with free potable water, housing

764 See *Grootboom*, pars 21-22; 24-79. The most compelling arguments in favour of the Court adopting the minimum core have been made by Bilchitz. See Bilchitz *SALJ* 484-501; Bilchitz 2003 *SAJHR* 1-26

765 See *Grootboom*, pars 34, 38 and 40-42.

766 See *Grootboom*, par 35-38.

767 See *Grootboom*, par 35.

768 See *Grootboom*, par 35-38.

769 See *Grootboom*, par 45; Olivier *et al Introduction to Social Security* 146-147.

770 See *Grootboom Case*, par 36.

771 See *Grootboom*, par 36.

or health care services on the basis of relevant constitutional rights.⁷⁷² All that is required of municipalities (inclusive of other government spheres) is to adopt and implement legislation/by-laws, plans and policies that will make it easier for individuals to be able to personally access housing, healthcare services and potable water. For example, in the case of housing, this may require that municipalities plan, budget and implement policies that grant housing subsidies to eligible beneficiaries so that they can buy/construct their own houses.

As indicated above, the methodology used by the Court in *Grootboom* was followed in subsequent cases such as *Treatment Action Campaign* and *Mazibuko* and has seriously been criticised by some constitutional law experts.⁷⁷³ The Court's methodology deviates from making any substantive engagement with the content of socio-economic rights. Although "the old styled legal methodology" used by the Court seems to have placed the transformative potential of constitutional socio-economic rights "upon a backburner", the Court ironically acknowledge that the realisation of these rights is a key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to realise their full potential.⁷⁷⁴ Despite their qualification as "access" rights, this category of rights is very important to the pursuit of social justice because their realisation could eradicate extreme forms of inequalities in many areas. For example, their realisation may ensure that the poor have access to land, housing, water, food and social security. It must be stressed that, despite the textual formulation of these rights, in any event, municipalities must prioritise and meet the basic needs of impoverished people when they give effect to socio-economic rights that fall within their exclusive or shared areas of competence.

In addition to the fact that these rights are "access" rights, they are further qualified by the duties set out in sections 26(2) and 27(2) of the Constitution to

772 See Liebenberg *Socio-Economic Rights* 151.

773 For details of some of the criticisms, see 3.2.1 above; Bilchitz *SALJ* 484-501; Bilchitz 2003 *SAJHR* 1-26; Brand 2011 *Stell LR* 614- 638; Liebenberg *Socio-Economic Rights* 163-173; Davis 2010 *SAJHR* 94-97; Stewart 2008 *SAJHR* 472-494.

774 See *Grootboom*, par 23; Davis 2010 *SAJHR* 96-97.

the effect that the "state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights." Some of these qualifications also apply to the section 24(b) constitutional environmental rights and the section 29(b) right to further education.⁷⁷⁵ The term "progressive realisation" indicates that the rights of access to housing, water, food, healthcare services, social security and social assistance as well as further education cannot be realised immediately by government.⁷⁷⁶ What this means is that, individuals cannot be entitled to socio-economic rights such as housing on demand and the obligation of municipalities is to move progressively to facilitate equal access to these rights.⁷⁷⁷ This entails removing legal, operational and administrative obstacles which restrict access to socio-economic rights and the expansion of access to a broader range of people over time.⁷⁷⁸ After removing obstacles that restrict access to socio-economic rights, municipalities must provide the basic needs of those who cannot access socio-economic needs despite the existence of an enabling legal and policy environment.⁷⁷⁹ Progressive realisation also requires that local government authorities should move "expeditiously and effectively" towards meeting the overall objectives of socio-economic rights and must ensure that they take steps to satisfy the basic needs of those in urgent need.⁷⁸⁰ In this regard, any deliberate retrogressive measures in the realisation of socio-economic rights would require the most careful consideration and must be fully justified by municipalities to communities, taking into consideration the totality of the rights provided for in the Bill of

775 See Brand 'Introduction to Socio-Economic Rights in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa* 3-4.

776 *Grootboom*, par 45.

777 *Grootboom*, pars 45 and 95; *Treatment Action Campaign*, pars 32 and 35-36. See De Vos 'The right to housing' in Brand and Heyns *Socio-economic Rights in South Africa* 101. In *Soobramoney v Minister of Health*, Chaskalson writing on behalf of the majority, indicated that it was necessary for government to focus on the larger needs of the majority rather than on the specific needs of particular individuals within society. See *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1698, par 31.

778 *Liebenberg Socio-Economic Rights* 187.

779 See *Grootboom*, par 45; Olivier *et al Introduction to Social Security* 146-147.

780 See *Liebenberg Socio-Economic Rights* 187-189.

Rights and the extent to which available resources were used to the maximum.⁷⁸¹

The formulation of the socio-economic rights in sections 25(5), 26(1) and 27(1) of the Constitution requires that government adopts measures only within the context of available resources.⁷⁸² This means that the rights in question, the content of obligations imposed on local government, the reasonableness of measures adopted to realise these rights as well as the rate at which municipalities achieve desired results is subject to the availability of resources.⁷⁸³ One of the most crucial considerations in realising socio-economic rights is the availability of financial resources in particular.⁷⁸⁴ This implies that in the absence of adequate financial and other resources (such as human and natural resources), socio-economic rights cannot be realised. Where municipalities suffer from acute shortage of financial resources due to the lack of a viable tax base and limited financial support from national and provincial government, they cannot be reasonably expected to promptly provide houses to communities, for example.

The socio-economic rights in the Constitution have been described as "abstract", "empty" or "vague" rights because they do not specify the exact quantity of social goods that people are entitled to, for example.⁷⁸⁵ The nature of these rights therefore, requires that municipalities should adopt "reasonable legislative and other measures" to give them effect.⁷⁸⁶ In view of this, the "reasonableness" review has emerged as the standard used by courts to assess *inter alia*, local government's compliance with the obligations imposed by the socio-economic rights in the Constitution.⁷⁸⁷ Although the term reasonable has not been defined by the Court,⁷⁸⁸ the Court has outlined several conditions that must be satisfied before legislative and other

781 See Liebenberg *Socio-Economic Rights* 188-189. See UN *General Comment No 3: The Nature of State Parties Obligations* (1990), par 9.

782 See ss 26(2) and 27(2) of the Constitution; *Grootboom*, par 46.

783 See *Soobramoney*, par 11; Liebenberg *Socio-Economic Rights* 191-198.

784 *Soobramoney*, par 43; *Grootboom*, par 46.

785 See Pieterse 2007 *Human Rights Quarterly* 798-800; De Vos 1997 *SAJHR* 69.

786 *Grootboom*, pars 53-66; *Mazibuko*, pars 66-67.

787 For a detailed account and analysis of the reasonableness standard, see Liebenberg *Socio-Economic Rights* 131-227.

788 *Iles* 2004 *SAJHR* 455-457.

measures, adopted to realise socio-economic rights could be considered to be reasonable.⁷⁸⁹ Firstly, local government is expected to put in place comprehensive by-laws, policies, plans and programmes to realise socio-economic rights.⁷⁹⁰ It is expected that by-laws, policies, plans and programmes adopted to give effect to socio-economic rights must be reasonable from conception to implementation and must be backed by strong commitment to achieve the intended result.⁷⁹¹

Secondly, in the context of local government, it is expected that a reasonable programme aimed at realising constitutional socio-economic rights should clearly allocate responsibilities and tasks to different municipal departments⁷⁹² and ensure that appropriate financial and human resources are available to execute assigned responsibilities.⁷⁹³ Responsibilities should be allocated after consultation between all municipal departments and must be guided by existing legislation and policies.⁷⁹⁴ However, the national and provincial spheres of government are required to assume a supervisory role and ensure that by-laws, policies, plans, programmes and other strategies adopted by municipalities are adequate to meet the state's socio-economic rights obligations.⁷⁹⁵

Thirdly, measures adopted by local government authorities to realise socio-economic rights must establish coherent programmes, directed towards and capable of progressively realising socio-economic rights for all, within the limit of available resources.⁷⁹⁶ The "contours and content of the measures to be adopted are primarily a matter for the legislature and the executive", who must ensure that such measures are reasonable.⁷⁹⁷ The Court has indicated that one of its main concerns is to ensure that there was meaningful engagement

789 See *Grootboom*, pars 39-44.

790 See *Grootboom*, par 42; Liebenberg *Socio-Economic Rights* 152.

791 See *Grootboom*, par 42; Liebenberg *Socio-Economic Rights* 152.

792 Examples of municipal departments as evident from the governance structure of the Tlokwe City Council include: Corporate Services; Community Services; Finance; Housing and Planning; Economic Development; Infrastructure; and Public Safety. See <http://www.potch.co.za/cindex.htm> [date of use 23 September 2013].

793 See *Grootboom*, par 38; Liebenberg *Socio-Economic Rights* 152.

794 See *Grootboom*, pars 40 and 66.

795 See *Grootboom*, pars 40 and 66.

796 See *Grootboom*, pars 41; Liebenberg *Socio-Economic Rights* 152.

797 See *Grootboom*, par 41. For criticisms of this position, see Iles 2004 *SAJHR* 455; Liebenberg *Socio-Economic Rights* 58, 66-76.

between affected communities and municipalities in the design and implementation of by-laws, plans, programmes and policies that seek to give effect to socio-economic rights.⁷⁹⁸

Fourthly, it is expected that reasonable measures directed towards realising socio-economic rights must take into consideration, the objectives of the Constitution, the nature and prevalence of poverty in South Africa and the capacity of municipal departments responsible for implementing social programmes.⁷⁹⁹ The programmes must be balanced and flexible and must pay attention to short, medium and long term needs. Any social programme that, for example, excludes a significant segment of society, especially impoverished people, cannot be said to be reasonable.⁸⁰⁰ According to the Court, reasonableness must be understood in the context of the objectives and values of the Constitution and the Bill of Rights as a whole.⁸⁰¹ The Court held that:

A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.⁸⁰²

In view of the above, and by way of analogy, any challenge based on sections 24, 25(5), 26, 27 and 29 of the Constitution in which it is argued that local government authorities failed to meet the positive obligations imposed on them by sections 26(2) and 27(2), courts may have to simply decide whether the legislative and other measures adopted are reasonable, taking into consideration available resources.

798 See *Residents of Joe Slovo Community*, pars 237-245; *Doctors for Life International*, pars 123-125, 129-134; *Occupiers of 51 Olivia Road*, pars 14-15. Meaningful engagement is now considered an integral part of the reasonableness standard. See Liebenberg *Socio-Economic Rights* 153-154.

799 See *Grootboom*, par 43; Liebenberg *Socio-Economic Rights* 153.

800 See *Grootboom*, pars 43, 56 and 63; Liebenberg *Socio-Economic Rights* 153.

801 See *Grootboom*, par 83; Liebenberg *Socio-Economic Rights* 153.

802 *Grootboom*, par 41.

In the context of local government, the obligation to adopt "reasonable legislative and other measures" to give effect to constitutional socio-economic rights suggest that municipalities should use their legislative and executive powers to adopt by-laws, policies, plans (such as IDPs), programmes and any other strategy to give effect to socio-economic rights. The measures adopted by a municipality will also be subject to the standard of reasonableness.

3.2.2.4 *The general limitation clause*

In terms of the Constitution, all rights are subject to the general limitation contained in section 36.⁸⁰³ Despite the fact that section 36 of the Constitution limits all rights in the Bill of Rights, it must be noted that, apart from opinions expressed in *Khosa*,⁸⁰⁴ the Court has not applied the section 36 limitations clause in socio-economic rights cases generally.⁸⁰⁵

In *S v Zuma and Others*⁸⁰⁶ the Court indicated that a two-stage analysis is required where the contravention of a fundamental right is to be justified under section 36 of the Constitution.⁸⁰⁷ The first issue to be addressed is whether there has been a contravention of a fundamental right.⁸⁰⁸ At this stage, the onus lies with he who alleges the infringement to prove that an infringement of a right has occurred.⁸⁰⁹ Stewart suggests that at this level of the analysis, the Court should establish the meaning or content of the right in question.⁸¹⁰ The second stage examines whether the contravention or limitation can be

803 Section 36 of the Constitution provides that: "(1)The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights".

804 See Mokgoro J in *Khosa*, pars 83-84. See also Ngcobo J in *Khosa*, pars 105-106, 113-137.

805 Iles 2004 *SAJHR* 448-465. For a detailed interpretation of section 36 of the Constitution and how it could be applied in limiting socio-economic rights cases, see: Stewart 2008 *SAJHR* 485-493.

806 *S v Zuma and Others* 1995 (4) BCLR 401 (CC).

807 See *S v Zuma*, par 21. See also *Moise v Greater Germiston Transitional Local Council* 2001 (8) BCLR 765 (CC) at pars 17-19.

808 See *S v Zuma*, par 21; Stewart 2008 *SAJHR* 474.

809 See *Moise v Greater Germiston*, par 18; Stewart 2008 *SAJHR* 474-475.

810 See Stewart 2008 *SAJHR* 475.

justified in terms of section 36 of the Constitution.⁸¹¹ Here, the burden of justification is shifted to the state or any other party relying on the justification to prove that the law or conduct is justifiable under section 36 of the Constitution.⁸¹²

In *S v Zuma*, the Court indicated that the two-stage approach to justification calls for a broader interpretation of the fundamental right at the first stage of the analysis, taking into consideration the importance of the right in an open and democratic society based on freedom and equality.⁸¹³ On the other hand, the second stage scrutinises the qualification/limitation according to specific criteria of justification.⁸¹⁴ In terms of section 36 of the Constitution, the second stage of justification involves a proportionality analysis which requires that the reasonableness of the limitation must be tested in relation to the nature of the right, the nature and extent of the limitation, the importance of the purpose of the limitation, the relationship between the limitation and the purpose, and whether there are less restrictive means of achieving that purpose.⁸¹⁵ The stringent nature of the justification under section 36 of the Constitution has been acknowledged by the Court as follows:

It is no longer doubted that, once a limitation has been found to exist, the burden of justification under section 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on the factual and/or policy considerations, the party contending for justification must put such material before the court. It is for this reason that the government functionary responsible for legislation that is being challenged on constitutional grounds must be cited as a party. If the government wishes to defend the particular enactment, it then has the opportunity – indeed an obligation – to do so. The obligation includes not only the submission of legal argument but placing before the court the requisite factual material and policy considerations. Therefore, although the burden of justification under section 36 is no ordinary onus, failure by government to submit such data and argument

811 *S v Zuma*, par 21; Stewart 2008 SAJHR 475.

812 *Moise v Greater Germiston*, par 18; Stewart 2008 SAJHR 475.

813 *S v Zuma*, par 21.

814 *S v Zuma*, par 21.

815 See Ngcobo J in *Khosa*, par 114; *Moise v Greater Germiston* pars 17-18; Iles 2004 SAJHR 454. Woolman argues that not all limitation questions will involve a proportionality analysis. See Woolman 1997 SAJHR 108-109.

may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment. Indeed, this is such a case.⁸¹⁶

Despite the stringent requirements of justification called for by section 36 of the Constitution, as shown above, this has not been utilised by the Court thus far in socio-economic rights cases. In terms of sections 26(2) and 27(2) of the Constitution, the state is simply required to justify that the measures adopted are reasonable to progressively realise the rights of access, subject to available resources. However, what is important to note for current purposes is that, like all other rights, socio-economic rights are not absolute. This means that, at times, interested and affected persons cannot always gain access to social goods such as housing when they seek to enforce the right of access to adequate housing. This is because the very nature of this right makes it clear that it can only be realised on a progressive basis and subject to the availability of resources, for example. This means that even after guaranteeing these rights in constitutions, their contribution towards the pursuit of social justice is not instantaneous. They have to be realised to achieve their desired effect.

3.2.3 Socio-economic rights obligations from national legislation and policies

Apart from the specific constitutional obligations imposed on local government to adopt and implement by-laws and other measures such as policies, plans (such as IDPs) and programmes to realise the socio-economic rights in the Constitution, national legislation and policies often impose specific socio-economic rights obligations on municipalities. Often, national legislation and policy may specifically define the quantity or quality of social goods that municipalities should provide to communities or oblige local government authorities to define minimum standards for the provision of social goods and services.⁸¹⁷ This shows that despite its self-governing powers, local government is also "regulated" by other spheres – subject to their monitoring

816 *Moise v Greater Germiston*, par 18. For a critique of the Court's two stage analysis, see Woolman 1997 SAJHR 108-134.

817 The *National Framework for Municipal Indigent Policies* (2006) is a good example. See *National Framework for Municipal Indigent Policies* (2006) 6.

and regulation.⁸¹⁸ Brand argues that the greatest possible advantage of rights in legislation and policies is that, where they create specified quantifiable legal entitlements, it may be easier for them to be claimed by intended beneficiaries and for the courts to uphold such claims.⁸¹⁹ The sub-sections that follow show the extent to which the national sphere of government has further delineated socio-economic rights responsibilities for municipalities through national legislation and policies. This confirms that national and provincial spheres of government can further assign additional powers and functions to municipalities.⁸²⁰ In addition, this also confirms that because the functional areas of local government are not hermetically sealed from those of provincial and national governments, their socio-economic rights areas of legislative and executive competence may overlap in some areas.⁸²¹ However, the discussion is limited to socio-economic rights that relate to the powers and functions of local government. It should equally be stressed that it is impossible within the context of this study to discuss in detail, all legislation and policies that relate to the socio-economic rights obligations of municipalities and therefore, the focus is on those that relate to the core functions of municipalities.

3.2.3.1 *Legislation and policies on the right to water*

The constitutional right of access to sufficient water is given legislative effect by the *Water Services Act*.⁸²² According to section 3(1) of the *Water Services Act*, everyone has the right to have access to basic water supply. The *Water Services Act* defines basic water supply as the prescribed minimum of water supply services needed for the reliable supply of a sufficient quantity and quality of water to both formal and informal households, to support life and personal hygiene.⁸²³ This legislation seems to add value to the constitutional guarantee of a right to sufficient water by indicating that the sufficiency of

818 See Du Plessis 2010 *Stell LR* 272; Steytler and Fessha 'Defining Provincial and Local Government Powers and Functions: The Management of Concurrency' 2.

819 Brand 'Introduction to Socio-Economic Rights' in Brand and Heyns *Socio-Economic Rights in South Africa* 13-14. See pars 47-51 of *Nokotyana Case*.

820 See the discussion in 2.5.4.4.

821 *R A Le Sueur and Another*, pars 20-21; *Maccsand (Pty) Ltd v City of Cape Town*, pars 37-38.

822 *Water Services Act* 108 of 1997.

823 S 1(iii) of *Water Services Act*.

water relates to both quality and quantity. However, this definition does not fully specify the content of the right to basic water supply. The content is further developed in the *Regulations Relating to Compulsory National Standards and Measures to Conserve Water* (2001).⁸²⁴ According to Regulation 3, the minimum standard for basic water supply services is:

- (a) the provision of appropriate education with respect to effective water use; and
- (b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month -
 - (i) at a minimum flow rate of not less than 10 litres per minute;
 - (ii) within 200 metres of a household; and
 - (iii) with an effectiveness such that no consumer is without supply for more than seven full days in any year.

The 25 litres of water per person per day guaranteed by Regulation 3(b) above as the quantity of basic water supply is consistent with the lowest level of water needed to support life (drinking and cooking) in the short term.⁸²⁵ However, it should be understood as the basic floor and not necessarily the sufficient quantity of water required for purposes of the right to water as entrenched in international and regional human rights instruments.⁸²⁶ As suggested by expert evidence and as confirmed by the High Court and Supreme Court of Appeal, the sufficient amount of water for purposes of the section 27(1)(b) constitutional right of water should vary between 42 and 50 litres of water per person per day.⁸²⁷ 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.⁸²⁸ The Court rejected the view that section 27(1) of the Constitution imposes a directly enforceable obligation on

824 *Regulations Relating to Compulsory National Standards and Measures to Conserve Water* (2001) GN R509 of GG 22355 of 8 June 2001.

825 This is the estimate of the World Health Organisation (WHO). See WHO 'Minimum water quantity needed for domestic uses' at 2. Accessed at http://ec.europa.eu/echo/files/evaluation/watsan2005/annex_files/WHO/WHO5%20%20Minimum%20water%20quantity%20needed%20for%20domestic%20use.pdf [date of use 5 March 2013]; Jansen van Rensburg 2008 *Stell LR* 420.

826 Jansen van Rensburg 2008 *Stell LR* 420-422.

827 Stewart and Horsten 2009 *SAPL* 459; Jansen van Rensburg 2008 *Stell LR* 417.

828 *Mazibuko*, par 67.

the state to provide sufficient water on demand to every person.⁸²⁹ The government's *Strategic Framework for Water Services* (2003)⁸³⁰ 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.⁸³¹ Unfortunately, it seems the basic national standards giving effect to the constitutional right of access to sufficient water has not been revised till date.⁸³²

Regulation 4 deals with interruptions in the provision of water services. It requires a water services institution to take steps to ensure that, where the water services usually provided by or on behalf of that water services institution are interrupted for a period of more than 24 hours for reasons other than those contemplated in section 4 of the *Water Services Act*,⁸³³ a consumer has access to alternative water services comprising at least 10 litres of potable water per person per day and sanitation services sufficient to protect health.

829 *Mazibuko*, pars 48-49. For a critique of the Court's methodology in this case, see Stewart 2010 *Penn State International Law Review* 506-508.

830 DWA *Strategic Framework for Water Services: Water is Life, Sanitation is Dignity* (2003).

831 DWA *Strategic Framework for Water Services: Water is Life, Sanitation is Dignity* (2003) 45-47; Heleba 2011 *Law, Democracy and Development* 15.

832 Heleba 2011 *Law, Democracy and Development* 15.

833 S 4 of the *Water Services Act* provides that: "4(1) Water services must be provided in terms of the conditions set by the water services provider. (2) These conditions must – (a) be accessible to the public; (b) accord with conditions for the provision of water services contained in by-laws made by the water services authority having jurisdiction in the area in question; and (c) provide for – (i) the technical conditions of existing or proposed extensions of supply; (ii) the determination and structure of tariffs; (iii) the conditions of payment; (iv) the circumstances under which water services may be limited or discontinued; (v) procedures for limiting or discontinuing water services; (vi) measures to promote water conservation and demand management; (3) Procedures for the limitation or discontinuation of water services must - (a) be fair and equitable; (b) provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations unless – (i) other consumers would be prejudiced; (ii) there is an emergency situation; (iii) or the consumer has interfered with a limited or discontinued service; and (c) not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant authority that he or she is unable to pay for basic services...".

In relation to quality of potable water, Regulation 5 requires water services authorities⁸³⁴ to include a suitable programme for sampling the quality of potable water provided by it to consumers in a Water Services Development Plan (WSDP) - prepared as part of the IDP process.⁸³⁵ The water quality sampling programme must specify the points at which potable water provided to consumers will be sampled, the frequency of sampling, and for which substances and determinants the water will be tested. Furthermore, the results obtained from tested samples must be consistent with the South African Bureau of Standards (SABS) 241: Specifications for Drinking Water or relevant drinking water guidelines published by the Department of Water Affairs and Forestry.⁸³⁶ Regulation 5 further requires that in case sampling indicates that the quality of water poses health risks, the water services institutions must follow the prescribed procedure to protect consumers.⁸³⁷

The North Gauteng High Court recently dealt with the right of the Carolina Community to access water in *Federation for Sustainable Environment and Others v Minister of Water Affairs*.⁸³⁸ The Carolina community suffered from "acid mine water" contamination.⁸³⁹ Leakages from mines contaminated the water resources of this area, depriving about seventeen thousand community residents of regular water supply since the middle of January 2012. In order to alleviate the suffering of community residents in affected areas, water tanks were placed to supply water to residents of Silobela and Carolina at the

834 A water services authority means any municipality, including a district or "rural council" responsible for ensuring access to water services to communities. See "Definitions" in the *Water Services Act*.

835 See s 12-18 of the *Water Services Act* for details. Integrated development planning is discussed in detail in chapter 5.

836 DWAf *Strategic Framework for Water Services: Water is Life, Sanitation is Dignity* (2003) 46.

837 See Regulation 5(4) of Government notice R509 of Gazette No.22355 of 8 June 2001. See further, Regulation 6 on "Control of objectionable substances".

838 See *Federation for Sustainable Environment and Others v Minister of Water Affairs* [2012] ZAGPPHC 128. Although subsequent reference is made to *Federation for Sustainable Environment and Others*, this researcher is aware of other related judgments of the same court. Typing errors in the above judgment were corrected in *Federation for Sustainable Development and Others v Minister of Water Affairs and Others* (2012) North Gauteng High Court, Pretoria, Case No: 35672/12 of 3 August 2012. The full reasons for the judgment of 3 August 2012 were outlined in another judgment on 15 August 2012 - *Federation for Sustainable Development and Others v Minister of Water Affairs and Others* (2012) North Gauteng High Court, Pretoria, Case No: 35672/12 of 15 August 2012.

839 *Federation for Sustainable Environment and Others*, par 4.

beginning of February 2012. From March 2012 until the beginning of May 2012, the system of providing potable water through water tanks proved inadequate. Often, some of the tanks were not refilled while others remained empty. In general, water supply was inadequate and residents had to walk long distances to access potable water from the tanks.⁸⁴⁰

Using the broad constitutional provision on *locus standi*,⁸⁴¹ the applicants (*Federation for Sustainable Environment*⁸⁴² and the *Silobela Concerned Community*)⁸⁴³ brought an urgent application before the North Gauteng High Court against *inter alia*, the Minister of Water Affairs, the Sibanda District Municipality and the Luthuli Local Municipality, arguing that the court should *inter alia*, declare unlawful, the failure of the respondents to provide residents of the Carolina Community with reliable supply of fresh drinking water for an extended period beyond the prescribed seven days period in terms Regulations 3(b) of the Water Regulations.⁸⁴⁴ They further argued that every day that the residents of Carolina did not have access to an effective and reliable supply of potable water constituted a fundamental violation of their constitutional right to have access to sufficient water.⁸⁴⁵ Moreover, the applicants argued that the respondents should consult with residents and other interested and affected parties in order to put in place measures in the medium to long term that would ensure that potable water is provided to the residents as well as mitigate and prevent water pollution by the mines in the area.⁸⁴⁶

The Court acknowledged the duty of the respondents to provide water to residents of the Carolina Community based on the requirements of Regulations 3 of the Water Regulations⁸⁴⁷ and the constitutional and

840 *Federation for Sustainable Environment and Others*, pars 4-5.

841 See s 38 of the Constitution.

842 *Federation for Sustainable Environment is a registered Non Governmental Organization*.

843 *Silobela Concerned Community is a voluntary association of about 150 Silobela community residents. See Federation for Sustainable Environment and Others*, par 3.

844 *Federation for Sustainable Environment and Others*, par 6.

845 *Federation for Sustainable Environment and Others*, par 6.

846 *Federation for Sustainable Environment and Others*, par 7.

847 *Federation for Sustainable Environment and Others*, par 10.

legislative duties jointly imposed on the respondents.⁸⁴⁸ The court dismissed the claim of the (Fifth to the Ninth) respondents that the water crisis was not urgent and highlighted that this problem probably started before February 2012.⁸⁴⁹ The court stressed that if the legacy of apartheid is ever to be eliminated, "Courts, must also strive to encourage the national government and all its structures, to boldly and with haste march towards" realising the transformative objectives of the Constitution.⁸⁵⁰ The court held that because the case relates to the violation or failure to restore to normality the enjoyment of the fundamental constitutional right of access to water, the matter was intrinsically urgent.⁸⁵¹

In relation to the request by applicants that the court should declare unlawful the failure of the respondents to provide access to reliable potable water for more than seven full days as required by Regulations 3(b) of the Water Regulations,⁸⁵² the court held that the respondents could not bear this responsibility alone due to the fact that the applicants had through the burning of water tanks, constrained the respondents' response to the water crisis.⁸⁵³ Based on the constitutional and legislative duties imposed on the respondents, the court held that:

... the municipality must strive to resolve as speedily as possible the water problem in Silobela and Carolina. It must equally have a progressive plan to achieve this objective and must engage and inform the community of the steps and progress of doing so. It is in this context that I understand the reason for the applicants to seek prayers 3 to 6. These respondents are accountable to the communities. In my view, the orders sought are reasonable and should therefore be granted, notwithstanding their fierce objection to these reliefs being granted.⁸⁵⁴

Informed by the above finding, the Court ordered *inter alia* that, the Sixth and Seventh respondents (respectively, the Acting Executive Mayor and Municipal Manager of the Gert Sibanda District Municipality) should:⁸⁵⁵ provide temporary potable water to residents of the Carolina Community within 72

848 *Federation for Sustainable Environment and Others*, pars 10-15.

849 *Federation for Sustainable Environment and Others*, par 16.

850 *Federation for Sustainable Environment and Others*, par 17.

851 *Federation for Sustainable Environment and Others*, par 18.

852 See *Federation for Sustainable Environment and Others*, par 2.

853 *Federation for Sustainable Environment and Others*, par 22.

854 *Federation for Sustainable Environment and Others*, par 24.

855 See *Federation for Sustainable Environment and Others*, par 26.

hours of the Court's order in line with Regulations 3(b) of the Water Regulations; engage actively and meaningfully with applicants regarding the measures being taken to ensure that potable water can be resupplied through the water supply services in the Carolina Community and "where, when, what volume and how regularly temporary water will be made available in the interim"; and to report to the court within one month of its order on the measures been taken to ensure that potable water is supplied to the Carolina Community through the relevant water supply services.⁸⁵⁶ The court granted respondents leave of appeal against its decision without suspending the execution of its orders.⁸⁵⁷ However, it should be noted that although the respondents failed to comply with the timeframes set out in the court orders, the water crisis was apparently resolved without an appeal to a higher court.

It follows from the above paragraphs that legislation, regulations and government's policy on the right of access to sufficient water provides minimum standards for basic water supply. These minimum standards provide the baseline that water services authorities must comply with, while seeking to achieve higher standards in accordance with the obligation to progressively realise socio-economic rights. If the legislation and policies discussed above are fully implemented, they will ensure that even impoverished people have access to at least 25 litres of water a day. Although this quantity of water may be able to satisfy the basic water needs of some community residents, the *Mazibuko* cases demonstrate that in some instances, this quantity will be inadequate in addressing the water needs of impoverished households. Where municipalities do not take the initiative to go beyond the minimum standard, this will diminish the social justice potential of the constitutionally entrenched right of access to sufficient water. This may reinforce rather than address socio-economic inequalities.⁸⁵⁸

856 See *Federation for Sustainable Environment and Others*, par 26.

857 See *Federation for Sustainable Development and Others*, pars 23-24 and 27.

858 See Table 1 in 2.4.3.

3.2.3.2 Legislation and policies on the right to health care

The *National Health Act*⁸⁵⁹ was enacted to *inter alia*, give effect to the health rights in sections 27 and 28(1)(c) of the Constitution.⁸⁶⁰ However, according to section 156(1) and (2) of the Constitution, read with Schedule 4B of the Constitution, the executive and legislative competence of local government is limited to the provision of "municipal health services." According to section 1 of the *National Health Act*, municipal health services include:

(a) water quality monitoring; (b) food control; (c) waste management; (d) health surveillance of premises; (e) surveillance and prevention of communicable diseases, excluding immunisations; (f) vector control; (g) environmental pollution control; (h) disposal of the dead; and (i) chemical safety, but excludes port health, malaria control and control of hazardous substances.

Health services not included in the definition of municipal health services (such as reproductive healthcare and medical treatment for prisoners) only become local government's responsibility if specifically assigned to it by national or provincial government in terms of section 156(4) of the Constitution. This is in line with the principle of allocative subsidiarity which requires national and provincial spheres of government to assign to municipalities any matter which the latter would most effectively administer locally.⁸⁶¹

According to section 32 of the *National Health Act*, it is the responsibility of district and metropolitan municipalities to ensure that appropriate medical health services are effectively and equitably provided in their respective areas. As envisaged in the *White Paper for the Transformation of the Health*

859 *National Health Act* 61 of 2003.

860 The *National Health Act* aims to regulate national health and provide uniformity in respect of health services across the nation by establishing a national system which will *inter alia*: provide to the population of the Republic, in an equitable manner, the best possible health services that available resources can afford; protect, respect, promote and fulfil the rights of the people of South Africa to the progressive realisation of the constitutional right of access to health care services, including reproductive health care; provide the people of South Africa with an environment that is not harmful to their health or well-being; and provide children with basic nutrition and basic health care services contemplated in section 28(1)(c) of the Constitution. See s 2 of the *National Health Act*.

861 See 2.5.4.4.

System in South Africa (1997),⁸⁶² the *National Health Act* established a district health system.⁸⁶³ The district health system has various health districts whose boundaries correspond with the current boundaries of metropolitan and district municipalities.⁸⁶⁴ This implies that each metropolitan or district municipality constitutes a health district. The *National Health Act* requires that the MEC for health should consult with municipal councils to establish a district health council for each district and metropolitan council.⁸⁶⁵ The district health council is required to promote co-operative governance and ensure the co-ordination of planning, budgeting, provisioning and monitoring of all health services that affect residents of the health district.⁸⁶⁶ According to the *White Paper for the Transformation of the Health System in South Africa* (1997), the functions of each health district include: creating awareness on available health services; collaborating with other sectors of government and NGOs in promoting health and ensuring the rendering of health services in the health district; providing for community participation in health promotion and health service provision; ensuring the availability of a full range of primary health care and other relevant health services in communities, clinics, community health centres, district hospitals and other facilities; ensuring primary environmental health services, the promotion and maintenance of environmental hygiene; the prevention of water pollution; enforcement of environmental health legislation regarding sanitation, housing, smoke, noise, food and occupational hygiene, the identification and control of local health hazards; and ensuring that health services are provided to those arrested and charged, in collaboration with the relevant authorities.⁸⁶⁷ However, the *White Paper for the Transformation of the Health System* (1997) indicates that the powers of local government over the range of functions outlined above are subject to negotiations with

862 Department of Health *White Paper for the Transformation of the Health System in South Africa* (1997). See generally par 2.3 "The District Health System".

863 See s 29(1) of *National Health Act*.

864 See s 29(2) of *National Health Act*. See 4.3.2 for categories of municipalities.

865 See s 31(1) of *National Health Act*. For details on the composition of a district health council, see s 31(2) of the *National Health Act*.

866 See s 31(3)(a) and (b) of *National Health Act*.

867 See par 2.3.3 "Functions of a health district" in the *White Paper for the Transformation of the Health System in South Africa* (1997).

provincial governments.⁸⁶⁸ Health managers of all district and metropolitan municipalities are expected to develop and present a district health plan (DHP), as part of the IDP process, to their district health councils.⁸⁶⁹ It is suggested that, where district and metropolitan municipalities comply with their health obligations flowing from the legislation and policy discussed above, this could bring health services closer to communities and facilitate their access to primary healthcare services, especially. This makes it possible for people living in poverty to access their basic healthcare needs.

Although the Court has failed to develop the substantive content of the right of access to healthcare services, it has enforced this right in a number of cases. In *Treatment Action Campaign*, the Court held that the government's policy on the prevention of mother-to-child transmission which restricted the administration of Nevirapine to specific research and training sites was unreasonable because it denied mothers and their newborn children in public hospitals and clinics outside these sites, the opportunity of receive a single dose of Nevirapine at the time of birth of the child.⁸⁷⁰ The Court ordered a review of the policy to make it possible for all public hospitals and clinics that have testing and counselling facilities to prescribe Nevirapine where it is medically indicated. In addition, government was ordered to extend the testing and counselling facilities to hospital and clinics throughout the public health sector beyond the pilot test sites in order to expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.⁸⁷¹

In *B and Others v Minister of Correctional Services and Others*,⁸⁷² the applicants, HIV positive inmates of Pollsmoor Prison, approached the Western Cape High Court, Cape Town, with an application for an order declaring *inter alia* that, they and all HIV positive prisoners with a CD4 count of less than 500/ml should be entitled to receive anti-retroviral medication at State expense as consistent with the section 35(2)(e) constitutional right to

868 See par 2.3.3 "Functions of a health district" in the *White Paper for the Transformation of the Health System in South Africa* (1997).

869 See generally s 33 of *National Health Act*.

870 *Soobramoney*, pars 80-90.

871 *Soobramoney*, par 90.

872 *B and Others v Minister of Correctional Services and Others* 1997(6) BCLR 789 (C).

adequate medical treatment.⁸⁷³ In the absence of "firm guidelines relating to anti-retroviral treatment of HIV prisoners", and informed by the Department of Correctional Services operating principle that, "prisoners should have access to health services and treatment equal to that provided to persons attending health facilities of provincial hospitals", the court expressed its willingness to extend the provincial hospital's policy on the treatment of AIDS patients to prisoners.⁸⁷⁴ The provincial hospital's policy defined the extent to which the provincial executive was committed to realising the right of access to adequate health services for members of the public infected by AIDS. According to this policy, full-blown AIDS persons attending public health facilities qualified for ARV treatment at the State's expense if their CD4 count was less than 200/ml but more than 50/ml.⁸⁷⁵ The court indicated that at the very least, HIV positive prisoners should receive the same treatment enjoyed by members of the public who attend provincial public hospitals.⁸⁷⁶ However, considering that the main issue under contention was on what constitutes "adequate" medical treatment in terms of section 35(2)(e),⁸⁷⁷ the court indicated that it lacked institutional competence to determine for medical doctors and the executive the content of that right.⁸⁷⁸ The court held that since medical experts had translated what constitutes adequate medical treatment for the first and second applicants (including a prison doctor for the second applicant) through prescription, they had given concrete form to the constitutional right of prisoners to adequate medical treatment which it was prepared to uphold.⁸⁷⁹ The court ordered that anti-retroviral treatment should be extended to the first and second applicant because they were entitled to receive it on prescribed medical grounds.⁸⁸⁰

873 *B and Others*, pars 1-4.

874 *B and Others*, par 24.

875 *B and Others*, pars 24-25.

876 *B and Others*, par 24.

877 *B and Others*, par 41.

878 *B and Others*, pars 32 and 34.

879 *B and Others*, pars 31, 35-36 and 60.

880 *B and Others*, pars 60-61.

In *Dudley Lee V Minister of Correctional Service*,⁸⁸¹ the Constitutional Court declared that the respondents were liable for delictual damages suffered by the applicant when he contracted tuberculosis(TB) while in detention because the responsible Correctional Services authorities failed to take preventative and precautionary measures to prevent the applicant from contracting TB as required by Standing Correctional Orders (SCOs).⁸⁸² The SCOs were specifically adopted pursuant to sections 2(a)-(b) and 12 of the Correctional Services Act⁸⁸³ to define health measures that were supposed to be implemented by prison authorities in order to cater for the health of detainees and prevent the spread of contagious diseases amongst inmates.⁸⁸⁴ The Constitutional Court held that non-adherence to the SCOs by responsible authorities violated *inter alia*, the applicants constitutional right to medical treatment, at state expense as required by section 35(2)(e) of the Constitution.⁸⁸⁵

Although the above cases may be useful in indicating the willingness of the Court to enforce the right to healthcare services, they do not add any value to the substantive content of the right of access to health care. This notwithstanding, where metropolitan and district municipalities are able to perform their statutory duties relating to health districts under their jurisdictions, this could promote the delivery of health services to communities. The delivery of district health services to communities and by implication the realisation of the right of access to healthcare services could enhance the contribution of municipalities towards the pursuit of justice. This is due to the fact the realisation of the right to health is closely linked to the realisation of other human rights (including) socio-economic rights.⁸⁸⁶ In addition, it is established that the realisation of the right of access to

881 *Dudley Lee v Minister of Correctional Services* 2013 (2) BCLR 129 (CC). For details on the facts of this Case, see *Dudley Lee*, pars 1-10.

882 See *Dudley Lee*, pars 37, 59-71 and 77.

883 *Correctional Service Act* 111 of 1998. S 11 of the *Correctional Service Act* defines the obligations of the Department of Correctional Services re the rights of prisoners to receive adequate health care services.

884 For details on relevant provisions of the SCOs, see *Dudley Lee*, par 9.

885 See *Dudley Lee*, pars 61-65.

886 See UN General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) par 3.

healthcare services plays an important role in the fight against poverty.⁸⁸⁷ Without a healthy life, the ability of people to actively exercise their public participation rights, further develop their capacity and provide their basic needs is seriously constrained, for example.⁸⁸⁸ These can cumulatively reinforce rather than address socio-economic inequalities. Therefore, non compliance with the obligations imposed on municipalities to contribute towards the realisation of the right of access to health care services is inimical to the pursuit of social justice.

3.2.3.3 *Legislation and policies on the right to housing*

According to Schedule 4A of the Constitution, the approval and management of housing construction is a function that falls under concurrent provincial and national legislative competence. However, this function has been delegated to some municipalities with the necessary resources to speed up housing delivery.⁸⁸⁹ There are several legislation and policies that provide specific responsibilities for municipalities in order to facilitate the relation to the right of access to adequate housing. According to the *White Paper on Housing*, housing can be defined as a variety of processes through which habitable, stable and sustainable public and private residential environments are created for viable households and communities.⁸⁹⁰ Just like in *Grootboom*, this definition recognises that adequate housing "entails more than bricks and mortar".⁸⁹¹

The *White Paper on Housing* (1994) acknowledged the potential role of municipalities in housing development as follows:

The physical processes of planning and housing is very much a local community matter. The role of metropolitan and especially local government in enabling, promoting and facilitating the provision of

887 See Wolfe 2011 *Focus* 25-30; Grant *Health and Poverty Linkages: Perspectives of the Chronically Poor* (2005); Strauss and Horsten 2013 *PER* 336-392.

888 See Table 1 in 2.4.3.

889 See www.info.gov.za/speech/DynamicAction?pageid=461&sid=16739&tid=29399 [date of use 21 May 2012].

890 See "4.2 National Housing Vision" in Department of Housing (now Human Settlement) White Paper: A New Housing Policy and Strategy for South Africa (1994).

891 See *Grootboom*, par 35. This explains why the definition of "housing development" in the *Housing Act* 107 of 1997 includes access to potable water, adequate sanitary facilities and domestic energy (electricity) supply.

housing to all segments of the population in areas under their jurisdiction, can therefore not be overemphasised. The absence of legitimate, functional and viable local authority structures will jeopardise both the pace and quality of implementation of housing programmes.⁸⁹²

In view of the above acknowledgment, the *White Paper on Housing* (1994) envisaged that municipalities will perform the following housing functions: set housing delivery goals; identify and designate land for housing purposes; regulate safety and health standards in housing provision; create and maintain a public environment conducive to development and healthy communities; mediate conflicts in the housing development process; provide facilitative support to housing delivery agencies; plan, fund and provide bulk engineering services; provide community and recreational activities; plan and regulate the use of land in areas under their jurisdiction.⁸⁹³

The *Housing Act* requires all municipalities to contribute to the realisation of the right of access to adequate housing. Section 9 of the *Housing Act* provides that:

- (1) Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to (a) ensure that – (i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis ... (b) set housing delivery goals in respect of its area of jurisdiction (c) identify and designate land for housing development (d) create and maintain a public environment conducive to housing development which is financially and socially viable (e) promote the resolution of housing conflicts arising from the housing development process (f) initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction.

The above provision makes it clear that the *Housing Act* imposes an obligation on municipalities to do everything possible, within the framework of national and provincial legislation and policy, to ensure that inhabitants within their jurisdictions have access to adequate housing.⁸⁹⁴ According to the

892 See '5.2.3 Role of Local, Rural and Metropolitan Government' in Department of Housing (now Human Settlement) White Paper: A New Housing Policy and Strategy for South Africa (1994).

893 See '5.2.3 Role of Local, Rural and Metropolitan Government' in Department of Housing (now Human Settlement) White Paper: A New Housing Policy and Strategy for South Africa (1994).

894 See *Blue Moonlight Properties*, par 24.

National Housing Code, the above provision requires that municipal planning should include a local housing strategy and delivery targets.⁸⁹⁵ The *National Housing Programme for Housing Chapters of Integrated Development Plans*⁸⁹⁶ seeks to define the scope of the housing planning component of the IDP in relation to legislation and policy and to clarify the roles and responsibilities of relevant stakeholders in the IDP process, amongst others.⁸⁹⁷ Under this programme, municipalities are supposed to be provided grants in order to develop realistic and strategic "Housing Chapters" - which reflects their housing needs and priorities - during the IDP process that are linked to Provincial Housing Sector Plans.⁸⁹⁸ Under this ambitious programme, assistance is supposed to be provided to all municipalities that do not have sufficient financial and human resources to undertake the development of Housing Chapters in the IDP. The nature of financial assistance depends on the type of support required/applied for.⁸⁹⁹ Once the Housing Chapter is approved by the municipal council (after consultation with relevant sector departments and the public), the mayor of the relevant municipality is expected to enter into an agreement with the Provincial MEC to secure funding for the implementation of the projects.⁹⁰⁰ The approved Housing Chapter is consolidated into the sector plan of the IDP such as the spatial development framework.⁹⁰¹ Housing projects in the IDP approved on the basis of a municipality's Housing Chapter are funded from budgets of the National Housing Programmes.⁹⁰²

895 See "Part 3 Integrated Development Plans Part 1" of the *National Housing Code* (2009) 7.

896 See "Part 3 Integrated Development Plans Part 1" of the *National Housing Code* (2009) 9.

897 See "Part 3 Integrated Development Plans Part 1" of the *National Housing Code* (2009) 11.

898 See "Part 3 Integrated Development Plans Part 1" of the *National Housing Code* (2009) 12.

899 See "Part 3 Integrated Development Plans Part 1" of the *National Housing Code* (2009) 16-17.

900 For details of the content of the Memorandum of Understanding, see "Part 3 Integrated Development Plans Part 1" of the *National Housing Code* (2009) 21.

901 See "Part 3 Integrated Development Plans Part 2" of the *National Housing Code* (2009) 16.

902 For details of the content of the Memorandum of Understanding, see "Part 3 Integrated Development Plans Part 1" of the *National Housing Code* (2009) 21.

The *Prevention of Illegal Eviction From and Unlawful Occupation of Land Act*⁹⁰³ which gives effect to section 26(3) of the Constitution is applicable to municipalities. The PIE Act prohibits unlawful evictions of occupiers from state or private property without a court order.⁹⁰⁴ Under this Act, a court can only issue an order for eviction if upon considering all the relevant circumstances, it is of the opinion that it is just and equitable to do so.⁹⁰⁵ In the same vein, the *Extension of Security of Tenure Act*⁹⁰⁶ specifically seeks to prevent arbitrary evictions of farm workers by farm/land owners. Just like the PIE Act, the *Extension of Security of Tenure Act* provides that farm residents can only be evicted subject to a court order.⁹⁰⁷

The PIE Act requires that where a private person has instituted eviction proceedings against unlawful occupiers, the municipality within which the land is situated "may" appoint experts in dispute resolution to facilitate meetings of interested parties and attempt to settle any dispute between them.⁹⁰⁸ In a number of cases, the Court has established that a key factor for determining the fairness of an eviction of persons from private or public property by state authorities is whether they have meaningfully engaged with each other.⁹⁰⁹ This means that even for unlawful occupiers, human rights law provides them with substantive and procedural protection against arbitrary evictions.⁹¹⁰

In *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others*,⁹¹¹ a majority of the Court found section 16 of the *Slums Act*, enacted by the Kwazulu-Natal provincial legislature,⁹¹² to be in violation of the obligations imposed by section 26 of the

903 *Prevention of Illegal Eviction From and Unlawful Occupation of Land Act* 19 of 1998. Hereafter, PIE Act (1998).

904 See s 8(1) of PIE Act (1998).

905 See ss 4(6)-(7) and 6 of PIE Act (1998) for details. For an extensive discussion on this topic, see Muller *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law*.

906 *The Extension of Security of Tenure Act* 62 of 1997.

907 See ss 8 and 9 of the *Extension of Security of Tenure Act*.

908 See s 7 of PIE Act (1998) for details.

909 See *Port Elizabeth Municipality*, pars 39-43; *Occupiers of 51 Olivia Road*, pars 5, 14-21. The Court's jurisprudence on meaningful engagement is discussed in detail in 4.2.

910 Liebenberg 2012 *African Human Rights Law Journal* 13-14.

911 *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* 2010 (2) BCLR 99 (CC). For the facts of this case, see pars 1-10 and 87-91.

912 The details of s 16 of the *Slums Act* are outlined in par 103 of *Abahlali Basemjondolo*.

Constitution.⁹¹³ This is because under section 16 of the *Slum Act*, the MEC could, by notice order any municipality or private landowner to evict unlawful occupiers of slums without due consideration of the requirement of justice and fairness prescribed by the PIE Act.⁹¹⁴ The Court held that section 16 is at odds with section 26(2) of the Constitution because it requires a municipality or owner of private property to "proceed with the eviction of unlawful occupiers even if the PIE Act cannot be complied with."⁹¹⁵ The Court further reasoned that:

Related to the coercive nature of section 16 is the fact that the PIE Act does not compel any owner or municipality to evict unlawful occupiers. Section 16 does. I am unable to support the reasoning that says that whilst the PIE Act does not compel eviction proceedings, it does not prohibit legislation providing for the kind of compulsion required by section 16. In my view, to the extent that section 16 eliminates discretion on the part of the owner or municipality, it erodes and considerably undermines the protection against the arbitrary institution of eviction proceedings. It renders those who are unlawful occupiers and who are invariably found in slums and informal settlements liable to face eviction proceedings which, but for the provision of section 16, would not have occurred.⁹¹⁶

Liebenberg indicates that all state action in relation to eviction of people from public or private land must conform to the standard of reasonableness developed by the Court.⁹¹⁷ It is argued that the requirement for meaningful engagement⁹¹⁸ in eviction cases shows equal respect and recognition to people facing poverty, and where implemented in good faith, could contribute to the building of solidarity and the capacity needed to participate in decision-making processes.

It is also important to note that in terms of the National Housing Code (2009), municipalities have an obligation to provide housing assistance to people who find themselves in emergency situations for reasons beyond their control.⁹¹⁹ This includes people whose existing shelter has been destroyed or damaged; those whose prevailing situation poses an immediate threat to their life, health

913 See *Abahlali Basemjondolo*, pars 102-123.

914 See *Abahlali Basemjondolo*, pars 110-111.

915 See *Abahlali Basemjondolo*, pars 111.

916 See *Abahlali Basemjondolo*, pars 112.

917 Liebenberg 2012 *African Human Rights Law Journal* 13.

918 See 4.2 on meaningful engagement.

919 See "Part 3 Emergency Housing Programme" in the *National Housing Code* (2009) 9.

and safety; or those who have been evicted or face the threat of imminent eviction.⁹²⁰ Municipalities receive grants from provincial government to provide emergency housing assistance.⁹²¹

In *Blue Moonlight Properties*,⁹²² the Constitutional Court explained the housing responsibilities of municipalities. The Court noted that section 9 of the *Housing Act* obliges municipalities, as part of the process of integrated development planning, to take "*all reasonable and necessary steps* within the context of national and provincial housing legislation and policy" to ensure, *inter alia*, that the inhabitants of their respective areas have access to adequate housing.⁹²³ This suggests that subject to national and provincial housing legislation and policies, municipalities could adopt by-laws on housing issues. The Court stressed that as per its earlier jurisprudence in *Grootboom*, the duty to provide housing under section 26 of the Constitution falls on all three spheres of government, which must operate in accordance with the principles of co-operative government.⁹²⁴ Contrary to arguments raised by the City that the provision of housing was a primary responsibility for national and provincial government which did not place an obligation on municipalities to self-fund housing projects in especially emergency situations,⁹²⁵ the Court held, based on the proper interpretation of the constitutional, legislative and policy framework on the right of access to adequate housing, as well as its earlier jurisprudence in *Grootboom*, that, there is no basis for City's argument.⁹²⁶ The Court held that, the assertion that local government is not entitled to self-fund housing projects in the realm of emergency situations in which it is best situated to react to, and to engage with and prospectively plan around the emergency housing needs of local communities is based on a misconception of its jurisprudence in *Grootboom*.⁹²⁷ The Court held that based on the powers and functions of

920 See "Part 3 Emergency Housing Programme" in the *National Housing Code* (2009) 9.

921 See "Part 3 Emergency Housing Programme" in the *National Housing Code* (2009) 15-17.

922 For details of the facts, see *Blue Moonlight Properties*, pars 1-9.

923 *Blue Moonlight Properties*, par 24.

924 *Blue Moonlight Properties*, par 42.

925 See *Blue Moonlight Properties*, pars 47-53.

926 See *Blue Moonlight Properties*, pars 53-57 at 57.

927 See *Blue Moonlight Properties*, par 57.

municipalities, including those relating to housing as spelt out by the Constitution, relevant legislation and policies, it would hardly be possible for the City to carry out its constitutional and legislative obligations without being entitled or obliged to fund itself in the sphere of emergency housing.⁹²⁸ The Court also held that the City's argument that it would have acted *ultra-vires* by responding to the emergency housing needs of the occupiers without an express legislative obligation was unpersuasive.⁹²⁹ Based on an interpretation of relevant provisions of the National Housing Code (2009), the Court held that:

Besides its entitlement to approach the province for assistance, the City has both the power and the duty to finance its own emergency housing scheme. Local government must first consider whether it is able to address an emergency housing situation out of its own means. The right to apply to the province for funds does not preclude this. The City has a duty to plan and budget proactively for situations like that of the Occupiers.⁹³⁰

Based on an analysis of the relevant policy and legal framework on housing, the Court concluded that the City's interpretation of Chapter 12 of the Housing Code (2009) as neither permitting nor obliging them to take measures to provide emergency accommodation, after having been refused financial assistance by the province, is incorrect and that the City is obliged to provide temporary accommodation.⁹³¹ It declared the City's housing policy unconstitutional in that it excluded people evicted by a private landowner from its temporary housing programme, as opposed to those relocated by the City.⁹³²

It worth noting that, often, municipalities fail to implement court orders that obliged them to respond to their housing obligations. *Mchunu and Others v Executive Mayor, Ethekwini Municipality and Others*⁹³³ is a good example. The case concerns 37 families currently living in deplorable conditions in a

928 See *Blue Moonlight Properties*, par 53.

929 For details, see *Blue Moonlight Properties*, pars 58-67.

930 See *Blue Moonlight Properties*, par 67.

931 For details, see *Blue Moonlight Properties*, par 96.

932 For details, see *Blue Moonlight Properties*, par 97.

933 *Mchunu and Others v Executive Mayor, Ethekwini Municipality and Others* 2013 (1) SA 555 (KZD)

transit camp in the area of Ethekewini Kwa-Zulu Natal.⁹³⁴ In March 2009 the Durban High court (case number 16732/2008 on 6 March 2009)⁹³⁵ gave two simultaneous orders. The one, granted an eviction order to the Department of Transport to allow for the construction of a road ahead of the 2010 soccer world cup. In terms of this order, the residents of Siyanda informal settlement were reallocated to the Richmond transit camp. The other order, instructed the Ethekewini Municipality to reallocate these families and provide them with low-cost housing by 7 March 2010.⁹³⁶ The Ethekewini municipality failed to comply with the court order. On 17 September 2012, these families, with the help of pro-bono public interest litigation NGO returned to court.⁹³⁷ In *Mchunu and Others v Executive Mayor*, the court remarked that the conditions in the transit camp are "unsafe and unhygienic" and the situation should be addressed urgently. The court therefore, ordered the Executive Mayor, the Municipal Manager and the Director of Housing as functionaries of the municipality to take all the necessary steps, within three months, to provide the families living in the transit-camp with permanent housing.⁹³⁸ This case demonstrates the willingness of the court to make functionaries of the Ethekewini Municipality directly accountable for the socio-economic rights obligations of local government. Nevertheless, the period of three months ordered by the court expired and the families are still living in the transit camp. The Ethekewini Municipality and its functionaries have failed to implement the court order obliging them to provide these families with housing.

There are other housing statutes and policies that cannot be discussed in detail within the context of this research.⁹³⁹ These include: the *Social Housing Act*⁹⁴⁰ which specifically seeks to address the housing needs of low to

934 *Mchunu and Others v Executive Mayor*, pars 3-5.

935 This case could not be obtained through the internet.

936 *Mchunu and Others v Executive Mayor*, par 1.

937 *Mchunu and Others v Executive Mayor*, par 5.

938 *Mchunu and Others v Executive Mayor*, pars 6-21.

939 For a detailed discussion on existing housing policies and legislation, see: Tissington *Towards An SER Matrix: Monitoring the Progressive Realisation of Socio-Economic Rights in South Africa* (2010) ; Tissington *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* (2011).

940 See *Social Housing Act* 16 of 2008.

medium income households;⁹⁴¹ the *Rental Housing Act*⁹⁴² which seeks to promote the provision of rental housing;⁹⁴³ and the *Upgrading of Informal Settlement Programme* (2009) whose primary objective is to cater for the special development requirements of informal settlements.⁹⁴⁴

Legislation and policies assign the important role of satisfying the housing needs of communities on municipalities. The numerous housing requirements on municipalities confirm the view canvassed by De Visser that, for local government to effectively fulfil its expanded developmental mandate, municipalities (especially metros) should be given express constitutional competence over housing delivery.⁹⁴⁵ In executing their housing obligations, municipalities must provide at least temporary accommodation to those in emergency situations and even the illegal occupiers that they are about to evict. From the Court's jurisprudence, it is clear that even illegal occupiers cannot be evicted without meaningful engagement and the provision of alternative temporary accommodation. It was argued that the requirement for meaningful engagement in eviction cases shows equal respect and recognition to people facing poverty, and where undertaken in good faith, contributes to the building of solidarity and the capacity needed to participate in decision-making processes.⁹⁴⁶ By providing housing to all categories of people, municipalities contribute towards reducing socio-economic inequalities.⁹⁴⁷ The requirement that municipalities should provide alternative temporary accommodation to occupiers before they are evicted prevents conflicts over limited resources. A combination of these factors shows that by complying with their legislative and policy housing obligations, municipalities contribute towards the pursuit of social justice.

941 See s 5 of the *Social Housing Act* which obliges local government to facilitate social housing delivery in its jurisdiction through the IDP process.

942 See *Rental Housing Act* 50 of 1999 as amended by *Rental Housing Act* 43 of 2007.

943 See Preamble to *Rental Housing Act*.

944 See "Part 3 Upgrading Informal Settlement" in the *National Housing Code* (2009).

945 Christmas and De Visser 2009 *CJLG* 111-118; De Visser 2009 *CJLG* 20-21.

946 See Table 1 in 2.4.3.

947 See Table 1 in 2.4.3.

3.2.3.4 Legislation and policies on the environmental right

The Court is yet to define the normative content of the section 24 constitutional environmental right. However, Du Plessis argues that the notions of intergenerational equity and sustainable development provide a useful start to its understanding.⁹⁴⁸ She indicates that section 24(b) of the Constitution guarantees intergenerational environmental protection to the people of South Africa while imposing an obligation on the state to adopt and implement *inter alia*, legislation and policies that will secure sustainable development.⁹⁴⁹ As evident from the discussion in chapter 2, sustainable development seeks to ensure the effective management of the environment in the process of socio-economic growth in order to *inter alia*, redistribute resources that will ensure the eradication of extreme socio-economic inequalities by specifically meeting the basic needs of impoverished persons such as water, sanitation, food, energy, and ensuring an improved standard of living, including health for everyone.⁹⁵⁰ To Du Plessis, sustainable development is mainly about eradicating poverty and inequalities in a manner that allows for the rebuilding of ecosystems and the natural resources that human beings depend on for their collective survival.⁹⁵¹ On the other hand, intergenerational equity emphasises the need to manage the country's natural resource base in such a way that future generations will be able to have equal access thereto.⁹⁵² This seeks to ensure that prudent management of the environment continues *ad infinitum* as today's generation bequeaths the obligation to secure sustainable development through legislative and other measures to the next generation.

While section 24 of the Constitution guarantees the right to sustainable development and intergenerational environmental equity, it does not expressly guarantee impoverished persons especially, the right to food, water, health

948 See Du Plessis 2011 SAJHR 290.

949 See Du Plessis 2011 SAJHR 290.

950 See 2.5.4.2 and 2.5.4.5; Urquhart and Atkinson *A Pathway to Sustainability: Local Agenda 21 in South Africa* 20-21; Burns and Hattingh 2007 SAJELP 3-5; De Visser "Institutional Framework for Developmental Local Government: Making Good on the Promise of Development" 2-3.

951 Du Plessis 2011 SAJHR 279.

952 Du Plessis 2011 SAJHR 290.

care, social security and housing. The right of access to health care, food, water, social security and housing are expressly guaranteed in sections 26(1) and 27(1) of the Constitution subject to the availability of resources. Due to the fact that the realisation of the sections 26(1) and 27(1) rights are entirely dependent on the availability of resources, it becomes obvious that a strong relationship exist between the meaning and right to sustainable development embedded in section 24(b) and the explicit reference to "health" and "well-being" in section 24(a) of the Constitution, respectively. This point is clearly articulated by Du Plessis when she argues that:

Although section 24 is cast in broadly-construed terms, it protects their right to live a healthy life, to enjoy well-being and to have their own and their children's natural environment protected. Thus, s 24 indirectly relates to the basic services associated with these entitlements. However, it also refers to a broader spectrum of other basic needs in so far as it expressly refers to sustainable development...health...and well-being...These notions are wide open to (creative) interpretation.⁹⁵³

Based on the phraseology of the section 24 constitutional environmental right, and in line with the views in the above extract, Du Plessis argues that in addition to sustainable development, there are three additional objectives of the constitutional environmental right: to protect the "environment", to promote human "health" and "well-being".⁹⁵⁴

Firstly, because the environment in the South African context is conceived in anthropocentric terms, the section 24 environmental right seeks to ensure that the inter-relationship between people and the natural environment is such that the environment is not and does not become harmful to people's health or well-being.⁹⁵⁵ This inter-relationship must cater for people's dependence on the environment for resources such as drinking water, food, and air to breathe.⁹⁵⁶ In this regard, she argues that what is perceived as "environmental quality" goes beyond the conservation of natural resources and has much to do with people's health, access to water and sanitation, as well as land use.⁹⁵⁷ In addition, she maintains that:

953 See Du Plessis 2011 *SAJHR* 291.

954 See Du Plessis 2011 27 *SAJHR* 292-297.

955 See Du Plessis 2011 27 *SAJHR* 293.

956 See Du Plessis 2011 27 *SAJHR* 293.

957 See Du Plessis 2011 27 *SAJHR* 285.

...future growth and the improvement of the quality of life depend on the quality of people's environment and their ability to live healthy lives, whilst the reduction of poverty in the country's urban and rural areas is a crucial precondition for reducing environmental problems such as soil and water pollution and other environmentally unsustainable practices.⁹⁵⁸

In addition, the section 24 environmental right seeks to ensure that the natural environment is managed in such a way that enables people to live and work under conditions that will not harm their mental and physical health.⁹⁵⁹ It has been stressed that health "is a fundamental human right indispensable for the exercise of other human rights."⁹⁶⁰ The human right to health has been interpreted to include food, clothing, housing, medical care and other social services.⁹⁶¹ This means that, addressing conditions that negatively affect human health, which is an objective of the constitutional environmental right, has the potential to foster the realisation of other socio-economic rights. The environment is an "underlying determinant" of the right to health and other associated socio-economic rights.⁹⁶² Based on this theoretical framework, it becomes practically possible to locate a right to health arising from the section 24 environmental right. However, this possibility is diminished by the Court's jurisprudence relating to the principle of constitutional subsidiarity, which demonstrates that the Court will not be prepared to enforce the section 27(1) health rights through the section 24 environmental right, for example.⁹⁶³ The same can also be said of the rights of access to sufficient water and food.⁹⁶⁴ The rights to water and food will be compromised if for example, ground water pollution is not prevented or effectively managed. This possibility is clearly illustrated in the recent Carolina cases where acid mine drainage polluted the water resources of the Carolina community, thereby depriving residents of

958 See Du Plessis 2011 27 *SAJHR* 285.

959 See Du Plessis 2011 27 *SAJHR* 293-294. See Horsten, Janse Van Rensburg, Olivier and Mpedi "Socio-Economic Rights" in Govindjee and Vrancken *Introduction to Human Rights Law* 170.

960 See par 1 of CESCR General Comment No.14: The Right to the Highest Attainable Standard of Health (2000).

961 See par 2 of CESCR General Comment No.14: The Right to the Highest Attainable Standard of Health (2000). For details of the normative content of the right to health, see pars 8-13 of CESCR General Comment No 14.

962 See par 11 of CESCR General Comment No.14: The Right to the Highest Attainable Standard of Health (2000).

963 See *Mazibuko*, pars 73-74

964 See Du Plessis 2011 *SAJHR* 294; Kotze 2009 1 *Finnish Environmental Law Report* 74-75.

potable water.⁹⁶⁵ This point further reinforces the need to fulfill the right of access to sanitation. Without fulfilling this right, there is the danger that, open defecation can result to underground water pollution with multiple effects.⁹⁶⁶ In general, protection from increasingly life-threatening environmental trends such as global warming, unacceptable levels of carbon dioxide emissions, industrial discharge of toxic waste, floods, deforestation and desertification, all fall within the ambit of the protection accorded the people of South Africa by the section 24 environmental right. Ineffective legal and other responses to these life-threatening environmental trends could potentially affect peoples' health negatively through the spread of diseases, for example.⁹⁶⁷

Furthermore, an objective of the constitutional environmental right, evident from section 24(a), is the promotion of peoples' "well-being".⁹⁶⁸ Although well-being is defined as "general health and happiness",⁹⁶⁹ Du Plessis argues that this provision obliges the state to protect peoples' "welfare", in a manner that relates to environmental interests but which does not obviously have health implications.⁹⁷⁰ The reference to "well-being" would then suggest that, in this context, section 24(a) of the Constitution seeks to protect aesthetic interests which people may hold in the environment.⁹⁷¹ Such aesthetic interests may also embrace a sense of spiritual and psychological well-being. In this context, it has been suggested that such an entitlement does not directly embrace other socio-economic rights.⁹⁷²

Due to its strong inclination to the principle of sustainable development, section 24 of the Constitution indicates that one of its objectives is to ensure the balancing of socio-economic and environmental interests in development planning processes. These interests include human needs such as food, water, sanitation and energy, which must be satisfied in the short, medium to

965 See *Federation for Sustainable Environment and Others*.

966 Bilchitz 2010 *SALJ* 591-605 at 591.

967 See Centre for International Governance Innovation 'Climate Change in Africa: Adaptation, mitigation and governance challenges' (2009) 16-20.

968 For a critical engagement with the implications of the notion of well-being, see Du Plessis 2011 *SAJHR* 295-297.

969 Hornsby *Oxford Advanced Learner's Dictionary* 1356.

970 Du Plessis 2011 *SAJHR* 295.

971 Du Plessis 2011 *SAJHR* 295.

972 Du Plessis 2011 *SAJHR* 295.

long term.⁹⁷³ For example, in terms of development planning, every municipality is required by section 9(1) of the *Housing Act*, as part of its integrated development planning and within national and provincial housing legislation and policy, to take reasonable and necessary steps to *inter alia*, prevent or remove conditions not conducive to the health and safety of inhabitants within its jurisdiction.⁹⁷⁴ This is consistent, for example, with section 24(a) of the Constitution which provides the right to an environment not harmful to health and well being and the section 24(b)(i) constitutional right to have an environment protected from pollution.

Despite the importance of environmental considerations to realising certain socio-economic rights as highlighted above, it is only recently that environmental protection has emerged as a fundamental consideration in socio-economic rights discourse in South Africa.⁹⁷⁵ Due to the fundamental role that effective environmental management can contribute towards poverty alleviation and in securing for all members of society a basic quality of life, like all other socio-economic rights, it has been argued that South Africa's section 24 environmental rights should be viewed as a socio-economic right.⁹⁷⁶ Therefore, the section 24 constitutional environmental right provides entitlements that go beyond what is needed for biological survival⁹⁷⁷ and is central to realising the objectives of the Constitution to improve the lives of all and attain social justice.⁹⁷⁸ This is attributed to the fact that, certain elements of the broad section 27 rights to health, access to sufficient quantity and quality of water and food, as well as the section 26 right of access to

973 See Du Plessis 2011 *SAJHR* 298.

974 See *Nokotyana and Others*, par 28.

975 This argument has been forcefully made by Du Plessis AA. See Du Plessis 2011 *SAJHR* 279-307. See also Manda 'Introducing Socio-Economic Rights' in Liebenberg and Pillay *Socio-Economic Rights in South Africa* 9-40 at 23. Although some South African scholars have discussed the section 24 environmental right under "Socio-economic rights", they do not offer any motivation for this right to be considered as a socio-economic right or on the role it can play in fostering the realisation of traditionally perceived socio-economic rights. See for example, Horsten, Janse Van Rensburg, Olivier and Mpedi "Socio-Economic Rights" in Govindjee and Vrancken *Introduction to Human Rights Law* 170-171; Nichol and Winstanley "Environmental Rights" in Liebenberg and Pillay *Socio-Economic Rights in South Africa* 131-154.

976 See Du Plessis 2011 *SAJHR* 279-307.

977 See Du Plessis 2011 *SAJHR* 282.

978 Du Plessis 2011 *SAJHR* 281; Bilchitz 2010 *SALJ* 591-605 at 603.

adequate housing are interdependent and reinforced by the fulfilment of elements of the section 24 environmental rights.

There are several specific sector environmental statutes relevant to local government which are not discussed in the context of this study due to its scope.⁹⁷⁹ However, the *National Environmental Management Act (NEMA)*⁹⁸⁰ is the most important environmental legislation in South Africa.⁹⁸¹ Although NEMA applies to all spheres of government and organs of state, it provides a principled framework for environmental governance at the local government level because it outlines environmental functions and duties for local government as well as a number of environmental law principles that should guide municipalities' interpretation, administration and implementation of environmental matters.⁹⁸² This implies that the environmental management principles contained in section 2 of NEMA should also guide the implementation of the section 24 constitutional environmental obligations by all organs of state, including municipalities.⁹⁸³ Therefore, the principles of environmental management outlined in section 2 of NEMA generally apply to all actions of all municipalities that have the potential to significantly affect the environment.⁹⁸⁴ It is trite noting that the ability of municipalities to effectively apply environmental management principles can contribute towards poverty alleviation, the satisfaction of basic needs, an improvement in the health and well-being of people in South Africa as well as the pursuit of social justice.⁹⁸⁵

Section 2(2) of NEMA adopts an anthropocentric approach to environmental protection by requiring that environmental management must place people and their needs at the forefront of its concern and should serve their physical, psychological, developmental, cultural as well as social interests equitably.

979 Good examples include: the *National Environment Management: Air Quality Act (NEMAQA)* 39 of 2004; the *National Environmental Management: Biodiversity Act (NEMBA)* 10 of 2004; *National Environmental Management: Protected Areas Act* 57 of 2003; the *National Environmental Management: Waste Act (NEMWA)* 59 of 2008. For a discussion on the place of these sector Acts on local government, see Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 408–416.

980 The *National Environmental Management Act (NEMA)* 107 of 1998.

981 See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 391.

982 See s 2(1)(e) of NEMA; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* at 391-401 for a detailed discussion.

983 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 392.

984 S 2(1) of NEMA.

985 See Du Plessis 2011 *SAJHR* 279-307; Fuo 2013 *Obiter Law Journal* 77-95.

This principle is consistent with the general constitutional developmental objects of local government which puts emphasis on the equitable satisfaction of human needs and environmental protection.⁹⁸⁶ It has been argued that this principle requires that in managing the environment at the local government level, every municipality should adopt a human-centred and equality focused approach.⁹⁸⁷

Another important principle outlined in section 2(3) of NEMA is that of sustainable development. The pursuit of sustainable development requires consideration of a host of factors including: the ecosystem, including the loss of biodiversity; pollution and degradation of the environment; disturbance of landscapes and sites that constitute the nation's cultural heritage; waste; the use and exploitation of non-renewable natural resources; the development, use and exploitation of renewable resources and the ecosystems; application of caution and risk-averseness; negative impacts on the environment; and respect and protection of people's environmental rights.⁹⁸⁸ The emphasis NEMA puts on sustainable development for all organs of state is consistent with the constitutional and legislative mandate of local government to promote socio-economic development and a safe and healthy environment.⁹⁸⁹ As Table 1⁹⁹⁰ indicates, the promotion of sustainable development is one of the generic benchmarks that could be used by state authorities to pursue social justice.

Furthermore, NEMA also provides for the principles of intergovernmental coordination and harmonisation⁹⁹¹ which requires that policies, legislation and actions relating to the environment must be coordinated and harmonised.⁹⁹² In this regard, sections 11(1) and (2) of NEMA respectively oblige relevant national departments and all provinces to prepare within prescribed

986 Generally see 2.5.4.2 and 2.5.4.5. Section 4(2)(f) of the *Systems Act* obliges municipalities to provide equitable access to municipal services while s 4(2)(i) requires municipalities to promote a safe and healthy environment.

987 See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 393.

988 See s 2(4)(a)(i)-(viii) of NEMA.

989 See s152 (1)(c) and (d) of the Constitution; 2.5.4.2 and 2.5.4.5.3 and 2.5.4.5; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 393-394.

990 See 2.4.3.

991 See s 2(4)(l) of NEMA.

992 See s 2(4)(l) of NEMA.

timeframes environmental implementation and management plans, when exercising functions that may affect the environment. National departments listed in Schedules 1 and 2 of NEMA are expected to prepare a consolidated environmental implementation and management plan.⁹⁹³ Section 16 of NEMA also extends the duty on municipalities to comply with environmental implementation and environmental management plans.⁹⁹⁴ Environmental implementation and management plans seek to coordinate the environmental policies, plans, programmes and decisions of various departments and organs of state (including local government) that exercise functions that affect the environment or that are entrusted with powers and duties aimed at achieving, protecting and promoting sustainable development.⁹⁹⁵ This further seeks to minimise duplication of procedures and functions and promote consistency in the exercise of powers and functions affecting the environment.⁹⁹⁶ The principle of intergovernmental coordination and harmonisation seem to be consistent with the requirement of joint action between different levels of government in state authorities' pursuit of social justice.⁹⁹⁷

Section 2(4)(f) of NEMA incorporates the principle of public participation in environmental decision-making⁹⁹⁸ and obliges that the "participation of all affected and interested parties in environmental governance should be protected, and that all people must have to develop the understanding, skills and capacity necessary for achieving equitable and effective participation" by vulnerable and disadvantaged persons in particular. This provision, when applied to local government, enjoins municipalities to ensure direct participation by interested and affected persons in environmental decision-

993 See s 11(3) and (4) of NEMA.

994 Section 16(1)(a) of NEMA provides that "Every organ of state must exercise every function it may have, or that has been assigned or delegated to it, by or under any law, and that may significantly affect the protection of the environment substantially in accordance with the environmental implementation plan or the environmental management plan prepared, submitted and adopted by that organ of state in accordance with this Chapter: Provided any substantial deviation from an environmental management plan or environmental implementation plan must be reported forthwith to the Director General and the Committee".

995 See s 12(a) of NEMA.

996 See s 12(a)(i) and (ii) of NEMA.

997 See Table 1 in 2.4.3.

998 See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 396.

making processes at the local level.⁹⁹⁹ This is consistent with constitutional and legislative obligation imposed on municipalities to ensure public participation in decision-making processes at the community level.¹⁰⁰⁰ In addition, public participation in environmental decision-making processes is strengthened by the principle of environmental education and awareness which seeks to promote community well-being and empowerment.¹⁰⁰¹ This principle is also in line with one of the generic benchmarks for state authorities' pursuit of social justice.¹⁰⁰²

In addition, the public trust doctrine is also protected in NEMA.¹⁰⁰³ According to this doctrine, the environment is held in trust for the people and the beneficial use of environmental resources must serve the public interest and the environment must be protected as the common heritage of the people of South Africa.¹⁰⁰⁴ This principle is important in the context of municipal service provision especially as it relates to, for example, domestic water supply.¹⁰⁰⁵ This means that municipalities, for example, must use and distribute water resources in such a way that it will benefit the people of South Africa as a whole.¹⁰⁰⁶ This principle requires that where a municipality pollutes the environment, it must clean-up its pollution, failing which interested and affected persons may through litigation for example, compel compliance. Likewise, as a governor of its communities, a municipality can also rely on this principle to ensure rectification of pollution by others.¹⁰⁰⁷ In this regard, section 28(1) of NEMA extends the duty of care and remediation of environmental damage to all persons, including municipalities, that cause significant pollution or degradation to take reasonable measures to prevent such pollution or degradation from occurring, continuing, or reoccurring.

999 See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 396-397.

1000 S 152(e) of the Constitution; Chapter 4 of the *Systems Act* is dedicated to promoting community participation at the local government level. See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 396-397.

1001 See s 2(4)(g) of NEMA

1002 See 2.4.3.

1003 See s 2(4)(o) of NEMA.

1004 See s 2(4)(o) of NEMA.

1005 See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 398-399.

1006 See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 398-399.

1007 See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 399.

However, where such harm is authorised by law or cannot reasonably be avoided or stopped, the person responsible for that harm must minimise and rectify such pollution or degradation of the environment.¹⁰⁰⁸

The role of municipalities in the control of emergency incidents (disaster management) such as sudden emission, fire or explosion leading to serious danger to the public or potentially serious pollution of, or detriment to the environment is spelt out in section 30 of NEMA.¹⁰⁰⁹

Du Plessis argues that adherence to the local government duties emanating from NEMA could also be submitted as proof of a municipality's compliance with the obligation to "take reasonable legislative and other measures" to fulfil the section 24 constitutional environmental right.¹⁰¹⁰

The above discussion shows that by complying with environmental law and policy obligations, municipalities promote sustainable development. In promoting sustainable development, the fruits of economic growth are redistributed to address issues of poverty and extreme socio-economic inequalities. It was shown that certain elements of the right to food, water, health and housing are interdependent and reinforced by the fulfilment of the environmental right. Without effective management of the environment, the realisation of the right to food, water and health are compromised. In addition, NEMA obliges municipalities to *inter alia*, promote sustainable development, facilitate public participation in decision-making processes and through the public trust doctrine, use and distribute resources (such as water) in a way that will benefit all the people of South Africa. In line with the generic benchmarks for state authorities' pursuit of social justice,¹⁰¹¹ the above discussion shows that by promoting sustainable development, redistributing the proceeds of economic growth, reducing socio-economic inequalities and facilitating public participation in decision-making processes, municipalities contribute to the pursuit of social justice.

1008 See s 28(1) of NEMA.

1009 See s 30(1)-(10) of NEMA for details.

1010 See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 400-401.

1011 See Table 1 in 2.4.3.

3.2.3.5 Legislation and policies on the right to sanitation

The Constitution does not expressly provide a right to sanitation *per se*¹⁰¹² but this is implicit in the section 24 environmental right, the section 26 right to housing,¹⁰¹³ the section 27(1)(a) right of access to healthcare services,¹⁰¹⁴ and the section 27(1)(b) right of access to sufficient water.¹⁰¹⁵ In terms of legislation, section 3(1) of the *Water Services Act* guarantees everyone "a right of access to basic water supply and basic sanitation." Section 3(3) obliges every water services authority to include in its WSDP, measures that will ensure the realisation of the rights of access to basic water supply and sanitation.

Section 1(ii) of the *Water Services Act* defines basic sanitation as "the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewage from households, including informal households."¹⁰¹⁶ The *White Paper on Basic Household Sanitation* (2001) also provides a comprehensive definition for sanitation and sets out the "minimum acceptable basic level of sanitation" as follows:

'Sanitation' refers to the principles and practices relating to the collection, removal or disposal of human excreta, household waste water and refuse as they impact upon people and the environment. Good sanitation includes appropriate health and hygiene awareness and behaviour, and acceptable, affordable and sustainable sanitation services.

The minimum acceptable basic level of sanitation is: (a) appropriate health and hygiene awareness and behaviour; (b) a system for disposing of human excreta, household waste water and refuse, which is acceptable and affordable to the users, safe, hygienic and easily accessible and which does not have an unacceptable impact on the environment; and (c) a toilet facility for each household.¹⁰¹⁷

1012 Bilchitz 2010 SALJ 591.

1013 The *Housing Act* 107 of 1997 includes potable water and sanitary facilities in the definition of "housing development". In *Grootboom*, the Court indicated that the right of access to adequate housing also includes appropriate services such as the removal of sewage. See *Grootboom*, par 35

1014 See Du Plessis 2011 SAJHR 285, 294 and 298; UN *General Comment No15: The right to water* (2002), par 12.

1015 Du Plessis 2010 RECIEL 319.

1016 See also DWAF *Strategic Framework for Water Services: Water is Life, Sanitation is Dignity* (2003) 46.

1017 *White Paper on Basic Household Sanitation* (2001) 5-6.

The above extract affixes three legs to sanitation: collection and removal of household waste, including excreta; hygiene education; and toilets. However, Regulation 2 of the *Regulations Relating to Compulsory National Standards and Measures to Conserve Water* (2001) narrows down the minimum standard for basic sanitation services to the provision of a toilet (presumably per household) and hygiene education. Despite this, it provides some detail requirements on exactly what an appropriate toilet entails. Regulation 2 of the *Regulations Relating to Compulsory National Standards and Measures to Conserve Water* indicates as follows:

- (a) The provision of appropriate health and hygiene education; and
- (b) A toilet which is safe, reliable, environmentally sound, easy to clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests.

The above provision sets out a number of requirements but does not provide a specific uniform framework which must be followed by municipalities for example, in the provision of toilets. This allows for flexibility which will take into consideration local circumstances. What will constitute, for example, an adequate toilet for purposes of sanitation will depend on the facts and circumstances of each case. In *Beja and Others*, the Cape High Court Division held that the provision of unenclosed toilets – "open view toilets" to residents of Makhaza was unreasonable and violated their constitutional rights to *inter alia*, sanitation, human dignity and privacy and was completely contrary to the spirit and purport of the Constitution.¹⁰¹⁸

Nokotyana and Others was the first case to come before the Court with regards to the question of access to sanitation. Considering the importance of sanitation to human survival and well-being, Bilchitz has expressed disappointment with the Court's failure to develop the normative content of the right to sanitation in *Nokotyana*.¹⁰¹⁹ However, it should be noted that the legislative and policy framework on the right of access to sanitation represent minimum standards which must be applied by municipalities. In complying

1018 *Beja and Others*, pars 107-150.

1019 Bilchitz 2010 SALJ 591-592.

with their sanitation obligations, municipalities are at liberty to set higher standards, consistent with the duty of progressive realisation.

Bilchitz has correctly pointed out that without fulfilling the right of access to sanitation, there is the danger that open defecation can result to underground-water pollution with multiple effects.¹⁰²⁰ As illustrated in *Beja and Others*, failure by municipalities to comply with the minimum standards of sanitation provision reinforces existing socio-economic inequalities. It is argued that, this failure to address the basic sanitation needs of people facing poverty amounts to a denial of social recognition which reinforces class subordination, thereby making it impossible for affected people to participate in socio-political life as equals.¹⁰²¹ As the generic benchmarks for state authorities' pursuit for social justice suggest, this trend is counterproductive.¹⁰²²

3.2.3.6 *Legislation and policies on the right to electricity*

Although the inability of the poor to access energy withholds a vital key to ending absolute poverty,¹⁰²³ in terms of the Constitution and legislation, there is no enumerated right of access to electricity. However, this right is implicit in the constitutional right of access to adequate housing¹⁰²⁴ and is closely connected with the right to health.¹⁰²⁵ South African policies recognise the relationship between poverty and electricity and seek to address this by promoting access to free basic electricity to impoverished households.¹⁰²⁶ Apart from this, since electricity is recognised as a basic need, this right can be established within relevant local government legislation which obliges

1020 See Bilchitz 2010 *SALJ* 591.

1021 See Liebenberg 2012 *African Human Rights Law Journal* 9.

1022 See Table 1 in 2.4.3.

1023 Adam *Free Basic Electricity: A Better Life for All* 8; Bradbrook and Gardam 2006 *Human Rights Quarterly* 392-397; Tully 2006 *North Western Journal of International Human Rights* 518-524.

1024 Adam *Free Basic Electricity: A better life for all* 10-11; Bradbrook and Gardam 2006 *Human Rights Quarterly* 407. See also par 37 of *Grootboom* where the Court included access to water, electricity and sewage removal as part of the context specific requirements that the state may be required to provide in order to meet its housing obligations under section 26 of the Constitution.

1025 Dugard 'Power to the People? A Rights-Based Analysis of South Africa's Electricity Services' in McDonald *Electric Capitalism* 226; Nefale and Roux 2003 *ESR Review* 19-21.

1026 See DME *Electricity Basic Services Support Tariff (Free Basic Electricity) Policy* (2003). Hereafter referred to as the *Free Basic Electricity Policy*. See *National Framework for Municipal Indigent Policies* (2006) 6-11.

municipalities to provide access to basic services to poor residents.¹⁰²⁷ In this regard, the *Free Basic Electricity Policy* (2003) approved the allocation of 50 kilo Watts (kWh) per month to all qualifying households, legally connected to the national electricity grid.¹⁰²⁸ According to this policy, the provision of 50kWh to qualifying households "should be made subject to *restrictions and principles*" in order to enhance their sustainability.¹⁰²⁹

As already indicated,¹⁰³⁰ in *Joseph*, the Court used existing constitutional and legislative provisions that oblige local government to provide basic services to community residents to establish a "public law right" to electricity.¹⁰³¹ It should be noted that the level of free basic electricity was informed by research conducted in 2001 which suggested that 50kWh of electricity per month was adequate to meet the basic needs for lighting, media access, limited water heating and basic ironing (or basic cooking) for impoverished households.¹⁰³² A quantitative survey conducted by *Earthlife Africa Johannesburg* in 2009 found that, the nationally prescribed minimum standard was inadequate in meeting its objective.¹⁰³³ In view of this finding, it was suggested that 200kWh of electricity was adequate to address the needs of urban households living in poverty.¹⁰³⁴ *Earthlife Africa Johannesburg* argues that, the initial study that led to the allocation of free 50kWh as the basic level of electricity needed by impoverished households did not consider whether they used this quantity of electricity because it was sufficient for their household needs or because they could not afford to pay more.¹⁰³⁵ The suggestion that 50kWh of electricity is insufficient in meeting the basic needs of impoverished households may also be supported by research conducted in other countries.¹⁰³⁶ However, the level

1027 *Joseph*, par 34-47.

1028 *Free Basic Electricity Policy* (2003) 8-10.

1029 Own emphasis. See *Free Basic Electricity Policy* (2003) 8-12. See 20-21 for the list of principles and restrictions.

1030 See 3.2.1.

1031 *Joseph*, par 34-47. See 3.2.

1032 See *Free Basic Electricity Policy* (2003) 7-9.

1033 Adam *Free Basic Electricity: A better life for all* 29.

1034 Adam *Free Basic Electricity: A better life for all* 29.

1035 Adam *Free Basic Electricity: A better life for all* 15.

1036 For example, in Thailand, 150kWh per month of electricity is provided to the poor to meet their basic needs. See Tully 2006 *North Western Journal of International Human Rights* 521. On the other hand, in Brazil, although 80kWh is regarded as the minimum required to satisfy the basic household needs of the poor, "customers under special

set by the national department represents a minimum floor. Well-to-do municipalities are at liberty to provide a higher level of electricity.¹⁰³⁷ However, it should be noted that if the current national policy is implemented, all poor households would have access to at least 50kWh of electricity which may address some of their basic energy needs.

The above paragraphs show that the nationally prescribed minimum standard for the provision of basic electricity to impoverished households is inadequate to meet their basic household needs. It is argued that the failure of government to address the actual needs of people experiencing poverty amounts to a denial of social recognition or denial of access to the social resources needed to facilitate their participation in socio-political life as equals.¹⁰³⁸ This reinforces socio-economic inequalities and class subordination¹⁰³⁹ and hampers the quest for social justice.

3.2.3.7 *Observations on constitutional socio-economic rights*

The above discussion shows that in addition to obligations imposed by the Constitution on local government to adopt "reasonable legislative and other measures" to contribute towards the realisation of socio-economic rights, national legislation and policies that give effect to constitutional socio-economic rights define duties on municipalities. In line with the principle of allocative institutional subsidiarity, several national legislation and policies delegate specific socio-economic rights responsibilities to municipalities. It seems that because national and provincial governments can assign additional socio-economic rights duties to specific municipalities, the extent of local government's powers over specific socio-economic rights may vary from one municipality to the other. For example, in terms of the *National Health Act*, only metropolitan and district municipalities have powers to render municipal health services through the district health system. This means that the extent to which municipalities contribute towards the realisation of

conditions are permitted to consume 220 kWh of electricity per month". See Tully 2006 *North Western Journal of International Human Rights* 521.

1037 See Adam *Free Basic Electricity: A Better Life for All* 5.

1038 See Liebenberg 2012 *African Human Rights Law Journal* 9.

1039 See Liebenberg 2012 *African Human Rights Law Journal* 9.

constitutional socio-economic rights and the pursuit of social justice may also vary.

It was established that in the areas of water, electricity and sanitation, national legislation and policies prescribed minimum standards that should be realised by municipalities. It was argued that the nationally prescribed quantity of basic water supply and electricity are inadequate in addressing the needs of impoverished households. Where municipalities do not take the initiative to go beyond the minimum standard, this will reinforce rather than address socio-economic inequalities thereby failing to meet one of the benchmarks for state authorities' pursuit of social justice. In terms of sanitation, it was argued that, failure by municipalities to address the basic sanitation needs of impoverished people amounts to a denial of social recognition which reinforces class subordination, thereby making it impossible for affected people to participate in decision-making processes. It was also argued such failure is counter-productive to the pursuit of social justice.

Furthermore, it was pointed out that where metropolitan and district municipalities perform their statutory health related duties in their jurisdictions, this could facilitate the delivery of health services to local communities. It was argued that, this could enhance the contribution of municipalities towards the pursuit of justice because the realisation of the right to health is closely linked and reinforces the fulfilment of other human rights. It was further mooted that where local communities enjoy healthy lives, they could actively exercise their public participation rights, further develop their capacity and provide their basic needs. Cumulatively, this will reduce socio-economic inequalities and foster local government's pursuit of social justice.

In the context of the right to housing, it was illustrated that national housing legislation and policies require municipalities to provide and protect the housing needs of impoverished people in particular. In this regard, municipalities must provide temporary accommodation to those in emergency situations, avoid arbitrary evictions and provide alternative temporal accommodation to even illegal occupiers facing eviction. Where municipalities provide houses to all categories of people, they reduce socio-economic

inequalities in access to housing. It was argued that the Court's prescription of meaningful engagement in eviction proceedings aims at promoting equal respect and recognition to people facing poverty. Where undertaken in good faith, meaningful engagement could contribute to the building of solidarity and the capacity needed by impoverished people to participate in decision-making processes. A combination of these factors shows that by complying with their legislative and policy housing obligations, municipalities contribute towards the pursuit of social justice.

After considering the constitutional environmental right as well as the applicable legal and policy frameworks relevant to local government, it was stated that where municipalities comply with their environmental law obligations, they will: promote sustainable development; facilitate public participation in decision-making processes; and redistribute resources in a way that will benefit all the people of South Africa. These requirements are in line with the generic benchmarks for state authorities' pursuit of social justice.¹⁰⁴⁰

The implication of the obligation imposed on municipalities to adopt reasonable legislative and other measures to give effect to socio-economic rights is discussed in 3.4 below. This section will also distil what it means for municipalities to respect, protect, promote and fulfil both socio-economic and "procedural" rights in the Constitution.

3.3 Procedural constitutional rights for the pursuit of social justice

The socio-economic rights described above require government to adopt legislation and other measures such as policies, plans and programmes and to actively implement them to meet the needs of all South Africans. Where government fails to implement measures to realise these rights or infringes existing access to these rights, there are also procedural rights in the Constitution which could assist interested and affected persons to compel government to comply with its socio-economic rights duties.¹⁰⁴¹ This means

1040 See Table 1 in 2.4.3 above.

1041 See Solange 2011 *Stell LR* 545-546; Liebenberg *Socio-Economic Rights* 88; Pieterse 2007 *Human Rights Quarterly* 820-821; Brand 'Introduction to Socio-Economic Rights

that, other constitutional rights may assist in unlocking the social justice potential of socio-economic rights. Furthermore, because socio-economic rights impose *inter alia* an obligation on local government authorities to desist from implementing retrogressive measures – reducing the socio-economic benefits received by local communities - without strict justification,¹⁰⁴² affected and interested persons could rely on the procedural rights in the Constitution to challenge such action. This means that even when socio-economic rights are realised by local government authorities, procedural constitutional rights remain important in ensuring that there is sustainability of access to socio-economic goods. This section provides a brief discussion on the constitutional framework of procedural rights that can be used to enhance the realisation of socio-economic rights and the manner in which they relate to the generic benchmarks for the pursuit of social justice. In this process, the discussion illustrates how procedural constitutional rights can be used to unlock the social justice potential of socio-economic rights.

3.3.1 The right of access to court

Litigation provides a mechanism through which interested and affected persons can hold government accountable for failures to realise socio-economic rights.¹⁰⁴³ Pieterse argues that socio-economic rights were included in the Constitution to ensure that, in appropriate circumstances, interested and affected persons should be able to enforce these rights against the state or others, where their enjoyment is threatened, disrupted or where the state generally fails to realise them.¹⁰⁴⁴ In this regard, section 34 of the Constitution provides everyone the right to have any dispute that can be resolved by the application of law, decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. The importance of this right lies in the fact that it provides even impoverished people a right to challenge, for example, local government authorities in court

in the South African Constitution' in Brand and Heyns *Socio-Economic Rights in South Africa 2*.

1042 See Liebenberg *Socio-Economic Rights* 188-191; ACHPR *Principles and Guidelines* (2010) 14.

1043 See *Mazibuko*, pars 160-161.

1044 Pieterse 2007 *Human Rights Quarterly* 806.

where they feel their rights (including socio-economic rights) have been traversed – especially when they are supported by NGOs. This also means hypothetically that, where local communities disagree with municipal authorities about the content of a socio-economic right, community members can approach the courts to resolve this dispute by asking a court to interpret the meaning and scope of the socio-economic right in question. This approach was followed by some residents of Phiri in the well-known *Mazibuko* cases (assisted by the Centre for Applied Legal Studies, Wits University), to challenge the content of the City of Johannesburg's Free Basic Water Policy as inconsistent with their constitutional right of access to sufficient water, for example.¹⁰⁴⁵ In *Mazibuko*, the Court acknowledged that litigation in socio-economic rights cases helps to hold the elected arms of government accountable. It fosters a form of participatory democracy that allows people to hold government accountable between elections over specific aspects of policies.¹⁰⁴⁶ According to the Court:

This case illustrates how litigation concerning social and economic rights can exact a detailed accounting from government and, in so doing, impact positively on the policy-making process. The applicants, in argument, rued the fact that the city had continuously amended its policy in the course of the litigation. In fact, that consequence of the litigation...was beneficial. Having to explain why the Free Basic Water policy was reasonable shone a bright, cold light on the policy that undoubtedly revealed flaws. The continual revision of the policy in the ensuing years has improved the policy in a manner entirely consistent with an obligation of progressive realisation.¹⁰⁴⁷

Eventhough the Court acknowledges the importance of the right of access to courts and litigation in facilitating the realisation of socio-economic rights, its methodology in the *Mazibuko* case has been criticised for failing to advance the needs of impoverished communities.¹⁰⁴⁸ Despite weaknesses of the

1045 The judgments of the High Court, Supreme Court of Appeal and the Constitutional Court are respectively cited as *Mazibuko v The City of Johannesburg* Case No 13865/06; *City of Johannesburg and Others v Lindiwe Mazibuko and Others* Case No 489/08 [2009] ZA SCA 20; and *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC). For a discussion of the various court judgments, see for example: Jansen van Rensburg 2008 *Stell LR* 415-435; Dugard and Liebenberg 2009 *ESR Review* 11-17; Kotze 2010 *Journal of Human Rights and the Environment* 156-160; Stewart 2010 *Penn State International Law Review* 487-512.

1046 See *Mazibuko*, pars 160-161.

1047 See *Mazibuko*, par 163.

1048 Dugard 2010 *Review of Radical Political Economics* 175-194; Stewart 2010 *Penn State International Law Review* 504-508.

Court's jurisprudence in *Mazibuko*, the outcome of socio-economic rights litigation could also guide the executive and legislative branches of municipalities in understanding the scope of socio-economic rights and the specific nature of the obligations that are imposed on them by existing laws and policies. In addition, public interest litigation could bring about meaningful changes to the life of millions of people. A good example in the South African context is the Court's ruling in *Treatment Action Campaign* where the government was ordered to review its HIV policy to make Nevirapine accessible in all public hospitals and clinics with sufficient capacity throughout the country in order to expedite HIV treatment and curb mother-to-child transmission.¹⁰⁴⁹ This case, championed by an NGO (Treatment Action Campaign), has been credited for the radical change in the manner in which the government currently responds to the HIV/AIDS related challenges in the country.¹⁰⁵⁰ Heywood indicates that numerous redistributive benefits have followed the review of government's HIV policy.¹⁰⁵¹ According to Heywood, there has been an "expansion of health infrastructure and services to poor people" and about 400,000 people who are alive may have died without these reforms.¹⁰⁵² *Treatment Action Campaign* therefore, illustrates that the right of access to courts could be used to obtain better redistributive outcomes that could enhance the pursuit of social justice. It is however acknowledged that the outcome of litigation may not always yield direct positive results.

3.3.2 *Locus standi*

To further strengthen the right of access to courts, section 38 of the Constitution¹⁰⁵³ entrenched a very broad approach to *locus standi*, making it possible for a wide category of persons to bring an action before a competent court, against the state and others, if they believe their rights (including socio-

1049 For details of the Court's findings, see *Soobramoney*, par 90; 3.2.3.2.

1050 For details, see Heywood 2003 *SAJHR* 278-315; Heywood 2009 *Journal of Human Rights Practice* 14-36.

1051 Heywood 2009 *Journal of Human Rights Practice* 23-27.

1052 Heywood 2009 *Journal of Human Rights Practice* 25-26.

1053 According to s 38 of the Constitution, the following persons can approach a court for relief when it is alleged that a right in the Bill of Rights has been infringed or threatened: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; and anyone acting in the public interest; and an association acting in the interest of its members.

economic rights) in the Bill of Rights have been infringed or threatened.¹⁰⁵⁴ This means that where local government authorities fail to adopt and implement measures such as by-laws, policies, plans and programmes that will ensure that socio-economic rights of communities are realised, interested persons (such as civil society organisations, community-based organisations and NGOs) and affected communities can rely on this provision and approach a court to compel relevant authorities to comply with their socio-economic obligations.

This broad approach to *locus standi* seems to be very important in South Africa's context because it creates room for interested persons and civil society organisations to defend the interests of the poor and marginalised through litigation, especially where other democratic mechanisms have failed to address their concerns.¹⁰⁵⁵ Recently, Federation for Sustainable Environment¹⁰⁵⁶ used this broad constitutional provision on *locus standi* to compel *inter alia*, the Minister of Water Affairs, the Sibanda District Municipality and the Luthuli Local Municipality, to provide potable water to residents of the Carolina Community.¹⁰⁵⁷ Although the respondents failed to provide temporary potable water to residents of the Carolina Community within 72 hours as per the court's order,¹⁰⁵⁸ the water crisis was eventually resolved without an appeal to a higher court. However, this case demonstrates how litigation could spur political solutions to socio-economic issues. In addition, the right to *locus standi* can also be utilised by interested and affected persons to seek judicial clarification on the scope and nature of the socio-economic obligations imposed on municipalities, when necessary.

1054 Pieterse 2007 *Human Rights Quarterly* 806. See *Ferreira v Levine NO and Others; Vryenhoek and Others v Powell NO and Others* 1999 (1) BCLR 1, pars 165-166 (hereafter *Ferreira Case*) where the Court held that the broad construction of locus standi seeks to ensure that constitutional rights enjoy the full measure of protection to which they are entitled. Even persons indirectly affected by a rights violation have the standing to approach a court for protection.

1055 Liebenberg *Socio-Economic Rights* 88; Pieterse 2007 *Human Rights Quarterly* 820-821.

1056 Federation for Sustainable Environment is a registered NGO.

1057 See *Federation for Sustainable Environment and Others*; 3.2.31.

1058 See *Federation for Sustainable Environment and Others*, par 26.

3.3.3 *The right to administrative justice*

The right to just administrative action is guaranteed in section 33 of the Constitution and requires that administrative action should be lawful, reasonable and procedurally fair.¹⁰⁵⁹ The *Promotion of Administrative Justice Act (PAJA)*¹⁰⁶⁰ defines administrative action as:

any decision taken, or any failure to take a decision, by (a) an organ of state, when – (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation; or (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include, (aa) executive powers or functions referred to in sections ... of the Constitution; ... (cc) the executive powers and functions of a municipal council...¹⁰⁶¹

From the above definition, it appears that municipalities are also responsible for administrative actions in their daily exercise of administrative duties. Section 33 of the Constitution applies only to administrative action which includes decision-making and the implementation thereof, by public authorities or by an organ of state.¹⁰⁶² Where a municipality exercises its administrative duties in a manner that defies the standards of lawfulness, reasonableness and procedural fairness, persons whose rights are adversely affected must be given written reasons failing which they may approach the courts or an independent and impartial tribunal to review such administrative action.¹⁰⁶³ This means that administrative action that is inconsistent with section 33 of the Constitution can be declared invalid to the extent of the inconsistency and the courts have powers to make any order that is just and equitable in the circumstances.¹⁰⁶⁴ Apart from declaratory orders, courts can

1059 See s 33(1) of the Constitution.

1060 The *Promotion of Administrative Justice Act (PAJA)* 3 of 2000.

1061 For an interpretation of this definition, see *Joseph*, pars 27-29. For a detailed discussion of the scope of what constitutes administrative action under the Constitution and the Promotion of Administrative Justice Act (PAJA) 3 of 2000, see Hoexter *Administrative Law in South Africa* 175-251; Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* 81-108.

1062 See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 371; Currie *The Promotion of Administrative Justice Act: A Commentary* 46-51.

1063 See s 33(2) and (3)(a) of the Constitution; Liebenberg *Socio-Economic Rights* 447.

1064 See s 172 of the Constitution; Liebenberg *Socio-Economic Rights* 380-447.

award damages against administrators for administrative conduct that prevents impoverished people from enjoying socio-economic rights guarantees.¹⁰⁶⁵

PAJA gives legislative effect to the rights guaranteed in section 33 of the Constitution. Section 3 of PAJA is dedicated to promoting procedural fairness in administrative action. Section 3(1) and (2) of PAJA provides that:

- (1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. (2)(a) A fair administrative procedure depends on the circumstances of each case. (b) In order to give effect to procedurally fair administrative action, an administrator, subject to subsection (4) must give a person referred to in subsection (1) – (i) adequate notice of the nature and purpose of the proposed administrative action; (ii) a reasonable opportunity to make representations; (iii) a clear statement of the administrative action; (iv) adequate notice of any right of review or internal appeal, where applicable; and (v) adequate notice of the right to request reasons in terms of section 5.

The above provision spells out in detail, the procedure that must be followed by municipal administrators when they undertake administrative action which is likely to affect the rights or legitimate expectations of community residents. In *Walele v City of Cape Town*, the Court pointed out that the most important component of procedural fairness is the one expressed in the *audi alteram partem* principle which requires that parties to be affected by an administrative decision be given a hearing before the decision is taken.¹⁰⁶⁶ The essence of the *audi alteram partem* principle is to give people an opportunity to participate in making decisions that affect them, promote rationality in administrative decision-making and improve the quality of decisions.¹⁰⁶⁷ In line with the generic benchmarks that can guide state authorities' pursuit of social justice,¹⁰⁶⁸ the requirements of procedural fairness in administrative decision-making promotes public participation in decision-making. However, PAJA

1065 For a detailed discussion of the jurisprudence of courts on this issue, see Liebenberg *Socio-Economic Rights* 442-446.

1066 *Walele v City of Cape Town and Others* 2008 (11) BCLR 1067, par 27. See also, *Joseph*, par 41. For a detailed interpretation of section 3 of PAJA, see *Walele v City of Cape Town*, par 27-43.

1067 *Joseph*, par 42; *Walele v City of Cape Town*, par 27.

1068 See 2.4.3.

provides circumstances where administrators can depart from the requirements in 3(2) of the Act.¹⁰⁶⁹

Furthermore, in terms of section 4 of PAJA, where administrative action materially and adversely affects the rights of the public, an administrator is required to act in a manner that gives effect to the right to procedurally fair administrative action.¹⁰⁷⁰ PAJA also makes it possible for individuals aggrieved by administrative decisions by local government officials to institute proceedings for judicial review or lodge a complaint with state institutions supporting constitutional democracy such as the Public Protector, for example.¹⁰⁷¹ Recently, following findings of maladministration and the dismal failure of the Nala Local Municipality to eradicate the "bucket toilet system" and to complete pro-poor houses abandoned at the foundation level since 2009, the local community lodged a complaint to the Public Protector's Office to investigate the failure of the municipality to comply with its constitutional obligations.¹⁰⁷² Pursuant to this complaint, there were several visits to the Municipality by the Public Protector which led to agreement on how to address the service delivery problems.¹⁰⁷³

The right to administrative justice is linked to the socio-economic rights in that, in making decisions related to the realisation of socio-economic rights – (such as a decision on whether a municipality should terminate existing access to water or electricity for non-compliance with relevant by-laws¹⁰⁷⁴ or the

1069 See s 3(4) and (5) of PAJA.

1070 See s 4(1)-(4) of PAJA.

1071 See s 6 of PAJA; Currie *The Promotion of Administrative Justice Act: A Commentary* 9.

1072 See "Public Protector Advocate Thuli Madonsela revisits Nala to check up on Progress" at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=34074&tid=97915> [date of use 4 March 2013]; "Public Protector Advocate Thuli Madonsela reports back to the community of Nala Municipality on progress made" at: www.info.gov.za/speech/DynamicAction?pageid=461&sid=34091&tid=98003 [date of use 4 March 2012].

1073 See "Public Protector Advocate Thuli Madonsela revisits Nala to check up on Progress" at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=34074&tid=97915> [date of use 4 March 2013]; "Public Protector Advocate Thuli Madonsela reports back to the community of Nala Municipality on progress made" at: www.info.gov.za/speech/DynamicAction?pageid=461&sid=34091&tid=98003 [date of use 4 March 2012].

1074 *Joseph*, par 26.

approval of building plans),¹⁰⁷⁵ municipal administrators must subject themselves to the standards of reasonableness, lawfulness and procedural fairness.¹⁰⁷⁶ For example, improper allocation of funds, lengthy delays in receiving social services and the neglect of those in desperate need of basic services in the public administrative processes would not pass the test of reasonableness.¹⁰⁷⁷ As Liebenberg points out, the right to administrative justice has played a very important role in the protection of social security rights in particular.¹⁰⁷⁸ PAJA seeks to promote good governance and efficiency in municipal administration. The Act seeks to create a culture of accountability, openness and transparency in municipal administration and in the general exercise of public power.¹⁰⁷⁹ In *Joseph*, the Court noted that the values and principles that underpin the concept of good governance are intrinsic to PAJA. The Court asserted that:

Taken together, the values and principles... require government to act in a manner that is responsive, respectful and fair when fulfilling its constitutional and statutory obligations. This is of particular importance in the delivery of public services at the level of local government. Municipalities are, after all, at the forefront of government interaction with citizens. Compliance by local government of its procedural fairness obligations is crucial therefore, not only for the protection of citizens' rights, but also to facilitate trust in the public administration and in our participatory democracy.¹⁰⁸⁰

This shows how the constitutional right to just administrative action could be used by interested and affected persons to hold local government authorities accountable for administrative acts that are contrary to their legal duties and where necessary, the rights to administrative justice can be used to enforce obligations imposed on local authorities for the realisation of socio-economic rights. The right to administrative justice and section 3(1) of PAJA can be used to sustain access to socio-economic needs¹⁰⁸¹ and, in line with the

1075 See *Walele v City of Cape Town*, par 27.

1076 See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 371.

1077 See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 371; *Grootboom*, pars 53-67.

1078 Liebenberg *Socio-Economic Rights* 442. See Liebenberg 2012 *African Human Rights Law Journal* 11.

1079 See Preamble to PAJA; *Joseph*, pars 43-45.

1080 See *Joseph*, par 46.

1081 See *Joseph*, pars 1-76.

generic benchmarks for state authorities' pursuit of social justice, facilitates public participation in decision-making.¹⁰⁸²

3.3.4 The right of access to information

Section 32 of the Constitution gives everyone the right of access to information held by the state, required for the exercise or protection of any rights. Although this provision is qualified by the need to reasonably alleviate financial and administrative burdens on the state,¹⁰⁸³ it is significant because it enables government to promote awareness about programmes that give effect to socio-economic rights.¹⁰⁸⁴ Individuals and organisations interested in promoting the realisation of socio-economic rights could use this right to obtain information from a municipality especially about the progress made to implement by-laws, policies, plans and programmes that give effect to socio-economic rights.

The *Promotion of Access to Information Act (PAIA)*¹⁰⁸⁵ gives legislative effect to section 32 of the Constitution. In order to facilitate the exercise or protection of any right, PAIA accords public or private persons the right to request access to information held by public bodies such as municipalities - including functionaries within municipalities and their independent contractors.¹⁰⁸⁶ However, the Act does not apply to records requested for civil or criminal proceedings after the commencement of such proceedings.¹⁰⁸⁷ When interpreting the provisions of PAIA, courts are required to prefer any reasonable interpretation that is consistent with the objects of the Act over any alternative interpretation that is inconsistent with those objects.¹⁰⁸⁸

Section 32 of the Constitution and PAIA seek to promote a culture of transparency and accountability in public and private bodies and to promote a society wherein, people have effective access to information to enable them

1082 See Table 1 in 2.4.3.

1083 See s 32(2) of the Constitution.

1084 See Brand 'Introduction to Socio-Economic Rights' in Brand and Heyns *Socio-Economic Rights in South Africa* 10; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 372.

1085 *Promotion of Access to Information Act (PAIA)* 2 of 2000.

1086 See s 4 of PAIA.

1087 See s 7 of PAIA.

1088 See s 2 of PAIA.

effectively exercise and protect their rights.¹⁰⁸⁹ One of the objects of PAIA is to educate and empower people so that they can "effectively scrutinise and participate in decision-making by public bodies that affect their rights."¹⁰⁹⁰ In addition, PAIA seeks to give effect to the constitutional obligations of the state to promote "a human rights culture and social justice".¹⁰⁹¹ As Justice Sachs points out, the plethora of constitutional and statutory provisions on the right of access to information demonstrates a commitment to operate a government that is practically democratic, accountable, responsive and open to the people.¹⁰⁹² Since the right of access to information has the potential of enabling the public in general and NGOs in particular to access information held by organs of state, this can be used, for example, to check corruption and other bad administrative practices that can impede the realisation of socio-economic rights at local government level. However, a recent report suggests that, although public bodies acknowledge their obligations under PAIA, there is a general decrease in actual disclosure of information and that, public bodies often resort to legal battles in order to avoid disclosure.¹⁰⁹³

In general, the constitutional and legislative frameworks on the right of access to information seek to promote good governance and its fundamental underlying principles such as public participation in decision-making processes. As established in Table 1 above, public participation in decision-making is an indispensable ingredient for local authorities' pursuit of social justice.¹⁰⁹⁴

3.3.5 The right to public participation

There is no enumerated right to public participation in government decision-making processes in the Bill of Rights. However, the Court has indicated that the right to public/political participation "is given effect ... through the political

1089 See generally s 9 of PAIA.

1090 S 9(e)(iii) of PAIA.

1091 See s 9(c) of PAIA.

1092 *Minister of Health NO v New Clicks South Africa (Pty) Ltd* 2006 (1) BCLR 1 CC (hereafter, *Minister of Health v New Clicks*), par 625.

1093 Centre for Environmental Rights *Barricading the Doors: Instead of Improving Access to Environmental Information, Public and Private Bodies Try to Use the Law to Avoid Disclosure* (2012) 1-6.

1094 See 2.4.3.

rights guaranteed in section 19 of the Bill of Rights",¹⁰⁹⁵ as supported by the right to freedom of expression and the duties imposed on government to facilitate public participation and promote democratic and accountable government.¹⁰⁹⁶ The right to public participation is a very important component of South Africa's democracy especially taking into consideration the fact that the majority of the population was previously excluded from governance processes.¹⁰⁹⁷ The right to public participation is given considerable importance at the local government level both in terms of the Constitution and legislation. In this regard, section 152(1)(a) and (e) of the Constitution obliges local government to provide democratic and accountable government to local communities and to ensure community participation in local government matters. In addition, the entire chapter 4 of the *Systems Act* is dedicated to enhancing community participation in local government matters.¹⁰⁹⁸ De Visser argues that the "elaborate" legal framework on public participation at the local level signals a clear attempt to establish a "social pack" between the state and society in order to correct the past that was characterised by exclusionary governance processes and repression.¹⁰⁹⁹

Public participation in governance is an indispensable component of South Africa's democracy.¹¹⁰⁰ Liebenberg argues that a "deliberative model of democracy", as envisaged by the Constitution can enhance the realisation of human rights norms.¹¹⁰¹ She argues that this model of democracy does not pretend to seek consensus through public reasoning in decision-making processes but rather, gives opportunities for parties to understand each others' concerns and make mutually acceptable trade-offs/mutual

1095 Section 19 of the Constitution guarantees every citizen the right to make political choices. See s 19(1) and (2) of the Constitution.

1096 *Doctors for Life International*, par 106.

1097 See 2.5.3 and 2.5.4.5.1.

1098 The nature and scope of the obligation of local government to promote public participation in local governance is discussed in detail in 4.2 below.

1099 De Visser *Developmental Local Government: A Case Study* 105. Bilchitz has also argued that this social contract informs the current relationship between local government and citizens in South Africa. See Bilchitz 2010 *Constitutional Law Review* 45-78.

1100 See *Doctors for Life International*, pars 107-116; Liebenberg 2012 *African Human Rights Law Journal* 7-10; Brand 2011 *Stell LR* 622-625; Davis 2012 *PER* 2-3.

1101 Liebenberg 2012 *African Human Rights Law Journal* 7-10.

accommodation.¹¹⁰² It is believed that the promotion of frequent good-faith public participation in decision-making promotes the pursuit of social justice because this makes it possible for legislation and policies to reflect the real needs of society.¹¹⁰³ In addition, public participation promotes the legitimacy of government policies in the eyes of citizens.¹¹⁰⁴ Promoting public participation in governance has the potential of ensuring that the content of policies and legislation giving effect to constitutional socio-economic rights reflect the actual needs of citizens.¹¹⁰⁵ At the local government level, this is possible if councillors and administrators take into account the input of community residents generated in public participation processes. This means that public participation should not be carried out as a mechanical exercise with the sole objective of ensuring compliance with legal obligations but should equally be informed by the need to ascertain the actual needs of local communities and to explore context sensitive solutions to local problems.¹¹⁰⁶ Table 1¹¹⁰⁷ suggests that facilitating public participation in decision-making is indispensable in local government's pursuit of social justice.

3.3.6 The right to vote

Elections represent one mechanism that could be used by the electorate to hold members of elected arms of government accountable over specific aspects of government's socio-economic rights policies.¹¹⁰⁸ The relevance of political participation in the realisation of socio-economic rights is strengthened by the inherently political nature of these rights, the relationship between constitutional rights and democracy and the deference attitude adopted by the Court.¹¹⁰⁹

1102 Liebenberg 2012 *African Human Rights Law Journal* 9-10 and 25.

1103 See Christiano 'The Significance of Public Deliberation' in Bohman and Rehg *Deliberative Democracy* 244-245; Carpini *et al* 2004 *Annual Review of Political Science* 320.

1104 See Christiano 'The Significance of Public Deliberation' in Bohman and Rehg *Deliberative Democracy* 244; Carpini *et al* 2004 *Annual Review of Political Science* 320.

1105 *Doctors for Life International*, par 108.

1106 See De Visser *Developmental Local Government: A Case Study* 106; Liebenberg 2012 *African Human Rights Law Journal* 9-10 and 25.

1107 See 2.4.3.

1108 See *Mazibuko*, par 160.

1109 See 3.2.1; Stewart 2011 *Diritto Pubblico Comparato Ed Europeo* 1513-1516 and 1525-1526; Liebenberg 2012 *African Human Rights Law Journal* 28.

South Africa is founded on *inter alia*, the values of universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.¹¹¹⁰ In line with this commitment, every adult citizen is guaranteed the right to secretly vote in elections for any legislative body established in terms of the Constitution.¹¹¹¹ This right is given legislative effect by the *Electoral Act*.¹¹¹² In *New National Party of South Africa v Government of the Republic of South Africa and Others*,¹¹¹³ the Court made it clear that the right to vote "is indispensable to, and empty without, the right to free and fair elections" and that the latter gives content and meaning to the former.¹¹¹⁴ The Court went further to state that the right to free and fair elections underlines the importance of the right to vote and that, the requirement that every election should be fair has implications in the way in which the right to vote can be given substantive content and legitimately exercised.¹¹¹⁵

Although the electoral system is subsequently given greater attention in the context of local government,¹¹¹⁶ it suffices to note that, at least theoretically, when government fails to create a favourable environment for citizens to realise their socio-economic needs such as housing, water, electricity and healthcare services, as required by socio-economic rights obligations, citizens could hold government to account by voting it out of office. The right to vote gives citizens the power to influence decision-making in government. When this right is violated by government authorities, such violations can result in political instability which generally undermines democracy and development. The Court has observed that while the importance of the right to vote is "self-evident and cannot be overstated", "it is sufficient to say the right is fundamental to a democracy because without it, there can be no

1110 See s 1(d) of the Constitution; *Doctors for Life International*, pars 111 and 115.

1111 See s 19(3)(a) of the Constitution.

1112 *Electoral Act* 73 of 1998.

1113 *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (5) BCLR 489.

1114 *New National Party of South Africa*, par 12.

1115 *New National Party of South Africa*, par 12.

1116 Elections at the local government level is discussed in 4.4.3 below. For a detailed discussion of the right to vote and the electoral system in South Africa, see *Richter v Minister of Home Affairs and Others* 2009 (3) SA 615 (CC). For a critique of the electoral system, see Mattes 2002 *Journal of Democracy* 22-36.

democracy."¹¹¹⁷ This right however, requires that proper arrangements for its exercise be put in place for it to be able to add value to any democracy. This means that, in addition to administrative structures, an enabling socio-political environment should be established in order to facilitate the voting process. In addition, ensuring that every eligible voter has the opportunity to vote in regular free and fair elections, is an acknowledgement of the equal moral worth of all participants/adults in society. This recognition is indispensable in state authorities' pursuit of social justice.¹¹¹⁸

3.4 Constitutional rights-based duties of municipalities

As indicated in 3.1 above, this part of the chapter explores the duties of municipalities in terms of the constitutional rights of local communities. Generally, it examines the obligation imposed on municipalities to respect, protect, promote and fulfill the rights in the Bill of Rights.¹¹¹⁹ In addition, it briefly explores the meaning and implication of the obligation on the state to take reasonable "legislative and other measures" to give effect to socio-economic rights with specific reference to municipalities. This part of the chapter ends with a table that summarises the rights-based duties of local government in terms of the Constitution, relevant legislation and policies.

In order to illuminate the meaning of the duties to respect, protect, promote and fulfil human rights, this section draws, *inter alia*, from the jurisprudence of the African Commission on Human and Peoples' Rights (ACHPR) as developed in the well-known case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*.¹¹²⁰ It should be stressed that the jurisprudence of the ACHPR is used not for the sake of establishing any binding obligations on municipalities but simply to shed light on what it means for local government authorities to respect, protect, promote and fulfill human rights.¹¹²¹ Liebenberg indicates that although the Constitutional Court has

1117 *New National Party of South Africa*, par 11.

1118 See Table 1 in 2.4.3.

1119 See s 7(2) of the Constitution.

1120 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60.

1121 The ACHPR has indicated that these duties apply to all human rights and that they are universally applicable. See *(SERAC) and Another v Nigeria*, par 44. Besides,

recognised the typology of 'respect, protect, promote and fulfil' in a range of judgments, it has not explicitly relied on this typology in its socio-economic rights jurisprudence.¹¹²² This translates to the fact that, at the moment, there is no explicit jurisprudence from the Court to guide the interpretation of these duties.

3.4.1 The obligation to respect

The obligation to respect human rights is generally considered to impose a negative duty on local government authorities to refrain from directly or indirectly interfering with the enjoyment of any of the human rights entrenched in the Constitution.¹¹²³ This obligation means that municipalities must respect right-holders, their autonomy and freedom, liberty of their actions, and their access and use of resources.¹¹²⁴ In terms of socio-economic rights, this obligation requires that municipalities should respect the free use of resources owned collectively or individually, for the purpose of satisfying rights related needs.¹¹²⁵

3.4.2 The obligation to protect

The obligation to protect human rights is generally understood as imposing a positive duty which requires that local government authorities adopt and implement positive measures (such as by-laws) to ensure that third parties such as local companies and private persons do not violate the human rights of beneficiaries, individually or collectively.¹¹²⁶ In the case of socio-economic

section 39 of the Constitution permits such an approach to the interpretation of the Bill of Rights. See s 39(1)(b)-(c) of the Constitution; *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) at par 35.

1122 Liebenberg *Socio-Economic Rights* 86

1123 See *SERAC and Another v Nigeria*, par 44; Udombana 2004 *Stanford Journal of International Law* 131; De Wet and Du Plessis 2010 *African Human Rights Law Journal* 349; Liebenberg *Socio-Economic Rights* 84; Tissington *A Resource Guide to Housing in South Africa 1994-2010* (2011) 42; ACHPR *Principles and Guidelines* (2010) 11; Brand *Courts and Transformative Politics* 95.

1124 See *SERAC and Another v Nigeria*, par 44; Udombana 2004 *Stanford Journal of International Law* 131; ACHPR *Principles and Guidelines* (2010) 11; UN *General Comment 15: The right to water* (2002), par 21.

1125 See *SERAC and Another v Nigeria*, par 44; Udombana 2004 *Stanford Journal of International Law* 131.

1126 See Tissington *A Resource Guide to Housing in South Africa 1994-2010* (2011) 42; Udombana 2004 *Stanford Journal of International Law* 133; ACHPR *Principles and Guidelines* (2010) 11; Brand 'Introduction to Socio-Economic Rights' in Brand and

rights, this requires that municipalities should, for example, adopt by-laws that regulate the activities of individuals and local companies that affect people's access to and enjoyment of socio-economic rights such as pollution, for example.¹¹²⁷ This further requires that municipalities should put in place mechanisms such as administrative structures to ensure that by-laws adopted to protect people's enjoyment of socio-economic rights are enforced and monitored so as to grant effective remedies in cases where rights are violated.¹¹²⁸ The duty to protect socio-economic rights may require that municipalities adopt and implement measures that will ensure that private partners rendering municipal services such as water supply do not impose onerous conditions of access that may restrict the ability of the poor to enjoy such services.¹¹²⁹ The obligation to protect human rights also requires local government authorities to protect beneficiaries of protected rights against socio-economic and political interferences.¹¹³⁰ This generally entails creating and maintaining a favourable legal and administrative atmosphere for individuals and communities to enjoy and freely realise their rights and freedoms.¹¹³¹

3.4.3 The obligation to promote

The obligation to promote human rights requires that municipalities should educate and create appropriate public awareness programmes about the existence of human rights and how people can effectively access programmes and institutions put in place to give effect to them.¹¹³² Public awareness about the programmes that give effect to human rights can be

Heyns *Socio-Economic Rights in South Africa* 9-12; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 98-100; De Wet and Du Plessis 2011 *AHRLJ* 349.

1127 See ACHPR *Principles and Guidelines* (2010) 11; UN *General Comment 19: The right to social security* (2008), par 45.

1128 Khosa *Socio-Economic Rights in South Africa* 37; *SERAC and Another v Nigeria*, par 46; Udombana 2004 *Stanford Journal of International Law* 134.

1129 See UN *General Comment 15: The Right to Water* (2002), par 24.

1130 See *SERAC and Another v Nigeria*, par 46; Udombana 2004 *Stanford Journal of International Law* 133.

1131 See *SERAC and Another v Nigeria*, par 46; Udombana 2004 *Stanford Journal of International Law* 133.

1132 See ACHPR *Principles and Guidelines* (2010) 11; Brand 'Introduction to Socio-Economic Rights' in Brand and Heyns *Socio-Economic Rights in South Africa* 10; Udombana 2004 *Stanford Journal of International Law* 134.

achieved, for example, through the use of the media and community outreach programmes by municipal councillors. The obligation to promote also entails that municipalities should promote tolerance amongst local communities.¹¹³³ In the context of socio-economic rights, this obligation has also been interpreted to mean that municipalities should promote the values and objectives of socio-economic rights in administrative decision-making processes, for example.¹¹³⁴ This means that officials in-charge of the day-to-day administration of a municipality, should be made to understand that socio-economic rights were specifically entrenched in the Constitution in order to ensure that the basic needs of the impoverished people such as water, electricity and sanitation could be met, for example. It has been suggested that, the duty to promote means that, public officials must use their decision-making discretionary powers to primarily advance human rights.¹¹³⁵

3.4.4 The obligation to fulfil

The obligation to fulfil human rights entails that municipalities must take "positive steps" or "all appropriate means" to advance the realisation of human rights.¹¹³⁶ The obligation to fulfil human rights "*incorporates duties* to help in the facilitation and provision of resources and services necessary for human rights."¹¹³⁷ As the ACHPR indicates, the duty to take "all appropriate means" to realise human rights suggest that, depending on the type of rights under consideration, the level of emphasis in the application of these duties will vary.¹¹³⁸ However, in brief, this duty requires each municipality "to move its machinery towards the actual realisation of the rights."¹¹³⁹ Positive steps that can be taken by local government authorities include proactive measures that facilitate the full enjoyment of rights without discrimination or wastage of

1133 See *SERAC and Another v Nigeria*, par 46.

1134 See ACHPR *Principles and Guidelines* (2010) 11; Tissington *A Resource Guide to Housing in South Africa 1994-2010* (2011) 43.

1135 Brand 'Introduction to Socio-Economic rights' in Brand and Heyns *Socio-Economic Rights in South Africa* 10-11.

1136 See ACHPR *Principles and Guidelines* (2010) 11; Par 2 of UN *General Comment 3: The nature of State parties obligations* (1990); Tissington *A Resource Guide to Housing in South Africa 1994-2010* (2011) 43.

1137 Udombana 2004 *Stanford Journal of International Law* 136. Own emphasis.

1138 *SERAC and Another v Nigeria*, 48.

1139 *SERAC and Another v Nigeria*, 47.

resources.¹¹⁴⁰ Positive steps also include appropriate administrative, economic, educational, legal and social measures adopted to realise human rights.¹¹⁴¹ In the context of socio-economic rights, the obligation to adopt positive and "appropriate means" to realise such rights is a very broad obligation which gives municipalities the leeway to use their initiative to adopt and implement any measure that can foster the realisation of socio-economic rights, provided such measures are not *ultra-vires*. The paragraphs that follow discuss some of the positive measures that may be "appropriate", depending on the circumstances of each municipality. These measures include what is also referred to as "key" socio-economic rights obligations.¹¹⁴²

Against the above backdrop, the obligation to fulfil socio-economic rights suggests that municipalities should adopt and implement by-laws, plans, policies, projects and programmes that further give effect to socio-economic rights.¹¹⁴³ The above measures should take into consideration other poverty alleviation plans and policies and the actual needs of the poor.¹¹⁴⁴ In addition, adopted by-laws, plans and policies must equally identify resources available to meet their objectives and the most cost-effective way of using available resources.¹¹⁴⁵ Adopted plans, policies and programmes must be continuously monitored and evaluated in order to ensure that defined objectives are met.¹¹⁴⁶ Plans, by-laws, policies and programmes adopted by a municipality should complement national and provincial strategies. In addition, municipalities should ensure that communities participate in the design,

1140 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Rights* 98-100; Brand 'Introduction to Socio-Economic Rights' in Brand and Heyns *Socio-economic Rights in South Africa* 10; Dankwa and Flinterman 1987 *Human Rights Quarterly* 136-146.

1141 See par 7 of UN *General Comment 3: The nature of State parties obligations* (1990); Du Plessis *Fulfilment of South Africa's Constitutional Environmental Rights* 98-100; Brand 'Introduction to Socio-Economic Rights' in Brand and Heyns *Socio-economic Rights in South Africa* 10; Dankwa and Flinterman 1987 *Human Rights Quarterly* 136-146.

1142 See ACHPR *Principles and Guidelines* (2010) 16-18.

1143 See ACHPR *Principles and Guidelines* (2010) 10 and 15; UN *General Comment 15: The right to water* (2002), par 26.

1144 See ACHPR *Principles and Guidelines* (2010) 15.

1145 See ACHPR *Principles and Guidelines* (2010) 15.

1146 See ACHPR *Principles and Guidelines* (2011) 15.

implementation and review of by-laws, policies, plans and programmes that give effect to socio-economic rights.¹¹⁴⁷

Furthermore, the obligation to fulfil socio-economic rights suggests that municipalities should establish administrative structures that will ensure the implementation of any binding legislation, policies, plans and programmes that give effect to socio-economic rights.¹¹⁴⁸ The duty to fulfil also requires the adoption and implementation of budgetary measures that will ensure an effective administration capable of successfully implementing policies, plans and programmes that give effect to socio-economic rights.¹¹⁴⁹ The establishment of administrative structures and the processes used by administrative officials to implement legislation, policies, plans and programmes constitutes governance which is viewed as an aspect of fulfilment.¹¹⁵⁰

In addition, local government could actively engage and partner with civil society organisations in order to realise socio-economic rights.¹¹⁵¹ This is based on the recognition that civil society organisations have a key role to play in monitoring the implementation of measures that give effect to socio-economic rights in particular.¹¹⁵²

Moreover, the duty to fulfil socio-economic rights suggests that municipalities could cooperate with international partners such as foreign governments, international NGOs, international local government associations and other municipalities (within and abroad) in order to realise socio-economic rights.¹¹⁵³ International cooperation may provide technical, financial and human resource assistance needed to implement policies and programmes that give effect to socio-economic rights.

The duty to fulfil also requires that municipalities create a favourable environment which allows individuals to access their own needs such as

1147 See ACHPR *Principles and Guidelines* (2011) 15.

1148 See ACHPR *Principles and Guidelines* (2010) 10.

1149 See ACHPR *Principles and Guidelines* (2010) 10.

1150 Kotzé *Legal Framework for Integrated Environmental Governance* 51.

1151 See ACHPR *Principles and Guidelines* (2010) 18.

1152 ACHPR *Principles and Guidelines* (2010) 18.

1153 See ACHPR *Principles and Guidelines* (2010) 17.

housing, water and electricity.¹¹⁵⁴ This suggests that local government could contribute towards the realisation of socio-economic rights by creating a favourable environment for economic growth and job creation.¹¹⁵⁵ Through economic growth and job creation, people get the means to provide basic needs for themselves. However, where individuals and communities cannot gain access on their own to their basic needs, municipalities must take necessary measures to ensure that each person within its jurisdiction, may obtain basic socio-economic rights satisfaction.¹¹⁵⁶ According to the ACHPR, the obligation to fulfil socio-economic rights also means that:

The rights of vulnerable and disadvantaged groups should be prioritised in all programmes of social and economic development, and particular attention must be paid to vulnerable and disadvantaged groups in programmes aimed at ensuring access to appropriate services and resources.¹¹⁵⁷

For socio-economic rights to be fulfilled, each municipality must ensure that the goods and services necessary to enjoy socio-economic rights must be *available, adequate and accessible* to all, especially vulnerable and disadvantaged groups.¹¹⁵⁸

The duty to fulfil socio-economic rights also suggest that municipalities should adopt and implement comprehensive, integrated, co-ordinated, transparent and long term strategies that contain clear goals for realising socio-economic rights.¹¹⁵⁹ Such strategies may ensure access to basic resources and needs on an intergenerational basis.¹¹⁶⁰ In addition, it requires municipalities to continuously aim at improving the number of people who have access to relevant rights as well as the quality of enjoyment.¹¹⁶¹

1154 See ACHPR *Principles and Guidelines* (2010) 11; UN *General Comment 19: The right to social security* (2008), par 48.

1155 See ACHPR *Principles and Guidelines* (2010) 11.

1156 See ACHPR *Principles and Guidelines* (2010) 11; UN *General Comment 19: The Right to Social Security* (2008), par 50.

1157 See ACHPR *Principles and Guidelines* (2010) 11.

1158 See ACHPR *Principles and Guidelines* (2010) 10; UN *General Comment 19: The right to social security* (2008), par 51.

1159 See ACHPR *Principles and Guidelines* (2010) 11; UN *General Comment 15: The Right to Water* (2002), par 28.

1160 See UN *General Comment 15: The Right to Water* (2002), par 28.

1161 See ACHPR *Principles and Guidelines* (2010) 11; UN *General Comment 19: The Right to Social Security* (2008), par 51.

The above discussion suggests that the obligation to respect, protect, promote and fulfil human rights requires municipalities to adopt and implement a multitude of legal, administrative, educational, social and economic measures that further the objectives of human rights. Consistent with these duties, municipalities are expected to: adopt, implement and review by-laws, policies, plans and programmes that give effect to rights; establish administrative structures that will ensure effective implementation of plans, policies and by-laws; provide remedies in cases where rights are violated; budget and allocate the necessary finances to implement policies; ensure sustainable access to goods and services; promote economic growth and job creation; partner with relevant international and domestic role players to further the realisation of rights; and create educational awareness programmes about rights as well as the programmes and agencies that give effect to these rights. In addition, municipalities should involve community residents in designing, implementing and reviewing measures that give effect to socio-economic rights especially and co-ordinate and integrate its human rights strategies with those of national and provincial government.

3.4.5 *Obligation to take reasonable legislative and other measures*

The meaning of the obligation imposed on all spheres of government to take "reasonable legislative and other measures" to realise the socio-economic rights entrenched in sections 24, 25(5), 26 and 27 of the Constitution has been discussed above.¹¹⁶² What is emphasised in this context is the fact that these provisions create "an open-ended" duty with significant initiative left in the hands of local government authorities to realise socio-economic rights.¹¹⁶³ This task should be broadly executed by the legislative and executive arms of each municipality,¹¹⁶⁴ together with its administration, through various local governance processes including by-law making and implementation, policy-making and implementation, (strategic) planning and implementation,

1162 See 3.2.2.

1163 Du Plessis 2010 *Stell LR* 269.

1164 From the bigger perspective of all spheres of government, see Brand 'Introduction to Socio-Economic Rights' in Brand and Heyns *Socio-Economic Rights in South Africa*¹²; Pieterse 2010 *Law, Democracy and Development* 231-232. See Liebenberg *Socio-Economic Rights* 40.

performance monitoring and evaluation, and financial management, amongst other processes.¹¹⁶⁵ In terms of local government, for example, this obligation entails that, in addition to by-laws, local government should adopt policies, (strategic) plans - such as IDPs, programmes and strategies that would contribute to the realisation of socio-economic rights.¹¹⁶⁶ These measures will be consistent with the executive and legislative authority of municipalities generally outlined in section 11(3) of the *Systems Act*.

The table below provides a summary of the human rights obligations of municipalities towards local communities emanating from the Constitution, legislation and policies discussed above. However, it should be noted that the duties of local government in relation to the rights discussed vary taking into consideration the competencies of local government.

1165 For local governance processes, see Coetzee *Public Administration: A South African Introductory Perspective* 3 and 97; Cloete *Public Administration and Management* 57-60; Du Plessis 2010 *Stell LR* 274-275.

1166 Du Plessis and Du Plessis 'The Balancing of Sustainability Interests in South Africa' in Faure and Du Plessis *The Balancing of Interests in Environmental Law in Africa* 432.

Table 3: Rights-based duties of local government

1	Access to water	<ul style="list-style-type: none"> - Legislative and other measures: Adopt and implement by-laws, policies, plans, programmes and other strategies - Respect, protect, promote and fulfil 	<ul style="list-style-type: none"> - Provide everyone access to basic water supply - Develop and implement a Water Service Development Plan (WSDP) as part of the IDP 	<ul style="list-style-type: none"> - Provide everyone one access to 25litres of water per day - Provide free 6kilo litres of water per month for every poor household - Water quality must meet SABS specification
2	Access to healthcare	<ul style="list-style-type: none"> - Legislative and other measures: Adopt and implement by-laws, policies, plans, programmes and other strategies - Respect, protect, promote and fulfil 	<ul style="list-style-type: none"> - Provide municipal health services - Metros and district councils should establish district health councils - Develop and implement a District Health Plan as part of the IDP 	
3	Access to housing	<ul style="list-style-type: none"> - Legislative and other measures: Adopt and implement by-laws, policies, plans, programmes and other strategies - Respect, protect, promote and fulfil 	<ul style="list-style-type: none"> - Use the IDP to ensure that inhabitants have access to housing - Comply with legal procedure for evictions - Provide temporal accommodation in cases of emergency 	<ul style="list-style-type: none"> - Develop local housing strategies and delivery targets - All municipalities should develop Housing Chapters as part of the IDP - Provide emergency housing assistance
4	Environmental rights	<ul style="list-style-type: none"> - Legislative and other measures: Adopt and implement by-laws, policies, plans, programmes and other strategies - Respect, protect, promote and fulfil 	<ul style="list-style-type: none"> - Outlines guiding environmental law principles such as sustainable development and public participation - Comply with Environmental Management Plans developed by the other spheres - Develop and implement Environmental Management Plans - Obliges public participation in environmental decision-making processes 	

5	Access to sanitation	<ul style="list-style-type: none"> - Legislative and other measures: Adopt and implement by-laws, policies, plans, programmes and other strategies - Respect, protect, promote and fulfil 	<ul style="list-style-type: none"> - WSDP must promote access to basic sanitation 	<ul style="list-style-type: none"> - Provide every household access to basic sanitation which includes a toilet and hygiene education
6	Access to electricity	<ul style="list-style-type: none"> - Legislative and other measures: Adopt and implement by-laws, policies, plans, programmes and other strategies - Respect, protect, promote and fulfil 		<ul style="list-style-type: none"> - Provide free 50 kWh per month for every poor household
7	Access to courts	<ul style="list-style-type: none"> - Respect, protect, promote and fulfil 		
8	<i>Locus standi</i>	<ul style="list-style-type: none"> - Respect, protect, promote and fulfil 		
9	Administrative justice	<ul style="list-style-type: none"> - Respect, protect, promote and fulfil 	<ul style="list-style-type: none"> - Ensure administrative action is procedurally fair 	
10	Access to information	<ul style="list-style-type: none"> - Respect, protect, promote and fulfil 	<ul style="list-style-type: none"> - Provide access to public information requested by private persons or public authorities 	
11	Public participation	<ul style="list-style-type: none"> - Respect, protect, promote and fulfil 	<ul style="list-style-type: none"> - Enhance community participation in local governance 	
12	Right to vote	<ul style="list-style-type: none"> - Respect, protect, promote and fulfil 		

3.5 Reflection on the challenges of rights as a mechanism for social justice

Despite consensus that human rights represent one mechanism that can be used by state authorities to pursue social justice, concerns have also been raised about the difficulties faced in the use of this mechanism.¹¹⁶⁷ In practice, the constitutional protection of all variety of human rights and the legal obligations they impose on all spheres of government and organs of state do not always lead to the satisfaction of the basic needs of people living in poverty.¹¹⁶⁸ This means that many people continue to live in poverty despite the protection of human rights in the Constitution, legislation and policies. Some have attributed the inability of human rights to promptly address high levels of poverty and extreme inequalities in access to social services to the textual formulation of socio-economic rights in the Constitution; the manner in which the Court has interpreted and applied the requirement of "reasonableness" in assessing government's compliance with the positive duties imposed by sections 26(2) and 27(2) of the Constitution; and the failure of some government departments, organs of state and functionaries to fulfil their rights obligations.¹¹⁶⁹ Critics argue that the socio-economic rights guaranteed in the Constitution are vague and that instead of using the reasonableness standard to give normative content to these rights,¹¹⁷⁰ the Court has eluded all opportunities that have come before it,¹¹⁷¹ thereby,

1167 See Pieterse 2007 *Human Rights Quarterly* 799; Van der Walt 'A South African Reading of Frank Michelman's Theory on Social Justice' in Botha *et al Rights and Democracy* 163-164.

1168 See *Grootboom*, pars 1-2; Pieterse 2007 *Human Rights Quarterly* 799; Van der Walt 'A South African Reading of Frank Michelman's Theory on Social Justice' in Botha *et al Rights and Democracy* 163-164.

1169 See Pieterse 2007 *Human Rights Quarterly* 796-813; Liebenberg *Socio-Economic Rights* 131-223; Bilchitz 2002 *SALJ* 485-501; Bilchitz 2003 *SAJHR* 1-26; De Vos 2001 *SAJHR* 258-276; Stewart 2010 *Penn State International Law Review* 487-512; Stewart 2008 *SAJHR* 472-494.

1170 Liebenberg *Socio-Economic Rights* 176; Pieterse 2007 *Human Rights Quarterly* 808; Bilchitz 2003 *SAJHR* 10; Lehmann 2006-2007 *American University International Law Review* 165, 177; Stewart 2010 *Penn State International Law Review* 492-493.

1171 See pars 52-58, 66-68 of the *Mazibuko* case and pars 28-33 of *Grootboom* where the Court eluded request that it should give content to socio-economic rights.

reducing the standard of reasonableness to mere compliance with requirements of good governance.¹¹⁷²

In addition, most of the socio-economic rights entrenched in the Constitution are "access" rights which are subject to progressive realisation. Due to this textual formulation, the Court refuses to recognise an immediate, direct and individual entitlement to any of the socio-economic rights in the Constitution.¹¹⁷³ This means that impoverished individuals cannot claim the socio-economic rights guaranteed in the Constitution. It has been suggested that this has reduced constitutional socio-economic rights to generalised rights of community members to "reasonable policies".¹¹⁷⁴ Liebenberg argues that, the reasonableness standard as perceived through the Court's jurisprudence renders the judicial enforcement of socio-economic rights an "imperfect and flawed attempt to synchronise the real world with the ideal construct of a constitutional world."¹¹⁷⁵ In effect, the reasonableness review gives the legislative and executive branches of government a wide level of discretion in its policy choices designed to give effect to socio-economic rights.¹¹⁷⁶

Pieterse argues that despite the imperfect nature of constitutional socio-economic rights, "they remain one of the only potentially effective political channels through which the needs of vulnerable sectors of the society may audibly be expressed."¹¹⁷⁷ Pieterse suggests that, despite their "abstract" nature, legislatures and policy-makers, intended beneficiaries, community organisations, advocates and scholars of socio-economic rights should use other "forms of political expression" including political lobbying and grass root democracy, to uncover socio-economic rights entitlements and translate them

1172 Liebenberg *Socio-Economic Rights* 176. Pieterse links the standard of reasonableness to a more "administrative-law-like" scrutiny. See Pieterse 2007 *Human Rights Quarterly* 808. On the other hand, Bilchitz describes it as constituting some desirable features of state policy. See Bilchitz 2003 *SAJHR* 10.

1173 See *Grootboom* pars 20, 28-33, 41-45; *Soobramoney* pars 42-43; Brand *Courts Socio-Economic Rights and Transformative Politics* 35-36; Pieterse 2007 *Human Rights Quarterly* 807; Liebenberg *Socio-Economic Rights* 138; Stewart 2011 *Diritto Pubblico Comparato ed Europeo* 1511.

1174 Brand *Courts, Socio-Economic Rights and Transformative Politics* 35-36.

1175 Liebenberg *Socio-Economic Rights* 65-66. See also, Davis *Socio-Economic Rights* 207.

1176 Liebenberg *Socio-Economic Rights* 151, 174.

1177 Pieterse 2007 *Human Rights Quarterly* 819.

"into more concrete, needs-lined, notions of entitlement."¹¹⁷⁸ This is an invitation to all spheres of government, including local government, to ensure that they use their legislative and executive powers to give constitutional socio-economic rights content that reflects the lived experiences of intended beneficiaries. The deference attitude of the Court and the inherently political nature of constitutional socio-economic rights mean that, for their underlying objectives to be met, the executive and legislative branches of government in all spheres must comply with their socio-economic rights duties. It is a shared view that if all spheres of government and organs of state comply with their constitutional human rights obligations, this will foster the state's pursuit of social justice.¹¹⁷⁹ For local government authorities, this means that, in addition to the duty to respect, protect, promote and fulfil human rights, municipalities must adopt and implement legislative (by-laws) and other measures such as policies, plans, programmes and other strategies that will promote the realisation of socio-economic rights. In any case, the process for designing and implementing by-laws, policies, plans and programmes that give effect to socio-economic rights must promote public participation.¹¹⁸⁰ Through this approach, measures adopted and implemented at the local government level as required by the Constitution can reflect and meet the actual needs of communities. In addition to obligations imposed by the Constitution, municipalities must also fulfil socio-economic rights obligations imposed by national legislation and policies.

3.6 Chapter summary

This chapter analysed the constitutional rights informing the pursuit of transformative constitutionalism and social justice in order to establish the rights-based obligations that inform the role of local government in the pursuit of social justice. This analysis was followed by a discussion of the socio-economic rights responsibilities of local government and options that could be used by municipalities to realise human rights with specific reference to the

1178 Pieterse 2007 *Human Rights Quarterly* 819-821. See Stewart 2011 *Diritto Pubblico Comparato ed Europeo* 1510.

1179 See Albertyn and Goldblatt 1998 *SAJHR* 249; Liebenberg *Socio-Economic Rights* 29; Pieterse 2007 *Human Rights Quarterly* 796-822.

1180 Pieterse 2007 *Human Rights Quarterly* 797-800, 803-804, 819-822.

constitutional obligation to respect, protect, promote and fulfill rights as well as the obligation to adopt "reasonable legislative and other measures" to realise socio-economic rights. This chapter established that, in addition to the specific rights-based duties imposed on local government by the Constitution, national legislation and policies define duties on local government to realise, especially socio-economic rights.

It was established that although all rights in the Bill of Rights represent one mechanism through which the mandate of transformative constitutionalism can be realised, local government's realisation of the socio-economic rights entrenched in the Constitution can contribute towards the pursuit of social justice because these rights specifically seek to satisfy the material needs of people such as water, food, housing, electricity, healthcare services, sanitation, social security and a healthy environment. From this perspective, the socio-economic rights in the Constitution are important to local government's pursuit of social justice because where municipalities give effect to them by adopting and implementing by-laws, policies, plans and programmes, taking into consideration the actual needs of vulnerable people, this could ensure that poor, disadvantaged and often marginalised community members have the basic needs of life that will enable them to participate in socio-political life as true equals. In addition, it was established that the potential of the socio-economic rights in the Constitution to contribute towards the pursuit of social justice is further enhanced by the fact that they impose "positive" obligations on all spheres of government to adopt and implement laws, policies, plans, programmes and any other measure that will ensure their realisation.

This chapter also established that there are several national legislation and policies that delegate specific socio-economic rights responsibilities to municipalities. It argued that because national and provincial governments can assign additional socio-economic rights duties to specific municipalities, the extent to which municipalities contribute towards the realisation of constitutional socio-economic rights and the pursuit of social justice may also vary. It was established that in the areas of water, electricity and sanitation,

national legislation and policies prescribed minimum standards, often inadequate to meet the actual needs of impoverished households, which should be fulfilled by municipalities. It was argued that where municipalities do not take the initiative to go beyond the minimum standard, this will reinforce rather than address socio-economic inequalities. It was indicated that this could constrain rather than foster the pursuit of social justice. In relation to the right of access to housing, it was argued that by fulfilling their manifold housing duties and engaging meaningfully with those facing evictions, municipalities will minimise inequalities in access to housing, promote equal respect and recognition to impoverished people, build solidarity and the capacity needed to participate in decision-making processes. These factors cumulatively contribute towards local government's pursuit of social justice. Equally important is the need for municipalities to fulfil their environmental law obligations. This will ensure that municipalities promote sustainable development; facilitate public participation in decision-making processes; and redistribute resources in a way that will benefit all the people of South Africa.

Despite the potential of socio-economic rights, this chapter argued and illustrated that the procedural rights in the Constitution are equally important in guiding local government's pursuit of social justice because they provide mechanisms for interested and affected persons to participate in decision-making processes, hold local authorities accountable to communities and generally promote good governance. It was established that without respect and protection of constitutional procedural rights, the ability of communities to influence decision-making in governance will be limited which may increase frustration amongst community members and possibly bring about political instability that undermines development. This chapter also established that where local government authorities fail to comply with their socio-economic rights duties as mandated by the Constitution, interested and affected South Africans could rely on procedural constitutional rights (such as the right of access to courts or just administrative action) to compel local government through mechanisms such as courts to comply with their obligations. It was indicated that where municipalities fail to realise socio-economic rights, communities could potentially hold local leaders accountable by voting them

out of office. In addition, it was established that the right to public participation could be used to influence the content of laws, policies, plans and programmes that give effect to socio-economic rights. In this way, socio-economic rights can reflect the actual needs of the poor.

In order to better understand the meaning of rights-based duties of local government, this chapter drew from *inter alia* the jurisprudence of the ACHPR, specifically in relation to how it has interpreted the state's duty to respect, promote, protect and fulfil human rights. It was established that, read jointly, the duty to respect, protect, promote and fulfil human rights require that local government should adopt and implement a variety of legal, socio-economic, administrative and educational measures. It was indicated that, in any instance, local government should promote public participation in the design and implementation of measures that give effect to socio-economic rights. In addition to these duties, this chapter argued that the constitutional duty imposed on the state to adopt reasonably legislative and other measures to give effect to socio-economic rights mean that in addition to by-laws, local government should adopt and implement policies, plans, programmes and any other strategy to that will further the objectives of socio-economic rights.

It was argued in this chapter that, by complying with its human rights obligations as spelt out in the Constitution, national legislation and policies, local government contributes towards the pursuit of social justice. This requires that municipalities comply with the loaded duties enveloped in the obligation to respect, protect, promote and fulfil the rights in the Constitution generally. In addition, within the context of socio-economic rights, municipalities should adopt and implement by-laws, policies, plans (such as IDPs) and any other measure that will foster the objectives of socio-economic rights.

CHAPTER 4

LOCAL GOVERNMENT AND THE PURSUIT OF SOCIAL JUSTICE

4.1	Introduction	223
4.2	Democratic local government	226
4.2.1	<i>Introduction</i>	<i>226</i>
4.2.2	<i>Public participation in the activities of local government</i>	<i>229</i>
4.2.3	<i>Election of local leaders</i>	<i>246</i>
4.2.4	<i>Observations on local democracy</i>	<i>250</i>
4.3	Local government structures	252
4.3.1	<i>Introduction</i>	<i>252</i>
4.3.2	<i>Metropolitan municipalities</i>	<i>253</i>
4.3.3	<i>District municipalities</i>	<i>255</i>
4.3.4	<i>Local municipalities</i>	<i>261</i>
4.3.5	<i>District management areas</i>	<i>263</i>
4.3.6	<i>Municipal councils and committees</i>	<i>264</i>
4.3.7	<i>Observations on local government structures</i>	<i>268</i>
4.4	Local government role players	271
4.4.1	<i>Introduction</i>	<i>271</i>
4.4.2	<i>Municipal councillors</i>	<i>271</i>
4.4.3	<i>Municipal managers</i>	<i>273</i>
4.4.4	<i>Traditional authorities</i>	<i>276</i>
4.4.5	<i>Local community</i>	<i>280</i>
4.4.6	<i>External service providers</i>	<i>285</i>
4.4.7	<i>National and provincial government</i>	<i>288</i>
4.4.7.1	<i>Support from national government</i>	<i>291</i>
4.4.7.2	<i>Support from provincial government</i>	<i>294</i>
4.4.8	<i>SALGA</i>	<i>298</i>
4.4.9	<i>International donors</i>	<i>299</i>
4.4.10	<i>Observations on local role players</i>	<i>300</i>
4.5	Local government's instrumentation	302
4.5.1	<i>Introduction</i>	<i>302</i>
4.5.2	<i>Policies</i>	<i>304</i>

4.5.2.1	Types of policies	305
4.5.2.2	Policy-making and implementation	309
4.5.3	<i>Strategic plans</i>	313
4.5.3.1	Meaning of strategic planning	314
4.5.3.2	Strategic planning and implementation	315
4.5.4	<i>Observations on local government's instrumentation</i>	325
4.6	Chapter summary	326

4.1 Introduction

The discussion in chapter 2 established that local government has undergone significant transformation in terms of its mandate, powers and functions.¹¹⁸¹ In addition to its original powers and functions, the constitutional principle of allocative subsidiarity¹¹⁸² makes it possible for other spheres of government to further assign national and provincial functions to local government.¹¹⁸³ As a co-responsible sphere of government, local government shares the responsibility, together with other spheres, of realising the transformative objectives of the Constitution and the pursuit of social justice. Although the pursuit of social justice does not expressly appear as object of local government, chapter 2 established several complementarities between social justice as an objective of transformative constitutionalism and the expanded developmental mandate of local government.¹¹⁸⁴ In brief, both emphasise the need to eradicate poverty and extreme socio-economic inequalities by ensuring that impoverished members of society have the material resources needed to enable them participate in decision-making processes as true equals.¹¹⁸⁵ The generic benchmarks in Table 1 suggest that for local government to advance the pursuit of social justice, municipalities must: redistribute resources to meet the needs of impoverished people; promote public participation in decision-making; fulfil human rights; build local capacity; promote sustainable development; address the structural causes of socio-economic inequalities; promote group solidarity; address the stigma associated with welfare beneficiaries; avoid the privatisation of basic services; and share responsibilities with national and provincial governments.¹¹⁸⁶ Although the benchmarks highlight the need to protect and fulfil human rights, chapter 3 established that the realisation of the socio-economic rights

1181 See 2.5.4 above; *City of Cape Town and Others v Robertson*, par 60; De Visser *Developmental Local Government: A Case Study* 113-114; Du Plessis 2010 *Stell LR* 265-267; Christmas and De Visser 2009 *CJLG* 107; De Visser 2009 *CJLG* 12-14.

1182 See 2.5.4.4.

1183 See 2.5.4.3 and 2.5.4.4.

1184 See 2.5.4.6.

1185 See 2.5.4.6.

1186 See 2.4.3 for the generic benchmark. For an illustration of the complementarities between the generic benchmarks for state authorities' pursuit of social justice and the expanded developmental mandate of local government, see 2.5.4.6.

entrenched in the Constitution represents only one of the mechanisms through which local government can pursue social justice.

It was also established that in order to enable local government to realise its expanded developmental mandate, the Constitution and legislation guarantee substantial powers and a wide-range of governing discretion to local authorities.¹¹⁸⁷ In this regard, the Court has emphasised that the conduct of a "municipality is not always invalid only for the reason that no legislation authorises it."¹¹⁸⁸

In terms of section 2 of the *Systems Act*, a municipality is defined as an organ of state within the local sphere of government exercising executive and legislative authority within a defined geographic area¹¹⁸⁹ and consisting of political structures, an administration and the community.¹¹⁹⁰ The three components of a municipality (the community, the political structures and the administration) operate in accordance with defined statutory and political relationships, including specifically, their relationship with other political structures and political office bearers.¹¹⁹¹ This implies for example that, apart from political structures within the municipality such as the municipal council and ward committees, municipalities are expected to relate to other political structures at the provincial and national levels in their operations.

The purpose of this chapter is to question to what extent the legal and institutional make-up of South Africa's local government lends itself to the pursuit of social justice with specific reference to the generic benchmarks summarised in Table 1.¹¹⁹² The chapter focuses on the nature and relevance of public participation at the local level, the structures and various role players in local government as well as the nature of local government's governance

1187 Du Plessis 2010 *Stell LR* 269.

1188 *City of Cape Town and Other v Robertson*, par 60.

1189 Determined in accordance with the provisions of the *Local Government: Municipal Demarcation Act* 27 of 1998. See s 2(a) of the *Systems Act*.

1190 See s 2(b) of the *Systems Act*. In the context of a municipality, a community refers to residents of a municipality; ratepayers of that municipality; Civil Society Organisations and NGOs involved in local matters within a municipality; and visitors as well as non-residents of a municipality who make use of a municipality's services. See s 1 of the *Systems Act*.

1191 See s 2(c) of the *Systems Act*.

1192 See 2.4.3.

instrumentation in order to question the extent to which the latter could cumulatively contribute to or may be necessary for the pursuit of social justice. In order to achieve the above objective, the chapter is divided into four parts:

Part one elaborates on the nature of political participation (the right to participate in the conduct of local government affairs and the right to vote/elect local representatives – constitutive of the participatory and representative nature of South Africa's democracy) focusing on local government level in order to assess the extent to which it could facilitate local government's pursuit of social justice. This is important given the fact that public participation is one of the benchmarks identified for state authorities' pursuit of social justice and a prerequisite for the realisation of all human rights.¹¹⁹³

Part two of the chapter outlines the role of different municipal structures in facilitating local government pursuit of social justice. This is necessary given the fact that these have legally defined roles to execute and often exercise powers that affect communities.

Part three explains the role of the various role players in facilitating local government's pursuit of social justice. This section also examines the extent to which cooperation with other spheres of government could enhance local government's pursuit of social justice. This part of the chapter is informed by the fact that social justice cannot be pursued by one sphere of government alone.¹¹⁹⁴

The last part explores the theoretical foundation of two specific local governance instruments – local government strategic planning and policy-making - in order to establish how they may assist municipalities to pursue public/constitutional objectives, with specific reference to social justice.

1193 See 2.4.3; 3.2.1; *Politics* 30; Brand 2011 *Stell LR* 622-625; Stewart 2011 *Diritto Pubblico Comparato Ed Europeo* 1515; Liebenberg 2012 *African Human Rights Law Journal* 7-10.

1194 See generic benchmarks in Table 1 at 2.4.3.

4.2 Democratic local government

4.2.1 Introduction

The constitutional objects of local government oblige municipalities to provide democratic and accountable government to local communities and to facilitate the involvement of communities in the matters of local government.¹¹⁹⁵ The generic benchmarks distilled from the theories and perspectives on social justice suggest that public participation in government decision-making is indispensable to state authorities' pursuit of social justice.¹¹⁹⁶ This view is equally shared by constitutional law scholars commenting on transformative constitutionalism.¹¹⁹⁷

In *Doctors for Life International v Speaker of the National Assembly and Others*,¹¹⁹⁸ the Court indicated that the words "public involvement" and "public participation" are often used interchangeably to refer to the "active participation of the public" in decision-making processes.¹¹⁹⁹ The Court explained that the phrase "facilitate public involvement" is a broad concept which relates to the duty to ensure public participation in government decision-making processes.¹²⁰⁰ In the South African context, this duty imposes an obligation on municipalities to take steps to promote public participation in local government matters.¹²⁰¹ In *Minister of Health NO and New Clicks South Africa (Pty) Ltd*,¹²⁰² Sachs J indicated that the plethora of constitutional and statutory provisions which oblige government to promote public participation demonstrates a commitment to operate a government that is practically democratic, accountable, responsive and open to the people.¹²⁰³

1195 See s 152(a) and (e) of the Constitution and 2.5.4.5.

1196 See Table 1 in 2.4.3.

1197 See Liebenberg *Socio-Economic Rights* 29-34; Pieterse 2005 *SAPL* 159; Pieterse 2007 *Human Rights Quarterly* 819-821; Langa 2006 *Stell LR* 354; Klare 1998 *SAJHR* 155; Brand *Courts, Socio-Economic Rights and Transformative Politics* 30; Brand 2011 *Stell LR* 622-625; Stewart 2011 *Diritto Pubblico Comparato Ed Europeo* 1515.

1198 *Doctors for Life International v Speaker of the National Assembly and Others* 2006 12 *BCLR* 1399 (CC).

1199 *Doctors for Life International*, par 118.

1200 *Doctors for Life International*, par 119.

1201 See *Doctors for Life International*, pars 119-129.

1202 *Minister of Health NO v New Clicks South Africa (Pty) Ltd* 2006 (1) *BCLR* 1 CC.

1203 See *Minister of Health NO v New Clicks*, pars 625-627.

Public participation at the local government level does not operate in isolation but seeks to further strengthen traditional aspects of liberal democracy such as periodic elections and representation in elected assemblies like municipal councils.¹²⁰⁴ In *Doctors for Life International*, the Court also emphasised that the representative and participatory elements of South Africa's democracy should be seen as mutually supportive and not in tension with each other.¹²⁰⁵ In a majority judgment written by Ngcobo J, the Court drew from international law and stressed that:

The right to political participation includes but it is not limited to the right to vote in an election. That right represents ... an institutionalisation of the right to take part in the conduct of public affairs. The broader right ... envisages forms of participation which are not limited to the electoral process. It is now generally accepted that modes of participation may include not only indirect participation through elected representatives but also forms of direct participation.¹²⁰⁶

The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes a duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.¹²⁰⁷ ... In our country, the right to political participation is given effect not only through the political rights guaranteed in section 19 of the Bill of Rights, as supported by the right to freedom of expression but also by imposing a constitutional obligation on the legislatures to facilitate public participation in the law-making process.¹²⁰⁸

The above extract demonstrates that the participatory nature of South Africa's democracy embraces the general right to participate in government decision-making and law-making processes and the specific right to vote/elect public representatives. This suggests that the Constitution bestows two democratic features on local government: promoting participation of communities and community organisation in the activities of municipalities; and ensuring that community residents can elect their representatives to municipal councils.

1204 See Liebenberg *Socio-Economic Rights* 29-30; Brand 2011 *Stell LR* 622-625; Ackermann 2004 *New Zealand Law Review* 643; Solange 2011 *Stell LR* 543.

1205 *Doctors for Life International*, pars 111 and 115.

1206 *Doctors for Life International*, par 98.

1207 *Doctors for Life International*, par 105.

1208 *Doctors for Life International*, par 106.

As indicated in previous chapters,¹²⁰⁹ it is a shared view that governments which promote quality public participation can establish more just societies because this improves the quality of legislation and policies - making it possible for them to reflect the actual needs of society.¹²¹⁰ In addition, apart from the fact that political participation is considered an essential part of "the good life",¹²¹¹ laws and policies that are the outcome of this process often enjoy legitimacy in the eyes of citizens.¹²¹² Moreover, governments which promote inclusive public participation in decision-making build mutual respect and concern among all citizens.¹²¹³ From this perspective, promoting inclusive public participation in decision-making may help in building group solidarity¹²¹⁴ and addressing some underlying causes of socio-economic inequalities such as cultural practices that exclude women from public decision-making processes on the basis of gender, for example.¹²¹⁵ Justice Ngcobo neatly sums up the value of promoting inclusive public participation when he asserts that:

The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.¹²¹⁶

1209 Generally, see 2.2; 2.4.3; and 3.5.

1210 See Christiano 'The Significance of Public Deliberation' in Bohman and Rehg *Deliberative Democracy: Essays on Reason and Politics* 244-245; Carpini, Cook and Jacobs 2004 *Annual Review of Political Science* 320.

1211 See Christiano 'The Significance of Public Deliberation' in Bohman and Rehg *Deliberative Democracy: Essays on Reason and Politics* 245.

1212 See Christiano 'The Significance of Public Deliberation' in Bohman and Rehg *Deliberative Democracy: Essays on Reason and Politics* 244; Carpini, Cook and Jacobs 2004 *Annual Review of Political Science* 320.

1213 See Christiano 'The Significance of Public Deliberation' in Bohman and Rehg *Deliberative Democracy: Essays on Reason and Politics* 245 and 251-252; *Port Elizabeth Municipality*, par 37-39 and 43.

1214 See Sachs J in *Elizabeth Municipality*, par 37-39 and 43.

1215 This will be in line with two of the generic benchmarks in Table 1 – promoting group solidarity and addressing the underlying causes of inequalities. See 2.4.3.

1216 *Doctors for Life International*, par 115.

The above extract confirms some of the instrumental and intrinsic values of inclusive participatory democracy.

4.2.2 Public participation in the activities of local government

The Constitution obliges local government to provide democratic and accountable government to local communities and to encourage community participation in local government matters.¹²¹⁷ In addition, section 160(7) of the Constitution obliges a municipal council "to conduct its business in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted". In terms of legislation, the entire chapter 4 of the *Systems Act* is dedicated to community participation at local government level. To complement formal representative government and bring government closer to the people, municipalities are obliged to encourage and create conducive conditions for communities to participate in municipal affairs, including: the preparation, implementation and review of IDPs; the establishment, implementation and review of performance management systems; the monitoring and review of municipal performance; the preparation of municipal budgets; and strategic decisions relating to the provision of municipal services.¹²¹⁸ In order to enhance public participation in local governance processes, municipalities are obliged to use their resources and annually allocate funds in their budgets for building the capacity of communities, municipal councils and municipal officials.¹²¹⁹ The obligation to build local capacity is in line with the generic benchmarks for state authorities' pursuit of social justice.¹²²⁰ Through this process, communities may gain the skills needed to participate in local governance processes and hopefully those needed to address some of their daily challenges.

The main vehicles for public participation envisaged by the *Systems Act* include councillors, ward committees and advisory committees.¹²²¹ However,

1217 See also ss 152(1)(a) and (e) and 195(e) of the Constitution.

1218 See s 16(1)(a)(i)-(v) of the *Systems Act*.

1219 See s 16(1) (b) and (c) of the *Systems Act*.

1220 See Table 1 in 2.4.3.

1221 See s 17(1)(d) and (4) of the *Systems Act*.

peremptory guarantees on the right to public participation in local government matters should not be interpreted in such a manner that effectively takes away the right of a municipality to use its legislative and executive powers to govern.¹²²² This is supported by the fact that popular pressure does not always constitute a sound basis for policy formulation. In this regard, municipalities should not abdicate their governing duties to the public but ensure that consultations serve as an effective medium of communication between communities and their elected representatives.¹²²³

Municipalities are obliged to establish appropriate mechanisms, processes and procedures which enable local communities to participate in municipal matters.¹²²⁴ Established mechanisms, processes and procedures for public participation must provide for: the receipt, processing and consideration of petitions and complaints lodged by members of the local community; notification and public comment procedures; public meetings and hearings by political office bearers and administrative officials of the municipality; consultative sessions with traditional leaders and NGOs within the jurisdiction of the municipality; and report-back to the community.¹²²⁵ Moreover, where desirable, a municipality can establish an advisory committee consisting of non council members to advise the council on any matter within the municipality's competence.¹²²⁶ It is possible to presume that such a committee would be constituted *inter alia*, by persons with expertise on various local government related matters, who can significantly guide the municipality towards achieving its objects.

Moreover, each municipality is obliged to communicate to its community, information relating to: available mechanisms, processes and procedures for community participation; the matters that are open for community participation; and rights and duties of community members regarding public participation; and municipal governance, management and development.¹²²⁷

1222 See s 16(2) (b) and (c) of the *Systems Act*.

1223 Craythorne *Municipal Administration* 98 and 408.

1224 See s 17(2) of the *Systems Act*.

1225 See s 17(2)(a)-(e) of the *Systems Act*.

1226 See s 17(4) of the *Systems Act*.

1227 S 18(1)(a)-(d) of the *Systems Act*.

In order to ensure effective communication, municipalities are obliged when communicating to the community through the media, to take into consideration: the language preferences and usage in the municipality; the special needs of people who cannot read and write;¹²²⁸ and generally ensure that communication is done in a newspaper or newspapers circulating in its area and determined by the council as the newspaper of records; and by means of radio broadcast covering the area of the municipality.¹²²⁹

The elaborate provisions on public participation at the local level is also extended to people who cannot read or write, people with disabilities, women and other disadvantaged people. Municipalities are obliged to ensure that the mechanisms, procedures and processes put in place to enhance public participation do not exclude these categories of people.¹²³⁰ For example, when the municipality invites the local community to submit written comments or representations on any matter before the council, it is obliged to state in the invitation that any person who cannot write, may come during office hours to a place where a municipal staff member named in the invitation will assist that person to transcribe that person's comments or representations.¹²³¹ In addition, when a municipality requires a form to be completed by a member of the local community, the municipality is obliged to ensure that a staff member of that municipality gives reasonable assistance to persons who cannot read or write, in order to enable such persons to understand and complete the form.¹²³² If the form relates to the payment of money to the municipality or to the provision of any service, the assistance must include an explanation of its terms and conditions.¹²³³

The emphasis and special attention given to people who cannot read and write is commendable given the high levels of adult illiteracy in South

1228 S 18(1)(b) of the *Systems Act*.

1229 See s 21(a)-(c) of the *Systems Act*.

1230 See s 17(3)(a)-(d) of the *Systems Act*.

1231 See s 21(4) of the *Systems Act*.

1232 See s 21(5)(a) of the *Systems Act*.

1233 See s 21(5)(a) of the *Systems Act*.

Africa.¹²³⁴ This has the potential of ensuring that the needs and concerns of vulnerable groups of people are reflected in socio-economic policy choices which will ensure that such policies reflect their lived experiences. However, De Visser has criticised the extent to which the *Systems Act* compels municipalities to cater for the participation of illiterate members of the community. He argues that:

The framework put forward by the Municipal Systems Act is very elaborate. The Act stresses certain elements that are indeed critical and need to be legislated. An example is the emphasis on ensuring access for neglected sectors of society to citizen participation... However, in attempting to turn the tide on unresponsive governance, the Municipal Systems Act goes beyond what is required of institutional legislation. In fact on the issue of citizen participation, the Act shackles municipalities by regulation to the extent that, instead of enhancing autonomy by providing momentum to local democracy, it encroaches on municipal autonomy. The requirement that a staff member must be present to assist illiterate persons to put their comments in writing is a clear example. This requirement is far too detailed and it deprives a municipality of the opportunity to devise other creative ways of facilitating citizen participation. The mixture of soft law, general principles of citizen participation and detailed regulation in the Municipal Systems Act is awkward and undermines the strength of the general principles that the Act should have been limited to....¹²³⁵

Although the *Systems Act* may be too detailed in the manner in which it prescribes that "neglected sectors" of society be given specific forms of assistance, this can be justified taken into consideration the practical lack of balance of power between such subjects and their leaders/governors. In the absence of these prescribed legal obligations, the impression may be created that municipal officials perform favours to marginalised persons by giving them such assistance.

Taking into consideration the extensive provisions on the right to public participation at the local government level, De Visser argues that the *Systems Act* has made "a concerted attempt to rejuvenate the battered relationship"

1234 See Aitchison and Harley 2006 *Journal of Education* 89-112; South African Institute for Race Relations 'South Africa's literacy level lower than other emerging markets despite spending more' Press Release on 25 January 2012.

1235 De Visser *Developmental Local Government: A Case Study* 105-106. Du Plessis acknowledges that although the legal provisions on public participation are quite extensive, there is nothing which prevents municipalities to be innovative in the manner in which they facilitate public participation. See also Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 476.

that existed between the state and society in the old order and that the Act legislates what can be called a "social pact" between community residents and municipalities.¹²³⁶ According to De Visser, the Act "shows a remarkable commitment to ensuring public participation."¹²³⁷ If implemented, the current provisions for public participation at the local government level will foster local democracy and ensure that municipalities contribute towards the pursuit of social justice by adopting and implementing strategies that reflect the actual needs of poor, disadvantaged and often marginalised people.¹²³⁸

Despite the elaborate legislative framework and guarantees of the right to public participation in local governance, the potential impact of such provisions in terms of policy formulation and implementation is doubted, given the absence of quality participation at the local government level.¹²³⁹ In the context of the obligation imposed on Parliament and the NCOP to promote public participation in law-making processes, the Court held in *Doctors for Life International* that, the right to public participation guarantees a positive right of the public to participate in public affairs and a duty on government to facilitate public participation in the conduct of public affairs in order to ensure that this right is realised.¹²⁴⁰ According to the Court, the duty to facilitate public participation has two legs: firstly, there is the duty to provide meaningful opportunities for public participation in policy formulation and law-making processes; and secondly, the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.¹²⁴¹ From this perspective, what local government officials should understand is that public participation should be seen as a "continuum that ranges from providing information and building awareness, to partnering in decision-making." In

1236 De Visser *Developmental Local Government: A Case Study* 105.

1237 De Visser *Developmental Local Government: A Case Study* 105. See also Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 476

1238 In adopting Fraser's conception of social justice, it was argued *inter alia*, that she clearly identifies the satisfaction of basic needs as a precondition for achieving social justice. See 2.4.2. Public participation was identified as one of the benchmarks that could be used to ensure that the actual need of communities are met. See 2.2 and 2.4.3.

1239 De Visser *Developmental Local Government: A Case Study* 106; Holness 2011 SAPL 11; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 477.

1240 *Doctors for Life International*, par 129.

1241 *Doctors for Life International*, par 129. See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 477-478.

other words, the Constitution "predicates and incorporates within its vision", the permanent engagement of the citizenry in public decision-making processes on an ongoing basis.¹²⁴²

On the contrary, it has been argued that the tendency of municipal officials is to see the framework for public participation in the *Systems Act* as the legal, and therefore strategic minimum which must be complied with, and have therefore, conducted public participation with the misconception "that Chapter 4 of the *Systems Act* outlines the process of public participation."¹²⁴³ De Visser indicates that:

Public participation then becomes a technical exercise, where officials 'tick off' the relevant sections of the Act after yet another poorly attended public hearing. The success of public participation will not come from the framework of the Municipal Systems Act but from the creativity displayed by municipalities in their own policies and by-laws on public participation.¹²⁴⁴

It is argued that this mechanical approach to public participation is inimical to local democracy and the pursuit of social justice. This is because abstract insistence on compliance with the legal framework for public participation without due consideration of the inputs generated in the process may lead to the implementation of strategies that do not reflect the actual needs of communities. In addition, this undermines affected communities and has the potential of further reinforcing rather than addressing existing socio-economic inequalities.

In addition to the mechanical application of the public participation process highlighted in the above extract, communities themselves hardly get involved sufficiently in municipal affairs, except mostly when things have severely gone wrong.¹²⁴⁵ Local government often frequently overlooks effective public participation in the context of discharging their socio-economic rights

1242 *Doctors for Life International*, pars 129-130. See Holness 2011 *SAPL* 9-10; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 478.

1243 De Visser *Developmental Local government: A Case Study* 106. Emphasis of De Visser. See Chenwi 2011 *SAPL* 128-129; Holness 2011 *SAPL* 9.

1244 De Visser *Developmental Local Government: A Case Study* 106. See Holness 2011 *SAPL* 11-12.

1245 *National Policy Framework for Public Participation (2007)* 7; *Beja and Others*, pars 81-84; Chenwi 2011 *SAPL* 128-129.

obligations.¹²⁴⁶ In one instance, the City of Johannesburg shamefully argued that occupiers of unsafe and unhealthy buildings had been given a hearing before the City's decision to evict them simply because occupiers had an opportunity to file affidavits in the High Court in opposition to the ejection application.¹²⁴⁷ This forms a very impoverished conception of the right and process of public participation at the local government level and displays disrespect for the "voices" and dignity of impoverished and marginalised persons.¹²⁴⁸ *Occupiers of 51 Olivia Road* also demonstrates that municipalities are at times exclusionary in making decisions that affect significant portions of the population.¹²⁴⁹

A recent report by the NPC diagnoses the growing instability in state citizen relations and the obstacles faced by impoverished collectivities to participate in decisions affecting their needs and living conditions.¹²⁵⁰ The NPC proposes to address these paucities by creating advisory councils to bring together policy-orientated academics and activists to advise government on anti-poverty measures, pro-poor agenda's and pro-poor policies.¹²⁵¹ This approach redirects engagement to be facilitated through formal processes while perceiving the 'poor' as a predefined and fixed category denying them the ability to participate in their needs.¹²⁵²

As such it assigns attributes to 'impoverished' individual/collective bodies without inquiring otherwise.¹²⁵³

1246 See *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008(5) BCLR 475(CC) at par 9; Holness 2011 SAPL 11-12; Wilson 2011 *Urban Forum* 265-282; *Beja and Others*, par 146.

1247 *Occupiers of 51 Olivia Road* par 9.

1248 See *Occupiers of 51 Olivia Road* par, 10; Holness 2011 SAPL 9-10; Wilson 2011 *Urban Forum* 274.

1249 *Occupiers of 51 Olivia Road* par 13; Holness 2011 SAPL 9-12, 17-20.

1250 NPC "Institutions and Governance Diagnostics" accessed at http://www.npconline.co.za/MediaLib/Downloads/Home/Tabs/Diagnostic/Diagnostic_Institutions%20and%20governance.pdf at 16-17 [date of use 8 November 2013].

1251 NPC "Institutions and Governance Diagnostics" at 16-17.

1252 See Brand *Courts, Socio-Economic Rights and Transformative Politics* 65-66, 151-152, 176-180, 182-186; Stewart 2011 *Diritto Pubblico Comparato Ed Europeo* 1525.

1253 See Brand *Courts, Socio-Economic Rights and Transformative Politics* 65-66, 151-152, 176-180, 182-186; Stewart 2011 *Diritto Pubblico Comparato Ed Europeo* 1525.

As indicated in the preceding paragraphs, De Visser is clearly of the opinion that the success of public participation at the local government level "will not come from the framework of the *Municipal Systems Act* but from the creativity displayed by municipalities in their own policies and by-laws on public participation."¹²⁵⁴ In the absence of general creativity from municipalities in ensuring quality participation at the local government level, it is suggested that important lessons could be distilled from the Court's jurisprudence on meaningful engagement. Although the Court has generally made it clear that it will not dictate to other branches of government the method to be followed to ensure quality public participation in policy formulation, law-making and the implementation thereof,¹²⁵⁵ in *Occupiers of 51 Olivia Road*, the Court linked the obligation of municipalities to involve communities in local governance to "meaningful engagement".¹²⁵⁶ Meaningful engagement requires municipalities to pay particular attention to their constitutional and legislative obligations when they develop policies, plans and programmes that give effect to socio-economic rights and to effectively seek and consider the views of intended right-holders.¹²⁵⁷ In this manner, policies, plans and programmes that give effect to socio-economic rights can be tailored to suit different contexts.

In *Occupiers of 51 Olivia Road*, more than four hundred occupiers of two buildings in the inner city of Johannesburg applied for leave to the Court to set aside a judgment of the Supreme Court of Appeal that authorised their eviction by the City. The occupiers argued *inter alia* that the City did not give them a hearing before deciding to evict them.¹²⁵⁸ The Supreme Court of Appeal based its findings on the fact that the buildings were unsafe and unhealthy. The Supreme Court then ordered the City to provide housing assistance to those in desperate need by relocating them to a temporary

1254 De Visser *Developmental Local Government: A Case Study* 106. See Du Plessis acknowledges that there is room for creativity on the part of local government officials. See *Fulfilment of South Africa's Constitutional Environmental Right* 476.

1255 *Doctors for Life International*, pars 123-124.

1256 *Occupiers of 51 Olivia Road*, pars 13-15.

1257 Chenwi 2011 SAPL 129; Holness 2011 SAPL 13-14.

1258 For details on the grounds raised by the Occupiers for the Court to set aside the eviction order of the Supreme Court of Appeal, see par 7 of *Occupiers of 51 Olivia Road*.

settlement area.¹²⁵⁹ After hearing the application for leave to appeal, the Court issued an interim order in which it required that the City and the occupiers engage with each other meaningfully on certain issues.¹²⁶⁰ Specifically, the interim order obliged the City and Occupiers to engage meaningfully, as soon as possible, in order to resolve the difficulties and differences aired in the application before the Court in the light of the values of the Constitution, the constitutional and legislative duties of the municipality, and the rights and duties of the citizens concerned; and to alleviate the plight of the occupiers by making the buildings as safe and as conducive to health as is reasonably practicable. The Court ordered the City and Occupiers to submit reports on the results of the engagement, which was taken into consideration in writing the judgment.¹²⁶¹ As a result of this interim order, an agreement was reached between the City and the Occupiers on how to resolve the eviction problems.¹²⁶² *Occupiers of 51 Olivia Road* therefore illustrates that quality public participation or meaningful engagement at the local government level can be used to find common grounds on challenges that municipalities face in the pursuit of social justice. It is argued that meaningful engagement resonates with the idea of "participatory parity" which constitutes the bedrock of Fraser's conception of social justice.¹²⁶³

In *Occupiers of 51 Olivia Road*, the Court defined meaningful engagement as a two-way process in which the City and those about to become homeless, would talk to each other meaningfully in order to achieve certain objectives.¹²⁶⁴ It held that meaningful engagement has the potential to contribute towards the resolution of disputes and to "increased understanding and sympathetic care" if both sides are willing to participate in the process. The Court noted that people may be so vulnerable that they may not be able to understand the importance of engagement and may even refuse to take part in the process. The Court held that if this happens, a municipality cannot merely walk away but must make reasonable efforts to engage with such

1259 *Occupiers of 51 Olivia Road*, par 1.

1260 *Occupiers of 51 Olivia Road*, par 5.

1261 *Occupiers of 51 Olivia Road*, par 5.

1262 *Occupiers of 51 Olivia Road*, pars 6, 25-29.

1263 See 2.3.3.3 and 2.4.2.

1264 *Occupiers of 51 Olivia Road*, par 14.

vulnerable people and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. The Court stated that because the engagement process precisely seeks to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people, that process should preferably be managed by careful and sensitive people.¹²⁶⁵ It held that the failure of the City to engage with the occupiers was contrary to the spirit and purport of the Constitution, a violation of the right to human dignity, as well as other socio-economic rights obligations imposed by the Constitution.¹²⁶⁶ Yacoob J held that where a municipality's strategy, policy or plan is expected to affect a large number of people, there is a greater need for "*structured, consistent and careful engagement*".¹²⁶⁷ The Court further observed that the process of meaningful engagement can only work if both sides act reasonably and in good faith.¹²⁶⁸ The Court cautioned that community residents who approach the engagement process with an intransigent attitude or with unreasonable and non-negotiable demands may stall the engagement process. On the hand, municipalities must not perceive vulnerable groups and individuals as a "disempowered mass" but rather encourage them to be pro-active rather than being purely defensive. The Court expressed the view that civil society organisations that champion the cause of social justice should preferably facilitate the engagement process in every possible way.¹²⁶⁹ Lastly, the Court indicated that secrecy is inimical to the constitutional value of openness and counter-productive to the process of meaningful engagement.¹²⁷⁰ This requires that in negotiating a policy, plan or programme that affects the rights of communities, municipalities *must furnish complete and accurate information* that will enable affected communities reach reasonable decisions.¹²⁷¹ The objectives of meaningful engagement will differ from one context to another.¹²⁷²

1265 *Occupiers of 51 Olivia Road*, par 15.

1266 *Occupiers of 51 Olivia Road*, par 16.

1267 *Occupiers of 51 Olivia Road*, par 19. Own emphasis.

1268 *Occupiers of 51 Olivia Road*, par 20.

1269 *Occupiers of 51 Olivia Road*, par 20.

1270 *Occupiers of 51 Olivia Road*, par 21.

1271 *Occupiers of 51 Olivia Road*, par 21.

1272 *Occupiers of 51 Olivia Road*, par 14. See also *Residents of Joe Slovo Community*, pars 241-242.

In *Port Elizabeth Municipality v Various Occupiers*,¹²⁷³ the Port Elizabeth municipality, responding to a petition signed by about 1600 people, sought an eviction order against 68 people who had illegally occupied and erected their shacks on privately-owned land within the Municipality.¹²⁷⁴ The petition was signed by the owners of the property and people in the neighbourhood. At the time when the proceedings were instituted in the Eastern Cape Local Division of the High Court, the occupiers had been living on the property for periods of between two to eight years.¹²⁷⁵ Most of the occupiers had moved into the area zoned for residential purposes after being evicted from other areas. The occupiers indicated that they were willing to leave the illegally occupied property if they were given reasonable notice and provided with suitable alternative land on which they could move. The occupiers rejected an offer by the Municipality to be moved to Walmer Township on the ground that Walmer was crime-ridden, offered no security of occupation and was over-crowded, *inter alia*.¹²⁷⁶ The Municipality argued that if alternative land was provided to the occupiers, this would enable the occupiers to jump the housing queue, disrupt the ongoing housing programme and force the municipality to grant them preferential treatment.¹²⁷⁷

After a detailed exposition of the legal framework for evictions,¹²⁷⁸ the Court assigned itself a managerial role in ensuring that the parties find mutually acceptable solutions to their conflicting interests. Writing on behalf of the majority, Justice Sachs stated that:

In seeking to resolve the above contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus, one potentially dignified and effective mode of achieving sustainable reconciliation of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation

1273 *PE Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC).

1274 See *PE Municipality*, par 1, 48-52.

1275 See *PE Municipality*, par 2, 48-52.

1276 See *PE Municipality*, par 2, 48-52.

1277 *PE Municipality*, par 3. For details on the decisions of the High Court and Supreme Court of Appeal, see *PE Municipality*, pars 4-5.

1278 *PE Municipality*, pars 11-38.

through a third party should replace arms length combat by intransigent opponents.¹²⁷⁹

The Court expressed the view that in a context such as South Africa, where communities have long been divided and placed in hostile camps, mediation has the potential of enabling parties to relate with each other in pragmatic and sensible ways, building up prospects for respectful good neighbourliness for the future.¹²⁸⁰ In addition, the Court indicated that mediation promotes respect for human dignity, underlines the fact that "we all live in a shared society", contributes towards reducing conflicts between the different parties involved in the process and minimises the expenses of litigation.¹²⁸¹ The Court indicated that in deciding whether it is just and equitable for an eviction order to be made, courts have to consider whether there was an attempt at mediation.¹²⁸² The Court stressed that the housing obligations of municipalities extend beyond the development of housing schemes to treating those within their jurisdiction with respect. The Court stated that where the need to evict people arises, municipalities must make attempts to resolve the problem before seeking an eviction order.¹²⁸³ The Court held that:

To sum up: in the light of the lengthy period during which the occupiers have lived on the land in question, the fact that there is no evidence that the Municipality or the owners of the land need to evict the occupiers in order to put the land to some other productive use, the absence of any significant attempts by the Municipality to listen to and consider the problems of this particular group of occupiers, and the fact that this is a relatively small group of people who appear to be genuinely homeless and in need, I am not persuaded that it is just and equitable to order the eviction of the occupiers.¹²⁸⁴

In view of the above finding, the Court held that in all future litigation involving occupiers, courts should be reluctant to accept that it will be just and equitable to order their eviction if it is not satisfied that all reasonable steps had been taken to get an agreed and mediated solution.¹²⁸⁵

1279 *PE Municipality*, par 39.

1280 *PE Municipality*, par 43.

1281 *PE Municipality*, par 42.

1282 *PE Municipality*, par 47.

1283 *PE Municipality*, par 56 and 61.

1284 *PE Municipality*, par 59.

1285 *PE Municipality*, par 61.

In *Residents of Joe Slovo Community*, Justice Ngcobo asserted that in implementing any programme giving effect to socio-economic rights, the key requirement which must be met is meaningful engagement between the government and residents.¹²⁸⁶ This requirement flows from the need to treat community residents with respect and care for their inherent human dignity as well as the need for government to ascertain the needs and concerns of individual households.¹²⁸⁷ The process of meaningful engagement does not require the parties to agree on every issue. What is required of the parties is that they should approach the engagement process in good faith and reasonableness and should understand the concerns of the other party.¹²⁸⁸ Meaningful engagement can only be achieved if all the parties approach the process in good faith and a willingness to listen, and where possible, to accommodate one another. Justice Ngcobo stressed that the goal of meaningful engagement is to find a mutually acceptable solution to the difficulties confronting the government and citizens in the quest to realise socio-economic rights.¹²⁸⁹ The need for structured and concerted engagement was equally emphasised by Justice Ngcobo when he observed that different messages and perhaps conflicting information from officials of all three spheres of government conveyed to residents of Joe Slovo created misunderstanding and distrust in the minds of the residents regarding the relocation project.¹²⁹⁰ Even though mutual understanding and accommodation of each others' concerns remain the primary focus of meaningful engagement, the decision ultimately lies with government. However, government must ensure that the decision is informed by the concerns raised by residents during the process of engagement.¹²⁹¹

From the pronouncements of the Court in *Doctors for Life International*, it can be said that, in order to ensure meaningful involvement by ordinary citizens in policy and law-making processes of local government, municipalities must provide notice of the issues under consideration and the opportunities for

1286 *Residents of Joe Slovo Community*, par 238.

1287 See *Residents of Joe Slovo Community*, par 238.

1288 *Residents of Joe Slovo Community*, par 244.

1289 *Residents of Joe Slovo Community*, par 244.

1290 *Residents of Joe Slovo Community*, par 247.

1291 *Residents of Joe Slovo Community*, par 244.

participation that are available.¹²⁹² In addition, municipalities should provide public education that builds on the capacity of ordinary citizens to meaningfully engage in local government matters and this can be achieved through road shows, community workshops, radio programmes and publications informing the public about activities of the municipality.¹²⁹³ The Court in this case also observed that:

Public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive. If legislation is infused with a degree of openness and participation, this will minimize dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to make sure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus acceptance, of legislation. This not only improves the quality of the law-making process, but also serves as an important principle that government should be open, accessible, accountable and responsive.¹²⁹⁴

The above extract is emphatic of the Court's attempt to promote public participation in local government. The emphasis placed on public participation at the local government level serves to justify the potential of local government in the pursuit of social justice. At the very least, meaningful engagement will improve the quality of policies and by-laws that specifically give effect to socio-economic rights and ensure that they speak to the lived experiences of local communities.¹²⁹⁵

Although developed in the context of the right to housing, the main points emphasised by the Court in its jurisprudence on meaningful engagement provides key guidelines that could be used by municipalities to ensure quality public participation in planning, design and implementation of local policies, IDPs and by-laws.¹²⁹⁶ Meaningful engagement goes beyond mere public participation in policy design and implementation.¹²⁹⁷ Meaningful engagement

1292 See *Doctors for Life International*, par 131.

1293 See *Doctors for Life International*, pars 131-132.

1294 *Doctors for Life International*, par 205.

1295 See Ray 2008 *Human Rights Law Review* 709; Wilson 2011 *Urban Forum* 281. For some cautious observations about the possibility of some municipalities not apply the Court's jurisprudence on meaningful engagement, see Liebenberg 2012 *African Human Rights Law Journal* 19-20.

1296 See Chenwi 2011 *SAPL* 131; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 478.

1297 See Chenwi 2011 *SAPL* 129-130; Holness 2011 *SAPL* 25-31.

recognises "the core importance of fostering active participation and gives content to the right of participation" of community residents while embracing the principles of transparency and accountability.¹²⁹⁸ An application of the guidelines developed by the Court has the potential to enrich local policies, plans and by-laws. It gives marginalised and impoverished communities the opportunity to promote social change by directly influencing the content of policies, programmes and plans that seek to, *inter alia*, give effect to socio-economic rights.¹²⁹⁹ To this effect, Liebenberg argues that:

In many respects, the Court's judgment is a welcome affirmation of the principle of participatory, deliberative democracy in resolving conflicts involving constitutional rights such as housing. A failure to engage meaningfully is to be treated by courts as a weighty consideration against the grant of an eviction order. Those directly affected by decisions impacting on their housing rights are given an opportunity to participate in exploring the implications of these rights in their particular, localised circumstances. In this way, the Court avoids imposing top-down solutions that may not be attuned and responsive to local contexts and needs.¹³⁰⁰

As the above extract indicates, meaning engagement promotes localised solutions to local problems. Meaningful engagement requires the fostering of participation over a long period of time that begins with the conception of a plan, policy or piece of by-law and ends with the implementation and preservation of such a plan, policy or by-law.¹³⁰¹ Meaningful engagement remains an innovative mechanism that can be used to enforce socio-economic rights.¹³⁰² Muller argues that meaningful engagement can play an important role in ensuring that executive decisions which do not fall within the purview of administrative action in terms of PAJA and the Constitution, take into consideration the needs of impoverished people.¹³⁰³ This is because executive decisions in the housing development process are not subject to the requirements of procedural fairness in terms of sections 3 and 4 of PAJA as

1298 See Chenwi 2011 *SAPL* 130; Holness 2011 *SAPL* 14, 25-31.

1299 See Chenwi 2011 *SAPL* 130; Holness 2011 *SAPL* 14, 25-31; Wilson 2011 *Urban Forum* 282; Ray 2008 *Human Rights Law Review* 709.

1300 Liebenberg 2012 *African Human Rights Law Journal* 18-19.

1301 See Muller 2011 *Stell LR* 753; Holness 2011 *SAPL* 25-31.

1302 See Muller 2011 *Stell LR* 756; Chenwi 2011 *SAPL* 129; Ray 2008 *Human Rights Law Review* 708-712.

1303 See Muller 2011 *Stell LR* 752 and 756.

well as section 33 of the Constitution.¹³⁰⁴ It is suggested that, in line with the generic benchmarks distilled in Table 1, if the Court's guidelines on meaningful engagement are applied by municipalities, this has the potential to generally promote quality public participation at the local government level; contribute towards the building of local capacity; promote solidarity; enhance the realisation of human rights in general and socio-economic rights in particular; and ensure that strategies adopted and implemented by municipalities in pursuit of social justice meet the actual needs of impoverished people. Wilson argues that, when undertaken with a clear acknowledgement of government's obligations and the dignity of people living in poverty, meaningful engagement "has the ability to achieve real improvements in social welfare while at the same time, allowing for planning and development to proceed."¹³⁰⁵ If applied in good faith, meaningful engagement, as envisaged by South African local government law could further enhance the role of local government in the pursuit of social justice.

Despite the potential of meaningful engagement in facilitating the pursuit of social justice, Lieberberg sounds a very cautious note when she argues that:

However, there is a real danger that meaningful engagement as an adjudicatory strategy may descend into an unprincipled, normatively-empty process of local dispute settlement. This would undermine the normative underpinning of deliberative democracy... It should be borne in mind that in *Olivia Road*, the Court scrutinised and endorsed the agreement pursuant to its engagement order. It did so because meaningful engagement had been specifically ordered by it upon the conclusion of the parties' argument. However, it emphasised that the process of engagement should take place before litigation commences unless it is not possible or reasonable to do so because of urgency or some other compelling reason. The implication is that not all engagement processes will be subjected to the same judicial scrutiny and approval which took place in *Olivia Road*. There is no guarantee that the process or outcome of engagement between communities and authorities will respect and vindicate relevant constitutional rights. This is a particular concern given the power imbalance which exists between deeply disadvantaged groups facing homelessness in an eviction situation and local authorities or private landowners. Communities who lack the support of non-governmental organisations (NGOs) or public interests lawyers are particularly vulnerable in this context and may not be in a position to secure the effective protection of their housing and other rights in an engagement process. Meaningful engagement would

1304 See Muller 2011 *Stell LR* 752 and 756.

1305 Wilson 2011 *Urban Forum* 281.

thus fail to meet Fraser's criterion of participatory parity for just deliberative fora.¹³⁰⁶

As the above extract indicates, the success of the Court's current jurisprudence on meaningful engagement would largely depend on the good faith and willingness of local government authorities to put it into practice. Liebenberg argues that the allocation of appropriate resources to those living in poverty could help in addressing the skewed power relations that exist between local government officials and impoverished communities in the engagement process.¹³⁰⁷ In addition, she argues that where court judgments elaborate on the nature and implications of housing rights in the eviction context, this may provide a constitutional normative framework within which to search for specific solutions in engagement processes between the parties.¹³⁰⁸ She further argues that a normative constitutional framework is important in guiding parities to assess whether the processes and outcomes of meaningful engagement are consistent with the Constitution, especially in cases where the engagement process ultimately breaks down.¹³⁰⁹ She argues that:

Such normative parameter setting is also important for guiding human rights-compliant responses and policy setting in other contexts where similar problems are faced. It is arguable the Court in *Olivia Road* missed an important opportunity to sketch normative markers for the resolution of a widespread systemic problem facing a large group of highly vulnerable people facing eviction from sub-standard accommodation in South Africa's urban areas. Normative guidance is essential given the authorities' preference for requiring evicted city-dwellers to relocate to townships and informal settlements situated at the peripheries of towns and cities, thereby reinforcing the deeply entrenched legacy of apartheid spatial planning in South Africa.¹³¹⁰

Apart from the need for the Court to develop a normative constitutional framework that can guide the engagement process, it has also been argued that for the type of public participation envisaged by meaningful engagement to be successful, long term deliberative partnerships must be forged between

1306 Liebenberg 2012 *African Human Rights Law Journal* 19.

1307 Liebenberg 2012 *African Human Rights Law Journal* 19-20.

1308 Liebenberg 2012 *African Human Rights Law Journal* 19-20.

1309 Liebenberg 2012 *African Human Rights Law Journal* 19-20.

1310 Liebenberg 2012 *African Human Rights Law Journal* 20.

government and communities.¹³¹¹ Through such partnerships, communities must engage openly through their leaders with other parties and avoid making unreasonable demands.¹³¹² Muller argues that it is only through the fostering of long-term deliberative partnerships that unlawful occupiers will be able to rise above the wrong perception that they are weak and passive beneficiaries of government's generosity.

4.2.3 Election of local leaders

The right to vote is a component of the right to public participation.¹³¹³ As earlier explained, the right to vote is important for the pursuit of social justice because where a municipality fails to create the socio-economic environment required for people to realise their needs, citizens can use this right to hold elected representatives/councillors accountable by voting them out of office, for example.¹³¹⁴ The free and fair exercise of this right creates political stability which is generally required for sustainable development.¹³¹⁵ Against this backdrop, the election of municipal councillors, which is intrinsic to the nature of South Africa's participatory democracy, can enhance local democracy, accountability¹³¹⁶ and the pursuit of social justice at the local level.

The municipal electoral system of South Africa is based on a mixed system of 40 percent proportional representation and 60 percent constituency-based elections.¹³¹⁷ The *Structures Act*¹³¹⁸ and the *Local Government: Municipal Electoral Act*¹³¹⁹ regulate the electoral system of local government. Two matrices are adopted for metropolitan and local councils on the one hand and district and local councils on the other.

1311 See Muller 2011 *Stell LR* 755-756.

1312 See Muller 2011 *Stell LR* 755-756.

1313 *Doctors for Life International*, pars 98, 105-106.

1314 See 3.3.6.

1315 See 3.3.6.

1316 De Visser *Developmental Local Government: A Case Study* 94; Mottair *Elections and the Electoral System in South Africa: Beyond Free and Fair elections* 1.

1317 See s 157(1) and (2) of the Constitution; De Visser *Developmental Local Government: A Case Study* 91; "3.1 Electoral System" in "Section E: Political Systems" of the WPLG (1998).

1318 See precisely ss 22 and 23 of the *Structures Act* and Schedules 1 and 2.

1319 *Local Government: Municipal Electoral Act* 27 of 2000. This Act deals with matters such as voters roll and election date, preparation for elections, observers and voters education, voting and the counting of votes.

In terms of the total number of councillors in metropolitan and local councils, the *Structures Act* dictates that 50 percent of the councillors must be elected on a party lists system in order to proportionally represent political parties while the other 50 percent must be directly elected as ward councillors in a "winner-takes-all" election system.¹³²⁰ This means that the 50 percent of the ward councillors elected must correspond to the number of wards in the municipality and elected to represent those wards.¹³²¹ This balance of 50 percent ward representation and 50 percent proportional representation satisfies the constitutional obligation that the adopted system must result in proportional representation.¹³²² If a local municipality has no wards, all its councillors must be elected from party lists to represent political parties on a proportional basis in the municipal council. Local municipalities with fewer than 7 councillors have no wards.¹³²³ Candidates for ward elections can be independent or nominated by a political party.¹³²⁴

The system of electing councillors to district municipalities is outlined in Schedule 2 of the *Structures Act*. The council of a district municipality is made up of a 60 percent segment and a 40 percent segment.¹³²⁵ This means that, voters in the district elect 40 percent of the councillors through a party list system to represent the party while 60 percent of the councillors are elected as representatives of local municipalities and district management areas that make up the district municipality.¹³²⁶ Where a district municipality contains district management areas, the numbers of councillors allocated to the district management areas, which depends on the number of registered voters per area, are elected from party lists to proportionally represent parties in those areas.¹³²⁷ Local councils in the district appoint representatives to the district

1320 See s 22(1) and (2) of the *Structures Act*, S 8 of Schedule 1 of the *Structures Act*.

1321 See s 6 of Schedule 1 of the *Structures Act*.

1322 S 157(3) of the Constitution.

1323 See s 22(4) of the *Structures Act*.

1324 De Visser *Developmental Local Government: A Case Study* 91.

1325 See s 23(2) and (3) of the *Structures Act*.

1326 See s 2(a) of Schedule 2 of the *Structures Act*.

1327 See s 2(b) of Schedule 2 of the *Structures Act*.

council and the number of councillors appointed depends on the number of registered voters residing in the jurisdiction of a local council.¹³²⁸

It has been argued that the system of proportional and constituency-based representation adopted by South Africa contributes significantly to enhancing local democracy.¹³²⁹ For example, while the ward system ensures that communities have access to their elected representative, the system of proportional representation ensures gender balance within municipal councils and equally promotes the inclusion of smaller parties.¹³³⁰ The inclusion of smaller parties in municipal councils mitigates "distortions" caused by the "winner takes all" approach.¹³³¹ Gender balance is enhanced by the requirement that, in compiling party lists for proportional elections, political parties are obliged to ensure that 50 percent of candidates on the party list are women and that, male and female candidates are evenly distributed through the list.¹³³² The inclusion of smaller parties and attempts to ensure gender balance in municipal councils has the potential of stimulating diverse views on policy matters which may ultimately improve the quality of adopted policies, plans and by-laws that seek to further the broad developmental objectives of local government. In addition, the deliberate attempt to ensure gender balance in municipal councils could also be interpreted as an attempt to address pervasive cultural practices that reinforce socio-economic inequalities by excluding women from decision-making processes, for example.¹³³³

Despite the view that the system of constituency and proportionality representation enhances local democracy, it has been seriously criticised by

1328 See s 23(1)(b) of the *Structures Act* and ss 14(a) and 15 of Schedule 2 of the *Structures Act*.

1329 De Visser *Developmental Local Government: A Case Study* 94.

1330 See De Visser *Developmental Local Government: A Case Study* 94; Mottair *Elections and the Electoral System in South Africa: Beyond Free and Fair Elections* 8-9.

1331 See De Visser *Developmental Local Government: A Case Study* 94.

1332 See s 11(3) of Schedule 1 of the *Structures Act*.

1333 The patriarchal nature of the South African society, its racial past, some traditions and customs reinforce socio-economic inequalities and generally "had the effect to impair or nullify the recognition, enjoyment and exercise by women of their human rights and fundamental freedoms" in the socio-economic, political and cultural fields. See Preamble of the *Women Empowerment and Gender Equality Bill* (2012) GN 701 in GG No 35637 of 29 August 2012.

some scholars.¹³³⁴ As indicated in the preceding paragraphs, in addition to ward councillors, the system of election results in the election of proportional representation councillors who are neither directly linked nor accountable to any specific community.¹³³⁵ Due to the fact that proportional representation councillors are elected on a closed party list and are not linked to any constituency, voters cannot directly hold them accountable irrespective of their performance. Lack of direct accountability obstructs public participation and may undermine local government's pursuit for social justice since this may dilute responsiveness to community needs. Furthermore, tension between ward councillors and proportional representation councillors may arise from the feeling that the workload of the former is disproportionate compared to that of the proportional representation counterpart.¹³³⁶

De Visser suggests that, in order to introduce a degree of accountability amongst proportional representative councillors, instead of voting for a closed party list, voters should be able to express their preference for particular candidates.¹³³⁷ This suggestion resonates with the wish of many South Africans as shown in the number of often violent protests from communities demanding a voice in the selection of ANC councillors for the 2011 local government elections.¹³³⁸ In addition, the system of proportional representation has the potential of stifling local government's institutional independence because it tilts accountability towards political structures rather than to the municipal council as those not seen to be following party lines can be ejected from the party.¹³³⁹

1334 See De Visser *Developmental Local Government: A Case Study* 94-98; Mattes 2002 *Journal of Democracy* 22-36.

1335 See De Visser *Developmental Local Government: A Case Study* 96; Paradza *et al Assessing the Role of Councillors in Service Delivery at Local Government Level in South Africa* (2010) 11.

1336 See De Visser *Developmental Local Government: A Case Study* 96; Steytler 2009 *Law, Democracy and Development* 239.

1337 See De Visser *Developmental Local Government: A Case Study* 96.

1338 For some of these protests see: 'Bushbuckridge protest against councillors' accessed at: <http://www.citizen.co.za/citizen/content/en/citizen/local-news?oid=202906&sn=Detail&pid=334&Bushbuckridge-protest-against-councillors> [date of use 4 December 2012]; 'Protest over ANC-imposed councillor' accessed at <http://www.iol.co.za/news/south-africa/kwazulu-natal/protest-over-anc-imposed-councillor-1.1073082> [date of use 4 December 2012].

1339 See De Visser *Developmental Local Government: A Case Study* 97-98; Mattes 2002 *Journal of Democracy* 24-25.

4.2.4 Observations on local democracy

Table 1¹³⁴⁰ suggests that state authorities must facilitate public participation in decision-making processes in their pursuit of social justice.¹³⁴¹ It is argued that because the legal framework for local government in South Africa makes extensive provision for public participation in local government matters, this justifies the potential of municipalities contributing to the pursuit of social justice. Apart from entrenching the right of community residents to participate in local governance, it imposes a duty on municipalities to develop the capacity of community residents and councillors so that they can meaningfully participate in the design and implementation of plans, policies, strategies and programmes that give effect to local government's expanded "developmental" mandate. Specifically, the *Systems Act* seeks to ensure that marginalised members of society, such as illiterates, should be given an opportunity to make inputs on local government matters. Despite these guarantees, the quality of public participation is poor in most municipalities. This has been attributed mainly to the mechanical application of the legal provisions on public participation by local government officials, which has effectively sidelined the views and interests of the poor in local governance. However, the jurisprudence of meaningful engagement developed by the Court provides valuable guidelines which could be used by local government officials to improve the quality of public participation at the local level. When effectively utilised, the Court's jurisprudence on meaningful engagement promises to improve, *inter alia*, the quality of policies at the local level by ensuring that they reflect the needs of the poor; promote capacity building and solidarity; and foster the realisation of socio-economic rights. Capacity building, strengthening group solidarity and the realisation of human rights are required benchmarks for state authorities' pursuit of social justice.¹³⁴² This means that, applying the guidelines on meaningful engagement has the potential to enhance local government's pursuit of social justice. However, it was argued that in order to realise the anticipated outcomes of meaningful engagement, it is important for government to allocate appropriate resources to impoverished

1340 See 2.4.3.

1341 See 2.4.3.

1342 See Table 1 in 2.4.3.

people. This will assist in addressing the skewed power relations that exist between municipalities and communities in the engagement process. Furthermore, where court judgments elaborate on the nature and implications of housing rights, this may provide a constitutional normative framework which could be used to search for specific solutions in engagement processes between parties, especially in cases where the engagement process ultimately breaks down.¹³⁴³ It was argued that it is only through the fostering of long-term deliberative partnerships between government and communities that meaningful engagement will be able to address the needs of local communities.

In terms of representative democracy, it was indicated that the electoral system for local government in South Africa is based on a mixture of proportional representation and constituency-based elections. Although this system has its advantages, it has been largely criticised for introducing a category of municipal councillors (proportional representation councillors) who are neither directly linked nor accountable to any community. This category of councillors cannot be directly held accountable by any community. As political appointees, they owe and pay allegiance to the party rather than local communities and in most instances, expend their energy defending the interests of the party rather than those of communities. It was also argued that because they are not accountable to local communities, this may undermine their responsiveness to the actual needs of communities and the quest for social justice. This suggests the need to move away from the election of councillors based on closed party lists. In addition, it was established that the requirement for gender parity in municipal councils seeks to address socio-cultural practices that have pervasively sidelined women from decision-making processes. This is an attempt to address one of the root causes of persistent socio-economic inequalities which enhances local government's pursuit of social justice.¹³⁴⁴

1343 Liebenberg 2012 *African Human Rights Law Journal* 19-20.

1344 See Table 1 in 2.4.3.

4.3 Local government structures

4.3.1 Introduction

Following the democratic transition, there was a need to reconfigure the local government landscape in order to create municipalities that were financially viable and capable of executing their newly mandated role, including delivering services in an equitable and sustainable manner throughout the country.¹³⁴⁵ In this regard, section 155(1) of the Constitution established three categories of municipalities (category A, B and C municipalities, also respectively referred to as metropolitan, local and district municipalities) and envisaged that national legislation should define: the different types of municipalities that could be established in each category; the criteria to be used in establishing the various categories of municipalities; their geographical boundaries; and the division of powers and functions between municipalities when an area has municipalities of both category B and C.¹³⁴⁶ Pursuant to the obligation imposed by section 155(2) and (3) of the Constitution, the *Structures Act* and the *Local Government: Municipal Demarcation Act*¹³⁴⁷ were enacted. An independent demarcation board, established in terms of the *Municipal Demarcation Act*, and guided by factors outlined in section 25 of that Act,¹³⁴⁸ continues to redefine the boundaries of municipalities that fit into the three categories outlined in section 155(1) of the Constitution. Different types of municipal structures can be established within

1345 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 445; Reddy 'South Africa: Local Government Democratisation and Decentralisation Revisited' in Reddy *Local Government Democratisation and Decentralisation* 201; Zybrands 'Local government' in Venter and Landsberg *Government and Politics in South Africa* 135-136.

1346 See s155 (2) and (3) of the Constitution.

1347 *Local Government: Municipal Demarcation Act* 27 of 1998.

1348 In determining a municipal boundary, the Municipal Demarcation Board is guided *inter alia* by: the interdependence of people, communities and economies, determined by a host of factors; the need for cohesive, integrated and unfragmented areas; the financial viability and administrative capacity of the municipality to perform municipal functions effectively and efficiently; the need to share and redistribute financial and administrative resources; provincial and municipal boundaries; areas of traditional rural communities; existing and expected land use, social, economic and transport planning; topographical, environmental and physical characteristics of the area; and the need to rationalise the total number of municipalities within different categories and of different types to achieve the objectives of effective and sustainable service delivery, financial viability and macro-economic stability. See s 25 of the *Municipal Demarcation Act*.

the various categories of municipalities in the country.¹³⁴⁹ Du Plessis has argued that although the Constitution is not clear on the consequences of the various categories of municipalities, this may be relevant in relation to the extent to which the newly created structures and institutions respond to their new constitutional mandate.¹³⁵⁰ She argues that:

The categorisation of municipalities and the different types of municipal institutions could be relevant here in so far as it pertains to the manner in which different municipalities with similar or different resources, infrastructure and challenges, proceed in fulfilling the section 24 environmental right.¹³⁵¹

The above observation is true both in terms of the extent to which the different categories of municipalities and their structures may fulfil local government's constitutional rights obligations and contribute towards achieving defined constitutional objectives. The subsequent discussion examines the nature of different municipal structures and generally evaluates the extent to which they could facilitate local government's pursuit of social justice with reference to the benchmarks in Table 1.

4.3.2 Metropolitan municipalities

The first category of municipalities is referred to as category A or metropolitan municipalities.¹³⁵² A metropolitan municipality has exclusive municipal legislative and executive authority in its area of jurisdiction.¹³⁵³ Apart from the legal duty to co-operate with other spheres of government, metropolitan municipalities do not share the obligation of pursuing social justice with another local authority.¹³⁵⁴ It is envisaged by the *Structures Act* that a metropolitan municipality must be a conurbation with areas of high population density; an intense movement of goods, people and services; extensive development; and multiple business districts and industrial areas.¹³⁵⁵ A metropolitan municipality is a centre of economic activity, with a complex and

1349 See ss 7-11 of the *Structures Act*.

1350 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 444-445.

1351 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 445.

1352 See s 155 (1)(a) of the Constitution.

1353 See s 1 of the *Municipal Structures Act*; CoGTA *State of Local Government in South Africa* (2009) 22-24.

1354 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 445-446.

1355 See s 2(a)(i)-(iv) of the *Structures Act*.

diverse economy; it constitutes a single area for which integrated development planning is desirable; and shares strong interdependent social and economic linkages between its constituent units.¹³⁵⁶

There are currently eight metropolitan municipalities in the country.¹³⁵⁷ Metropolitan municipalities are well resourced and control a bulk of the country's productive economy.¹³⁵⁸ The criteria used in establishing them suggest that such municipalities have a good tax base that could be used to generate finances needed to meet their constitutional mandate including the provision of services such as water, sanitation and electricity. In addition, their stimulating economic environment may expose them to a more skilled workforce, which is indispensable in ensuring optimal output in the quest to achieving the objects of local government.¹³⁵⁹ A combination of the above factors may be the reason why metropolitan municipalities are also referred to as "self-standing municipalities"¹³⁶⁰ or as unities.¹³⁶¹ They may require a lesser degree of support from provincial and national spheres of government in their pursuit of social justice.¹³⁶²

Despite the potential advantages metropolitan municipalities seem to enjoy, it has been suggested that some of them are too big and have impractical boundaries.¹³⁶³ In addition, one of the main problems with metropolitan municipalities is that their administration is cut-off from constituents making it

1356 See s 2(b)-(d) of the *Structures Act*.

1357 These are Buffalo City Metropolitan Municipality (East London); City of Cape Town Metropolitan Municipality (Cape Town); Ekurhuleni Metropolitan Municipality (East Rand); eThekweni Metropolitan Municipality (Durban); City of Johannesburg; Mangaung Metropolitan Municipality (Bloemfontein); Nelson Mandela Bay Metropolitan Municipality (Port Elizabeth); and Tshwane Metropolitan Municipality (Pretoria).

1358 For details, see DPLG (now CoGTA) *State of Local Government in South Africa* (2009) 22-24; National Treasury *2011 Local Government Budget and Expenditure Review 2006/07-2012/13* (2011) 11.

1359 Municipal Demarcation Board (MDB) *State Municipal Assessment 2010/2011: National Trends in Municipal Capacity* (2012) iv and v.

1360 Steytler and De Visser *Local Government Law of South Africa* 2-19.

1361 Zybrands 'Local government' in Venter and Landsberg *Government and Politics in South Africa* 136.

1362 See Christmas and De Visser 2009 *CJLG* 109.

1363 Zybrands 'Local government' in Venter and Landsberg *Government and Politics in South Africa* 136; De Visser 2009 *CJLG* 15.

difficult for the masses to ensure political accountability.¹³⁶⁴ This challenge is further exacerbated by the fact that a large number of metropolitan councillors are indirectly elected by way of nominated proportional party lists.¹³⁶⁵ In addition, a serious challenge currently faced by metropolitan municipalities is the influx of migrants from rural areas which increases demand for municipal services.¹³⁶⁶ This influx helps in increasing backlogs in the provision of municipal services.

Despite the above challenges, the level of financial and human resources available to metropolitan municipalities suggest that they could use their legislative and executive powers to design and implement measures that redistribute resources to poor areas, facilitate public participation in local governance, build local capacity, promote sustainable development and direct their administrative machinery towards the full realisation and protection of human rights.¹³⁶⁷ For example, due to their vibrant economic base and existing infrastructure, metropolitan municipalities would probably face fewer challenges in promoting local economic growth which is necessary to create employment opportunities that can improve the life of communities. It is argued that metropolitan municipalities have enormous potential to contribute towards the pursuit of social justice.

4.3.3 District municipalities

The second category of municipalities is referred to as category C or district municipalities. The *Structures Act* requires that where an area does not meet the criteria for a metropolitan municipality, such an area must have municipalities of both category C and B.¹³⁶⁸ This explains why a district municipality shares municipal legislative and executive authority in its area

1364 Zybrands 'Local government' in Venter and Landsberg *Government and Politics in South Africa* 136; De Visser 2009 *CJLG* 15.

1365 See Zybrands 'Local government' in Venter and Landsberg *Government and Politics in South Africa* 136-138. See Mattes 2002 *Journal of Democracy* 22-36 at 25-26; Southall 2000 *Commonwealth and Comparative Politics* 147-170. See 4.4.2.

1366 Statistics South Africa *Migration and Urbanisation in South Africa* (2006) 21-22; NPC *National Development Plan* (2011) 6-7; National Treasury *2011 Local Government Budget and Expenditure Review 2006/07-2012/13* (2011)10-11; Nealer 'Local Government and service delivery' in Van der Walt *Municipal Management: Serving the People* 158.

1367 See Table 1 in 2.4.3.

1368 See s 3 of the *Structures Act*.

with a category B municipality (also known as a local municipality) within whose area it falls.¹³⁶⁹ There are currently 44 district municipalities in the country.¹³⁷⁰ In general, district municipalities play two main roles: they redistribute resources within a district according to needs; and assist and develop the capacity of local authorities to provide and sustain services to communities in their areas.¹³⁷¹

Since district and local municipalities share municipal executive and legislative powers over the matters prescribed in sections 156 (general powers and functions of municipalities) and 229 (fiscal powers and functions of municipalities) of the Constitution, the *Structures Act* requires that these functions and powers be shared between the district municipality and the local municipalities within the district.¹³⁷² However, the onus lies with the district municipality to ensure the entire district achieves integrated, sustainable and equitable social and economic development of its area by: ensuring integrated development planning for the district municipality as a whole; promoting bulk infrastructural development and services for the entire district; building the capacity of local municipalities in case of lack thereof, so as to ensure they exercise their powers and perform their functions; and promoting the equitable distribution of resources between local municipalities within the district area so as to ensure that services are rendered at an appropriate level within the entire district area.¹³⁷³ It has been suggested that because the purpose of the district municipality is to respond to the needs and capacity of local municipalities, the district municipality may play a different role in respect to each local municipality in its district.¹³⁷⁴ This also means that the division of powers and functions between a district municipality and the local municipalities in the district can vary depending on individual needs and capacity.¹³⁷⁵

1369 See s 155(1)(b) of the Constitution.

1370 See <http://www.localgovernment.co.za/> [date of use 6 October 2013]

1371 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 449.

1372 See s 83(1)-(2) of the *Structures Act*.

1373 See s 83(3)(a)-(d) of the *Structures Act*.

1374 Steytler 2003 *Law, Democracy and Development* 230.

1375 Steytler 2003 *Law, Democracy and Development* 230.

Section 84(1) of the *Structures Act* specifies the powers and functions of district municipalities. These include: integrated development planning for the district municipality as a whole, including developing a framework for integrated development plans of all municipalities in the area of the district municipality; potable water supply systems; bulk supply of electricity, which includes for the purposes of such supply, the transmission, distribution and, where applicable, the generation of electricity; domestic waste-water and sewage disposal systems; solid waste disposal sites, in so far as it relates to the determination of a waste disposal strategy, the regulation of waste disposal, and the establishment, operation and control of waste disposal sites, bulk waste transfer facilities and waste disposal facilities for more than one local municipality in the district; municipal roads which form an integral part of a road transport system for the area of the district municipality as a whole; regulation of passenger transport services; municipal airports serving the area of the district municipality as a whole; municipal health services; fire fighting services serving the area of the district municipality as a whole, which includes planning, co-ordination and regulation of fire services, specialised fire fighting services such as mountain, veld and chemical fire services, co-ordination of the standardisation of infrastructure, vehicles, equipment and procedures, training of fire officers; the establishment, conduct and control of fresh produce markets and abattoirs serving the area of a major proportion of the municipalities in the district; the establishment, conduct and control of cemeteries and crematoria serving the area of a major proportion of municipalities in the district; promotion of local tourism for the area of the district municipality; municipal public works relating to any of the above functions or any other functions assigned to the district municipality; the receipt, allocation and, if applicable, the distribution of grants made to the district municipality; and the imposition and collection of taxes, levies and duties as related to the above functions or as may be assigned to the district municipality in terms of national legislation.¹³⁷⁶ It is evident from the myriad of functions of district municipalities outlined in section 84(1) of the *Structures Act* that horizontal cooperation between district and local municipalities in the

¹³⁷⁶ See s 84(1)(a)-(p) of the *Structures Act* as amended by section 6(a) of the *Local Government: Municipal Structures Amendment Act* 33 of 2000.

areas of financial, administrative and technical support services is indispensable for district municipal structures to realise their constitutional mandate and contribute towards the pursuit of social justice.¹³⁷⁷

Following the amendment of section 84 of the *Structures Act* in 2000, some functions that were originally performed by local authorities were given to district municipalities. A good example of such function is the provision of potable water-supply systems. The rationale for this approach was to enable district municipalities to play a more "developmental" role in disadvantaged rural areas in particular. While this move has been lauded for attempting to comply with the constitutional obligation imposed on local government to satisfy, especially the basic needs of local communities, it has also been criticised on the ground that it increased the responsibilities of district municipalities that already generally suffer from limited financial and human resource capacity.¹³⁷⁸ In the 2010/2011 financial year, it was reported that district municipalities not responsible for the water services authority role spent 48.8 percent of their budgets on governance and administration.¹³⁷⁹ Municipalities that spend almost half of their budgets on governance and administration would probably lack the financial resources needed to promote sustainable development, protect and fulfil human rights as well as pursue social justice.

The amendment of section 84 of the *Structures Act* in 2000 did not completely eliminate uncertainty regarding where responsibility lies for the provision of core municipal services such as water, electricity, sewage and health services.¹³⁸⁰ This uncertainty over responsibility in the provision of access to basic services was recently highlighted in the court battles by the Carolina Community against the Albert Luthuli Local Municipality and the Gert Sibanda District Municipality in the Mpumalanga Province, triggered by the need to

1377 Steytler 2003 *Law, Democracy and Development* 239. See s 88 of the *Structures Act*.

1378 See Zybrands 'Local government' in Venter and Landsberg *Government and Politics in South Africa* 136; MDB *State Municipal Capacity Assessment 2010/2011: National Trends in Municipal Capacity* (2012) iii and vi.

1379 MDB *State Municipal Capacity Assessment 2010/2011: National Trends in Municipal Capacity* (2012) vi.

1380 See Steytler 2003 *Law, Democracy and Development* 235; Christmas and De Visser 2009 *CJLG* 111; NPC *National Development Plan* (2011) 364; MDB *State Municipal Capacity Assessment 2010/2011: National Trends in Municipal Capacity* (2011) vi.

compel the latter to fulfil their constitutional and statutory obligations to provide potable water to Carolina residents.¹³⁸¹ Despite the Court's order that the government should provide temporary potable water to all residents of the Carolina Community within 72 hours, both municipalities failed to meet the deadline and rather, decided to lodge an appeal to suspend the operation of the North Gauteng High Court's orders.¹³⁸² *Lawyers for Human Rights (LHR)*,¹³⁸³ one of the legal representatives of the Carolina Community interpreted this move as "indicative of the two municipalities' consistent refusal to accept their responsibility to provide even the most basic water supply to the residents."¹³⁸⁴ This confusion over responsibilities may negatively affect the extent to which district authorities implement the benchmarks required for state authorities' pursuit of social justice, such as the fulfilment of human rights, for example.¹³⁸⁵ From this perspective, it can be argued that confusion over responsibilities is inimical to municipalities' pursuit of social justice.

In addition to the confusion over responsibility in the provision of basic municipal services, the amendment of section 84 of the *Structures Act* in 2000 effectively removed income generating services from local municipalities to districts.¹³⁸⁶ With limited income generating opportunities, it appears that some local municipalities within districts will find it extremely difficult to adopt context specific measures that could enable them effectively play their "developmental" role.¹³⁸⁷ Furthermore, the sharing of executive and legislative functions between local and district municipalities can be a potential source of

1381 See *Federation for Sustainable Environment and Others v Minister of Water Affairs* [2012] ZAGPPHC 128.

1382 See "Press Release – Carolina Residents to Oppose Municipalities' Leave to Appeal Application" accessed at: <http://www.lhr.org.za/news/2012/press-release-carolina-residents-oppose-municipalities-leave-appeal-application> [date of use 19 July 2012].

1383 Lawyers for Human Rights is an independent human rights organisation with 30 years experience in human rights activism and public interests litigation in South Africa. See <http://www.lhr.org.za/> [date of use 19 July 2012].

1384 See "Press Release – Carolina Residents to Oppose Municipalities' Leave to Appeal Application". Accessed at: <http://www.lhr.org.za/news/2012/press-release-carolina-residents-oppose-municipalities-leave-appeal-application> [date of use 19 July 2012].

1385 See 2.4.3.

1386 Steytler 2003 *Law, Democracy and Development* 235 and 239; Zybrands 'Local government' in Venter and Landsberg *Government and Politics in South Africa* 136.

1387 See Zybrands 'Local government' in Venter and Landsberg *Government and Politics in South Africa* 136.

tension. In fact, it has been suggested that the flexible distribution of functions and powers between local and district municipalities in some cases, has led to a contest for resources¹³⁸⁸ and that, the continual legislative and policy changes on local government has not cleared the confusion on the powers and functions of local and district municipalities.¹³⁸⁹ Tensions of this nature may impact negatively on the ability of some municipalities to play their "developmental" role and undermine their pursuit of social justice because it may divert attention from the main task.¹³⁹⁰ It appears that the existence of a harmonious relationship between district and local municipalities within any district is necessary for such municipalities to be able to realise developmental outcomes. Du Plessis argues that:

Without cooperation among different municipal institutions in district areas, it would not be possible for one single authority to address all the development challenges and at the same time be responsive to the needs and demands of local residents. District municipalities theoretically have an important role in local government generally, as well as in achieving local government's constitutional objectives and obligations. It is argued here that the institution of district municipalities could in theory be of significant benefit for the fulfilment of the section 24 environmental right by smaller, less capacitated local authorities.¹³⁹¹

The above extract highlights that without horizontal co-operation at the district level, municipal institutions in these areas face serious challenges in their pursuit of social justice. Despite their constraints, it is suggested that district municipalities should concentrate on assisting local municipalities to understand that which is necessary for local authorities' pursuit of social justice and on developing the local capacity needed to implement policies that could redistribute resources to the poor, promote quality public participation in local governance, protect and fulfil constitutional rights, promote sustainable

1388 Steytler 'Local Government in South Africa: Entrenching decentralised government' 192; *Fulfilment of South Africa's Constitutional Environmental Right* 451.

1389 Kirkby *et al* 2007 *SAPR/PL* 148-149; Edward 2008 *Politeia* 72-73. By virtue of s 85 of the *Structures Act*, the MEC for local government in the province has powers to further adjust the powers and functions between district and local municipalities.

1390 See CoGTA *State of Local Government in South Africa* (2009) 22; Kirkby *et al* 2007 *SAPL* 145 -146 for details.

1391 *Fulfilment of South Africa's Constitutional Environmental Right* 450.

development, promote group solidarity and where possible, address other underlying causes of socio-economic inequalities.¹³⁹²

4.3.4 Local municipalities

The third category of municipalities is referred to as category B or local municipalities. There are 227 local municipalities in South Africa.¹³⁹³ A category B municipality has municipal executive and legislative authority in an area that includes more than one municipality.¹³⁹⁴ According to section 84(2) of the *Structures Act*, a local municipality has the functions and powers conferred by section 83(1) of the *Structures Act*, excluding those functions and powers vested by section 84(1) of the *Structures Act* in the district municipality in whose area it falls. However, where appropriate, a local municipality can be authorised by the Minister of Cooperative Governance and Traditional Affairs,¹³⁹⁵ after the necessary consultations, to perform a function or exercise a power mentioned in section 84(1)(b),(c),(d) and (i) of the *Structures Act* respectively dealing with potable water supply systems; bulk supply of electricity; domestic waste water and sewage disposal systems; as well as municipal health services.¹³⁹⁶ In the case of authorisation, the Minister must regulate the legal, administrative and practical consequences that flow from such authorisation.¹³⁹⁷ Furthermore, the Minister can amend any authorisation granted to a local municipality in terms of section 84(3)(a) of the *Structures Act* and regulate the consequences of such amendment.¹³⁹⁸ The authority to amend authorisations therefore gives the Minister powers to address situations where a local municipality subsequently proves to be unable to execute authorised powers and functions. The effect of an authorisation is that the district or local municipality concerned does not lose the function as it merely allows another municipality to also perform it.¹³⁹⁹

1392 See Table 1 in 2.4.3.

1393 See <http://www.localgovernment.co.za/> [date of use 06 October 2013].

1394 S 155(1) of the Constitution; S 1 of the *Structures Act*.

1395 Hereafter, the Minister.

1396 See s 84(3)(a) read together with s 84(1)(b),(c),(d) and (i) of the *Structures Act*.

1397 See s 84(3)(b)(i)-(iii) of the *Structures Act*.

1398 See s 84(3)(c) of the *Structures Act*, as substituted by s19 (b) of the *Local Government: Municipal Structures Amendment Act 51 of 2002*.

1399 Steytler 2009 *Law, Democracy and Development* 236.

The concentration of powers and functions in the hands of district municipalities in certain core areas such as water and electricity means that public pressure for the non-delivery of such services can be exerted on the local municipality instead of directing them to the district municipality.¹⁴⁰⁰ This implies that without public awareness, local councillors may bear the anger of community residents for failures that are beyond their immediate powers. In addition, due to the fact that local municipalities often cover vast far flung rural areas, the centre of administrative decision-making is often far from communities.¹⁴⁰¹ This has resulted in satellite governments that are cut-off from rural communities which often lack the means of transport to administrative decision-making centres, for example.¹⁴⁰² This implies that without taking government to such far flung rural areas, community members cannot make sufficient input into policies and programmes that are supposed to address their needs. This also means that adopted policies and programmes may not necessarily reflect the aspirations of communities.

Furthermore, due to the fact that local municipalities are an amalgamation of two or more municipalities that occurred during the interim period of transformation, constituent towns often have little or nothing in common and some previously viable municipalities have increasingly become financially vulnerable given their merger with areas that lacked a sound tax base.¹⁴⁰³ Local municipalities in largely rural areas find it extremely difficult to attract and retain skilled staff and it is estimated that these municipalities (with communal tenure) spend about 70 percent of their budgets on governance

1400 For example, on 19 March 2012, residents of Lesedi Local Municipality, (part of the Sedibeng District Municipality) burnt the houses of at least eight councillors during a violent protest over, *inter alia*, power cuts and high electricity rates. The supply of electricity is a function of district municipalities. The frustration of community residents could in practice be effectively addressed at the district level. See 'SALGA Provincial Executive Committee Rotational Meets in Lesedi Municipality' accessed at: <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=27925&tid=70638> [date of use 12 December 2012].

1401 See Zybrands 'Local government' in Venter and Landsberg *Government and Politics in South Africa* 137; Nealer 'Local Government and service delivery' in Van der Walt *Municipal Management: Serving the People* 158.

1402 See Zybrands 'Local government' in Venter and Landsberg *Government and Politics in South Africa* 137; Nealer 'Local Government and service delivery' in Van der Walt *Municipal Management: Serving the People* 158.

1403 See Zybrands 'Local government' in Venter and Landsberg *Government and Politics in South Africa* 137; De Visser 2009 *CJLG* 15.

and administration.¹⁴⁰⁴ In these circumstances, it becomes difficult to envisage how such local municipalities can play any meaningful "developmental" role and pursue social justice without massive external support. The ability of rural local municipalities to achieve the objects of "developmental" local government and pursue social justice is seriously limited by the obvious fact that, they have the least level of development in terms of infrastructure, industries and economic activities.¹⁴⁰⁵

Despite all the challenges highlighted above, it is suggested that local municipalities generally remain closer to local communities when compared to district and metropolitan municipalities, thereby making them more suitable functionaries in some instances.¹⁴⁰⁶ It has been suggested that because local councils are closer to communities, they are better placed to protect and fulfil the constitutional rights of communities.¹⁴⁰⁷ This means that local municipalities could take advantage of their closeness to local communities to promote human rights and to facilitate the participation of communities in designing and implementing strategies that seek to give effect to their rights. This may enhance their role in the pursuit of social justice.

4.3.5 District management areas

A district management area is defined as part of a district municipality which in terms of section 6 of the *Structures Act*, has no local municipality and is governed by that district municipality alone.¹⁴⁰⁸ Alternatively, a district management area can be defined as an area within a district municipality, which is not part of any local municipality but is managed and governed directly by the district municipality under whose jurisdiction it falls.¹⁴⁰⁹ A district municipality exercises all municipal powers and functions in any district

1404 See MDB *State Municipal Capacity Assessment 2010/2011: National Trend in Municipal Capacity* (2012) vi; NPC *National Development Plan* (2011) 364 and 371; National Treasury *2011 Local Government Budget and Expenditure Review 2006/07-2012/13* (2011) 11-12.

1405 For details on the development challenges faced by rural municipalities and the extent of support provided by national government, see National Treasury *2011 Local Government Budget and Expenditure Review 2006/07-2012/13* (2011) 191-210.

1406 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Rights* 446.

1407 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Rights* 446-448.

1408 See s 1 of the *Structures Act*.

1409 HSRC *National Study of Service Delivery in District Management Areas* (2005) 10.

management area that falls under it.¹⁴¹⁰ This means that a district management area is not a municipality *per se*. In *Executive Council of the Province of the Western Cape v Minister of Provincial Affairs*, the Court made this quite clear when it asserted that a district management area is not a separate municipality but part of the district municipality by which it is governed.¹⁴¹¹

District management areas are usually very sparsely populated areas that are not viable for the establishment of local municipalities. Although these settlements have limited economic potential, they have high environmental and biodiversity value needing protection and conservation.¹⁴¹² Low population density in vast areas of land, often parks, deserts and semi-arid areas, pose a serious challenge to the ability of district municipalities to extend development in those areas as well as meet the needs of residents.¹⁴¹³ The very sparsely populated nature of district management areas and the long distances between settlements arguably makes it difficult for district authorities to implement most of the generic benchmarks in Table 1.

4.3.6 Municipal councils and committees

Each municipality is obliged to have a municipal council which exercises both the legislative and executive authority of a municipality.¹⁴¹⁴ This establishes a conventional model of government which blurs the traditional separation of powers between the executive and the legislature.¹⁴¹⁵

Due to the fact that the legislative and executive powers of a municipality are vested in the municipal council, in effect, the council makes all decisions concerning the exercise of all the powers and the performance of all the functions of the municipality, generally by way of a majority vote of

1410 S 89 of the *Structures Act*, Steytler and De Visser *Local Government Law of South Africa* 2-20 – 2-21; HSRC *National Study of Service Delivery in District Management Areas* (2005) 10.

1411 *Executive Council of the Province of the Western Cape v Minister of Provincial Affairs*, par 66.

1412 HSRC *National Study of Service Delivery in District Management Areas* (2005) 10.

1413 HSRC *National Study of Service Delivery in District Management Areas* (2005) 10-11.

1414 See s 151(2) of the Constitution and s 18(1) of the *Structures Act*.

1415 Steytler and De Visser *Local Government Law of South Africa* 3-3.

councillors.¹⁴¹⁶ Specifically, it is the function of every municipal council to: pass by-laws; approve development plans; approve budgets; impose rates and other taxes, levies and other duties; raise loans needed for its development projects; use the resources of the municipality in the best interest of the local community; facilitate the participation of communities in municipal matters; consult the community about the level, quality, range and impact of municipal services provided by the municipality; ensure the provision of services on an equitable basis to the poor; promote and undertake development in the community; promote a safe and healthy environment within the jurisdiction of the municipality; and contribute towards the realisation of socio-economic rights duties.¹⁴¹⁷ It is the responsibility of the municipal council to annually review the needs of communities, its organisational and delivery mechanisms, the processes of community participation in local governance and its overall performance relative to defined goals and objectives.¹⁴¹⁸ Annual review and evaluation makes it possible for municipal councils to be able to reprioritise community needs, improve municipal performance and enhance processes for involving communities in local governance in accordance with changing circumstances.¹⁴¹⁹ This wide-range of functions indicates that municipal councils, as internal local government institutions, have a direct role to play in implementing the generic benchmarks for the pursuit of social justice. Municipal councils promote and facilitate local government's pursuit of social justice by virtue of the nature of their functions.

Although there are certain municipal functions which may not be delegated by a council,¹⁴²⁰ in order to facilitate effective government, a council may elect from amongst its ranks, committees to execute delegated functions subject to national legislation.¹⁴²¹ The *Structures Act* regulates the establishment of

1416 See ss 151(2) and 160(1)(a) of the Constitution; S 30 of the *Structures Act*, Steytler and De Visser *Local Government Law of South Africa* 3-12 to 3-15. The local government elections system is discussed in detail in 4.2.3 above.

1417 See s 160(2) of the Constitution and ss 4(2)(a)-(j) and 25(1) of the *Systems Act*.

1418 See s 19(1) and (2) of the *Systems Act*.

1419 See Clarke and Stewart *Planning for Change* 54; Gordon *Strategic Planning for Local Government* 55; Mercer *Strategic Planning for Public Managers* 21.

1420 See s 160(2) of the Constitution.

1421 See s 160(1)(c) of the Constitution.

committees in detail. When establishing a committee, a municipality must take into consideration: the extent of the powers and functions of the municipality; the need for efficiency and effectiveness in the discharge of municipal powers and functions; and the financial and administrative resources available to support the proposed committee.¹⁴²² Depending on the type of governance model adopted in a municipality,¹⁴²³ a municipal council can establish an executive committee,¹⁴²⁴ committees to assist the executive committee or executive mayor,¹⁴²⁵ and any other committees that are necessary for the effective and efficient performance of municipal functions.¹⁴²⁶ The manner in which a municipality uses its discretion to structure its committee system can have consequences in local accountability and may also impact on the manner in which it discharges its constitutional duties.¹⁴²⁷ It is possible for a municipal council to set up committees that handle specific portfolios aligned to one or more of the generic benchmarks for the pursuit of social justice. For example, committees could be established to: build local capacity, enhance public participation and solidarity in communities; specifically design and see to the implementation of redistributive measures such as policies and plans;

1422 See s 33(a) and (b) of the *Structures Act*.

1423 See generally ss 7, 8, 9 and 10 of the *Structures Act*. This is essentially decided at the provincial level. See ss 11 and 12 of the *Structures Act*. In the various governance models, it is possible to either have a 'ceremonial' mayor in a local, district and metropolitan council or an 'executive' mayor. The application of the options in s 8(a)-(d) of the *Structures Act* leaves room for the election of a 'ceremonial' mayor in metropolitan municipalities. On the other hand, an application of the options in s 8(e)-(h) obliges the relevant metropolitan municipality to elect an executive mayor. In terms of district municipalities, an application of the options in s 9(a),(b),(e) and (f) leaves room for the election of a 'ceremonial' mayor while an application of the options in s 9(c) and (d) obliges the district municipality to elect an executive mayor. Lastly, in terms of local councils, an application of the options in s 10(a) and (c) of the *Structures Act* makes it possible for the election of a 'ceremonial' mayor while s 10(b) obliges local councils to elect an executive mayor.

1424 Metropolitan municipalities with the following types of governance model/system can establish an executive committee: collective executive system; collective executive system combined with a sub-council participatory system; collective executive system combined with a ward participatory system; and collective executive system combined with both a ward participatory system and a sub-council system. See s 42(1) read with s 8(a)-(d) of the *Structures Act*. In terms of category B municipalities, the following types of system can establish executive committees: collective executive system and a collective executive system combined with a ward participatory system. See s 42(1) read with s 9(a) and (b) of the *Structures Act*. Lastly, a category C municipality can establish executive committees if it has a collective executive system. See s 42(1) read with s 10(a) of the *Structures Act*.

1425 See s 80 of the *Structures Act*.

1426 See s 79 of the *Structures Act*.

1427 De Visser *et al* *The Quality of Local Democracies* 11; SALGA *Municipal Public Accounts Committee (MPAC): Enhancing Oversight in the Municipality* (2012) 3.

monitor and ensure compliance with human rights duties; and to investigate and make suggestions on how to address underlying causes of socio-economic inequalities in local communities, amongst others. These committees can enhance oversight, improve municipal performance and generally enhance local government's pursuit of social justice.

In addition to other committees, a metropolitan or district municipality can establish ward committees.¹⁴²⁸ It has been suggested that, in the true sense, a ward committee is not a governance structure in a municipality because its main objective is to enhance public participation in local government.¹⁴²⁹ It creates a formal and direct communication through which residents can interact with their ward councillors as well as forward complaints and recommendations on matters affecting them to the council.¹⁴³⁰ In this manner, they can influence decisions made by the municipality. In addition, ward committees can perform any function or exercise any powers as delegated to the ward such as monitoring compliance with measures that give effect to constitutional rights.¹⁴³¹

Given their proximity to community residents, ward committees could be used to influence policies, programmes and plans of a municipal council, by making them reflective of actual community needs. In practice, some ward committees are dysfunctional and this has been attributed to resources constraints faced by some municipalities and the fact that some community residents do not take interest in the functioning of ward committees either

1428 This is possible for a category A municipality if it has: a collective executive system combined with a ward participatory system; a collective executive system combined with both a sub-council and a ward participatory system; a mayoral executive system combined with a ward participatory system; or a mayoral executive system combined with both a sub-council and a ward participatory system. See section 8(c), (d), (g) and (h) read with section 72 of the Structures Act. On the other hand, a category B municipality can make use of a ward system if it has: a collective executive system combined with a ward participatory system; a mayoral executive system combined with a ward participatory system; or a plenary executive system combined with a ward participatory system. See s 9(b),(d) and (f) read with ss 72 and 73 of *Structures Act*.

1429 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 458-459.

1430 Ss 72(3) and 74(a) of the *Structures Act*. See Reddy 2010 *Politeia* 72. See ss 73 and 74 of the *Structures Act* for establishment, composition, functions and powers of ward committees.

1431 S 74(b) of the *Structures Act* as substituted by s 7 of the *Local Government Laws Amendment Act* 19 of 2008. See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 459.

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.¹⁴³² Furthermore, political parties have in some instances, infiltrated ward committees in the guise of civic bodies which has led to greater conflicts between community residents and ward councillors.¹⁴³³ In addition, some community members do not understand the exact role of ward committees. The result of these challenges has been lack of communication between ward councillors and residents which has in some cases, led to a breakdown of trust and complete chaos.¹⁴³⁴ In these circumstances, it is difficult to conceive how communities in some wards can effectively make inputs into policies, plans, programmes and by-laws that seek to further the constitutional mandate of local government. However, if properly constituted and well managed, ward committees could play a significant role in, for example, discharging the socio-economic rights duties of local government through creating educational awareness on the policies, programmes and by-laws adopted to give effect to socio-economic rights. In addition, they could serve as the entry point to the municipality through which communities make their input on the policies, plans, programmes and activities of the municipality.

4.3.7 Observations on local government structures

The various categories of municipalities operate in different socio-economic and geographic environments. This has the potential to impact on the extent to which they realise their broad constitutional mandate as well as implement the generic benchmarks for the pursuit of social justice.¹⁴³⁵ For example, while

1432 See CoGTA *State of Local Government in South Africa* (2009) 13-15; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 460.

1433 Reddy 2010 *Politeia* 72.

1434 DPLG (now CoGTA) *National Policy Framework for Public Participation* (2007) 9; Smith 'The Role of Ward Committees in Enhancing Participatory Local Governance and Development in South Africa: Evidence from Six Ward Committee Case Study' 45. Breakdown in communication and outburst of chaos was clearly demonstrated when Soweto residents burned the house of ANC councillor Joe Nemaungane in Soweto on 05-July-2011 for failing to prevent the installation of prepaid electricity metres in his ward. See Ntuli 'ANC Gauteng condemns the burning of councillors' houses' accessed at: <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=244311&sn=Detail&pid=71616> [date of use 7 July 2011].

1435 MDB *State Municipal Capacity Assessment 2010/2011: National Trends in Municipal Capacity* (2012) vi-viii; National Treasury *2011 Local Government Budget and*

the context of metropolitan municipalities makes it possible for them to promote sustainable development and generate revenues needed to design and implement measures that will contribute towards the realisation of their constitutional mandate, a large number of municipalities in especially rural and semi-urban areas do not simply have the tax base needed to finance development programmes, therefore, relying heavily on the equitable share grant from national government.¹⁴³⁶ Some municipalities in especially rural areas cannot raise the funds needed for even moderate municipal functionality.¹⁴³⁷ This means that although all municipalities have the constitutional and legislative powers to promote sustainable development and generate internal revenue through taxes, for example, only metropolitan municipalities and some district and local municipalities really have the financial muscle required to meaningfully contribute towards the pursuit of social justice. In addition, it was indicated that metropolitan municipalities are most unlikely to experience the same degree of constraint in hiring and retaining skilled personnel because of their urban context which exposes them to a skilled work force. This also has an impact on the ability of a municipality to implement the generic benchmarks for the pursuit of social justice. Despite these differences, it is argued that all municipalities should strive towards implementing all the generic benchmarks required for the pursuit of social justice. This is because there is no hierarchy in the benchmarks. Where some are neglected, this can derail the pursuit of social justice. It is argued that the resources dedicated to the implementation of each benchmark should be informed by local contexts. For example, in rural municipalities where a higher degree of solidarity may exist, it will not be

Expenditure Review 2006/07-2012/13 (2011) 8 and 9; Nealer 'Local Government and service delivery' in Van der Walt *Municipal Management: Serving the People* 158.

1436 Kirkby *et al* 2007 *SAPL* 161-162; Christmas and De Visser 2009 *CJLG* 110; CoGTA *State of Local Government in South Africa* (2009) 22; *Local Government Budgets and Expenditure Review* (2011) 51-53.

1437 Berkowitz 'There is no way to break it to them gently where the state of our municipality budgets are concerned. The time for a no-holds-barred overhaul is right now. Are you listening, Mr President – it is time for tough love' accessed at: www.thedailymaverick.co.za/article/2011-06-15-sa-municipalities-mess-and-agigantic-mess [date of use 15 June 2011]; CoGTA *State of Local Government in South Africa* (2009) 54. In 2008-2009, 57 municipalities received more than 75% of their revenue from national transfers. See CoGTA *State of Local Government in South Africa* (2009) 59.

necessary in that context to dedicate substantial resources to building group solidarity, for example.

Due to the fact that district municipalities share legislative and executive powers over a series of legally defined functions, different municipal institutions in district areas would have to closely co-operate with each other in order to be able to deliver on their constitutional mandate. Close co-operation would minimise conflicts over control of resources and help in developing practical solutions where there is confusion over responsibilities. Without co-operation, the potential of district authorities to contribute towards the pursuit of social justice is diminished. It was argued that district municipalities could contribute towards the pursuit of social justice by focusing on enlightening local authorities on what is required to establish socially just communities and by developing the capacity of local authorities to take necessary action. It was suggested that given the proximity of local municipalities to communities, they stand a better chance to protect and fulfil the constitutional rights of communities, compared to district municipalities, for example.

In addition, it was argued that the wide-range of legislative and executive powers and functions of municipal councils indicate that they have a direct role to play in implementing the generic benchmarks for the pursuit of social justice. Moreover, it was argued that, in order to foster the pursuit of social justice, a municipal council could establish specific committees with portfolios aligned to one or more of the generic benchmarks in Table 1. In this manner, the council can delegate some functions to specific committees in order to accelerate delivery. It was further argued that although there is evidence that most ward committees are dysfunctional, if revitalised and properly managed, they could serve as a channel through which wards influence the content of local policies and create awareness about programmes and structures that have been established to give effect to the constitutional rights of communities. In addition, they could also help in monitoring compliance with municipal by-laws, policies and plans, for example.

4.4 Role players in South African local government

4.4.1 Introduction

Although the geographic jurisdiction of municipalities has been exclusively defined on a wall-to-wall scale, different role players within municipal structures are expected to interact with role players within political structures at the national and provincial level.¹⁴³⁸ The various role players are interdependent for the realisation of local government's expanded developmental mandate and its pursuit of social justice.

4.4.2 Municipal councillors

A municipal council consists of councillors elected for a five year term¹⁴³⁹ through a system of proportional and ward representation.¹⁴⁴⁰ This means that there are two types of councillors (ward councillors and proportional representation councillors) whose functions can also be distinguished. Out of the municipal council, the proportional representation councillor mostly interacts with his/her political party at different levels and may often be assigned a supporting role in ward committees, especially when the ward councillor is unavailable.¹⁴⁴¹ On the other hand, apart from expressing the views of community residents in the council, ward councillors are responsible for: chairing ward committee meetings; reporting to communities decisions, policies, plans and programmes adopted by the council to address their needs; evaluating the impact of municipal projects at ward level and reporting findings to the council; and serving as a general communication channel between communities and the council.¹⁴⁴² This means that, as required by the generic benchmarks for state authorities' pursuit of social justice, ward councillors enhance local government's pursuit of social justice by facilitating

1438 *Maccsand* case, pars 47-48.

1439 S 26 of the *Structures Act*.

1440 See 4.2.2 above.

1441 *Paradza et al Assessing Assessing the Role of Councillors in Service Delivery at Local Government Level in South Africa* (2010) 11.

1442 *Paradza et al Assessing the Role of Councillors in Service Delivery at Local Government Level in South Africa* (2010) 11; *SERI et al Making Local Government Work: An Activist Guide* (2011) 14.

public participation in community matters and by building group solidarity at the ward level.¹⁴⁴³

All municipal councillors have an important oversight role to play in ensuring that policies, plans, projects and budgetary allocation are in line with the constitutional mandate of local government.¹⁴⁴⁴ Where they feel that proposed policies, plans, projects and budgetary allocations are not in line with community needs, they can vote against their adoption. Empirical research suggests that some municipal councillors do not effectively exercise their oversight function due to a variety of factors including corruption and low levels of education.¹⁴⁴⁵ The lack of effective oversight on the part of municipal councillors generally affects the output of municipalities. This implies that policies and programmes that seek to further the developmental objectives of local government, budgetary allocations and financial management systems are not subjected to rigorous scrutiny.¹⁴⁴⁶

It is important to note that in discharging their functions, councillors are obliged to adhere to the basic constitutional values and principles governing public administration and the Code of Conduct for Councillors.¹⁴⁴⁷ They are expected to *inter alia*, promote transparency and accountability in local governance.¹⁴⁴⁸ However, evidence suggests that instead of adhering to these constitutional principles and serving the public, some councillors are preoccupied with "accruing wealth at the expense of poor communities."¹⁴⁴⁹ There are reports of councillors being directly involved in growing corruption, financial mismanagement, patronage, nepotism and complete lack of

1443 See Table 1 in 2.4.3.

1444 Paradza *et al* *Assessing the Role of Councillors in Service Delivery at Local Government Level in South Africa* (2010) 13.

1445 De Visser *et al* *The Quality of Local Democracies* 21; Paradza *et al* *Assessing the Role of Councillors in Service Delivery at Local Government Level in South Africa* (2010) 16-19; Auditor-General *Consolidated General Report on the Audit Outcomes of Local Government 2010-11* (2012) 13.

1446 See De Visser *et al* *The Quality of Local Democracies* 21-24; Paradza *et al* *Assessing the Role of Councillors in Service Delivery at Local Government Level in South Africa* (2010) 16-19; Auditor-General *Consolidated General Report on the Audit Outcomes of Local Government 2010-11* (2012) 13.

1447 See s 195 of the Constitution; S 50 and Schedule 1 of the *Systems Act*.

1448 See s 195(1) of the Constitution.

1449 CoGTA *State of Local Government in South Africa* (2009) 10.

accountability in most municipalities.¹⁴⁵⁰ It is reported that councillors are "slow in taking up their responsibilities and do not take ownership of their role in implementing key controls."¹⁴⁵¹ It is difficult to imagine how municipalities that are mired in these malpractices can effectively advance the transformative objectives of the Constitution.

4.4.3 Municipal managers

Irrespective of the governance model adopted by a municipality, a municipal manager remains an indispensable functionary. Section 54A of the *Systems Act* compels every municipal council to appoint a municipal manager who is the head of administration and principal accounting officer of the municipality.¹⁴⁵² In appointing a municipal manager, the municipal council must ensure that the candidate possesses the prescribed skills, expertise, competencies and qualifications.¹⁴⁵³ Any appointment or contract of appointment between the municipal manager and the municipal council is null and void if the manager does not meet the prescribed skills, expertise, competencies and qualifications for that position.¹⁴⁵⁴ In *South African Municipal Workers Union and Another v Merafong City Local Municipality and Others*,¹⁴⁵⁵ the municipal council's decision to appoint a municipal manager in breach of section 54A of the *Systems Act* was declared null and void by the Johannesburg Labour Court.¹⁴⁵⁶ The stringent requirements for the appointment of municipal managers illustrate the strategic importance of their role to the effective governance of a municipality. In addition, these requirements seek to do away with the pervasive culture where municipal staffs, including municipal

1450 CoGTA *State of Local Government in South Africa* (2009) 11 and 19; Auditor-General *Consolidated General Report on the Audit Outcomes of Local Government 2010-2011* (2012) 64-66.

1451 Auditor-General *Consolidated General Report on the Audit Outcomes of Local Government 2010-2011* (2012) 13.

1452 See s 55(1) and (2) of the *Systems Act*. S 54A(1)(a) of the *Systems Act*. S 54(1)(a) obliges a municipal council to appoint an acting municipal manager under prescribed circumstances. However, due to the importance of this position, a municipal manager cannot function on an acting capacity for more than 6 months. See s 54A(2A)(a) and (b) of the *Systems Act*. See De Visser *et al The Quality of Local Democracy* 15.

1453 S 54A(2) of the *Systems Act*.

1454 S 54A(3)(a) and (b) of the *Systems Act*.

1455 *South African Municipal Workers Union and Another v Merafong City Local Municipality* (2013) Case No: J1021/12.

1456 *South African Municipal Workers Union and Another v Merafong City Local Municipality*, pars 23 and 30. For details of the judgment, read pars 1-27.

managers, were often appointed on the basis of political patronage and at times, in complete disregard for necessary skills and expertise.¹⁴⁵⁷

As head of the municipality's administration, the municipal manager is, subject to the policy directions of the municipal council, responsible and accountable for *inter alia*: the formation and development of an economical, effective, efficient and accountable administration capable of implementing the municipality's IDP, responding to the needs of communities and ensuring their participation in the affairs of the municipality and operating in accordance with the municipality's performance management system;¹⁴⁵⁸ the management of the municipality's administration; the implementation and monitoring of the implementation of the municipality's IDP; the management of the provision of services to the community in a sustainable and equitable manner; the appointment (subject to section 56(a) of the *Systems Act*), management, training, discipline and effective utilisation of staff; advising the political structures and political office bearers of the municipality; managing communications between the municipality's administration and its political structures and political office bearers; implementing the decisions of the political structures and political office bearers of the municipality; administering and implementing the municipality's by-laws and other relevant legislation; facilitating participation by local communities in the affairs of the municipality; and developing and maintaining a system that assesses the satisfaction of communities with municipal services.¹⁴⁵⁹ These myriad of administrative duties illustrates the important nature of the municipal manager's position to the functioning of the municipality. He/she serves as the bridge between the political structures and office bearers on the one hand and the municipal administration on the other.¹⁴⁶⁰ As accounting officer, he/she keeps records and documents of the municipality and carries the overall responsibility for its financial affairs.¹⁴⁶¹ Precisely, the municipal manager is responsible and accountable for: all income and expenditure of the

1457 See Christmas and De Visser 2009 *CJLG* 110; De Visser 2009 *CJLG* 17-18.

1458 S 55(1)(a) of the *Systems Act*.

1459 See s 55(1)(b)-(q) of the *Systems Act*.

1460 Steytler and De Visser *Local Government Law of South Africa* 8-21.

1461 Steytler and De Visser *Local Government Law of South Africa* 8-21.

municipality; all asserts and the discharge of all liabilities of the municipality; and proper compliance with the *Municipal Finance Management Act*.¹⁴⁶²

In view of the numerous strategic functions assigned to the municipal manager, the Court has stressed that "the municipal manager is a key structure of a municipality and not merely a personnel appointment as contemplated in section 160(1)(d) of the Constitution."¹⁴⁶³ Due to the strategic role of the municipal manager in facilitating the realisation of the constitutional and legislative mandate of municipalities, and the need to stay afloat from political dramas at the level of municipalities, they are barred from temporarily or permanently holding any political office in any political party.¹⁴⁶⁴ In discharging his/her administrative duties, the municipal manager should ensure that the administration of the municipality complies with the democratic values and principles contained in the Constitution.¹⁴⁶⁵ By virtue of the nature of their wide range of administrative functions, municipal managers directly contribute to local government's pursuit by: building local capacity; implementing and monitoring the implementation of redistributive measures such as policies and plans; facilitating public participation in the affairs of the municipality; and managing the provision of services in a manner that also meets the needs of impoverished households.¹⁴⁶⁶

It should be noted that despite the laudable legislative changes that are intended to ensure that municipalities recruit only competent and skilled municipal managers and other senior managers¹⁴⁶⁷ it will take some time for the system of local government to cleanse itself of incompetent and unskilled managers. According to recent reports, most municipal managers across the country lack relevant work experience and 25 percent of positions for municipal managers in the 2010/2011 financial year were vacant for more than

1462 The financial responsibilities of municipal managers are outlined in s 60 of the *Municipal Finance Management Act*.

1463 *Executive Council of the Western Cape v Minister for Provincial Affairs*, par 109. See also pars 107-108.

1464 S 56A which limits the political rights of municipal managers in this regard was introduced by s 5 of Act 7 of 2011. This limitation does not apply retrospectively.

1465 See s 50(1) of the *Systems Act*. S 195 of the Constitution outlines the basic values and principles governing public administration.

1466 These are in line with some of the generic benchmarks in Table 1. See 2.4.3.

1467 See respectively ss 54A (3)(a) and (b) and 56(1)(b) of the *Systems Act*.

3 months.¹⁴⁶⁸ This situation is further exacerbated by the fact that, across the country, almost 50 percent of technical services managers do not have an undergraduate degree "yet are responsible for services that account for the highest proportion of municipal assets value and for functions that represent the bulk of municipal expenditure."¹⁴⁶⁹ The lack of skilled and competent municipal managers and senior managers in some municipalities has led to administrative paralysis, thereby making it impossible for municipal councils to effectively function.¹⁴⁷⁰ In the current circumstances, some municipalities are barely functional and can hardly play the transformative role envisaged by the Constitution.

4.4.4 Traditional authorities

Before and during colonialism and apartheid, traditional authorities wielded enormous governing powers over their subjects.¹⁴⁷¹ Following the transition to democracy, traditional leadership was constitutionally recognised and protected as an institution at the local government level.¹⁴⁷² In particular, section 212(1) of the Constitution provides that national legislation "may provide for a role for traditional leadership as an institution at local level on matters affecting local communities." Apart from these broad pronouncements, the Constitution does not clearly define what the role of traditional leaders entails.¹⁴⁷³ However, article 81 of the *Structures Act* sheds more light on the participation of traditional leaders in municipal councils. Section 81(1) of the *Structures Act* provides that, traditional authorities that consistently observe a system of customary law in the area of a municipality may participate through their leaders, (identified in terms of section 81(2) by the MEC for local government in a province) in the proceedings of the

1468 MDB *State of Municipal Capacity Assessment 2010/2011: National Trends in Municipal Capacity* (2011) iv.

1469 MDB *State of Municipal Capacity Assessment 2010/2011: National Trends in Municipal Capacity* (2011) v; Auditor-General *Consolidated General Report on the Audit Outcomes of Local Government 2010/11* (2012) 81.

1470 See MDB *State of Municipal Capacity Assessment 2010/2011: National Trends in Municipal Capacity* (2011) iv-v; Paradza *et al Assessing the Role of Councillors in Service Delivery at Local Government Level in South Africa* (2010) 17; National Treasury *2011 Local Government Budgets and Expenditure Review 2006/07-2012/13* (2011) 105.

1471 Rugege 2009 *Law, Democracy and Development* 172-173.

1472 See ss 211 and 212 of the Constitution.

1473 Rugege 2003 *Law, Democracy and Development* 178.

municipal council of that area, "and those traditional leaders *must* be allowed to attend and participate in any meetings of the council."¹⁴⁷⁴ Where there is a traditional leader but no traditional authority,¹⁴⁷⁵ the traditional leader cannot participate in municipal council proceedings.¹⁴⁷⁶ However, the number of traditional leaders that may participate in the proceedings of a municipal council may not exceed twenty percent of the total number of councillors in that council.¹⁴⁷⁷ If the council has less than ten councillors, then only one traditional leader may participate in council proceedings.¹⁴⁷⁸

The role of traditional authorities in municipal councils is largely limited to participating in council debates, submitting motions, making proposals and asking questions, especially on issues relating to their administrative areas. They serve as advisers without voting rights and can neither be office-bearers nor members of council committees.¹⁴⁷⁹ Before a council takes a decision on any matter directly affecting the area of a traditional authority, the council must give the leader of that traditional authority, an opportunity to express a view on that matter.¹⁴⁸⁰ Rugege interprets this provision to mean that, even if the concerned traditional leader has not been nominated to the council, he has the right to be given an opportunity to express his views to the council on any matter before the council that affects his community.¹⁴⁸¹ The MEC for local government in a province, after consulting the provincial House of Traditional Leaders, may by notice in the *Provincial Gazette*, prescribe a role for traditional leaders in the affairs of a municipality.¹⁴⁸²

1474 Own emphasis. This is subject to the conditions set out in section 81(2) of the *Structures Act*. See Steytler and De Visser *Local Government Law of South Africa* 3-17 – 3-19.

1475 Traditional authority in this context seems to suggest that the authority of the traditional leader must be clearly tied to tradition or custom as opposed to for example, government created traditional leaders.

1476 Steytler and De Visser *Local Government Law of South Africa* 3-18.

1477 See 81(2)(b) of the *Structures Act* as amended by s 5 of Act 33 of 2000. Where the number of traditional leaders exceeds twenty percent, the MEC for local government in the province can put in place a rotating system for these traditional leaders. See 81(2)(c) of the *Structures Act* as amended by s 5 of Act 33 of 2000.

1478 See 81(2)(b) of the *Structures Act* as amended by s 5 of Act 33 of 2000.

1479 Steytler and De Visser *Local Government Law of South Africa* 3-19; Zybrands 'Local government' in Venter and Landsberg *Government and Politics in South Africa* (2011) 137; Rugege 2003 *Law, Democracy and Development* 180.

1480 S 81(3) of the *Structures Act*.

1481 Rugege 2009 *Law, Democracy and Development* 180-181.

1482 See 81(4)(b) of the *Structures Act*.

The representation of traditional leadership at the level of the municipal council is in line with their expected service delivery role. The Constitution assigns traditional leadership a general welfare role especially over matters affecting local communities.¹⁴⁸³ In this regard, the *Systems Act* contemplates that traditional authorities can serve as a mechanism for service delivery at the local government level.¹⁴⁸⁴ According to section 20(1)(e) of the *Traditional Leadership and Governance Framework Amendment Act*,¹⁴⁸⁵ national and provincial government may through legislative and other measures, provide a role for traditional councils and traditional leaders on issues of community welfare. Although these provisions are vague in that they do not generally specify the exact role of traditional authorities in service delivery, they attest to the potential role that traditional leadership can play as an institution at the local government level. The role of traditional authorities in local governance remains important given the close relationship between traditional authorities and rural communities¹⁴⁸⁶ and, because most land in rural areas and former Bantustans are administered by tribal authorities, they can facilitate development by providing land for projects such as housing.¹⁴⁸⁷ This means that traditional authorities could allocate tribal land to a municipality for general development purposes. It is argued that traditional authorities can play an important role in local government's pursuit of social justice by facilitating the implementation of some of the generic benchmarks in Table 1. For example, traditional authorities could: facilitate sustainable development in local communities through the allocation of land for municipal projects; promote group solidarity amongst their subjects; facilitate participation in local government matters through the creation of awareness; discourage cultural practices that undermine and sideline women from decision-making processes; and contribute towards the realisation of the constitutional socio-economic rights of their subjects by respecting existing access to water and housing, for example, and protecting the improper invasion of existing access.

1483 See s 212(1) of the Constitution.

1484 See part 2 of ch 8 of the *Systems Act*.

1485 *Traditional Leadership and Governance Framework Amendment Act* 41 of 2003.

1486 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 106-107; DPLG (now CoGTA) *National Policy Framework for Public Participation* (2007) 66.

1487 Ntsebeza 'Democratic Decentralisation and Traditional Authority: Dilemmas of Land Administration in Rural South Africa' 67.

Despite the potential role of traditional authorities in contributing towards local government's pursuit of social justice and service delivery, it is suggested that governance by some traditional leaders may not be essentially democratic.¹⁴⁸⁸ This can be attributed to amongst others, the increasing interests of tribal leadership in national politics and their desire to amass personal wealth.¹⁴⁸⁹ Allocating service delivery functions to traditional authorities may create a tendency where people are increasingly sidelined from democratic participation in rural areas where the authority of traditional authorities remains dominant. Despite this, it cannot be disputed that traditional leadership can play a role in the realisation of certain aspects of the obligations imposed on local government to realise socio-economic rights. In the case of the rights of access to water and sanitation, for example, this may relate specifically to the obligation to respect (not to interfere with enjoyment of a right), protect (ensure that the rights of others are not violated) and promote (through education) the realisation of socio-economic rights. In this vein, it has been argued that, owing to their proximity and close relationship with rural communities, traditional leadership may play an important role in "establishing, communicating and addressing the socio-economic human rights needs of rural communities."¹⁴⁹⁰ However, where traditional authorities lack a proper understanding of their socio-economic rights role, this could create tension between traditional authorities and elected councillors which may impede effective local governance and service delivery in rural areas especially.¹⁴⁹¹ Given the apparent overlap between the governing functions of traditional leaders and municipalities in rural areas, traditional authorities fear that "once these municipalities become fully operational, it will be the end of their influence and the end of traditional authorities."¹⁴⁹² Contrasting the powers enjoyed by traditional leaders during the colonial and apartheid periods to what obtains under the current dispensation, Rugege argues that:

1488 Hendricks and Ntsebeza 1999 *African Journal of Political Science* 118.

1489 See Ntsebeza 'Democratic Decentralisation and Traditional Authority: Dilemmas of Land Administration in Rural South Africa' 68.

1490 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 106-107; DPLG (now COGTA) *National Policy Framework for Public Participation* (2007) 66.

1491 See Hendricks and Ntsebeza 1999 *African Journal of Political Science* 118.

1492 Rugege 2003 *Law, Democracy and Development* 171 and 175.

With the establishment of wall-to-wall municipalities with wide ranging powers and functions under the Constitution and with tribal authorities having no taxing power and no government funds for development, they will be starved of funding and will not be able to show any justification for their continued existence.¹⁴⁹³

The view highlighted in the above extract has led to intense lobbying for an amendment of the Constitution and the enactment of legislation that will recognise traditional authorities "at the primary level as local government and that they not be part of municipalities."¹⁴⁹⁴ For example, the *Traditional Courts Bill*¹⁴⁹⁵ seeks to strengthen the role of traditional leadership in the administration of customary law and administrative justice. Rugege argues that even when such legislation is enacted, it will be constrained by the very fact that the role of traditional leaders is not clearly articulated in Chapter 7 of the Constitution.¹⁴⁹⁶ This is because whenever a conflict will arise over the possible overlap of functions and powers between local government and traditional leaders, the principle of constitutional supremacy will sway the pendulum in the direction of municipalities.¹⁴⁹⁷ This means that, even when the *Traditional Court's Bill* becomes law, traditional authorities will continue to play a limited developmental role and largely a secondary service delivery role.

4.4.5 Local community

Local communities are beneficiaries of government's pursuit of social justice. In addition to the socio-economic and procedural rights guaranteed in the Constitution,¹⁴⁹⁸ the *Systems Act* provides that members of the local community have the right to: contribute to the decision-making processes of the municipality; submit written or oral recommendations, representation and complaints to the municipal council or to another political structure or a political office-bearer or the administration of the municipality; to be informed of decisions taken by the municipality that affects their rights, property and

1493 Rugege 2003 *Law, Democracy and Development* 175.

1494 Rugege 2003 *Law, Democracy and Development* 181.

1495 See <http://www.justice.gov.za/legislation/bills/2012-b01tradcourts.pdf> [date of use 05 December 2012].

1496 Rugege 2003 *Law, Democracy and Development* 178.

1497 Rugege 2003 *Law, Democracy and Development* 178.

1498 See the discussion in 3.2 and 3.3.

reasonable expectations; to regular disclosure of the affairs of the municipality, including its finances; to demand that the proceedings of a municipal council and those of its committees be open to the public; and to the use and enjoyment of public facilities; to have access to municipal services.¹⁴⁹⁹ Generally, these rights have two main components: they reinforce and seek to facilitate community participation in local decision-making processes; and ensure that community residents can receive municipal services subject to compliance with their legal duties.¹⁵⁰⁰

Local communities have a fundamental role to play in ensuring that municipalities deliver on their constitutional mandate.¹⁵⁰¹ The local community comprises community residents, tax payers, civic organisations, NGOs and any other bodies involved in local affairs within the jurisdiction of a municipality.¹⁵⁰² Members of the community have rights which can be exercised through prescribed legislative mechanisms and procedures,¹⁵⁰³ including the right to participate and contribute to decision-making processes in municipalities.¹⁵⁰⁴ Participation in decision-making processes may relate specifically to the formulation and implementation of policies, plans, programmes and by-laws that seek to further the constitutional mandate of local government, including the realisation of socio-economic rights of communities. The right to public participation can be exercised through direct participation or through the submission of written or oral recommendations, representations and complaints to the municipal council or to the municipal administration or to another political structure or political office bearer.¹⁵⁰⁵ Community members have the right to demand responses to recommendations, representations and complaints submitted.¹⁵⁰⁶

Community members can contribute to local government's pursuit of social justice by adopting a pro-active approach to participation in local government

1499 See s 5(1) (a)-(g) of the *Systems Act*.

1500 See s 5(1) (g) of the *Systems Act*.

1501 See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 474; Chenwi 2011 *SAPL* 128-129.

1502 See s 1 of the *Systems Act*.

1503 S 5(1)(a) of the *Systems Act*.

1504 S 5(1)(a)(i) of the *Systems Act*.

1505 S 5(1)(a)(ii) of the *Systems Act*.

1506 S 5(1)(b) of the *Systems Act*.

matters. Such an approach may exert pressure on municipal structures to fulfil their constitutional duties. Where established channels for public participation do not address their concerns, communities could also challenge the exercise of executive or legislative powers by a municipality through litigation, for example.¹⁵⁰⁷ The positive effect of such a pro-active approach is illustrated by the outcome in the *Joseph* case. In the *Joseph* case, electricity supply to the applicants' residence (Ennerdale Mansions, a flat of 44 blocks) was terminated by City Power,¹⁵⁰⁸ without prior notice of disconnection, following the accumulation by the landlord of arrears amounting to ZAR 400.000.00.¹⁵⁰⁹ Following unsuccessful attempts by the applicants to compel their landlord to have electricity restored, the applicants unsuccessfully approached the South Gauteng High Court to compel City Power to have the electricity supply restored and to force City Power to conclude temporary electricity use arrangements with them. The applicants failed in the High Court because they could not establish a *prima facie* right to electricity. In a second application before the same court, the applicants sought reconnection of electricity supply and an order declaring that the disconnection without notice to the tenants of Ennerdale Mansion was procedurally unfair in terms of section 3(2)(b) of PAJA.¹⁵¹⁰ The court once more found that no rights of the applicants were specifically affected and that they were not entitled to reconnection of electricity.¹⁵¹¹

In the Constitutional Court, they sought the reconnection of electricity supply and an order declaring that they were entitled to procedural fairness in the form of notice, which would have given them an opportunity to make representations to the municipality before the disconnection. The applicants did not base their claim on any legitimate expectation nor legislative right to electricity, but that failure to reconnect the electricity violated their right to

1507 Examples of cases where communities (often in partnership with NGOs) forced municipalities to comply with their socio-economic rights duties include: *Joseph*; *Federation for Sustainable Environment and Others*; *Beja and Others*.

1508 City Power is a parastatal wholly owned by the City of Johannesburg and is responsible for providing electricity to people within the jurisdiction of the city. See *Joseph* case, par 4.

1509 For a detailed factual background, read pars 7-20 of *Joseph*.

1510 For a discussion of s 3 of PAJA, see 3.3.3.

1511 See pars 8 -10 of *Joseph*.

human dignity and housing.¹⁵¹² The respondents argued, *inter alia*, that no specific right of the applicants was infringed by the disconnection due to the fact that there was no contractual right for the applicants to receive electricity from City Power. In terms of the municipality's by-laws, the City had powers to disconnect electricity supply to a customer for *inter alia*, non-compliance with prescribed conditions,¹⁵¹³ subject to compliance with PAJA. The respondents further argued that, in the absence of privity of contract, the applicants were not entitled to procedural fairness before their household electricity supply was terminated.¹⁵¹⁴ However, in view of the fact that residents of premises to which the municipality was contracted to provide services to were included in the definition of "customer", the municipality conceded that even if the applicants had the right to procedural fairness, this could be limited under section 36 of the Constitution. They argued that, to hold otherwise would undermine the city's debt collection efforts/policy. The main issue to be addressed by the Court was whether the applicants were entitled to procedural fairness under section 3 of PAJA before City Power terminated electricity supply to Ennerdale Mansion.¹⁵¹⁵ The Court held that the termination of electricity supply to Ennerdale Mansion on was unlawful and that residents of the mansion were at least entitled to a pre-termination notice that would have given them an opportunity to make representations and find suitable solutions to the problem. The Court reasoned that the Constitution and legislation established a "special cluster of relationships" between municipalities and their residents, concretised by the bundle of public responsibilities that municipalities owe their residents in terms of the Constitution and legislation. In this context, administrative law principles that transcend the law of contract, govern these relationships.¹⁵¹⁶ The Court held that properly construed, these constitutional and statutory provisions created

1512 *Joseph*, par 12.

1513 In terms of by-law 15 of the City of Johannesburg Metropolitan Municipality: Credit Control and Debt Collection By-laws, Provincial Gazette Extraordinary (Gauteng), GG 213 GN 1857, 23 May 2005.

1514 *Joseph*, par 2.

1515 See par 21 of *Joseph* for secondary issues raised for determination.

1516 *Joseph*, pars 25, 34, 35.

an obligation on municipalities to provide essential services, which include electricity, to its residents.¹⁵¹⁷

In line with the discussion in 3.3.3, the *Joseph* case illustrates that the right to administrative justice could be used by community residents to enhance accountability and openness in local governance, thereby promoting the realisation of local government's constitutional mandate and its pursuit of social justice.

Community members should also enable municipalities to realise their constitutional mandate by paying municipal taxes and rates on property. In this regard, the *Systems Act* requires that, where applicable, community members are expected to promptly pay service fees, surcharges on fees, rates on property and other taxes consistent with national legislation and must comply with relevant municipal by-laws.¹⁵¹⁸ Where communities pay municipal taxes and rates on property, these assist municipalities in generating the revenue needed to provide services to communities in a sustainable manner, and promote the general development of communities. In addition, municipalities are able to redistribute resources and services to impoverished communities that cannot afford to pay for basic services and build local capacity.¹⁵¹⁹ Moreover, communities could also enhance local government's pursuit of social justice by participating in ward committees and any other mechanisms established for that purpose.

It should be noted that NGOs, civic society and community-based organisations can also contribute towards local government's pursuit of social justice given the expertise that is usually at their disposal.¹⁵²⁰ Such expertise could be used to improve the quality of local policies and to mobilise

1517 *Joseph*, par 47.

1518 See s 5(2)(a)-(e) of the *Systems Act* for details.

1519 See Table 1 in 2.4.3.

1520 See Muller 2011 *Stell LR* 756; Mubangizi 2009 *International NGO Journal* 454; Woolvaardt *et al* 'The Role of Private and Other Non-Governmental Organisations in Primary Health Care' in Barron and Roma-Reardon *South African Health Review* 223-224; Ray 2008 *Human Rights Law Review* 708.

community participation in local government matters.¹⁵²¹ This is possible where they participate in the activities of committees established to plan and implement the generic benchmarks for state authorities' pursuit of social justice.¹⁵²²

4.4.6 External service providers

Municipalities may engage external mechanisms for the provision of services to communities by entering into service delivery agreements.¹⁵²³ It is possible for a municipality to enter into a service delivery agreement with a municipal entity, another municipality, an organ of state (such as a water services committee or a traditional authority), a community-based organisation or legally competent NGOs, and any other institution, entity or person legally competent to operate a business activity.¹⁵²⁴

In deciding whether to rely on an internal or external mechanism in providing a particular service to the community, there are a host of factors which must be taken into consideration by a municipality including: the direct and indirect costs and benefits associated with the project if the service is provided by the municipality through an internal mechanism, including the expected effect on the environment and on human health, well-being and safety; the municipality's capacity and potential future capacity to furnish the skills, expertise and resources needed for the provision of the service through an internal mechanism; the extent to which the re-organisation of its administration and development of the human resource capacity within that administration could be utilised to provide a service through an internal mechanism; the likely impact on development, job creation and employment patterns in the municipality; the views of organised labour; and developing

1521 See Muller 2011 *Stell LR* 756; Woolvaardt *et al* 'The Role of Private and Other Non-Governmental Organisations in Primary Health Care' in Barron and Roma-Reardon *South African Health Review* 223-236; Ray 2008 *Human Rights Law Review* 708.

1522 See generic benchmarks in 2.4.3.

1523 See s 76(a)(i)-(iii) and (b) of the *Systems Act*. This is a growing practice in governments world wide. See Witters *et al* 'The Role of Public-Private Partnerships in Driving Innovation' in *Global Innovation Index* (2012) 81-87; Hrab 'Private Delivery of Public Services: Public-Private Partnerships and Contracting Out' 3-16; Reddy 2010 *Politeia* 74; Du Plessis 2010 *Stell LR* 288.

1524 See s 76(b)(i)-(v) of the *Systems Act*.

trends in the sustainable provision of that municipal service.¹⁵²⁵ In addition, the municipality is obliged to conduct a feasibility study which must *inter alia* assess the extent to which the provision of the service through an external mechanism will address the needs of the poor and remain affordable to the municipality and its residents.¹⁵²⁶

Although the use of external mechanisms for the provision of municipal services such as water and electricity are supposed to take into consideration the interests of the poor, there is the view that their use has increasingly led to the commercialisation of basic services such as water and electricity which has led to the trivialisation of the needs of impoverished people.¹⁵²⁷ Dugard argues that this bias stems from the fact that commercialised models treat water and electricity as sources of revenue as opposed to a progressive rights-based model which treats water and electricity as essential social goods.¹⁵²⁸ The drive by municipalities to ensure "100 percent cost recovery on operating and maintenance costs, even if capital investments are subsidised" has led to increasing water disconnections from poor households.¹⁵²⁹ Without resolving the "fault line" inherent in the contradictory rights-based and commercialised models, the ability of municipalities to meet the needs of impoverished people as required by their constitutional mandate is seriously challenged.¹⁵³⁰ The commercialisation of basic services such as water and electricity through external mechanisms is akin to privatisation which may undermine redistribution and the quest for social justice at the local level. This is because the use of prepaid meters makes it impossible for impoverished households to access basic services such as electricity, for example, once the

1525 See s 78(1)(a) and (b) of the *Systems Act*.

1526 See generally s 78(3)(c) (i)-(viii) of the *Systems Act*.

1527 See Dugard 2010 *Review of Radical Political Economics* 175-194; Dugard 'Civic Action and Legal Mobilisation: the Phiri water meters case' in Handmaker and Berkhout *Mobilising Social Justice in South Africa* 71-99.

1528 Dugard 2010 *Review of Radical Political Economics* 175 and 177. For details on this tension, see Moyo 'Privatisation of the Commons: Water as a Right; Water as a Commodity' in Liebenberg and Quinot *Law and Poverty: Perspectives from South Africa* at 362-380

1529 Dugard 2010 *Review of Radical Political Economics* 177.

1530 Dugard 2010 *Review of Radical Political Economics* 177.

free basic allocation is consumed.¹⁵³¹ This reinforces rather than alleviate social hardships. The benchmarks for state authorities' pursuit of social justice indicate that, where possible, municipalities should avoid privatising the provision of basic services.¹⁵³²

In the event, where a municipality decides to use an external mechanism for the provision of a service, it must establish a programme for community consultation and communicate through the media, information regarding the appointment of the external service provider and the contents of the service delivery agreement.¹⁵³³ This provision seeks to enhance accountability by ensuring that the community is able to, for example, oppose situations where municipal officials unduly favour relatives and friends as external service providers, for example. Where a municipality decides to use an external mechanism, before entering into a service delivery agreement with any institution or entity, juristic or natural person (with the exception of a municipal entity or an organ of state in any sphere of government), it must comply with the competitive bidding provision of the *Systems Act* which *inter alia*, seeks to minimise the possibility of fraud and corruption in the bidding process.¹⁵³⁴ These protective provisions suggest that municipalities cannot escape from their obligations to pursue social justice by outsourcing services. The law seeks to protect the interests of communities even in circumstances where a municipality decides to outsource a particular service. Despite the intention of the legal provisions discussed in this paragraph, there is overwhelming evidence of fraud and corruption in the process of selecting external service providers at the local government level in all the provinces.¹⁵³⁵ This has the potential of hampering the ability of municipalities to realise their broad constitutional mandate and their pursuit of social justice since capacity and efficiency are often overlooked in corrupt selection processes.

1531 See Dugard 'Power to the People? A Rights-Based Analysis of South Africa's Electricity Services' in McDonald *Electric Capitalism* 264-282; Bond and Dugard 2007 *Law, Social Justice and Global Development* 1-21.

1532 See Table 1 in 2.4.3.

1533 S 80(2) of the *Systems Act*.

1534 See generally s 83 of the *Systems Act*.

1535 See Auditor-General *Consolidated General Report on the Audit Outcomes of Local Government 2010-11* (2012) 64-67.

4.4.7 National and provincial government

In section 2.5.4.1 it was indicated that chapter 3 of the Constitution prescribes a system of co-operative government for South Africa. It obliges all spheres of government to respect the constitutional status, powers and functions of other spheres; not to assume powers or functions except those conferred on them by the Constitution; to refrain from encroaching on the geographical, functional or institutional integrity of government in other spheres; and to co-operate with one another in mutual trust and good faith by *inter alia*, assisting and supporting one another, co-ordinating their actions and legislation with one another, adhering to agreed procedures and avoiding legal proceedings against one another. Adherence to these principles is very important especially in the context of the fact that the functional areas of all spheres of government overlap.¹⁵³⁶ The overlap of powers and functions also applies to their shared constitutional socio-economic rights obligations. For example, the duty to fulfil rights, as well as the obligation to adopt reasonable legislative and other measures to give effect to socio-economic rights apply to all spheres of government.¹⁵³⁷ This means that without co-operation, the laws, plans and policies adopted by the different spheres of government to give effect to human rights may not be in tandem with each other. All spheres of government and organs of state must work together towards realising constitutional objectives, including the protection and fulfilment of human rights.

The constitutional prescription of co-operative governance is further reiterated by *inter alia* the *Systems Act*.¹⁵³⁸ Co-operative government obliges that intergovernmental relations be promoted and facilitated through the channels, structures and mechanisms established by the *Intergovernmental Relations Framework Act* (IGRFA).¹⁵³⁹ Where an organ of state or sphere of

1536 *Maccsand (Pty) Ltd v City of Cape Town*, pars 37 and 47; Steytler and Fesha *Defining Provincial and Local Government Powers and Functions: The Management of Concurrency* 6-9; Christmas and De Visser 2009 *CJLG* 111.

1537 These obligations were discussed in 3.4.

1538 See s 3(1)-(3) of the *Systems Act*; Kirkby *et al* 2007 *SAPR/PL* 144 -148.

1539 The *Intergovernmental Relations Framework Act* (IGRFA) 13 of 2005 was enacted to give effect to s 41(2) of the Constitution. See Woolman 2009 *Law, Democracy and Development* 62-75; Ch 2 of the IGRFA which outlines the Composition and roles of

government fails to exhaust the dispute resolution mechanisms created by the *IGRFA*, a court will not entertain such dispute.¹⁵⁴⁰ Despite the constitutional obligation imposed on the various spheres of government to be friendly and support each other so as to secure the collective well-being of all South Africans, this command seems to have fallen on deaf ears in some quarters as the various spheres of government are often at war with each other, often deciding to settle intergovernmental disputes in court.¹⁵⁴¹ The decision to engage in expensive litigation procedures in settling government differences often leads to the dissipation of scarce resources that could be used to execute "developmental" projects, including the implementation of projects that give effect to socio-economic rights.¹⁵⁴²

In *National Gambling Board v Premier of KwaZulu-Natal*, the Court reiterated that co-operative governance is foundational to the realisation of the country's constitutional objectives.¹⁵⁴³ The Court stressed that organs of state are obliged to avoid litigation against one another and that the obligation to settle disputes is at the heart of co-operative government. The Court held that the obligation to avoid litigation entails much more than an effort to settle a pending court case. It requires each organ of state to re-evaluate its position fundamentally and to consider alternative possibilities and compromises using any expert advice that is available. It concluded that failure to comply with the obligations of Chapter 3 of the Constitution is sufficient ground for refusing direct court access to warring organs of state.¹⁵⁴⁴ In line with this, in *Beja and Others*, the court dismissed a counter application by the Premier of the

the various intergovernmental structures (the President's Co-ordinating Council; "MinMECs"- a forum where national ministers and their provincial counterparts meet; Provincial intergovernmental forums; and Municipal intergovernmental forums). See Layman *Intergovernmental Relations and Service Delivery in South Africa: A Ten Year Review* 14-15; Edwards 2008 *Politeia* 68-72; Malan 2005 *Politeia* 230-236.

1540 S 41(3) of the Constitution; *National Gambling Board v Premier of Kwazulu-Natal and Others* 2002 (2) BCLR 156 at pars 32, 36 and 37; Woolman 2009 *Law, Democracy and Development* 63-65.

1541 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*; *Executive Premier of the Province of the Western Cape v Minister of Provincial Affairs and Constitutional Development and Another*; *Executive Council of Kwa Zulu-Natal v President of the Republic of South Africa and Others*; *National Gambling Board v Premier of KwaZulu-Natal*; *Beja and Others*, pars 162-172.

1542 See *Beja and Others*, pars 162-172.

1543 *National Gambling Board*, pars 32, 36 and 37.

1544 *National Gambling Board*, pars 32, 36 and 37.

Western Cape to review the constitutionality of certain provisions of the *National Housing Code* (2009) on the ground that the Premier and the City of Cape Town failed to utilise available intergovernmental forums to resolve disputes in accordance with the constitutional prescript for co-operative governance.¹⁵⁴⁵ Failure to comply with the principles of co-operative governance in this instance cannot be attributed to ignorance but the mere lack of political will to comply with constitutional requirements.

Although the principles of co-operative governance dictate that all spheres of government should refrain from encroaching on the geographical, functional or institutional integrity of government in other spheres, the *Maccsand* case illustrates that, in practice, the lawful exercise of powers by national and provincial spheres of government could negatively impact and "encroach" on the geographical, functional and institutional integrity of local government, for example.¹⁵⁴⁶ This case was principally triggered by uncoordinated land planning measures between the various spheres of government which resulted in two conflicting interests over the same land.¹⁵⁴⁷ The inability of the national government (represented by the Minister for Mineral Resources) and the City of Cape Town to resolve tensions arising from the interface between the *Mineral and Petroleum Resources Development Act*¹⁵⁴⁸ and the *Land Use Planning Ordinance*¹⁵⁴⁹ within intergovernmental structures resulted in this court battle.¹⁵⁵⁰ Most often, lack of co-operative governance stems from the desire to score political victories, especially where spheres of government or organs of state in different spheres of government are controlled by different political parties.¹⁵⁵¹ Generally, Edwards argues that the lack of co-operative governance across all spheres of government can be attributed to bureaucracy and a lack of properly co-ordinated and structured information systems to facilitate provincial monitoring; ineffective communication between different role players; incapacity to implement policies and programmes;

1545 *Beja and Others*, pars 162-172.

1546 *Maccsand (Pty) Ltd v City of Cape Town*, pars 37-38.

1547 *Maccsand (Pty) Ltd v City of Cape Town*, pars 20-21.

1548 *Mineral and Petroleum Resources Development Act* (MPRDA) 28 of 2002.

1549 *Land Use Planning Ordinance* (LUPO) 15 of 1985.

1550 *Maccsand (Pty) Ltd v City of Cape Town*, par s37-47.

1551 *Du Plessis Fulfilment of South Africa's Constitutional Environmental Right* 480; *Beja and Others*, pars 162-172.

inadequate financial resources and lack of commitment to co-operate; non-alignment of policies between provincial and local government; and inefficiency and lack of effectiveness in decision-making.¹⁵⁵²

The interdependence of the various spheres of government emphasises the co-relationship between all spheres of government and leaves room for national and provincial government to empower and supervise local government.¹⁵⁵³ Supervision entails supporting, monitoring and intervening in local government, under prescribed circumstances.¹⁵⁵⁴ Monitoring is essential to ensure that legislative frameworks are complied with and indicates that local government cannot effectively operate as part of a functional unit without mutual support. Interventions ensure that provincial and national government direct activities and outcomes in municipalities.¹⁵⁵⁵ The subsequent subsections further serve to show how national and provincial support of municipalities can enhance local government's pursuit of social justice.

4.4.7.1 Support from national government

National government is obliged by the Constitution, to adopt legislative and other measures that will support and strengthen the capacity of municipalities so that they can manage their own affairs, exercise their powers and perform their original and assigned functions.¹⁵⁵⁶ This obligation has been interpreted as creating an enforceable duty against the national government to support and strengthen the capacity of municipalities so that they can effectively govern and perform their original and assigned functions.¹⁵⁵⁷ This obligation implies that, national government could contribute towards local government's pursuit of social justice by developing the capacity needed by local authorities

1552 Edwards 2008 *Politeia* 75-76.

1553 Malan 2005 *Politeia* 227.

1554 See Steytler and De Visser *Local Government Law of South Africa* 15-5; De Visser *Developmental Local Government: A Case Study* 82; *Lagoon Bay Lifestyle Estate (Pty) Ltd v Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape and Others* (2011) Case No 10751/2011, Western Cape High Court at par 12; Malan 2005 *Politeia* 227.

1555 Steytler and De Visser *Local Government Law of South Africa* 15-5; "Section C 1.3.1" in the WPLG (1998). For a detailed account of national and provincial supervision of local government, see Steytler and De Visser *Local Government Law of South Africa* 15-5 to 15-57.

1556 See s 154(1) of the Constitution.

1557 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 479-480.

to implement the generic benchmarks in Table 1. The obligation to support and strengthen the capacity of municipalities could be satisfied through *inter alia*, the allocation of funds to municipalities which will enable them organise further training for newly elected councillors and municipal officials in particular. The duty to support municipalities will also be met by the national sphere of government where the Minister, pursuant to section 108 of the *Systems Act*, establishes essential national standards and minimum standards for municipal services, in the absence of clear legislative guidelines relating to such municipal services.¹⁵⁵⁸

National government could also facilitate the ability of local government to realise its constitutional mandate by monitoring the performance of municipalities. The Constitution accords national government legislative and executive authority to monitor and ensure that local government effectively performs its original constitutional functions in respect of the matters listed in Schedules 4B and 5B of the Constitution.¹⁵⁵⁹ This could be interpreted to mean that legislative and executive intervention in local government matters would be acceptable to the extent that it enables municipalities to better perform their functions. The *Systems Act* also makes it possible for national government to play a monitoring role over municipalities. For example, where the Minister is of the opinion that maladministration, corruption, fraud or any other serious malpractice has occurred or is occurring in a municipality, he/she may request the MEC in that province to open an investigation.¹⁵⁶⁰ In terms of section 107 of the *Systems Act*, the Minister may require any category of municipality, by way of notice in the Gazette, to submit to a specified national organ of state such information concerning their affairs as may be required in the notice, either at regular intervals or within a specified period. This provision can be very useful in instances where, for example, municipalities withhold information that may be required by Chapter nine institutions¹⁵⁶¹ (such as the Public Protector's Office or Human Rights

1558 See s 108(1)-(5) of the *Systems Act* on the procedure and factors to be considered by the Minister in establishing essential national and minimum standards.

1559 See s 155(7) of the Constitution.

1560 See s 106(4)(a) and (c) of the *Systems Act*.

1561 These are institutions that were established in chapter nine of the Constitution to support the country's democracy.

Commission) investigating complaints of corruption and maladministration against a municipality. This has the potential of increasing transparency and accountability in municipal governance which is essential in ensuring that municipalities meet their constitutional obligations, including those specifically related to the realisation of socio-economic rights and the pursuit of social justice.

In addition, the national sphere of government may also monitor municipalities in order to ensure transparency and control expenditure through the national treasury.¹⁵⁶² The national treasury is expected to enforce compliance with recognised accounting practice, expenditure classification and treasury norms and standards. Where a municipality, for example, commits a serious or persistent material breach of the standards set by the national treasury, the latter may stop the transfer of funds to that municipality.¹⁵⁶³ In addition, where provincial government fails to effectively oversee and support local government, the national sphere of government can invoke the provisions of section 100 of the Constitution and exercise this role.¹⁵⁶⁴ More recently, two days after the Democratic Alliance (DA) won the 2011 Local Government Elections in the Midvaal Municipality (in Gauteng Province) and retained control over it, President Jacob Zuma invoked this provision to request a Special Investigation Unit to probe into alleged maladministration in that municipality. Although this could be welcome as an early intervention from the national sphere of government, there is the view that this move seems to be tainted with some political considerations.¹⁵⁶⁵ This is largely because this is the only DA led municipality in Gauteng, coupled with fact that this municipality was strongly contested between the ANC and the DA during the 2011 Local Government Elections. It is important to note that at the beginning of this year, the Nelson Mandela Bay municipality became the first metro to be placed under administration by national and provincial government in order to

1562 See s 216 of the Constitution.

1563 See s 216(1) and (2) of the Constitution.

1564 See s 100 of the Constitution dealing with national intervention in a provincial administration.

1565 See www.themercury.co.za/zuma-s-motives-questioned-1.1073390 [date of use 24 May 2011].

restore full functionality.¹⁵⁶⁶ This is an example that illustrates the willingness of national government to intervene at the local government level in order to support and ensure that municipalities perform their constitutional duties. This type of vigilance and support potentially strengthens local government's pursuit of social justice. It demonstrates that the pursuit of social justice requires close partnership between municipalities and the other spheres of government.

4.4.7.2 *Support from provincial government*

Just like the national sphere of government, section 154(1) of the Constitution obliges the provincial sphere of government to adopt legislative and other measures to support and strengthen the capacity of local government to effectively govern its own affairs. In addition, just like national government, section 155(6) and (7) of the Constitution, oblige provincial governments to support, monitor and promote the development of local government capacity in order to ensure that the latter executes its constitutional obligations. The *Systems Act* obliges the MEC for local government in each province, to establish mechanisms, processes and procedures to monitor the manner in which municipalities in the province manage their own affairs, exercise their legislative and executive powers and execute their functions.¹⁵⁶⁷ Furthermore, the mechanisms put in place must monitor the development of local government capacity in the province and assess the support needed by municipalities to strengthen their capacity to fulfil their developmental mandate.¹⁵⁶⁸ Just like the Minister,¹⁵⁶⁹ the MEC for local government may require any category of municipality, by way of notice in the Gazette, to submit to a specified national organ of state, such information concerning their affairs as may be required in the notice, either at regular intervals or within a specified period.¹⁵⁷⁰

1566 See <http://www.wylie.co.za/NewsItem/226> [date of use 14 March 2013].

1567 See s 105(1)(a) of the *Systems Act*.

1568 See s 105(1)(b) and (c) of the *Systems Act*.

1569 See s 107 of the *Systems Act*.

1570 See s 105(2) of the *Systems Act*.

The implications that arise from the above obligations were explained in the context of national government above. In brief, these obligations mean provincial governments could also support local government's pursuit of social justice by developing the capacity needed by local authorities to implement the generic benchmarks in Table 1. There is little doubt that with sufficient provincial support and monitoring, the ability of municipalities to pursue social justice will be enhanced. However, it has been suggested that provincial governments often lack the financial muscles that can be used to bring municipalities under effective control.¹⁵⁷¹ This means that most of the support needed to enhance local government's pursuit of social justice will have to come from national government.

Provincial governments have constitutional powers to intervene in any municipality that cannot fulfil its executive obligations in terms of the Constitution or legislation.¹⁵⁷² Section 139 of the Constitution requires that when a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure the fulfilment of that obligation.¹⁵⁷³ There are three options that may be taken. Firstly, the relevant provincial executive may issue a directive to the relevant municipal council, describing the extent of the failure to fulfill its obligation and stating any steps required to meet its obligations.¹⁵⁷⁴ Secondly, depending on the magnitude of the problem, the relevant provincial executive may assume responsibility for the relevant obligation in that municipality to the extent necessary to: maintain essential national standards or meet established minimum standards for the rendering of a service; prevent the municipal council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or maintain economic unity.¹⁵⁷⁵ Lastly, the relevant provincial executive may dissolve the municipal council and appoint an administrator until a newly elected municipal council has been declared

1571 Reddy 2010 *Politeia* 78.

1572 See Mokale and Scheepers *An Introduction to Developmental Local Government* 11-12; CoGTA *State of Local Government in South Africa* (2009) 6-7.

1573 See s 139(1) of the Constitution. See also s106 of the *Systems Act*.

1574 S 139(1)(a) of the Constitution.

1575 S 139(1)(b)(i)-(iii) of the Constitution.

elected, if exceptional circumstances warrant such a step.¹⁵⁷⁶ From section 139(1) of the Constitution, it appears that provincial interventions take three forms: firstly, it can be minor – when its primary objective is to rectify identified weaknesses; secondly, it can be major – when it takes over municipal functions to stabilise a municipality and avoid a total collapse; and thirdly, it can be drastic – when there is already total collapse and the intervention is directed towards dissolving the municipal council.

Section 139(1) of the Constitution demonstrates that provincial governments have an important role to play in local government's pursuit of social justice. This provision requires provincial governments to play a supporting role in ensuring that municipalities achieve defined constitutional objectives, including the pursuit for social justice. In addition to the obligation to take appropriate steps that will ensure that municipalities *inter alia*, pursue social justice, provincial governments are expected to take over the execution of this transformative constitutional mandate as is the case with major and drastic interventions in municipalities. Provincial governments have an enormous contribution to make in relation to local government's success in pursuing social justice because the national executive only intervenes in a municipality where a provincial executive has failed to adequately supervise and monitor that municipality.¹⁵⁷⁷

In *Lagoon Bay Lifestyle Estate (Pty) Ltd v The Minister of Local Government*, the court acknowledged the "extensive powers and functions of 'supervision', 'monitoring' and 'support' of local government" granted by the Constitution and legislation to provincial governments.¹⁵⁷⁸ While there is elaborate constitutional and legislative provision to ensure that local government is supported, supervised and monitored by provincial and national government to ensure that municipalities comply with their constitutional obligations, evidence suggests that the latter spheres of government at times, loses sight

1576 S 139(1)(c) of the Constitution.

1577 S 139(7) of the Constitution.

1578 *Lagoon Bay Lifestyle Estate (Pty) Ltd*, par 12.

of this supervisory role.¹⁵⁷⁹ For example, within the context of housing, the court noted in *Beja and Others* that national and provincial departments of housing failed in their constitutional obligations to monitor and assist in the implementation of the Upgrading of Informal Settlement Project by the City of Cape Town.¹⁵⁸⁰ This lack of sufficient monitoring and assistance led to the wrong interpretation and application of the *National Housing Code* (2009) with severe negative outcomes – the provision of communal and open toilets to impoverished Makhaza residents. This lack of monitoring and assistance suggest a lack of communication between the various spheres of government and may reflect the uncooperative relationship that may exist where different political interests are at stake. Furthermore, the 2009 *Local Government Report* suggests that provincial interventions in terms of section 139(1)(c) of the Constitution demonstrates that the intergovernmental checks and balances put in place to ensure support and oversight of municipalities failed to effectively do so, either because they were not properly supported by national government or were not sufficiently institutionalised.¹⁵⁸¹

In addition to the apparent weak control and oversight of provincial and national government mentioned above, there seems to be the lack of a common vision and coordinated approach between national and provincial departments in supervising and supporting municipalities.¹⁵⁸² This problem is further compounded by limited human capacity especially at the local sphere of government.¹⁵⁸³ Since the challenges confronting local government differ both within municipalities and between provinces, provincial and national governments can be expected to mould their support to municipalities in accordance with context specific needs and challenges. Lack of sufficient co-operation between the various spheres of government as well as inadequate support from national and provincial government will undermine local government's pursuit of social justice.

1579 See MDB *State Municipal Capacity Assessment 2010/2011: National Trends in Municipal Capacity* (2011) vi-vii; DPLG (now CoGTA) *State of Local Government in South Africa* (2009) 17-21.

1580 See *Beja and Others*, par 148.

1581 DPLG (now CoGTA) *State of Local Government in South Africa* (2009) 17-18.

1582 DPLG (now CoGTA) *State of Local Government in South Africa* (2009) 21.

1583 De Villiers and Sindane 'Cooperative Government: The Oil of the Engine' 22; CoGTA *State of Local Government in South Africa* (2009) 19-20; Edwards 2008 *Politeia* 66

4.4.8 SALGA

In line with the transformation of local government, section 163 of the Constitution sets out a scheme through which organisations representing local government can participate in forums where important decisions affecting municipalities are made. This gives municipalities an opportunity to make collective input on matters that affect them. Section 163 of the Constitution obliges Parliament to enact legislation that must provide for the recognition of provincial and national organisations representing municipalities¹⁵⁸⁴ and to determine the procedure by which local government may: consult with national or provincial government; designate representatives to participate in the National Council of Provinces (NCOP); and nominate representatives to the Financial and Fiscal Commission.¹⁵⁸⁵ Organised local government is entitled to the appointment of two selected representatives in meetings of the Financial and Fiscal Commission¹⁵⁸⁶ and no more than ten part-time representatives designated by local government, representing the different categories of municipalities, may participate when necessary in the proceedings of the NCOP.¹⁵⁸⁷ However, representatives of organised local government have no voting rights at NCOP meetings.¹⁵⁸⁸

The *Organised Local Government Act*¹⁵⁸⁹ gives effect to section 163 of the Constitution. The Minister, with the consent of the MEC, is required to recognise one local government organisation in each province representing the majority of municipalities in that province. However, the local government organisation in question must be representative of all the different categories of municipalities in the province.¹⁵⁹⁰ In addition, the Minister is obliged to recognise one national organisation representing the majority of provincial organisations.¹⁵⁹¹ The local government organisation that represents all municipalities in South Africa in the various intergovernmental forums is

1584 See s 163(a) of the Constitution.

1585 See ss 163(b)(i)-(iii) and 221 of the Constitution.

1586 See s 221(c) of the Constitution.

1587 See s 67 of the Constitution.

1588 See s 67 of the Constitution.

1589 *Organised Local Government Act* 52 of 1997.

1590 S 2(1)(b) of the *Organised Local Government Act*.

1591 S 2(1)(a) of the *Organised Local Government Act*.

known as the South African Local Government Association (SALGA).¹⁵⁹² For the purpose of effective co-operative government, SALGA is expected to: develop common approaches for local government, as a sphere of government; enhance co-operation, mutual assistance and sharing of resources amongst municipalities; find solutions to problems facing local government generally; and facilitate compliance with principles of co-operative government and intergovernmental relations.¹⁵⁹³

Apart from participation at the NCOP and Financial and Fiscal Commission, SALGA can approach the Minister at any time for consultation.¹⁵⁹⁴ In the same vein, organised local government associations at the provincial level may approach the relevant MEC at any time for consultation.¹⁵⁹⁵ Furthermore, SALGA is also represented at the President's Coordinating Council.¹⁵⁹⁶ The right of organised local government to approach national and provincial executives at any time on issues that affect local government opens a channel for communication which could be exploited to find solutions to challenges faced by municipalities in discharging their constitutional duties as soon as they emerge. In addition, SALGA could use its presence at the Financial and Fiscal Commission to submit recommendations that will ensure that municipalities struggling financially, get more favourable financial allocations which could enable them to be more responsive to constitutional and legislative obligations, including the realisation of socio-economic rights duties. Solutions generated through SALGA's engagement in the President's Coordinating Council, the NCOP and the Financial and Fiscal Commission can generally enhance local government's pursuit of social justice.

4.4.9 International donors

International donors are also an important role player at the local government level. Generally, in support of its development efforts, the government of

1592 For more information on SALGA, visit: <http://www.salga.org.za>.

1593 S 3(3) of the *Systems Act*.

1594 S 4(3) of the *Organised Local Government Act*.

1595 S 4(7) of the *Organised Local Government Act*.

1596 The President's Coordination Council is an established body where the president meets with premiers and leaders of SALGA to discuss matters affecting local government.

South Africa benefits from the generous donations of foreign governments and international/foreign private donors.¹⁵⁹⁷ International private donors include NGOs, family and private foundations.¹⁵⁹⁸ The focus of most foreign-based donors in the country include promoting democracy, human rights, development, environmental protection, education, health and general poverty alleviation.¹⁵⁹⁹ These areas of focus cut across the expanded developmental mandate of local government, specifically. International donors such as the Konrad Adenauer Foundation (KAF), supports the transformation process of government through a variety of measures including the provision of political education and training, creation of partnerships with a wide range of stakeholders, offering political consultancy and conducting rigorous research that is relevant to the development challenges of local government.¹⁶⁰⁰ Through partnership with international donors such as the KAF, municipalities could enhance capacity building for municipal officials, for example. By contributing towards the development of local government capacity, international donors and partners also contribute towards local government's pursuit of social justice.¹⁶⁰¹ However, the potential of international donors to generally contribute towards local government's pursuit of social justice is constrained by the fact that they are not regulated by law. They enjoy absolute discretion in deciding where their money should be spent. This means that municipalities have the responsibility to inform and persuade them to fund projects that seek to further the pursuit of social justice.

4.4.10 Observations on role players

Although the legislative and executive powers and functions of municipalities are generally exercised through the municipal council in the different categories of municipalities, there are several internal and external role

1597 For a detailed discussion on this issue, see: Ewing and Guliwe 'Externally Funded Resources: Exploring the Role of Official Development Assistance in South Africa' in *The State of Social Giving in South Africa Report Series* (2005) 1-47; Ewing 'Understanding Private Foreign Giving in South Africa' in *The State of Social Giving in South Africa Report Series* (2005) 49-94.

1598 Ewing 'Understanding Private Foreign Giving in South Africa' in *The State of Social Giving in South Africa Report Series* (2005) 49 and 53.

1599 See Ewing 'Understanding Private Foreign Giving in South Africa' in *The State of Social Giving in South Africa Report Series* (2005) 55-56.

1600 For details, see: <http://www.kas.de/suedafrika/en/about/> [date of use 14 March 2013].

1601 See Table 1 in 2.4.3.

players that are directly or indirectly involved in the day-to-day functioning of municipalities. These include municipal councillors, municipal committees, municipal managers, municipal officials, traditional authorities, local communities, external service providers, SALGA and national and provincial governments. It was shown that the various role players have the potential to contribute and even unlock the potential of municipalities in local government's pursuit of social justice in different ways. In line with the generic benchmarks in Table 1, it was established that municipal councillors may contribute towards the pursuit of social justice by performing their oversight functions in a manner that improves the quality of public participation at the local level as well as the content of redistributive policies. In addition, ward councillors may further contribute by building community solidarity at the ward level. In relation to municipal managers, it was indicated that they are the accountable officers directly involved in ensuring that municipal administrations meet their constitutional and legislative obligations. Their wide range of administrative powers and functions show that they are directly relevant and could be helpful in ensuring that municipalities implement all the generic benchmarks required for local authorities' pursuit of social justice. Moreover, it was argued that although the Constitution and legislation are vague with regard to the actual role of traditional authorities in contributing towards the realisation of the constitutional mandate of local government, they could contribute towards municipalities' pursuit of social justice by: facilitating sustainable development in local communities (especially in rural areas) through the allocation of land; enhance solidarity in their communities; promote public participation in local government programmes by creating awareness; discouraging cultural practices that undermine and sideline women from decision-making processes; and by respecting and protecting the constitutional rights of local communities. Furthermore, it was highlighted that local communities could contribute towards local government's pursuit of social justice by adopting a pro-active approach towards public participation in local governance and by paying rates and taxes that could be used to redistribute services to poor communities. In terms of national and provincial government, it was established that they could assist local government by developing local capacity and providing the resources generally needed to

implement the benchmarks in Table 1. It was argued that in the case of major and drastic interventions in municipalities, national and provincial government assume the the responsibility of pursuing social justice for local communities albeit on a temporal basis. This confirms that social justice can only be pursued through partnership between the vatiuous spheres of government.

The interaction of diverse role players at the local level indicates that, to deliver on their constitutional mandate, municipalities should align and coordinate policies, by-laws, programmes and planning activities with those of other municipalities (in the case of districts) and relevant provincial and national departments, for example. This requires that various role players in government adhere to the principles of co-operative government and intergovernmental relations.¹⁶⁰² However, evidence¹⁶⁰³ suggests that the principles of co-operative government and intergovernmental relations are often overlooked by some role players. This has the potential to negatively impact on the extent to which some municipalities realise constitutional objectives, including the pursuit of social justice. This challenge is compounded by the fact that some role players such as councillors, municipal and senior managers as well as government officials at the provincial and national level, often lack the key competencies and skills required to effectively discharge their duties. In addition, financial mismanagement, corruption, lack of accountability and weak oversight by councillors make matters worse. Moreover, the increasing use of external service providers for the delivery of basic municipal services often undermines the needs and interests of poor communities.

4.5 Local government's instrumentation

4.5.1 Introduction

Municipalities are constitutionally mandated to use their own initiative in conjunction with their executive and legislative powers to govern local

1602 See 4.4.7.

1603 See Edwards 2008 *Politeia* 75-76; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 480; *Beja and Others*, pars 162-172.

communities in a manner that is "developmental".¹⁶⁰⁴ In South Africa, policy, resolutions, by-laws, IDPs, public participation and public private-partnerships, *inter alia*, have been identified as local governance instruments that are specifically prescribed by legislation.¹⁶⁰⁵ This section zooms into the theoretical base of two specific instruments which municipalities are obliged to use in order to realise their "developmental" mandate – namely, policies and strategic plans (specifically IDPs).¹⁶⁰⁶ In chapter one, it was indicated that IDPs and policies are flexible instruments that can be used by municipalities to govern local communities and achieve diverse objectives.¹⁶⁰⁷ The choice of the IDP was further informed by the fact that planning cuts across all processes of local governance.¹⁶⁰⁸ This part of the chapter illustrates and explains how these instruments may assist local government in governing and being "developmental". However, it should be noted that whereas chapter 5 of the *Systems Act* is dedicated to various aspects of the IDP, the *Act* does not specifically prescribe any process that should be generally followed in municipal policy-making and implementation. The *Systems Act* contains specific provisions relating to municipal tariff policies¹⁶⁰⁹ and debt collection policies.¹⁶¹⁰

1604 For the meaning and anticipated outcomes of "developmental" local government, see generally 2.5.4.2.

1605 See s 11(3) of the *Systems Act*. See further: Steytler 2011 *SAPL* 484-496; Harrison 'The origin and outcomes of South Africa's Integrated Development Plans' in Van Donk M *et al Consolidating Developmental Local Government* 321-337; Patel 'Tools and Trade-offs in Environmental Decision-making' in Van Donk *et al Consolidating Developmental Local Government* 357-376; Berrisford and Kihato 'Local Government Planning Legal Frameworks and Regulatory Tools: Vital Signs?' in Van Donk *et al Consolidating Developmental Local Government* 377- 403; Du Plessis 2010 *Stell LR* 274-275. See also, "Tools and approaches for developmental local government" in "Section B: Developmental Local Government" of the WPLG (1998).

1606 It should be noted, at the global level, emphasis is placed on "strategic planning" at the local government level as opposed to what is referred to as integrated development planning (IDP) in South Africa. As it will become clear in chapter 5, the main difference between these two forms of planning is that South Africa's IDP has a spatial component. See Mogale 'Developmental Local Government and Decentralised Service Delivery in the Democratic South Africa' in Mhone and Edigheji *Governance in the New South Africa: The Challenges of Globalisation* 220.

1607 Cloete *Public Administration and Management: New Constitutional Dispensation* 104; Craythorne *Municipal Administration* 401.

1608 See Bain 'Aspects of Planning in the Public Sector' in Hanekom *et al Key Aspects of Public Administration* 49.

1609 See ss 74 and 75 of the *Systems Act*. Section 74 outlines the principles which must be reflected in a municipal tariff policy while section 75 obliges municipal councils to adopt by-laws to give effect to the implementation and enforcement of its tariff policy.

1610 See ss 96-98 of the *Systems Act*. Section 96 requires municipalities to adopt, maintain and implement a credit control and debt collection policy which must be

4.5.2 Policies

The idea of public policy-making¹⁶¹¹ originated from the United States of America and became increasingly popular following Woodrow Wilson's seminal lecture in 1886 which was later published as an article in 1887.¹⁶¹² Public policy-making focused on separating politics from administration and stressed the role of bureaucrats in managing public organisations and in "translating policy ideals and aspirations into legislation, services, programmes, regulations, and so on."¹⁶¹³

In recent years, there has been growing interest in policy-making in the field of public administration.¹⁶¹⁴ Despite the growing interests, there are "different national intellectual traditions in the study of policy instruments."¹⁶¹⁵ Even within national jurisdictions, different "intellectual traditions" may mould different understandings of policy instruments.¹⁶¹⁶ For example, although it will become evident that most public administration experts in South Africa share a common understanding on the classification of policy instruments and their

consistent with its rates and tariff policies as well as the *Systems Act*. Section 97 spells out the content of a credit control and debt collection policy. On the other hand, section 98 obliges each municipal council to adopt by-laws to give effect to a municipality's credit control and debt collection policy, its implementation and enforcement. For the supervision and implementation of a municipality's credit control and debt collection policy and by-laws, see s 99-100 of the *Systems Act*.

1611 Definitions of "policy" are contentious. However, 'policy' represents a governance instrument while policy-making describes the process of policy formulation. For some definitions, see Gumede 'Public policy making in South Africa' in Venter and Landsberg *Government and Politics in South Africa* 166-167; Hattingh *Governmental Relations: A South African Perspective* 55; De Coning 'The nature and role of public policy' in Cloete and Wissink *Public Management: Improving Public Policy* 3-14.

1612 See Wilson 1887 *Political Science Quarterly* 197-222. For a detailed discussion on the evolution of policy studies, see Wissink 'History and development of policy studies and policy analysis' in Cloete and Wissink *Public Management: Improving Public Policy* 56-74.

1613 Gumede 'Public policy making in South Africa' in Venter and Landsberg *Government and Politics in South Africa* 165.

1614 See De Bruijn and Hufen 'The traditional approach to policy instruments' in Peters and Van Nispen *Public Policy Instruments: Evaluating the Tools of Public Administration* 11; see Wissink 'History and development of policy studies and policy analysis' in Cloete and Wissink *Public Management: Improving Public Policy* 57. A few examples in the South African context include: Gumede 'Public policy making in South Africa' in Venter and Landsberg *Government and Politics in South Africa* 165-182; Mokale and Scheepers *An Introduction to the Developmental Local Government System in South Africa* 50-55; Cloete *Public Administration and Management: New Constitutional Dispensation* 91-123.

1615 Peters and Van Nispen 'Prologue' in Peters and Van Nispen *Public Policy Instruments: Evaluating the Tools of Public Administration* 1.

1616 See Peters and Van Nispen 'Prologue' in Peters and Van Nispen *Public Policy Instruments: Evaluating the Tools of Public Administration* 1.

associated functions, some South African scholars limit their understanding of policy instruments to the traditional "political" type.¹⁶¹⁷ It is important to understand the different types of policy instruments and their associated functions in order to make informed policy choices.¹⁶¹⁸ It has been suggested that in order to make adequate policies, it is necessary for the policy maker to understand how other instruments fit into other aspects of the policy process, the variety of instruments available to the policy maker and the differences amongst the range of available instruments.¹⁶¹⁹ In addition, policies should be effectively coordinated with other instruments engaged in complementary tasks.¹⁶²⁰ The paragraphs that follow examine the different types of policy instruments in South Africa (also applicable at the local government level) before discussing policy-making and implementation processes, *per se*.

4.5.2.1 *Types of policies in South Africa*

In South Africa, policy studies "is relatively recent and still evolving."¹⁶²¹ The first type of policy identified by Hattingh and Cloete is referred to as "political policies".¹⁶²² This is the "primary type" of policy covered in most academic literature.¹⁶²³ Political policies can be represented as a plan of action adopted by a political party or the government in power and presented to the electorate/public as a series of value preferences which it seeks to implement

1617 The discussion of Gumede, Mokale and Scheepers is informed by an understanding of policies from the point of view that they are political documents. See Gumede 'Public policy making in South Africa' in Venter and Landsberg *Government and Politics in South Africa* 165-182; Mokale and Scheepers *An Introduction to the Developmental Local Government System in South Africa* 50-55.

1618 Peters and Van Nispen 'Prologue' in Peters and Van Nispen *Public Policy Instruments: Evaluating the Tools of Public Administration* at 1 and 2.

1619 Peters and Van Nispen 'Prologue' in Peters and Van Nispen *Public Policy Instruments: Evaluating the Tools of Public Administration* 2-3.

1620 Peters and Van Nispen 'Prologue' in Peters and Van Nispen *Public Policy Instruments: Evaluating the Tools of Public Administration* 3.

1621 Gumede 'Public policy making in South Africa' in Venter and Landsberg *Government and Politics in South Africa* 166. For definitions of "policy studies" see De Coning 'The nature and role of public policy' in Cloete and Wissink *Public Management: Improving Public Policy* 6-7. This research draws from the works of some South African experts in public administration to distinguish the types of policies in the country.

1622 Hattingh *Governmental Relations: A South African Perspective* 55; Cloete *Public Administration and Management: New Constitutional Dispensation* 94; De Coning 'The nature and role of public policy' in Cloete and Wissink *Improving Public Policy* 3-22 at 15-16; Cloete *South African Public Administration and Management* 127.

1623 Hattingh *Governmental Relations: A South African Perspective* 55.

upon election/re-election.¹⁶²⁴ Such policies cannot be enforced irrespective of their content and at best, remains the party's/government's vision for the future.¹⁶²⁵ This is the common view in academic literature which draws largely from the manner in which public policy developed as a branch of public administration in the United States.¹⁶²⁶ According to Cloete, such policies could be seen as election slogans or convenient propaganda documents which may only be better formulated when tabled in Parliament as a Bill.¹⁶²⁷ From the above explanation, it seems that political policies can be further subdivided into "government" policies and "party" policies. Cloete indicates that when a political party decides to take part in an election, it examines community life and "on the basis of its findings and the political beliefs of its members, it declares its stand on various issues."¹⁶²⁸ This initial declaration is purely a "party policy" and reflects the beliefs of members of that political party.¹⁶²⁹ On the other hand, a government can transform a "party policy" into a "government" policy, outlining the government's vision for the country.¹⁶³⁰ Although government policies still adhere to party philosophy, they generally aim at promoting the collective welfare of society as a whole.¹⁶³¹ Good examples of "political" policies include the ANC Freedom Charter,¹⁶³² the

1624 Hattingh *Governmental Relations: A South African Perspective* 55; Cloete *Public Administration and Management: New Constitutional Dispensation* 94; Cloete *South African Public Administration and Management* 127.

1625 Hattingh *Governmental Relations: A South African Perspective* 55; Cloete *Public Administration and Management: New Constitutional Dispensation* 94.

1626 See Venter 'Administering national government' in Venter and Landsberg *Government and Politics in South Africa* 89-90; Gumede 'Public policy making in South Africa' in Venter and Landsberg *Government and Politics in South Africa* 165-183.

1627 See Cloete *Public Administration and Management: New Constitutional Dispensation* 94; Cloete *South African Public Administration and Management* 128.

1628 Cloete *Public Administration and Management: New Constitutional Dispensation* 94; Cloete *South African Public Administration and Management* 128.

1629 Cloete *Public Administration and Management: New Constitutional Dispensation* 94; Cloete *South African Public Administration and Management* 128.

1630 Cloete *Public Administration and Management: New Constitutional Dispensation* 94-95; Thornhill *Cloete J South African Public Administration and Management* 127-128.

1631 Thornhill *Cloete J South African Public Administration and Management* 128; De Coning and Cloete 'Theories and models for analysing public policy' in Cloete and Wissink *Public Management: Improving public Policy* 26.

1632 The Freedom Charter was adopted at the Congress of the People in Kliptown on 26 June 1955.

RDP,¹⁶³³ the recent *National Development Plan* (2011),¹⁶³⁴ and all "White Papers".

A second type of policy is referred to as "executive policy".¹⁶³⁵ When an elected government translates a political policy into legislation, it then becomes the responsibility of "political executive institutions" and "executive office-bearers" to take the initiative to implement the legislation.¹⁶³⁶ Political executive institutions include "the Cabinet, Provincial Executive Councils and executive mayor/executive committee of municipal council."¹⁶³⁷ On the other hand, "executive office-bearers" include ministers and deputy ministers.¹⁶³⁸ It is the responsibility of executive office-bearers such as ministers, to transform legislation into a form that is passed unto various government departments for implementation.¹⁶³⁹ This becomes relevant in instances where original legislation explicitly requires a member of the executive arm of government such as a cabinet minister, member of a provincial executive council (MEC) or mayor to adopt specific policies in order to give effect to specific legislative provisions.¹⁶⁴⁰ In other instances, legislation may require that the executive give meaning to some provisions through interpreting and delimiting the scope of application.¹⁶⁴¹ Hattingh argues that "executive policies" are therefore

1633 This example is cited by Cloete. See Cloete *Public Administration and Management: New Constitutional Dispensation* 94; Thornhill Cloete *J South African Public Administration and Management* 128.

1634 See Thornhill Cloete *J South African Public Administration and Management* 128.

1635 Hattingh *Governmental Relations: A South African Perspective* 55; De Coning 'The nature and role of public policy' in Cloete and Wissink *Improving Public Policy* 15-16 Cloete *Public Administration and Management: New Constitutional Dispensation* 46-47.

1636 Hattingh *Governmental Relations: A South African Perspective* 55; Cloete *Public Administration and Management: New Constitutional Dispensation* 46-47, 95-96; Cloete *South African Public Administration and Management* 129.

1637 See Cloete *Public Administration and Management: New Constitutional Dispensation* 92-94; Thornhill Cloete *J South African Public Administration and Management* 126-127.

1638 See Cloete *Public Administration and Management: New Constitutional Dispensation* 92-94; Thornhill Cloete *J South African Public Administration and Management* 126-127.

1639 Hattingh *Governmental Relations: A South African Perspective* 55. See Cloete *Public Administration and Management: New Constitutional Dispensation* 46-47, 95-96; Thornhill Cloete *J South African Public Administration and Management* 129.

1640 See Cloete *Public Administration and Management: New Constitutional Dispensation* 95; Thornhill Cloete *J South African Public Administration and Management* 129.

1641 See Thornhill Cloete *J South African Public Administration and Management* 130.

implementable and enforceable.¹⁶⁴² Such executive policies should complement, but "cannot override, amend or be in conflict with laws", including subsidiary legislation.¹⁶⁴³ It is also important to note that enforceable "executive" policies can also emanate from negotiations between the executive (especially in municipalities) and the public (community residents) with regard to the content of a socio-economic right that the executive seeks to provide.¹⁶⁴⁴ Examples of "executive policies" in South Africa include national and municipal indigent policies which specifically give effect to the socio-economic rights of poor households by catering for their basic needs such as water, sanitation and electricity.¹⁶⁴⁵

The third type of policy is "administrative".¹⁶⁴⁶ For an executive policy emanating from "the highest authority to be duly implemented", it must be accompanied by an administrative policy to guide government departments (and municipalities) on the practical steps to be followed in effectively and correctly implementing that executive policy.¹⁶⁴⁷ From this perspective, Hattingh perceives "administrative" policy as a third genre of policy which is unenforceable *per se*.¹⁶⁴⁸ In other words, these are internal policy documents or administrative guidelines which give directions on how subordinate staff members should approach certain tasks. Examples of such guidelines could include the various *Integrated Development Planning Guidelines (2001)*¹⁶⁴⁹ and *Guidelines for the Implementation of the National Indigent Policy (2005)*.¹⁶⁵⁰

1642 See Hattingh *Governmental Relations: A South African Perspective* 55; Cloete *Public Administration and Management: New Constitutional Dispensation* 46.

1643 See *Akani Garden Route (Pty) Ltd*, par 7.

1644 See *Mazibuko*, pars 70-72 for similar reasoning. Gumede acknowledges that policies 'can come about through informal processes and bargaining'. See Gumede 'Public policy making in South Africa' in government' in Venter and Landsberg *Government and Politics in South Africa* 166.

1645 DPLG (now CoGTA) *National Framework for Municipal Indigent Policies* (2006).

1646 Hattingh *Governmental Relations: A South African Perspective* 55; De Coning 'The nature and role of public policy' in Cloete and Wissink *Improving Public Policy* 15-16.

1647 See Hattingh *Governmental Relations: A South African Perspective* 55; Cloete *Public Administration and Management: New Constitutional Dispensation* 96-97; Thornhill *Cloete J South African Public Administration and Management* 131.

1648 Hattingh *Governmental Relations: A South African Perspective* 55.

1649 See DPLG (now CoGTA) *IDP Guide Packs Series, Guides 0-6* (Government Printers, 2001).

1650 DPLG (now CoGTA) *Guidelines for the Implementation of the National Indigent Policy by Municipalities* (2005).

From the above classification, it seems that in exercising its governing powers, local government can adopt two types of policies – "executive" and "administrative" policies. An executive policy could be adopted by an executive mayor or any executive committee of a municipality (subject to the approval of the municipal council) in order to facilitate the implementation of any legal obligation specifically imposed on local government.¹⁶⁵¹ On the other hand, an administrative policy could be adopted by a municipality in order to guide municipal officials on how to execute defined functions.

4.5.2.2 *Policy-making and implementation*

In public administration, the term "policy-making" refers to the functions or generic administrative processes executed to obtain policies.¹⁶⁵² Cloete indicates that although there are different models and approaches to policy-making, there is no "generally-accepted prescriptive model."¹⁶⁵³ This means that complete rationality in policy-making is far-fetched because "input of political processes" cannot be completely eliminated.¹⁶⁵⁴ However, it has been suggested that the generic administrative functions executed to produce and implement a policy should include: identifying matters needing new policies or policy adaptation, authorisation, public statement of intent, public consultation, implementation, monitoring and evaluation.¹⁶⁵⁵ This suggests that these are

1651 In the context of a municipality, it is suggested that the application of an executive policy is subject to the approval of the municipal council because the legislative and executive powers of a municipality are constitutionally vested in the municipal council. See s 151(2) of the Constitution.

1652 Cloete *Public Administration and Management: New Constitutional Dispensation* 103; Thornhill Cloete *J South African Public Administration and Management* 138.

1653 Cloete *Public Administration and Management: New Constitutional Dispensation* 107; Thornhill Cloete *J South African Public Administration and Management* 141-142; De Coning and Cloete 'Theories and models for analysing public policy' in Cloete and Wissink *Public Management: Improving public Policy* 29-30 and 50. For a definition of policy models and a detailed discussion of the various policy models, see De Coning and Cloete 'Theories and models for analysing public policy' in Cloete and Wissink *Public Management: Improving Public Policy* 24, 29-50.

1654 See Cloete *Public Administration and Management: New Constitutional Dispensation* 106; Thornhill Cloete *J South African Public Administration and Management* 141; Hanekom *et al Key Aspects of Public Administration* 27.

1655 See De Coning and Cloete 'Theories and models for analysing public policy' in Cloete and Wissink *Public Management: Improving public Policy* 29; Thornhill Cloete *J South African Public Administration and Management* 138. For a detailed discussion of the generic administrative functions that produces a policy, see Cloete and Wissink *Public Management: Improving Public Policy* 97-163.

processes that could be followed by municipalities, for example, in making and implementing local policies.

Although the policy process starts when a policy problem is identified by one or more stakeholders, it is the executive office-bearers (president, ministers, provincial premiers and executive mayors or chairmen of executive municipal committees) who usually initiate the policy-making procedure, after approval of the ruling party.¹⁶⁵⁶ In formulating public policies, government is expected to take into consideration a number of factors or variables, reflecting the time and place where public authorities operate.¹⁶⁵⁷ Government is expected to take into consideration technological advancements and prevailing socio-economic, socio-cultural, socio-political and environmental variables.¹⁶⁵⁸ In brief, these variables specifically include factors such as inflation, economic growth and industrial development, population growth and urbanisation, available infrastructure, institutional capacity and expertise, budget constraints, crises such as natural disasters and international developments.¹⁶⁵⁹ In addition, because government exists to satisfy the needs and justified expectations of its citizens, it must take into consideration the needs and expectations of communities.¹⁶⁶⁰ This requires that government investigates the needs and expectations of citizens. This could be achieved

1656 Cloete *Public Administration and Management: New Constitutional Dispensation* 102; De Coning and Cloete 'Theories and models for analysing public policy' in Cloete and Wissink *Public Management: Improving public Policy* 28; Meyer and Cloete 'Policy agenda-setting' in Cloete and Wissink *Public Management: Improving Public Policy* 97; Thornhill *Cloete J South African Public Administration and Management* 137.

1657 See Cloete 'Public Policy in more and lesser developed states' in Cloete and Wissink *Public Management: Improving Public Policy* 81; Cloete *Public Administration and Management: New Constitutional Dispensation* 97-100; Thornhill *Cloete J South African Public Administration and Management* 132-137.

1658 See Cloete 'Public Policy in more and lesser developed states' in Cloete and Wissink *Public Management: Improving Public Policy* 81. For a detailed explanation of these variables in the context of both developed and developing countries, see Cloete 'Public Policy in more and lesser developed states' in Cloete and Wissink *Public Management: Improving Public Policy* 81-87; Thornhill *Cloete J South African Public Administration and Management* 127, 132-137.

1659 Cloete 'Public Policy in more and lesser developed states' in Cloete and Wissink *Public Management: Improving Public Policy* 83-86; Cloete *Public Administration and Management: New Constitutional Dispensation* 98-99; Thornhill *Cloete J South African Public Administration and Management* 127, 132-137.

1660 De Coning and Cloete 'Theories and models for analysing public policy' in Cloete and Wissink *Public Management: Improving public Policy* 27; Cloete *Public Administration and Management: New Constitutional Dispensation* 99; Thornhill *Cloete J South African Public Administration and Management* 132.

through, for example, promoting public participation in policy formulation.¹⁶⁶¹ Furthermore, it may also be necessary to take into consideration the principles/beliefs of the ruling party, the views of interests groups, the personal views of political executive office-bearers and the views of public officials.¹⁶⁶² Government policies are supposed to be dynamic in order to stay abreast with the frequently changing environment.¹⁶⁶³ In brief, it can be said that, in making a policy, municipalities must take into account, the needs of local communities and consider the internal and external factors that are likely to impact on the implementation of the policy.

It should be stressed that although there is no single generally appropriate model for policy-making, experts emphasise that public participation must be facilitated in policy-making and implementation processes.¹⁶⁶⁴ Public participation in the policy-making process ensures *inter alia* that, real community needs are taken into account and in the context of South Africa, this will be in line with the constitutional commitment to enhance public participation.¹⁶⁶⁵

In "real-life policy-making", government policies are usually formulated in a vague manner that does not commit government to specific objectives.¹⁶⁶⁶ This is based on the claim that "dysfunctional situations" can never be completely eliminated.¹⁶⁶⁷ However, after a policy has been formulated and approved, the government is expected to implement it. Policy implementation in this context encompasses those actions adopted by government to realise

1661 See De Coning and Cloete 'Theories and models for analysing public policy' in Cloete and Wissink *Public Management: Improving public Policy* 27.

1662 Cloete *Public Administration and Management: New Constitutional Dispensation* 100-101; Thornhill Cloete *J South African Public Administration and Management* 138.

1663 Cloete *Public Administration and Management: New Constitutional Dispensation* 104; De Coning and Cloete 'Theories and models for analysing public policy' in Cloete and Wissink *Public Management: Improving public Policy* 27-28.

1664 De Coning and Cloete 'Theories and models for analysing public policy' in Cloete and Wissink *Public Management: Improving public Policy* 50; Thornhill Cloete *J South African Public Administration and Management* 139 and 143.

1665 De Coning and Cloete 'Theories and models for analysing public policy' in Cloete and Wissink *Public Management: Improving public Policy* 27; Thornhill Cloete *J South African Public Administration and Management* 143; *Doctors for Life International*, pars 73, 78, 110-147.

1666 See Cloete *Public Administration and Management: New Constitutional Dispensation* 106; De Coning and Cloete 'Theories and models for analysing policy' in Cloete and Wissink *Public Management: Improving public Policy* 166.

1667 Cloete *Public Administration and Management: New Constitutional Dispensation* 106.

the objectives set forth in a policy.¹⁶⁶⁸ A common theory on policy implementation as well as the variables important to policy implementation success in government is yet to be developed.¹⁶⁶⁹ What this indicates is that there is no universally acceptable framework for successful policy implementation. However, research increasingly points to a "cluster of variables that can impact" on government policy implementation.¹⁶⁷⁰ As Brynard points out, there is consensus that implementation is a "multi-actor, multi-organisation process influenced both by the content and context of the policy being implemented."¹⁶⁷¹ This suggests that in addition to the quality of the policy (*vis-à-vis* its objectives, institutional and socio-economic and environmental context), government officials should ensure that during the implementation process, they take into consideration the local context and involve only actors and organisation that are most relevant to the implementation process. Due to the multitude of actors involved in policy implementation, it is also important to encourage and sustain commitment at all levels.¹⁶⁷²

There are a number of generic processes that can be adopted by government in implementing a policy.¹⁶⁷³ After approving a policy, government is supposed to engage in "marketing" the policy to the public in preparation for implementation.¹⁶⁷⁴ This enables the public to *inter alia*, assess the extent to which the policy meets their expectations and to create awareness on

1668 See Brynard 'Policy implementation' in Cloete and *Wissink Public Management: Improving public Policy* 166; Thornhill *Cloete J South African Public Administration and Management* 129.

1669 See Brynard 'Policy implementation' in Cloete and *Wissink Public Management: Improving public Policy* 164-165 and 168. For a detailed discussion of the existing theoretical backgrounds, see Brynard 'Policy implementation' in Cloete and *Wissink Public Management: Improving public Policy* 165-174.

1670 See Brynard 'Policy implementation' in Cloete and *Wissink Public Management: Improving public Policy* 169, 178-186.

1671 See Brynard 'Policy implementation' in Cloete and *Wissink Public Management: Improving public Policy* 174.

1672 For a detail discussion of the main variables, see Brynard 'Policy implementation' in Cloete and *Wissink Public Management: Improving public Policy* 178-186.

1673 See Brynard 'Policy implementation' in Cloete and *Wissink Public Management: Improving public Policy* 177; Cloete *Public Administration and Management: New Constitutional Dispensation* 108.

1674 Cloete *Public Administration and Management: New Constitutional Dispensation* 107; Thornhill *Cloete J South African Public Administration and Management* 142-143.

implementing institutional units.¹⁶⁷⁵ This is followed by a series of measures to ensure implementation of the policy such as enacting relevant legislation or by-laws, developing implementation plans, allocating funds, deploying skilled personnel, building capacity, establishing operational procedures and control measures.¹⁶⁷⁶ In order to evaluate the success of a policy in realising its goals/objectives, implementation has to be continuously monitored and evaluated.¹⁶⁷⁷

From the above discussion, it seems there is no prescriptive model for successful policy-making and implementation that has to be followed by municipalities in order to govern and realise their "developmental" objectives. What has emerged is that there are generic processes which could be followed in making and implementing a policy. It was observed that municipalities must facilitate public participation in policy-making and implementation and take into consideration the needs of communities, and the internal and external factors that are likely to impact on policy implementation. Due to the multiple number of actors involved in the policy-making and implementation processes, it is important to sustain the commitment of the most important actors in these processes. After adopting a policy, a municipality should market it to the public in preparation for implementation. It should allocate resources, responsibilities and take any other action which may be necessary for successfully implementing the policy. Implementation must be monitored and continuously evaluated to ensure that gaps are identified and corrected and desired outcomes realised.

4.5.3 Strategic planning

In South Africa, section 11(3)(a) of the *Systems Act* provides that, in governing a municipality, a municipal council could exercise its executive and legislative authority by developing, adopting and implementing plans. In

1675 Cloete *Public Administration and Management: New Constitutional Dispensation* 107.

1676 See Brynard 'Policy implementation' in Cloete and Wissink *Public Management: Improving public Policy* 178; Cloete *Public Administration and Management: New Constitutional Dispensation* 108.

1677 See Brynard 'Policy implementation' in Cloete and Wissink *Public Management: Improving public Policy* 177; Cloete *Public Administration and Management: New Constitutional Dispensation* 109-110; Thornhill Cloete *J South African Public Administration and Management* 144-145.

addition, the entire Chapter 5 of the *Systems Act* is dedicated to promoting integrated development planning at the local government level. In this regard, integrated development planning is considered local government's leading governance instrument.¹⁶⁷⁸ Although South Africa's local government integrated development planning may have its context specific features, at the international level, local government "strategic planning" has emerged as the leading governance instrument for municipalities.¹⁶⁷⁹ However, although similar processes are followed in "strategic planning" in both public and private sectors,¹⁶⁸⁰ there is no universally prescribed model for local government strategic planning.¹⁶⁸¹ This section examines the meaning of local government strategic planning, the generic process of conventional local government strategic planning and its potential advantages.

4.5.3.1 *Meaning of "strategic planning"*

Local government strategic planning has been defined as a systematic process by which a municipality anticipates and plans for its immediate and long-term future.¹⁶⁸² According to Mercer, local government strategic planning can be defined as "a process for setting future direction, a means to reduce risk and a vehicle for training managers".¹⁶⁸³ Local government strategic planning also refers to "a process for making strategic decisions, a way to develop consensus amongst top managers, and a means to develop a written long-range plan."¹⁶⁸⁴ Furthermore, local government strategic planning can also be defined as a process by which municipalities appraise their strengths,

1678 See Part III: 'Tools and Regulatory Instruments of Developmental Local Government' in Van Donk *et al Consolidating Developmental Local Government* 317.

1679 See *Gordon Strategic Planning for Local Government*; Bryson 1988 *Long Range Planning* 73-81. For a historical background to strategic planning, see Mercer *Strategic Planning for Public Managers* 2-5.

1680 See Mercer *Strategic Planning for Public Managers* 2 and 5; Clarke and Stewart *Planning for Change: Strategic Planning in Local Government* 9; Gordon *Strategic Planning for Local Government* 77; Bryson 1988 *Long Range Planning* 73-81; Streib and Poister 2005 *Public Administration Review* 46.

1681 Clarke and Stewart *Planning for Change: Strategic Planning in Local Government* vii; Bertocci *Strategic Planning and Management: A Road Map to Success* 40; Streib and Poister 2005 *Public Administration Review* 45-46.

1682 Gordon *Strategic Planning for Local Government* 8. See Clarke and Stewart *Planning for Change: Strategic Planning for Local Government* 6; Mercer *Strategic Planning for Public Managers* 17-18.

1683 Mercer *Strategic Planning for Public Managers* 19.

1684 Mercer *Strategic Planning for Public Managers* 19.

weaknesses, opportunities and threats in an attempt to control their destiny and achieve defined goals and objectives.¹⁶⁸⁵ Strategic planning enables municipalities to satisfy the current needs of communities while developing means to provide improved services to communities in the future, taking into consideration, the pool of either shrinking, static or expanding resources.¹⁶⁸⁶ The result of the strategic planning process is a written plan – a strategic plan that guides the municipality towards realising defined goals and objectives.¹⁶⁸⁷ The strategic plan represents "a vision of the future and of what the community and its governing and management" structures can realise within the limits of future realities, as currently perceived.¹⁶⁸⁸ An approved strategic plan serves as the blueprint that should guide actions and decision-making at the level of the municipality, as it moves towards realising its goals and objectives.¹⁶⁸⁹

The above definitions on local government strategic planning slightly differ, but generally consider strategic planning both as a "process" and a "product".¹⁶⁹⁰ The strategic planning process leads to a "product" – the strategic plan - which if implemented could facilitate the realisation of a municipality's goals and objectives, for example.

4.5.3.2 *Strategic planning and implementation*

Although there is not "one best way" to strategically plan,¹⁶⁹¹ there appears to be consensus on the generic process of conventional local government

1685 See Mercer *Strategic Planning for Public Managers* 6, 20; Bertocci *Strategic Planning and Management* 1.

1686 See Mercer *Strategic Planning for Public Managers* 5; Gordon *Strategic Planning for Local Government* 3.

1687 Gordon *Strategic Planning for Local Government* 54; Clarke and Stewart *Planning for Change: Strategic Planning for Local Government* 6.

1688 Gordon *Strategic Planning for Local Government* 10. See Bertocci *Strategic Planning and Management* 3.

1689 Gordon *Strategic Planning for Local Government* 9; Bertocci *Strategic Planning and Management* 12-13; "Chapter 3: Strategic planning" in CIIR *Capacity Building for Local NGOs: A Guidance Manual for Good Practice* 44.

1690 Gordon *Strategic Planning for Local Government* 3-4.

1691 Gordon *Strategic Planning for Local Government* 8-9 and 15; Mercer *Strategic Planning for Public Managers* 21; Bertocci *Strategic Planning and Management* 40; 'Strategic Planning' in CIIR *Capacity building for local NGOs* 44; Bryson 1988 *Long Range Planning* 78.

strategic planning.¹⁶⁹² This section describes the generic process of conventional local government strategic planning and discusses some important generic features of a local strategic plan.

4.5.3.2.1 Preparing to plan

It has been suggested that the first step in the strategic planning process is for the top management of a municipality to support the planning process with the resources and time needed during the complete cycle of the strategic plan.¹⁶⁹³ Once the decision has been made to start the strategic planning process, it is necessary for top management to appoint a planning leader who will set the stage for the actual planning sessions.¹⁶⁹⁴ The planning leader is expected to liaise with top management, clarify the expected outcomes and develop the agenda of the formal strategic planning sessions. The planning leader should be supported by a planning team, selected from the municipality and constituted by personnel from all levels of the municipality with diverse backgrounds and perspectives.¹⁶⁹⁵ The preliminary meetings are followed by actual strategic planning sessions in which analysis and planning occur. These formal meetings should involve all stakeholders.

4.5.3.2.2 Consulting the public

The local government strategic planning process requires large scale public consultations.¹⁶⁹⁶ All persons who have a direct interest in the activities of a municipality should be involved in the design and implementation of the local strategic plan.¹⁶⁹⁷ It has been suggested that although public participation

1692 Although the generic process and elements of the strategic plan can be referred to varyingly by different writers, they are the same in terms of scope. See Gordon *Strategic Planning for Local Government* 15; Mercer *Strategic Planning for Public Managers* 21; 'Strategic Planning' in CIIR *Capacity building for local NGOs* 41; Bryson 1988 *Long Range Planning* 74-77.

1693 Bertocci *Strategic Planning and Management* 42.

1694 Bertocci *Strategic Planning and Management* 42-43.

1695 Bertocci *Strategic Planning and Management* 43.

1696 Gordon *Strategic Planning for Local Government* 9; Clarke and Stewart *Planning for Change* 34 and 41; Mercer *Strategic Planning for Public Managers* 22; Bertocci *Strategic Planning and Management* 20 and 37.

1697 Gordon *Strategic Planning for Local Government* 15-17; Clarke and Stewart *Planning for Change* 25, 33-34; Bertocci *Strategic Planning and Management* 20 and 37. For a comprehensive list of stakeholders, see Gordon *Strategic Planning for Local Government* 16.

involving diverse and sometimes adversarial groups may stall the strategic planning process, it is desirable to invite and resolve differences during the planning rather than implementation stages.¹⁶⁹⁸ Broad public participation during strategic planning could lead to the adoption of a strategic plan which is supported by all stakeholders and represent a compromise of acceptable alternatives.¹⁶⁹⁹ This can avoid unnecessary waste of resources. In addition, the participation of all levels of municipal managers in the strategic planning process can help mould a common philosophical outlook amongst key elected and appointed local government officials.¹⁷⁰⁰ This is important because entrenched beliefs and values of the most influential members of institutions such as local government assist in structuring planning and other activities¹⁷⁰¹ which may be reflected in the quality of the services delivered.¹⁷⁰²

Municipalities can involve relevant role players in different ways during the design and implementation of a strategic plan. For example, some municipalities may prefer a grass-roots approach which encourages direct involvement of community members and municipal officials.¹⁷⁰³ If effectively utilised, the grass-root approach to community involvement may increase understanding, commitment and legitimacy towards a municipality's goals, objectives and development strategies.¹⁷⁰⁴ On the other hand, a municipality may rely on the input of organisations representing larger groups of individuals during the design and implementation of local strategic plans.¹⁷⁰⁵ Irrespective of the approach used in engaging citizens, it is necessary to ensure that there is broad agreement between the community, elected local officials and local government organisations.¹⁷⁰⁶

1698 Gordon *Strategic Planning for Local Government* 9-10.

1699 Gordon *Strategic Planning for Local Government* 9-10; Bertocci *Strategic Planning and Management* 30.

1700 Gordon *Strategic Planning for Local Government* 22; Clarke and Stewart *Planning for Change* 44 and 47.

1701 Gordon *Strategic Planning for Local Government* 21-22.

1702 Gordon *Strategic Planning for Local Government* 22.

1703 Gordon *Strategic Planning for Local Government* 19; Bertocci *Strategic Planning and Management* 7 and 37.

1704 See Gordon *Strategic Planning for Local Government* 19; Bertocci *Strategic Planning and Management* 7 and 37.

1705 Gordon *Strategic Planning for Local Government* 20; Clarke and Stewart *Planning for Change* 34.

1706 Gordon *Strategic Planning for Local Government* 20; Bertocci *Strategic Planning and Management* 3-4, 19-20 and 37.

4.5.3.2.3 Developing the mission statement

Like all public institutions, each municipality should have a mission statement.¹⁷⁰⁷ In the strategic planning process, a municipality can develop its mission statement before or after its needs assessment.¹⁷⁰⁸ A mission statement in this context, is an enduring statement of the purpose of the municipality.¹⁷⁰⁹ The mission statement should reflect the *raison d'être* of the municipality and must be concise and specific.¹⁷¹⁰ Mission statements rarely change and should be formulated in a manner that accommodates important contextual changes.¹⁷¹¹ The mission statement makes it possible for a variety of audiences to quickly scan and understand the mandate of a municipality.¹⁷¹² The mission statement does not state measurable targets but constitute the basis for a municipality's objectives and implementation plans.¹⁷¹³

4.5.3.2.4 Scanning the environment

An important feature of the local government strategic planning process is an environmental scan or needs assessment.¹⁷¹⁴ Due to the fact that municipalities exist and operate in environments that affect their ability to succeed, they must picture (as nearly as possible) the future environmental context (socio-economic, political, institutional and natural environment) within

1707 Mercer *Strategic Planning for Public Managers* 21; Gordon *Strategic Planning for Local Government* 23; Bertocci *Strategic Planning and Management* 12-13.

1708 According to Gordon's outline, the mission statement comes before the needs assessment. See Gordon *Strategic Planning for Local Government* 9. On the other hand, Bertocci outlines the mission statement after the needs assessment. See Bertocci *Strategic Planning and Management* 45-53.

1709 Mercer *Strategic Planning for Public Managers* 21; Gordon *Strategic Planning for Local Government* 23; Bertocci *Strategic Planning and Management* 47; Bryson 1988 *Long Range Planning* 74-76.

1710 Gordon *Strategic Planning for Local Government* 23; Clarke and Stewart *Planning for Change* 36; Bryson 1988 *Long Range Planning* 74-76.

1711 Gordon *Strategic Planning for Local Government* 23; Clarke and Stewart *Planning for Change* 36; Bertocci *Strategic Planning and Management* 51.

1712 Gordon *Strategic Planning for Local Government* 23-26; Bertocci *Strategic Planning and Management* 53.

1713 Gordon *Strategic Planning for Local Government* 26.

1714 Mercer *Strategic Planning for Public Managers* 6 and 21; Gordon *Strategic Planning for Local Government* 26; Clarke and Stewart *Planning for Change* 29. This is also referred to as a SWOT (acronym for "strengths, weaknesses, opportunities and threats") analysis. See Gordon *Strategic Planning for Local Government* 15.

which they will set goals and objectives and implement adopted strategies.¹⁷¹⁵ Strategies and plans adopted to realise defined goals and objectives must be constructed in a manner that takes into consideration the most likely scenarios.¹⁷¹⁶

The environmental scan seeks to determine the strengths, weaknesses, opportunities and threats that municipalities face.¹⁷¹⁷ An environmental scan usually consists of an internal and external scan.¹⁷¹⁸ In conducting an external scan, strategic planners look at factors exterior to municipalities that are likely to affect their success such as developments at the regional, national and international level.¹⁷¹⁹ On the other hand, in an internal scan, strategic planners examine the strengths and weaknesses of a municipality *per se*. The internal scan is complex and involves the examination of indefinable political factors, unemployment and demographic factors, community needs, legal and regulatory frameworks, economic and financial considerations, technology, community perception of the municipality and its services, local economic considerations and internal organisational context – the strategic mindset of senior municipal managers especially, the effectiveness of the municipality's decision-making style, institutional sensitivity to ethics, and the role of human resource functions in the implementation of programmes.¹⁷²⁰

The factors listed in the external and internal scans are supposed to facilitate the scanning process and the weight to be attached to each factor depends on the context of each municipality.¹⁷²¹ This means that some of these factors may be irrelevant in a given context. However, strategic planning at the local

1715 Clarke and Stewart *Planning for Change* 29; Gordon *Strategic Planning for Local Government* 26; Mercer *Strategic Planning for Public Managers* 6.

1716 Gordon *Strategic Planning for Local Government* 26; Bryson 1988 *Long Range Planning* 76.

1717 See Bertocci *Strategic Planning and Management* 45; Gordon *Strategic Planning for Local Government* 15.

1718 Gordon *Strategic Planning for Local Government* 38; Clarke and Stewart *Planning for Change* 29-35; Mercer *Strategic Planning for Public Managers* 5-7; Bertocci *Strategic Planning and Management* 45-47 and 57-64.

1719 Gordon *Strategic Planning for Local Government* 38; Bryson 1988 *Long Range Planning* 76.

1720 Gordon *Strategic Planning for Local Government* 38; Clarke and Stewart *Planning for Change* 29. For details on internal organisational considerations, read Gordon *Strategic planning for Local Government* 61-70.

1721 Gordon *Strategic Planning for Local Government* 27-28.

level will always be complicated by the fact that internal and external environmental factors are dynamic and sometimes, change in an unpredictable manner.¹⁷²² Due to this, strategic planning has to be a continuous process.¹⁷²³

After a scan of internal and external environmental factors, a narrative description should be provided of the environmental context which includes a conclusion of how significant factors may affect the municipality's performance in the future.¹⁷²⁴ Lessons gathered from environmental scanning constitute the basis for decisions about goals, objectives and strategies.¹⁷²⁵ Goals, objectives and strategies are expressed in the strategic development plan.

4.5.3.2.5 Adopting a strategic plan

After an environmental scan, strategic planners in a municipality must develop the strategic plan. A strategic plan contains a set of goals, objectives, strategies and an "implementation plan".¹⁷²⁶ Once a strategic plan is approved, it serves as a "blueprint for the budgeting process" and dictates the allocation of resources by a municipality, for example.¹⁷²⁷

As mentioned in the preceding paragraph, a strategic plan must contain goals, objectives and strategies. In this context, goals refer to generalised statements of where a municipality wishes to be in the near future.¹⁷²⁸ Goals are generally few in number, concise and non-quantitative. At the end of the year, a municipality's success is determined by examining the extent to which

1722 See Gordon *Strategic Planning for Local Government* 26-27; Mercer *Strategic Planning for Public Managers* 7.

1723 See Bertocci *Strategic Planning and Management* 24; Gordon *Strategic Planning for Local Government* 26-27; Mercer *Strategic Planning for Public Managers* 7.

1724 Gordon *Strategic Planning for Local Government* 38.

1725 Bertocci *Strategic Planning and Management* 67; Gordon *Strategic Planning for Local Government* 41; 'Strategic Planning' in CIIR *Capacity building for local NGOs* 56-59; Bryson 1988 *Long Range Planning* 77.

1726 Gordon *Strategic Planning for Local Government* 42-49; Clarke and Stewart *Planning for Change* 29; Mercer *Strategic Planning for Public Managers* 21.

1727 Gordon *Strategic Planning for Local Government* 54. See 'Strategic Planning' in CIIR *Capacity building for local NGOs: A guidance manual for good practice* 67; Bryson 1988 *Long Range Planning* 78.

1728 For details, see Gordon *Strategic Planning for Local Government* 42-44; Bertocci *Strategic Planning and Management* 67-69.

defined goals have been met.¹⁷²⁹ On the other hand, objectives refer to the specific, measurable targets set by a municipality for each goal.¹⁷³⁰ Objectives can be further sub-divided depending on the level of detail desired in the strategic plan and constitute a means by which the success of a strategic plan is measured.¹⁷³¹ Just like goals, the objectives of a municipality should be determined by findings of the internal and external environmental scans.¹⁷³²

In addition to goals and objectives, the local strategic plan should contain "strategies". Strategies refer to "the step-by-step means" or actions which a municipality uses to realise its objectives.¹⁷³³ Strategies generally consist of policies, programmes, projects, plans, operations and events to be executed by the municipality in order to realise its defined objectives.¹⁷³⁴ Whereas goals and objectives indicate what a municipality wants to achieve, strategies indicate how a municipality intends realising its goals and objectives.¹⁷³⁵ In adopting strategies, a municipality must be informed by the internal and external factors analysed in the environmental scan including priority needs of communities, available personnel and budgetary resources, available technology and the nature of co-operation with regional and national governments.¹⁷³⁶

4.5.3.2.6 Implementing a strategic plan

Complying with the generic strategic planning process discussed above is not a guarantee that a municipality will achieve its defined objectives. The

1729 Gordon *Strategic Planning for Local Government* 43. Bertocci makes a distinction between "medium-range" goals and "strategic goals". Strategic goals are the same as "objectives" because they are meant to be achieved within a 3-5 years timeframe. See also Bertocci *Strategic Planning and Management* 67-69.

1730 Gordon *Strategic Planning for Local Government* 44. See also Bertocci *Strategic Planning and Management* 67-68.

1731 See Gordon *Strategic Planning for Local Government* 44; Bertocci *Strategic Planning and Management* 68.

1732 Gordon *Strategic Planning for Local Government* 45.

1733 Gordon *Strategic Planning for Local Government* 45.

1734 Gordon *Strategic Planning for Local Government* 45.

1735 Gordon *Strategic Planning for Local Government* 46.

1736 Gordon *Strategic Planning for Local Government* 47-48. See 'Strategic Planning' in CIIR *Capacity building for local NGOs* 56-59; Bryson 1988 *Long Range Planning* 76-77.

success of a strategic plan also depends on implementation.¹⁷³⁷ "Strategic plans do not implement themselves" and their implementation can be hampered by a host of factors.¹⁷³⁸ Due to this reality, an "implementation plan" and a performance management system should constitute part of every strategic plan.¹⁷³⁹ A performance management system enables municipal managers and relevant decision-makers to determine the extent to which a municipality is on track in delivering anticipated outcomes and, if necessary, the type of corrective measures that must be implemented to realise such outcomes.¹⁷⁴⁰ However, it must be stressed that this research does not venture into how municipalities should implement strategic plans.

There are some benefits attached to local government strategic planning. Firstly, local government strategic planning enables local leaders to understand the dynamic environment within which they operate and anticipate the future.¹⁷⁴¹ By understanding future problems and opportunities, local leaders can position municipalities in a manner that responds appropriately to anticipated problems and opportunities.¹⁷⁴² Secondly, because strategic planning makes it possible for councillors and municipal officials at all levels to work as a team in the design and implementation of the strategic plan, it promotes team building and enhances the ability of the municipality to realise its goals and objectives.¹⁷⁴³ This has the possibility of generating and sustaining commitment amongst managers at different levels and thereby reducing resistance to change.¹⁷⁴⁴ Thirdly, the use of a participatory approach in local government strategic planning helps to build agreement between

1737 See Streib and Poister 2005 *Public Administration Review* 46; Gordon *Strategic Planning for Local Government* 49 and 54.

1738 Streib and Poister 2005 *Public Administration Review* 46.

1739 See Gordon *Strategic Planning for Local Government* 49-55; Clarke and Stewart *Planning for Change* 54-70; Mercer *Strategic Planning for Public Managers* 21

1740 See Gordon *Strategic Planning for Local Government* 55; Clarke and Stewart *Planning for Change* 60-62; Mercer *Strategic Planning for Public Managers* 21.

1741 Mercer *Strategic Planning for Public Managers* 1; Gordon *Strategic Planning for Local Government* 4; Bryson 1988 *Long Range Planning* 78.

1742 Gordon *Strategic Planning for Local Government* 4-5; Bertocci *Strategic Planning and Management: A Road Map* 7; Bryson 1988 *Long Range Planning* 78.

1743 Gordon *Strategic Planning for Local Government* 5; Bertocci *Strategic Planning and Management* 7; 'Strategic Planning' in CIIR *Capacity building for local NGOs* 42-43; Bryson 1988 *Long Range Planning* 78.

1744 Gordon *Strategic Planning for Local Government* 5; Bertocci *Strategic Planning and Management* 8; 'Strategic Planning' in CIIR *Capacity building for local NGOs* 42-43; Bryson 1988 *Long Range Planning* 78.

communities and local leaders, creates opportunities for communities to contribute towards setting goals for municipalities (which reflect their real needs) and increases the legitimacy of a strategic plan.¹⁷⁴⁵ Due to their involvement in the strategic planning process, communities are able to understand the conflicting pressures municipalities face and what they are striving to achieve.¹⁷⁴⁶ In addition, it has been suggested that group-based decisions in the strategic planning process results in better decisions since group interactions are more likely to generate a greater variety of alternative strategies.¹⁷⁴⁷ Alternative strategies may be enriched by the diverse background and specialisation of the strategic planning team. Furthermore, since the process of local government strategic planning results in the adoption of a strategic plan, it provides a coherent framework that facilitates decision-making and the allocation of resources at the local level.¹⁷⁴⁸

Despite the potential of local government strategic planning in addressing immediate to long term development needs at the level of municipalities, it is not a golden bullet that will certainly resolve all community and organisational challenges. This fact is stressed by Gordon's reminder that:

Strategic planning defines the most likely conditions within which decisions must be made, and it can highlight the potential effects of various decisions. But it cannot prescribe specific courses of action... Final decisions will have to be made by individuals and groups who, even with the best information, remain human and who must make difficult choices from opposing options. There is no guarantee that they will make the right selections. There is no guarantee that the data will remain constant or that conditions won't change. There is no guarantee that the programmes designed to fit an accurately projected scenario of the future will succeed. The best conceived plans can fail. On the other hand, an organisation that relies solely on intuitive decision-making can succeed. Although more informed decisions are possible through planning, and although the planning process enhances the chance of making the best decisions it does not ensue success; it improves the chances...In communities where resources

1745 See Gordon *Strategic Planning for Local Government* 5; Clarke and Stewart *Planning for Change: Strategic Planning for Local Government* 8; Bertocci *Strategic Planning and Management* 7; 'Strategic Planning' in CIIR *Capacity building for local NGOs* 42-43; Bryson 1988 *Long Range Planning* 78.

1746 Clarke and Stewart *Planning for Change* 8.

1747 Bertocci *Strategic Planning and Management* 7; 'Strategic Planning' in CIIR *Capacity building for local NGOs* 42-43.

1748 Mercer *Strategic Planning for Public Managers* 18; 'Strategic Planning' in CIIR *Capacity building for local NGOs* 42-43; Bryson 1988 *Long Range Planning* 78.

*are scares, strategic planning cannot increase them. It may be useful as a means of stretching resources, both human and capital...*¹⁷⁴⁹

The above extract demonstrates the complex nature of local government strategic planning. It points to the fact that highly skilled personnel is needed in strategic planning processes and in the implementation of strategies included in the strategic plan. However, the presence of highly skilled personnel is also no guarantee that defined objectives will be realised. In addition to constraints highlighted in the above extract, it has also been argued that because the "breadth of local operations is often well defined in law", innovation in strategic planning at the local government level can be limited by law.¹⁷⁵⁰ Furthermore, pressures for public accountability, makes it possible for decisions relating to strategic planning to be ultimately made at the highest levels.¹⁷⁵¹

In order to enhance the success of strategic planning at the local level, it has been suggested that municipal officials should ensure that after adopting the strategic plan, measures should be implemented that disseminate the content of the plan to all relevant stakeholders.¹⁷⁵² Good awareness of the content of the strategic plan may help to galvanise the support of those who will be affected by the implementation of the plan as well as council officials tasked with the implementation.¹⁷⁵³ Secondly, responsible local government officials must ensure that an adopted strategic plan is constantly reviewed and monitored during the process of implementation.¹⁷⁵⁴ This is to ensure that programmes that are implemented meet defined objectives and to enable local leaders to assess what new programmes may be necessary to appropriately respond to changing circumstances.¹⁷⁵⁵ Thirdly, there should be full commitment from all levels (front line staff, middle managers, senior managers and elected officials) of the municipality to the strategic plan. Lack

1749 Gordon *Strategic Planning for Local Government* 10-11. Own emphasis.

1750 Gordon *Strategic Planning for Local Government* 14.

1751 Roering and Bryson 1988 *Public Administrative Review* 995.

1752 Gordon *Strategic Planning for Local Government* 12; Bertocci *Strategic Planning and Management* 39.

1753 Gordon *Strategic Planning for Local Government* 12; Clarke and Stewart *Planning for Change* 17.

1754 Gordon *Strategic Planning for Local Government* 12.

1755 Gordon *Strategic Planning for Local Government* 12.

of commitment from any level may dampen the effectiveness of the strategic plan and subsequent planning cycles.¹⁷⁵⁶ Furthermore, local government officials should only adopt goals and strategies that "fit the time or place".¹⁷⁵⁷ This requires that in adopting goals and strategies, municipalities should take into consideration, available funding, knowledge, experience and political support. Instead of attempting to resolve all community problems "too quickly", the "wiser approach to planning is to do a few things well and move forward in small measures."¹⁷⁵⁸ In this regard, it has been suggested that, instead of using available resources to realise all "good ideas", municipalities should focus on delivering essential local government responsibilities such as provision of basic services, public safety and essential infrastructure.¹⁷⁵⁹ This essential level of services should only be expanded as resources increasingly become available. The rationale behind this incremental approach in local government strategic planning is to avoid fruitless expenditures.¹⁷⁶⁰ In addition, because strategic decision-making in government involves diverse actors which may often slow the process of strategic planning, it is necessary to promote co-operation amongst the various stakeholders.¹⁷⁶¹

4.5.4 Observations on local government's instrumentation

The above discussion serves to show that, in general, local policies and strategic plans are flexible local governance instruments that can be used to achieve different public objectives. The discussion on policy-making and strategic planning suggests that there is no universally prescribed model to policy-making or local government strategic planning. Scholars and other experts share the view that these instruments have generic processes which could be applied generally, subject to context specific modifications. In addition, the literature reviewed prescribes that municipalities should take into consideration internal and external environmental factors that are most likely

1756 Gordon *Strategic Planning for Local Government* 13; Bertocci *Strategic Planning and Management: A Roadmap to Success* 3-4 and 19-20.

1757 Gordon *Strategic Planning for Local Government* 13.

1758 Gordon *Strategic Planning for Local Government* 13.

1759 Gordon *Strategic Planning for Local Government* 13.

1760 Gordon *Strategic Planning for Local Government* 13.

1761 See Gordon *Strategic Planning for Local Government* 48-49; Roering and Bryson 1988 *Public Administrative Review* 995.

to impact on the implementation of policies and strategic plans, in the design process. In addition, scholars and other experts in both policy-making and local government strategic planning stress the need to promote public participation in the design and implementation processes.

4.6 Chapter summary

It was established in chapter 2 that for local government to contribute towards the quest for social justice, municipalities must: redistribute resources to meet the needs of the poor; promote public participation in local governance; build local capacity; protect and fulfil human rights; promote sustainable development; promote group solidarity amongst communities; address social stigma associated with welfare beneficiaries; avoid privatising the delivery of basic services; address the underlying causes of socio-economic inequalities; and share responsibilities with national and provincial governments. This chapter scrutinised the extent to which the legal and institutional configuration of local government in South Africa lends itself to municipalities' pursuit of social justice with specific reference to the above generic benchmarks. The chapter focused on the nature and relevance of political participation at the local level, the various structures and role players in local government, and the nature of local government's instrumentation in order to question the extent to which the latter could cumulatively contribute to the pursuit of social justice.

It was established that in line with the generic benchmarks for local authorities' pursuit of social justice, there is a legal framework that seeks to promote public participation at the local government level. This chapter established that there is extensive constitutional and legislative provision that oblige municipalities to facilitate public participation at the local government level. The entire chapter 4 of the *Municipal Systems Act* is dedicated to promoting public participation in local government matters, for example. It was argued that the extensive legal framework on public participation at the local government level further justifies the role of municipalities in the pursuit of social justice. Municipalities are obliged to build local capacity to enhance public participation and to establish processes, mechanisms and structures

that will ensure that even vulnerable and disadvantaged people can participate in local governance. However, drawing from the Court's jurisprudence in *Doctors for Life International*, it was established that the right to public participation at the local government level has two main components: the general right to participate in the conduct of local government affairs through, for example, public debate; and the specific right to vote. This chapter established that the right to public participation in the conduct of local government affairs seeks to reinforce traditional aspects of liberal democracy such as periodic elections and representation in elected assemblies.

It was argued that by complying with its legal obligations and facilitating public participation in the conduct of local government affairs, municipalities will be able to build local capacity, improve the quality and potential of local policies to reflect the actual needs of communities, and build mutual concern, respect and solidarity amongst community residents. Promoting inclusive public participation in local government matters may also help in addressing some of the underlying causes of socio-economic inequalities such as socio-cultural practices that undermine and sideline women from decision-making processes.

However, it was argued that despite the extensive legal guarantees on the right to public participation and existence of mechanisms such as ward committees to facilitate public participation, there are doubts about the quality of public participation at the local government level. This has been largely attributed to the fact that municipal officials have adopted a mechanical approach to public participation that simply seeks to comply with the legal requirements of Chapter 4 of the *Systems Act* with little attention given to the inputs generated in that process. In addition, some municipalities often completely disregard the constitutional and legislative requirements for public participation. It was also argued that this mechanical approach to public participation at the local government level is inimical to local democracy and the pursuit of social justice. This situation is further compounded by the fact that some communities show little interest in municipal governance and often only become actively involved when things have gone wrong.

In order to improve the quality of public participation at the local government level, it was suggested that municipalities be guided by the Court's jurisprudence on meaningful engagement. It was argued that, if consistently applied in good faith, meaningful engagement will further the course of social justice at the local government level. This has the potential of generally promoting inclusive public participation at the local government level, contribute towards capacity building, promote group solidarity, enhance the realisation of human rights and ensure that adopted policies reflect the actual needs of communities. Therefore, the process and outcome of meaningful engagement are generally in line with the generic benchmarks in Table 1. However, the success of meaningful engagement will largely depend on the ability of all role players to maintain a long-term mutually beneficial deliberative partnership. Where municipalities and communities find the partnership mutually useful, it is likely to be maintained over a long term period. In addition, meaningful engagement requires that appropriate resources be allocated to impoverished people in order to assist in addressing the skewed power relations that exist between municipalities and communities in the engagement process.

It was further established that the legal framework for the election of local councillors promotes gender parity in municipal councils. This was interpreted as a deliberate attempt to address an underlying cause of persisting socio-economic inequality – cultural practices that undermine and sideline women from equal participation in decision-making processes on the basis of gender. However, it was stated that the mixed system of ward and proportional representation makes it difficult for local communities to hold proportional representation councillors accountable because they are elected on a closed party list and are not directly linked to any constituency. This dilutes local accountability and responsiveness and may undermine the pursuit of social justice. It was suggested that in order to improve accountability and responsiveness of proportional representation councillors, they should be elected on an open list.

The chapter established that there are three categories of municipalities – metropolitan, district and local municipalities – operating in different socio-economic and geographic environments with often different governing structures. It was established that amongst these municipalities, metropolitan municipalities are better placed to implement the generic benchmarks for the pursuit of social justice because of the nature of the financial and human resources they command. On the contrary, most district and local municipalities lack the capacity and financial resources needed to engender social transformation at the community level. It was argued that despite these differences, all categories of municipalities should strive towards the implementation of all the generic benchmarks for the pursuit of social justice. These benchmarks are not hierarchical in nature and so, each municipality should take into consideration local needs when allocating resources for purposes of their implementation. It was further argued that despite their exposure to a vibrant economic base, the high level of rural-urban migration pose serious development challenges to metropolitan municipalities such as increasing urban poverty and the sprawl of informal settlements. This increases backlogs in service delivery.

In addition, it was established that because district and local municipalities share legislative and executive powers and functions, it is important to ensure that a harmonious relationship exist between them. Without sufficient co-operation, local authorities in a district cannot make a meaningful contribution towards establishing socially just communities. It was suggested that district municipalities could contribute towards the pursuit of social justice by ensuring that local authorities understand that which is necessary for the pursuit of social justice and developing their capacity for the implementation of the necessary measures. The chapter acknowledged that although local municipalities may be in a better position to protect and fulfil the human rights of local communities due to their close proximity, many district and local municipalities in rural areas cannot realise their constitutional mandate without external support from especially national and provincial governments due to their limited financial and human capacity. The chapter argued that the wide range of executive and legislative powers and functions exercised by

municipal councils indicate that they are capable, and have a direct role to play in implementing the generic benchmarks for the pursuit of social justice. Municipal councils could establish committees aligned to one or more of the generic benchmarks in Table 1 in order to maximise implementation outcomes. Furthermore, it was argued that although most ward committees are dysfunctional, if revitalised and properly managed, they could be used by communities to influence/improve the content of local policies, promote solidarity and create awareness about the structures and programmes put in place to give effect to human rights. In addition, ward committees could also be useful in monitoring compliance with by-laws and policies.

The chapter established that although the legislative and executive powers and functions of municipalities are generally exercised by municipal councils, there are several role players within different local government structures and external role players (such as national and provincial governments) who are directly or indirectly involved in the activities of municipalities. These role players could potentially contribute to local government's pursuit of social justice in different ways:

It was established that municipal councillors could contribute towards the pursuit of social justice by passing by-laws and making executive decisions that promote the interests of local communities; and by performing their oversight duties in a manner that improves the quality of public participation and the content of local policies as well as the implementation thereof. In addition, ward councillors could play a direct role by promoting group solidarity in local communities. However, it was argued that the low levels of education amongst most councillors and rampant corruption limit the effectiveness of their oversight role generally resulting in limited accountability and often the adoption and implementation of policies that do not address the actual needs of communities. Some councillors are preoccupied with the accumulation of wealth, through often illegal means, at the expense of poor communities. There are reports of widespread mismanagement, nepotism and lack of accountability at local government level.

In terms of municipal managers, this chapter established that the nature of their wide-range administrative powers and functions indicate that they are directly relevant to local administration's pursuit of social justice. This chapter also established that the municipal manager is a key structure of a municipality. However, the lack of skilled municipal managers in many municipalities across the country has in some instances, paralysed municipal administrations thereby, undermining the ability of some municipalities to fulfil their constitutional obligations. It was acknowledged that although legislation now requires that municipal managers be employed on the basis of their skills and expertise, it will take a long time for the system of local government to purge unskilled and inexperienced municipal managers.

Moreover, this chapter established that traditional leadership enjoys constitutional and legislative protection as an institution at the local government level. It was argued that although their service delivery role is vaguely defined by the Constitution and legislation, they could play a facilitating role in local government's pursuit of social justice. Due to the enormous administrative powers that traditional authorities wield over their subjects in some rural parts of South Africa, traditional leadership could play a role in, for example, building group solidarity in those communities. Furthermore, traditional authorities could facilitate sustainable development by providing land under their control for the implementation of municipal projects such as housing delivery. In addition, they can enhance public participation in local government matters by creating public awareness. In terms of constitutional rights, they are obliged to respect the rights of communities and could sustain the enjoyment of such rights by protecting them against improper invasions. Through educational campaigns, traditional authorities could minimise cultural practices that strengthen socio-economic inequalities and undermine the participation of women in decision-making processes. However, the efforts of traditional leaders may also be constrained by their limited financial power.

It was argued in this chapter that community residents, tax payers, NGOs and all organisations operating at the local government level have an important

role to play in ensuring that municipalities realise their constitutional mandate. Through public participation, they can improve the quality of policies; enhance local accountability; and ensure the responsiveness of councillors. It was also argued that when municipalities fail to meet their constitutional obligations, community members could rely on litigation to ensure compliance, especially in instances where dialogue has failed to achieve positive outcomes. In addition, communities can enhance the ability of municipalities to realise their developmental mandate by paying municipal taxes and property rates. This will enable municipalities generate the revenue needed to finance projects and redistribute resources to the poor, for example.

The chapter established that external service providers may also play a role in assisting local government realise its constitutional mandate. This is possible where municipalities enter into service delivery agreements with other public entities or private partners. However, it was indicated that the use of external mechanisms to provide municipal services such as electricity and water has increasingly led to the commercialisation of basic services which often undermines the interests of the poor. The commercialisation of basic services is akin to privatisation which may be inimical to the pursuit of social justice if the needs and interests of the poor are not given sufficient consideration. This chapter established that although there are legislative provisions which seek to ensure transparency and accountability in the process of externalising municipal services, in practice, the process is mired with fraud, corruption and nepotism which often undermine the quality of services delivered.

It was further established that because of the interdependent nature of the three spheres of government, the Constitution and legislation require national and provincial government to support, supervise and monitor the extent to which municipalities execute their powers and functions. This chapter also argued that because the functional areas of all three spheres of government overlap, it is important for all spheres of government to adhere to the principles of co-operative governance and intergovernmental relations. This ensures coordination of development strategies across all spheres of government and enables national and provincial governments to support

municipalities in realising their constitutional mandate. It was argued that although there are established channels and structures to promote co-operative governance between the various spheres of government, these structures and channels are often overlooked by government officials who prefer settling intergovernmental disputes in courts. It was argued that through expensive litigation, government officials waste limited resources that could be used to meet the needs of the poor. It was further argued that failure to adhere to the principles of co-operative governance is often due to lack of political will and the desire to score political victories. Furthermore, as part of supervision and monitoring, national and provincial governments can intervene in a municipality that cannot perform its executive duties. Pursuant to this power, national and provincial governments have intervened in some municipalities in order to restore them to full functionality. However, evidence also indicates that, often, national and provincial governments fail to exercise their supervisory role.

This chapter identified SALGA as an important role player at the local government level. Through its participation in intergovernmental forums such as the Financial and Fiscal Commission, the NCOP and the President's Coordinating Council, SALGA is able to express the needs and concerns of municipalities and jointly explore solutions to problems confronting local government. In addition, it was indicated that international donors also interact at the local government level and may provide different forms of support needed by municipalities to implement the generic benchmarks for the pursuit of social justice.

This chapter established that policies and strategic planning are legally prescribed governance instruments for South African municipalities. It provided theoretical insights into policy-making and strategic planning and established that policies and strategic plans are flexible local governance instruments that could be used by municipalities to govern and realise different objectives. It was noted that although it is undesirable to prescribe a universal approach to policy-making and strategic planning (and the implementation thereof), there appears to be consensus on the generic

processes that should be followed. However, it was indicated that while chapter 5 of the *Systems Act* regulates the process of strategic planning, it does not deal with the generic process of policy-making.

The next two chapters explore and critically investigate the relevance and potential of two existing local government instruments - the IDP and local indigent policies - in contributing towards South Africa's pursuit of social justice.

CHAPTER 5
INTEGRATED DEVELOPMENT PLANS AS A LOCAL
GOVERNANCE INSTRUMENT FOR PURSUING SOCIAL
JUSTICE

5.1	Introduction	336
5.2	Background to integrated development planning in South Africa	339
5.3	Legal and policy framework for IDPs	347
5.3.1	<i>Constitutional and legislative basis</i>	<i>347</i>
5.3.2	<i>Relevant generic features of IDPs</i>	<i>353</i>
5.3.2.1	Sector specific components	357
5.3.2.2	Interconnected and cooperative strategic planning	362
5.3.2.3	Implementation, monitoring and performance management	366
5.3.2.4	Public participation	368
5.4	Legal status of IDP	368
5.5	Potential of IDPs in local government's pursuit of social justice	369
5.6	Critical perspectives	372
5.7	Chapter summary	375

5.1 Introduction

Local government has been significantly transformed into a "co-responsible"¹⁷⁶² sphere of government with extensive legislative and executive powers and functions.¹⁷⁶³ In addition, local government is constitutionally mandated to realise an expanded developmental mandate.¹⁷⁶⁴ Their expanded developmental mandate requires that, municipalities promote socio-economic development; protect the environment; provide democratic and accountable government; facilitate community involvement in local government matters; ensure that the basic needs of community residents are met; and implement legislative and other measures that will contribute to the realisation of the rights entrenched in sections 24, 25(5), 26, 27 and 29 of the Constitution.¹⁷⁶⁵ This wide range of duties illustrate that, unlike the past where local government merely played a service delivery role, municipalities now have an expanded developmental mandate.¹⁷⁶⁶ De Visser argues in this regard that, "developmental local government" requires municipalities to explicitly target poverty and improve the material well-being of all South Africans.¹⁷⁶⁷ He argues that if local government does not adopt and implement redistributive strategies,¹⁷⁶⁸ it is unlikely that economic growth will positively impact on the most vulnerable segments of society.¹⁷⁶⁹

In line with the commitment to combat poverty and improve the material well-being of all South Africans, local government is equally obliged to contribute, together with other spheres of government, towards the pursuit of social

1762 Local government shares responsibility with national and provincial government to realise constitutional objectives. See 2.5.4.1.

1763 See *City of Cape Town and Others v Robertson*, par 60; De Visser *Developmental Local Government: A Case Study* 9-13, 113-114; Du Plessis 2010 *Stell LR* 265-267.

1764 See generally, 2.5.4.5 above.

1765 See: De Visser *Developmental Local Government: A Case Study* 9-13 and 72; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* 461; De Visser 2003 *Law Democracy and Development* 201-215. See generally, 2.5.4.5.

1766 See 2.5.4.5.

1767 See De Visser *Developmental Local Government: A Case Study* 10-11; 2.5.4.2.3.

1768 Examples of strategies include plans, policies, projects and programmes. See Gordon *Strategic Planning for Local Government* 45.

1769 He argues that integral components of the development process such as poverty alleviation can only be achieved through economic growth and redistribution. See De Visser *Developmental Local Government: A Case Study* 12; 2.5.4.2.3.

justice.¹⁷⁷⁰ This study adopts the view that, in essence, social justice is concerned with the eradication of poverty and extreme socio-economic inequalities in order to ensure that impoverished people have the material resources needed to equally participate in socio-political life.¹⁷⁷¹ In earlier sections of this study, ten benchmarks were identified to guide state authorities on how to pursue social justice.¹⁷⁷² It was argued that, in order to facilitate local government's pursuit of social justice, municipalities should: redistribute resources to people living in poverty; facilitate public participation in decision-making; build local capacity; address underlying causes of socio-economic inequalities; protect and fulfil human rights; promote sustainable development; address stigma associated with welfare beneficiaries; promote group solidarity; avoid privatisation of basic services; and share the responsibility of pursuing social justice with national and provincial government.¹⁷⁷³

It was argued that local government can contribute to the pursuit of social justice by using existing legally prescribed governance instruments such as strategic plans.¹⁷⁷⁴ It was established that governance instruments represent the mechanism through which governments pursue public purposes and defined objectives.¹⁷⁷⁵ In South Africa, integrated development planning is considered local government's leading legally prescribed governance instrument.¹⁷⁷⁶ The *Systems Act* obliges every municipality to undertake "developmentally oriented planning"¹⁷⁷⁷ in order to ensure that it: strives to achieve the constitutional objects of local government; gives effect to its developmental duties; and contributes, together with other organs of state, to the progressive realisation of the socio-economic rights contained in sections

1770 See further, 2.2 and 2.4.

1771 See 2.4.2.

1772 See Table 1 in 2.4.3.

1773 See Table 1 in 2.4.3.

1774 See 4.5.

1775 See 4.5.1.

1776 See 4.5.1; Part III: 'Tools and Regulatory Instruments of Developmental Local Government' in Van Donk *et al Consolidating Developmental Local Government* 317; Harrison 'The Origins and Outcomes of South Africa's Integrated Development Plans' in Van Donk *et al Consolidating Developmental Local Government* 321-337; Steytler 2011 *SAPL* 484-496;; Du Plessis 2010 *Stell LR* 274-275

1777 The meaning of "developmentally-oriented planning" is explored in 5.3.1 below.

24, 25, 26, 27 and 29 of the Constitution.¹⁷⁷⁸ The objective of integrated development planning appears to be to provide a strategic planning framework which enables municipalities to effectively realise their expanded developmental mandate, including the realisation of the socio-economic rights that fall under their area of competence.¹⁷⁷⁹ In the context of the socio-economic rights entrenched in the Constitution, the obligation to engage in planning should be understood against the backdrop of the fact that sections 24(b), 25(5), 26(2), 27(2) and 29(1)(b) of the Constitution oblige government to adopt reasonable "legislative and other measures" to realise relevant socio-economic rights. In view of this reciprocal objective and obligation, it is suggested that IDPs constitute one of the instruments that could be used by municipalities to realise constitutional socio-economic rights¹⁷⁸⁰ to benefit the basic needs of impoverished people.

The purpose of this chapter is to explore and critically investigate the relevance and potential of IDPs in contributing towards the pursuit of social justice in South Africa. In other words, this chapter examines to what extent IDPs and the applicable law and policy framework commanding municipalities to adopt and implement development planning measures are in line with and correspond to the benchmarks in Table 1.¹⁷⁸¹ In order to achieve this objective, the chapter is divided into five main parts. The first part begins by tracing the background to integrated development planning in South Africa. This is followed by a discussion of the legal and policy framework in order to establish the potential of IDPs in contributing towards the pursuit of social justice. Part three examines the legal status of IDPs. Against this backdrop, part four provides an overall assessment of the potential of IDPs in

1778 See s 23(1)(a)-(c) of the *Systems Act*.

1779 See ss 7(2), 26(2) and 27(2) of the Constitution read jointly. See also ss 4(2)(j) and 23(1)(c) of the *Systems Act*, De Visser 2003 *Law Democracy and Development* 201-215.

1780 The Constitutional Court has established that in order to comply with the obligations imposed by *inter alia* sections 26(2) and 27(2) of the Constitution, government must devise a "comprehensive and workable plan". See *Grootboom*, par 38. At the local government level, the IDP could also be seen as a comprehensive plan that is adopted to *inter alia*, give effect to the socio-economic right duties imposed on municipalities. See Du Plessis and Du Plessis 'The Balancing of Sustainability Interests in South Africa' in Faure and Du Plessis *The Balancing of Interests in Environmental Law in Africa* 432; *Blue Moonlight Properties*, par 24.

1781 See Table 1 in 2.4.3.

contributing towards the pursuit of social justice. This is followed by a brief critique of the IDP. The last part is the conclusion.

It should be noted that despite the importance of the IDP as the leading legally prescribed governance instrument for South African municipalities,¹⁷⁸² published academic material on this subject remains meagre.¹⁷⁸³ The analysis in this chapter relies on the limited (published) academic material on the subject, the main legal framework for IDPs (chapter 5 of the *Systems Act*), the WPLG (1998), the *IDP Guide Packs*,¹⁷⁸⁴ the *(Final Draft) Policy Paper on Integrated Development Planning (2000)*¹⁷⁸⁵ and the theoretical foundation on local government strategic planning.¹⁷⁸⁶

5.2 Background to integrated development planning in South Africa

At the international level, local government "strategic planning" has emerged as a key governance instrument for municipalities.¹⁷⁸⁷ However, as the discussion below will show, local government strategic planning is relatively recent in South Africa. Before 2012, planning and resource allocation across all spheres of government in democratic South Africa was guided by the so-called national *Medium Term Strategic Framework*.¹⁷⁸⁸ The *Medium Term*

1782 Harrison 'The Origins and Outcomes of South Africa's Integrated Development Plans' in Van Donk *et al Consolidating Developmental Local Government* 321.

1783 See Harrison 'The Origins and Outcomes of South Africa's Integrated Development Plans' in Van Donk *et al Consolidating Developmental Local Government* 321. In the context of socio-economic rights, Du Plessis has examined the potential of integrated development planning in specifically facilitating the realisation of environmental rights. See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 463-465.

1784 The *IDP Guide Packs Series, Guides 0-6* (2001) were developed by the Decentralised Development Planning (DDP) Task Team in the DPLG (now CoGTA) with support from the German Agency for Technical Co-operation (GTZ) to guide municipal managers, technical officers and councillors on how to prepare, integrate and manage the many dimensions involved in the IDP.

1785 CoGTA *(Final Draft) Policy Paper on Integrated Development Planning* (2000).

1786 See 4.5.3.

1787 See Gordon G *Strategic Planning for Local Government*; Clarke and Stewart *Planning for Change: Strategic Planning in Local Government*; Bertocci *Strategic Planning and Management: A Road map to Success*. For a historical background to strategic planning, see Mercer *Strategic Planning for Public Managers* 2-5.

1788 Thus far, the following Medium Term Strategic Frameworks have been adopted in South Africa: Presidency of the Republic of South Africa *Medium Term Strategic Framework: A Framework to Guide Government's Programme in the Electoral Mandate Period 2004-2009* (2004); Presidency of the Republic of South Africa *Together Doing More and Better: Medium Term Strategic Framework: A Framework*

Strategic Framework was linked to the country's five year electoral cycle and defined the strategic objectives and targets of government for the period of its elected term.¹⁷⁸⁹ In September 2009, under the presidency of Jacob Zuma, the "initial ideas" on long term government strategic planning were set out for public comments in the *Green Paper: National Strategic Planning* (2009).¹⁷⁹⁰ The *Green Paper on National Strategic Planning* (2009) justified the need for a long term national strategic plan and proposed the establishment of a National Planning Commission to design such a plan for the country.¹⁷⁹¹ The *Green Paper on National Strategic Planning* (2009) lamented the absence of a coherent long term strategic plan for the country and stressed that this had negatively affected government's ability to realise its "developmental objectives and priorities."¹⁷⁹² It argued that, the ideals enshrined in the Constitution (inclusive of social justice) "cannot be pursued in an *ad hoc* manner".¹⁷⁹³ It further argued that, the existence of a coordinated long term national strategic plan will ensure that national government "priorities are given due attention in allocating resources and responsibilities in all spheres of government."¹⁷⁹⁴ According to the *Green Paper on National Strategic Planning* (2009), national strategic planning is about clearly defining the objectives that South Africa sets for itself and assessing at the macro-level, where the country is in relation to these objectives.¹⁷⁹⁵ A national strategic plan also describes the policies, programmes, other options and trade-offs required to achieve national objectives and the specific interconnected roles that various institutions in government are meant to play in strategic planning.¹⁷⁹⁶ In addition, it indicated that national strategic planning in South Africa also seeks to correct the spatial dislocations of the past.¹⁷⁹⁷

to Guide Government's Programme in the Electoral Mandate Period 2009-2014 (2009).

- 1789 See Presidency of the Republic of South Africa *Together Doing More and Better: Medium Term Strategic Framework* (2009) 1-4; Presidency of the Republic of South Africa *Medium Term Strategic Framework* (2004) pars 1-4.
- 1790 See Presidency of the Republic of South Africa *Green Paper: National Strategic Planning* (2009) 1. Hereafter, *Green Paper on National Strategic Planning* (2009).
- 1791 *Green Paper: National Strategic Planning* (2009) 1.
- 1792 *Green Paper: National Strategic Planning* (2009) 1.
- 1793 *Green Paper: National Strategic Planning* (2009) 6.
- 1794 *Green Paper: National Strategic Planning* (2009) 4.
- 1795 *Green Paper: National Strategic Planning* (2009) 5.
- 1796 *Green Paper: National Strategic Planning* (2009) 5.
- 1797 *Green Paper: National Strategic Planning* (2009) 6.

The initial ideas and vision of national strategic planning outlined in the *Green Paper on National Strategic Planning* (2009) were given detailed content by the NPC in the *National Development Plan* (NDP) in 2011. The main objectives of the NDP are to reduce poverty and extreme inequalities by 2030.¹⁷⁹⁸ The NDP estimates that the economy would have to grow by about 5.4 percent on average every year over the next twenty years in order to be able to achieve its poverty reduction targets.¹⁷⁹⁹ Integral to the overriding objectives of the NDP is the commitment to *inter alia*, develop human capabilities and where necessary, provide free basic services to people living in poverty, in order to facilitate the capacity of all citizens to participate in making development choices.¹⁸⁰⁰ The NDP outlines the vision, general and specific targets, policy and planning priorities and implementable actions of the state that should ensure the realisation of defined outcomes in the main areas of focus such as health, human settlement, social protection, economic growth, employment creation, environmental protection and infrastructure development by 2030.¹⁸⁰¹ The national government expects that all the main areas of focus of the NDP should be able to positively impact on the reduction of poverty and extreme inequalities.¹⁸⁰² The NDP has received broad support from within all spheres of government, the private sector and political parties as South Africa's long term strategic plan.¹⁸⁰³ Despite this broad support, the NDP has been severely criticised by trade unions and some experts who argue, *inter alia* that, without structural changes to the country's economy, the poverty reduction targets set by the NIP cannot be realised.¹⁸⁰⁴ The NDP

1798 See *National Development Plan* (2011) 1-3, 90-91, 326. One of the objectives of the NDP is to reduce the proportion of the population with income below the poverty measure of R418 per month (in 2009 rands) from 39 percent in 2009 to zero in 2030 and to reduce the level of inequality from 0.7 in 2010 to 0.6 by 2030. The NDP also seeks to reduce the unemployment rate from 25 percent to 6 percent by 2030. See *National Development Plan* (2011) 90-91.

1799 See *National Development Plan* (2011) 90-91.

1800 See *National Development Plan* (2011) 1-3 and 21.

1801 See further, *National Development Plan* (2011) 1-39, 326. For a summary of targets, priorities and actions in the various areas, see *National Development Plan* (2011) 10-39.

1802 See *National Development Plan* (2011) 2.

1803 See <http://www.npconline.co.za> [date of use 4 March 2013].

1804 For details, see Cilliers and Camp "Highway or Byway? The National Development Plan 2030" (2013) 1-16; COSATU "Mangaung and the Second Phase of the Transition: Discussion Document for the COSATU CEC 25-27 February 2013" (2013)

recognises that its objectives can only be realised through difficult political choices and if "there is strong leadership and focused implementation."¹⁸⁰⁵

Although the NDP represents South Africa's national long term strategic development plan, the national government continues to produce and be guided by the *Medium Term Strategic Framework* (MTSF).¹⁸⁰⁶ As already indicated in the beginning of this section, the MTSF is a five year national strategic framework which is linked to the national government's electoral mandate period.¹⁸⁰⁷ The MTSF "is a statement of intent" that identifies the development challenges facing South Africa and is aligned to the priorities and strategies identified in the national long term strategic plan.¹⁸⁰⁸ The objectives of the current MTSF include halving poverty and unemployment, reducing socio-economic inequalities and ensuring universal access to basic services by 2014.¹⁸⁰⁹ At the moment, municipalities are expected to align their IDPs with the priorities identified in the MTSF¹⁸¹⁰ and the national strategic plan.¹⁸¹¹ At the provincial level, it is expected that IDPs should be linked to the Provincial Growth and Development Strategy (PGDS).¹⁸¹² The PGDS is a strategic framework that is supposed to guide development for each province as a whole.¹⁸¹³ It is aligned to *inter alia*, the priorities of the MTSF and is supposed to take into consideration, the strengths, constraints and specific needs of each province.¹⁸¹⁴ In addition, it serves as a tool through which the

at 20-45. Accessed at www.cosatu.org.za/docs/discussion/2013/analysis.pdf [date of use 6 November 2013].

1805 See *National Development Plan* (2011) 3, 90.

1806 The Presidency Republic of South Africa *Medium Term Strategic Framework: 2009 - 2014* (2009).

1807 *Green Paper: National Strategic Planning* (2009) 4; "Introduction" in The Presidency Republic of South Africa *Medium Term Strategic Framework: 2009 - 2014* (2009).

1808 See The Presidency Republic of South Africa *Medium Term Strategic Framework: 2009 - 2014* (2009) pars 1-8; *Green Paper: National Strategic Planning* (2009) 4.

1809 See The Presidency Republic of South Africa *Medium Term Strategic Framework: 2009 - 2014* (2009) at par 10.

1810 See The Presidency Republic of South Africa *Medium Term Strategic Framework: 2009 - 2014* (2009), par 3.

1811 *Green Paper: National Strategic Planning* (2009) 4.

1812 See Harrison 'Integrated Development Plans and Third World Politics' in Pillay *et al Democracy and Delivery: Urban Policy in South Africa* 187; *Integrated Development Plan of Tlokwe City Council* (2011) 90; *Mangaung Metropolitan Municipality: Integrated Development Plan 2012-2016* (2012) 6 and 66.

1813 The Presidency Republic of South Africa and the DPLG *Provincial Growth and Development Strategy Guidelines* (2005) 2.

1814 See Presidency Republic of South Africa and the DPLG *Provincial Growth and Development Strategy Guidelines* (2005) 2.

provincial sphere of government is supposed to provide guidance to municipalities on how matters relating to economic planning, infrastructure investment and development spending should take place in the province.¹⁸¹⁵ The PGDS serves as a mechanism through which provincial governments could enhance the implementation of national priorities, taking into consideration contextual needs.¹⁸¹⁶

In the context of local government, it has been suggested that the negative effects of fragmented and project-based planning were generally recognised by government during the late 1980s.¹⁸¹⁷ Following the institutional reconstruction of the democratic state and the establishment of local government as an autonomous sphere of government,¹⁸¹⁸ it became more evident that an instrument would have to be developed that would enable newly established municipalities to plan and perform their functions in a "coordinated, strategic, developmental and fiscally responsible" manner.¹⁸¹⁹ Significant decentralisation of powers and functions also meant that municipalities would have to take responsibility for strategic planning within their jurisdictions.¹⁸²⁰ The system of integrated development planning was introduced as a direct response to this need.¹⁸²¹ The *Systems Act* established the legal basis for IDPs with chapter 5 exclusively dedicated to integrated development planning at the local government level. The *Systems Act* requires each municipal council, during its elected term, to design and adopt an IDP for the development of the municipality, for the short and medium to

1815 The Presidency Republic of South Africa and the DPLG *Provincial Growth and Development Strategy Guidelines* (2005) 1-3.

1816 See Presidency Republic of South Africa and the DPLG *Provincial Growth and Development Strategy Guidelines* (2005) 2.

1817 Binns and Nel 2002 *Regional Studies* 923.

1818 Hattingh *Governmental Relations: A South African Perspective* 3; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 463; Simeon and Murray 2001 *Publius: The Journal of Federalism* 65-92; Malan 2005 *Politeia* 226-243.

1819 See Harrison 'The Origins and Outcomes of South Africa's Integrated Development Plans' in Van Donk *et al Consolidating Developmental Local Government* 323; Harrison 'Integrated Development Plans and Third World Politics' in Pillay *et al Democracy and Delivery: Urban policy in South Africa* 196; Sowman and Brown 2006 *Journal of Environmental Planning and Management* 695-696.

1820 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 463.

1821 Harrison 'The Origins and Outcomes of South Africa's Integrated Development Plans' in Van Donk *et al Consolidating Developmental Local Government* 323.

long term.¹⁸²² When the first term of elected councillors under the *Systems Act* started on 6 December 2000, the IDP system effectively came into effect and it is regarded as the main strategic planning instrument to be used by municipalities to realise their expanded developmental mandate.¹⁸²³ Integrated development planning created a platform of convergence for all sectoral developmental policies, plans and programmes that are directly linked to the constitutional and legislative mandate of local government.¹⁸²⁴ It allowed municipalities to develop a holistic approach to development that takes into consideration linkages between relevant sectors during the various stages of planning, implementation and monitoring of development policies, plans and programmes for the entire municipal area.¹⁸²⁵

Although integrated development planning was introduced in South Africa to primarily address the weaknesses of apartheid development planning,¹⁸²⁶ it was equally influenced by the need to align the country's planning system with prevailing international practices.¹⁸²⁷ For example, it is believed that integrated development planning in South Africa was an implicit response to the country's commitment to UN *Agenda 21*, which placed sustainability at the forefront of development.¹⁸²⁸ UN *Agenda 21* introduced a new form of thinking

1822 See s 25 (and generally ch 5) of the *Systems Act*; Harrison 'The Origins and Outcomes of South Africa's Integrated Development Plans' in Van Donk *et al Consolidating Developmental Local Government* 330.

1823 See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 463-464; Atkinson *Local Government, Local Governance and Sustainable Development: Getting the Parameters Right* 3; Harrison 'Integrated Development Plans and Third World Politics' in Pillay *et al Democracy and Delivery: Urban Policy in South Africa* 186-187; "3.1 Integrated development planning, budgeting and performance monitoring" in the *WPLG* (1998).

1824 CoGTA (*Final Draft*) *Policy Paper on Integrated Development Planning* (2000) 4.

1825 CoGTA (*A Final Draft*) *Policy Paper on Integrated Development Planning* (2000) 15.

1826 See "3.1.1 Why do integrated development planning?" in the *WPLG* (1998); Harrison 'The Origins and Outcomes of South Africa's Integrated Development Plans' in Van Donk *et al Consolidating Developmental Local Government* 323; Harrison 'Integrated Development Plans and Third World Politics' in Pillay *et al Democracy and Delivery: Urban Policy in South Africa* 192-194; Sowman and Brown 2006 *Journal of Environmental Planning and Management* 695-698.

1827 Harrison 'The Origins and Outcomes of South Africa's Integrated Development Plans' in Van Donk *et al Consolidating Developmental Local Government* 324-325; Harrison 'Integrated Development Plans and Third World Politics' in Pillay *et al Democracy and Delivery: Urban Policy in South Africa* 187-189; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 463; Mojapelo *The Effectiveness of the Integrated Development Planning (IDP) as a Tool to Accelerated Service Delivery* 15-16.

1828 See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 463; Harrison 'The Origins and Outcomes of South Africa's Integrated Development Plans'

world-wide that promotes the integration of economic, social and environmental considerations in the design, implementation and management of government policies, plans and programmes so as to increase efficiency and sustainability in development.¹⁸²⁹ In addition, the various programme areas/chapters of *UN Agenda 21* stress the need for national governments to adopt integrated human development strategies, policies and programmes that *inter alia*: combat poverty and provide the poor with access to fresh water, sanitation and basic education;¹⁸³⁰ protect and promote human health;¹⁸³¹ promote greater involvement of local levels of government, NGOs and affected communities in policy design and implementation; build and strengthen the capacity of local institutions; promote national and regional monitoring and oversight over local authorities as well as the alignment of budgetary processes.¹⁸³² *UN Agenda 21* highlighted the need to ensure sustainable integrated development planning across all spheres of government. Chapter 28 of *UN Agenda 21* is dedicated to promoting the role of local authorities in the pursuit of sustainable development.¹⁸³³

Todes argues that, although South Africa's IDPs have a relationship with *UN Agenda 21* in that they seek to develop regional/territorial strategies that respond to intertwined environmental, social and economic conditions, IDPs are not primarily about sustainability.¹⁸³⁴ The author argues that South Africa's IDPs are meant to be holistic multi-sectoral plans which guide the future development of defined municipal areas, giving direction to both municipalities

in Van Donk *et al Consolidating Developmental Local Government* 325; Du Plessis and Du Plessis 'Striking the Sustainability Balance in South Africa' in Faure and Du Plessis *The Balancing of Interests in Environmental Law* 449; *South Africa's Review Report for the Sixteenth Session of the United Nations Commission on Sustainable Development* (2008) 40; Todes 2004 *Journal of environmental Planning and Management* 844. Chapter 28 of *UN Agenda 21* entitled: "Local Authorities' Initiative in Support of Agenda 21" explores how local governments can promote sustainable development at the local level.

1829 See *UN Agenda 21*, "Chapter 8: Integrating Environment and Development in Decision-Making", par 8.2.

1830 See Ch 3 of *UN Agenda 21* for details.

1831 See Ch 6 of *UN Agenda 21* for details.

1832 See Ch 28 of *UN Agenda 21*; Par 28.3 of *UN Agenda 21*. See also Ch 8: "Integrating Environment and Development in Decision-Making", par 8.3; Ch 7: "Promoting Sustainable Human Settlement Development"; Ch 4: "Changing Consumption Patterns", par 4.7 "Objectives".

1833 See Ch 28 of *UN Agenda 21* for details.

1834 Todes 2004 *Journal of environmental Planning and Management* 850.

and other spheres of government operating within the area.¹⁸³⁵ The system of integrated development planning seeks to enable municipalities to "understand the various dynamics operating within their area, develop a concrete vision for the area, and strategies for realising and financing that vision."¹⁸³⁶ It seeks to promote public participation in development planning, needs prioritisation through strategic focus, integration and equity in the planning and allocation of scarce resources.¹⁸³⁷

What has emerged from the preceding paragraphs is that, in addition to the requirements of its expanded developmental mandate, an IDP is supposed to be linked to the country's development priorities identified in the *National Development Plan* (2011), the MTSF and PGDS. In addition, the IDP must seek to promote the realisation of the country's commitments to UN *Agenda 21*. Given the fact that UN *Agenda 21*, the current MTSF, the *National Development Plan* (2011) and local government's expanded developmental mandate focus *inter alia* on enhancing public participation,¹⁸³⁸ combating poverty¹⁸³⁹ and reducing extreme forms of inequalities¹⁸⁴⁰ by *inter alia* redistributing resources and providing free basic services to impoverished people, one may expect that these areas of emphasis will be reflected in the priorities and strategies of IDPs.¹⁸⁴¹ By prioritising public participation in local decision-making, poverty eradication and the elimination of extreme

1835 Todes 2004 *Journal of environmental Planning and Management* 844 and 849.

1836 See "3.1.1 Why do integrated development planning?" in the WPLG (1998).

1837 See Binns and Nel 2002 *Regional Studies* 923; Patel and Powell 'Intergovernmental Delivery in Municipal Areas: Reflections on Current Practice' in Van Donk *et al Consolidating Local Government* 352; CoGTA (*Final Draft*) *Policy Paper on Integrated Development Planning* (2000) 12-14; "3 Tools and approaches for developmental local government" in WPLG (1998).

1838 See s 152 (a) and (e) of the Constitution; Ch 4 of the *Systems Act, National Development Plan* (2011) 1-3 and 21; "Characteristics of developmental local government" in the WPLG (1998); The Presidency Republic of South Africa *Medium Term Strategic Framework: 2009-2014* (2009) at par 24; Generally "SECTION III: STRENGTHENING THE ROLE OF MAJOR GROUPS" in UN *Agenda 21*.

1839 See *National Development Plan* (2011) 1-3; Preamble to the *Systems Act*; "Maximising social development and economic growth in the WPLG (1998); The Presidency Republic of South Africa *Medium Term Strategic Framework: 2009-2014* (2009) at par 10; and Ch 3 of UN *Agenda 21*.

1840 See *National Development Plan* (2011) 1-3; Preamble to the *Systems Act* "Democratising development, empowering and redistribution" in the WPLG (1998); The Presidency Republic of South Africa *Medium Term Strategic Framework: 2009-2014* (2009) at par 10; and ch 3 of UN *Agenda 21*.

1841 See Ch 3 of UN *Agenda 21*; The Presidency Republic of South Africa *Medium Term Strategic Framework: 2009 - 2014* (2009), par 10; NPC *National Development Plan* (2011) 1-3 and 21; S 153(a) of the Constitution; 2.5.4.2 and 2.5.4.5 above.

inequalities through *inter alia*, redistribution in the IDP, it is suggested that this could enhance the value and potential of IDPs in the pursuit of social justice.¹⁸⁴² As evident from the above paragraphs, the objectives of *UN Agenda 21* complement some of the benchmarks in Table 1 and these include: promoting sustainable development; facilitating public participation in local decision-making; building local capacity; fighting poverty and inequalities by *inter alia*, (re)distributing resources in a manner that provides impoverished people access to water, sanitation, basic education and health care services; and promoting monitoring and support from national and provincial governments.¹⁸⁴³ It is argued that where municipalities successfully align their IDPs with *UN Agenda 21*, this could significantly enhance their potential to the pursuit of social justice.

5.3 Legal and policy framework for IDP

This section critically examines the legal and policy framework on IDPs, illustrating the extent to which it has the potential to enable municipalities to contribute towards the pursuit of social justice in South Africa. In order to achieve this objective, this section begins by discussing the constitutional and legislative basis for IDPs. This is followed by a critical evaluation of how relevant generic features and the function of the IDP could foster the pursuit of social justice by specifically enabling municipalities to implement the benchmarks in Table 1.¹⁸⁴⁴

5.3.1 Constitutional and legislative basis for IDP

The IDP fits into the planning obligations imposed by the Constitution on local government. Section 153 of the Constitution obliges every municipality to structure and manage its planning processes in order to give priority to the basic needs of communities, promote socio-economic development within its

1842 These areas are prioritised in some of the IDPs reviewed. See *Integrated Development Plan of Tlokwe City Council* (2011) 87 and 89; *Five Year Plan for Cape Town 2012-2017: Draft Review* (2013) 8-10; *Mangaung Metropolitan Municipality: Integrated Development Plan 2012-2016* (2012) 59-64; *City of Tshwane Integrated Development Plan 2011-2016* (2011) 103- 109. See the benchmarks in Table 1 in 2.4.3.

1843 See Table 1 in 2.4.3.

1844 See 2.4.3.

jurisdiction and participate in national and provincial development programmes. This provision demonstrates that the satisfaction of the basic needs of communities is one of the objectives that should guide municipal planning.

Although section 153 of the Constitution makes it clear that the obligation to satisfy the basic needs of communities appears as one of the main objectives of local government planning, it does not expressly link local government planning *per se* with the realisation of local government's socio-economic rights responsibilities. However, section 23(1) of the *Systems Act* obliges every municipality to undertake "developmentally-oriented planning" to ensure that it meets the objects and developmental duties of local government and contribute, together with other organs of state, to the progressive realisation of constitutional socio-economic rights.¹⁸⁴⁵

In addition, if one takes into consideration the expanded developmental mandate of local government,¹⁸⁴⁶ it is possible to argue that, although section 153 of the Constitution does not directly link municipal "planning processes" to the realisation of socio-economic rights, this is implicit. This argument is supported by the view that, for municipalities to be developmentally-oriented, they must strive towards achieving both the constitutional objects and socio-economic rights duties of local government.¹⁸⁴⁷ This means that developmentally-oriented planning should be geared towards achieving both the constitutional objects and socio-economic rights duties of local government. This may explain why the phrasing of section 23 of the *Systems Act* conveys the idea that developmentally-oriented planning must strive to ensure that it gives effect to: the objects of local government; the developmental duties of local government; and contribute to the realisation of socio-economic rights. Secondly, local government planning could be implied

1845 Those entrenched in ss 24, 25, 26, 27 and 29 of the Constitution. See s 23(1)(a)-(c) of the *Systems Act*.

1846 See 2.5.4.5.

1847 See Pieterse and Van Donk 'Developmental Local Government: Squaring the Circle Between Policy Intent and Impact' in Van Donk *et al Consolidating Developmental Local Government* 53-54; Address by the Acting Minister of Co-operative Governance and Traditional Affairs, Honourable Nathi Mthethwa, at the SALGA 2011 Elective Conference, 30 August 2011.

in the socio-economic rights obligations imposed by the Constitution on all spheres of government¹⁸⁴⁸ to adopt reasonable "legislative and *other measures*" to progressively realise socio-economic rights.¹⁸⁴⁹ The Constitutional Court has held that this obligation requires *inter alia* that, government must adopt and implement a comprehensive and workable plan to give effect to socio-economic rights.¹⁸⁵⁰ From this perspective, it could also be argued that the strategic plan (IDP), which is the product of the planning process at the municipal level, falls within the latitude of "*other measures*" contemplated by the Constitution.¹⁸⁵¹

The above exposition shows that the legal framework for IDPs specifically obliges municipalities to promote sustainable development, fulfil socio-economic rights and respond to the needs of impoverished local communities in particular.¹⁸⁵²

It is mandatory for each municipal council to adopt a strategic plan (IDP) for the development of the municipality within a prescribed period shortly after the start of its elected term.¹⁸⁵³ The *Systems Act* prescribes in detail, the process that must be followed by all municipalities in planning, drafting, adopting and reviewing IDPs.¹⁸⁵⁴ The process prescribed by the *Systems Act* includes: undertaking pre-planning activities (which include consideration and adoption of a draft strategic plan and the specification of time frames for the various steps involved in the IDP process);¹⁸⁵⁵ facilitating public participation through appropriate mechanisms in the various steps of the IDP process in order to ascertain development needs and priorities;¹⁸⁵⁶ and identifying all planning requirements binding on the municipality by virtue of national or provincial legislation.¹⁸⁵⁷ The *Systems Act* further requires that, each district municipality

1848 See s 7(2) of the Constitution.

1849 See ss 25(5), 26(2), 27(2) and 29(1)(b) of the Constitution.

1850 See *Grootboom*, par 38.

1851 See *Grootboom*, par 38; *Blue Moonlight Properties*, par 24. See also ACHPR *Principles and Guidelines* (2010) 15.

1852 This is in line with some benchmarks in Table 1 in 2.4.3.

1853 See s 25 of the *System's Act*.

1854 See generally ss 27-34 of the *Systems Act*.

1855 See s 29(1)(a) of the *Systems Act*.

1856 See 29(1)(b)(i)-(iii) of the *Systems Act*. Ch 4 of the *Systems Act* regulates in detail, the process of public participation in local governance.

1857 See s 29(1)(c) of the *Systems Act*.

should plan and adopt an IDP framework for its area as a whole, in close consultation with local municipalities.¹⁸⁵⁸ Local municipalities are subsequently obliged to align their IDPs with the district IDP framework.¹⁸⁵⁹

Section 26 of the *Systems Act* mandates that, an IDP must contain the following core components:¹⁸⁶⁰ the municipal council's vision for long term development of the municipality, with an emphasis on the municipality's most critical development and internal transformation needs; an assessment of the existing level of development in the municipality, which includes an identification of the communities that do not have access to basic services; the council's development priorities and objectives for its elected term; the council's development strategies; a spatial development framework which must include the provision of basic guidelines for a land use management system for the municipality; an applicable disaster management plan; a financial plan; and key performance indicators and performance targets.¹⁸⁶¹ Once the IDP is adopted by a municipal council, it serves as an operational guideline to the legislative and executive "branches" of a municipality.¹⁸⁶² As a strategic plan, the IDP should thus, serve as the blueprint of a municipality in making legislative and executive decisions that are in line with its developmental mandate.¹⁸⁶³

In addition to ensuring that the basic needs of people living in poverty are prioritised in the goals and objectives of an IDP, section 26 of the *Systems Act* prescribes that an IDP must contain "development strategies". The *Systems Act* does not define what constitutes a development strategy. Gordon defines

1858 See ss 27 and 29(2)(a) of the *Systems Act*.

1859 See s 29(3)(a) of the *Systems Act*.

1860 See Harrison 'Integrated Development Plans and Third World Politics' in Pillay *et al Democracy and Delivery: Urban Policy in South Africa* 187.

1861 See s 26(a)-(i) of the *Systems Act*. Performance indicators and performance targets are predetermined benchmarks that are used by a municipality to assess/monitor the extent to which it has made progress in achieving its objectives and to ascertain where further action is required to address identified problems. They can also be used to measure achievement of service delivery targets set for individuals or functional teams in a municipality. See Clarke and Stewart *Planning for Change* 61-63; Gordon *Strategic Planning for Local Government* 55-60; *Integrated Development Plan of the Tlokwe City Council* (2011) 160-162.

1862 See s 35(1) (a) and (b) of the *Systems Act*.

1863 See Sowman and Brown 2006 *Journal of Environmental Planning and Management* 699. See further: Gordon *Strategic Planning for Local Government* 54; Bryson 1988 *Long Range Planning* 78.

a strategy generally as the "step-by-step means by which an organisation reaches its objectives".¹⁸⁶⁴ It has been suggested that local government development strategies "provide answers to the question of how" a municipality will achieve its objectives.¹⁸⁶⁵ Strategies in a local government strategic plan may therefore, consist of plans, "programmes, events, operations, and projects" which are to be implemented by a municipality in order to realise its objectives.¹⁸⁶⁶ This suggests that a particular municipal strategy or set of strategies may be ideal as an inherent part of the IDP for the implementation of the benchmarks for the pursuit of social justice.¹⁸⁶⁷

When the planning process outlined in section 29 of the *Systems Act* is considered against the backdrop of the compulsory requirements of an IDP outlined in section 26 of the *Systems Act*, it becomes evident that the *Systems Act*, broadly speaking, is in line with the generic process followed in conventional local government strategic planning as distilled from international literature.¹⁸⁶⁸ This view is supported by the fact that conventional local government strategic planning and integrated development planning (as evident from sections 26 and 29 of the *Systems Act*) equally put emphasis on the need for pre-planning preparation; developing a mission statement; assessing the internal and external environments in which a municipality operates; developing goals, objectives and strategies; developing, adopting and implementing a strategic plan; and facilitating public participation in designing, adopting and implementing the strategic plan.¹⁸⁶⁹

In addition to development strategies, the *Systems Act* obliges municipalities to include specific plans in the IDP such as a disaster management plan and

1864 Gordon *Strategic Planning for Local Government* 45.

1865 *Integrated Development Plan of the Tlokwe City Council* (2011) 89.

1866 Gordon *Strategic Planning for Local Government* 45.

1867 For examples of specific strategies that are adopted to realise specific priorities, see *Integrated Development Plan of the Tlokwe City Council* (2011) 88-92.

1868 For details of this generic process, see: Streib and Poister 2005 *Public Administration Review* 46; Roering and Bryson 1988 *Public Administration Review* 995; Mercer *Strategic Planning for Public Managers* 2 and 5; Clarke and Stewart *Planning for Change: Strategic Planning in Local Government* 9; Gordon *Strategic Planning for Local Government* 77; Bryson 1988 *Long Range Planning* 73-81.

1869 See Streib and Poister 2005 *Public Administration Review* 46; Roering and Bryson 1988 *Public Administration Review* 995; Mercer *Strategic Planning for Public Managers* 2 and 5; Clarke and Stewart *Planning for Change* 9; Gordon *Strategic Planning for Local Government* 77; Bryson 1988 *Long Range Planning* 73-81.

a financial plan.¹⁸⁷⁰ The list of plans contemplated in section 26 of *Systems Act* is however, not exhaustive. As Table 3 indicates,¹⁸⁷¹ other legislation in, *inter alia*, the field of socio-economic rights may specifically require the inclusion of sector specific plans in the IDP. For example, section 3(3) of the *Water Services Act* imposes an obligation on water services authorities (including metropolitan and district municipalities) to provide a Water Services Development Plan (WSDP) in their IDPs. A WSDP is directly relevant to ensuring that municipalities continue to provide potable water to communities, including impoverished households, for example. In addition, because of the nature of the legislative and executive powers of local government, a municipality could adopt and include in its IDP, any other plan or development strategy that it deems necessary to realise its developmental mandate provided this does not contravene the Constitution or any relevant legislation.¹⁸⁷² This demonstrates that an IDP is not a static legal tool. The ability of municipalities to design and implement plans and development strategies not specifically prescribed by local government legislation means that they could utilise this flexibility to leverage resources that could be used to meet the needs of impoverished people, thereby, enhancing the value and potential of the IDP in the pursuit of social justice. This notwithstanding, the greatest strength of a strategic plan such as the IDP arguably lies in its deliberate attempt to produce positive change.¹⁸⁷³ Instead of allowing the transformative constitutional mandate and social justice to be realised through "disjointed incrementalism",¹⁸⁷⁴ the legal and policy framework for IDPs provide a structured scheme that could be used to prioritise and meet the needs of people living in poverty.

1870 See s 26(a)-(i) of the *Systems Act*.

1871 See Table 3 in 3.4.

1872 See s 151(3) of the Constitution; Du Plessis 2010 *Stell LR* 269; *City of Cape Town and Other v Robertson*, par 60.

1873 See Roering and Bryson 1988 *Public Administration Review* 995.

1874 This idea is borrowed from Roering and Bryson. See Roering and Bryson 1988 *Public Administration Review* 995.

5.3.2 Relevant generic features of IDPs

To prevent erratic planning, the *Systems Act* provides the process to be followed by a municipality to draft, consider and adopt its IDP.¹⁸⁷⁵ As indicated above, this sub-section does not venture into the details of the IDP process but rather discusses from a thematic point of view, relevant generic features of the content, functions and process of the IDP, as far as it serves to illustrate the social justice potential of the IDP.

5.3.2.1 Sector-specific components of an IDP

Integrated development planning at the local government level is supposed to cover different "sectors", some of which directly relate to the socio-economic rights areas where local government has some law-making and executive powers.¹⁸⁷⁶ The *IDP Guide V* defines a "sector" as a specific aspect of human need such as water, sanitation, housing, health, a healthy environment, land, energy (electricity) and education, for example.¹⁸⁷⁷ The approach adopted in *IDP Guide V* is that, in developing and implementing IDPs, "specific sectors should only be considered" in the various processes by a municipality when such sectors are relevant to local priorities.¹⁸⁷⁸ Due to the fact that local circumstances differ from one municipal area to another, local priorities will also differ.¹⁸⁷⁹ However, it is generally expected that the sectors listed above should be provided for in the IDP planning process.¹⁸⁸⁰ This implies that, based on a municipality's context, sector-specific and local area specific needs should be considered in the IDP process and included in a municipality's goals, objectives and strategies. It is argued that by incorporating sector-specific needs that are tied to the various socio-economic rights entitlements in the planning and implementation of IDPs, municipalities enhance the relevance of their IDPs to the realisation of socio-economic rights and the pursuit of social justice as applicable in their demarcated areas of jurisdiction.

1875 See s 29(1)(a) of the *Systems Act*.

1876 See the discussion in 3.2.3.

1877 See *IDP Guide Pack V* (2001) 5 and 38.

1878 See *IDP Guide Pack V* (2001) 5.

1879 See *IDP Guide Pack V* (2001) 38.

1880 See *IDP Guide Pack V* (2001) 6.

Although the IDP provides a framework for integrated strategic planning, it may be desirable for a municipality to have specific strategies (depending on local priorities) for some sectors in order to maximise sector-specific outcomes. For example, all priorities and objectives identified by the Tlokwe City Council have specifically defined strategies.¹⁸⁸¹ This means that specific strategies could be adopted to enhance the realisation of defined priorities and objectives, for example. In line with this need, legislation sometimes obliges municipalities to develop sector-specific strategies and instrumentation such as plans, as part of the IDP. The following are sector-specific examples of strategies and instrumentation prescribed by legislation or policies:

The *Systems Act* obliges every municipality to include in its IDP, a spatial development framework (SDF).¹⁸⁸² This obligation is reiterated by the newly adopted *Spatial Planning and Land Use Management Act* (SPLUMA).¹⁸⁸³ The SDF should constitute the basis for all decisions relating to spatial planning and land use management within a municipality's jurisdiction.¹⁸⁸⁴ It is required that a municipal SDF must assist in integrating, coordinating, aligning and expressing land development policies and plans emanating from different sectors of the various spheres of government as they apply within the municipal area.¹⁸⁸⁵ An SDF is important in ensuring for example, that, injustices of the past, including socio-economic inequalities that were exacerbated by apartheid spatial planning are addressed.¹⁸⁸⁶ In general, it is argued that land planning affects the enjoyment of all socio-economic rights - water, sanitation, housing, health care, electricity and a healthy environment, for example.¹⁸⁸⁷ The Preamble to SPLUMA acknowledges the role of spatial planning in contributing towards the state's constitutional obligation to realise the rights in sections 24, 25, 26 and 27 of the Constitution. It indicates, for

1881 See *Integrated Development Plan of the Tlokwe City Council* (2011) 89-92.

1882 See s 26(e) of the *Systems Act*.

1883 See s 20(2) of the *Spatial Planning and Land Use Management Act* 16 of 2013.

1884 See *IDP Guide V* (2001) 19.

1885 See s 12(5) of the *Spatial Planning and Land Use Management Act*.

1886 See "3.1.1 Why do integrated development planning?" in the WPLG (1998); Harrison 'Integrated development plans and third world politics' in Pillay *et al Democracy and Delivery* 192-194; Sowman and Brown 2006 *Journal of Environmental Planning and Management* 695-698.

1887 See Preamble to SPLUMA.

example, that, "a land use planning system that is protective of the environment" falls within the range of "reasonable legislative and other measures" that should be adopted to give effect to section 24 of the Constitution. Through the implementation of a land use planning and management system, conditions can be created that will enable citizens gain access to land on an equitable basis; enjoy the right of access to housing which includes an equitable spatial pattern and sustainable human settlements; and facilitate the progressive realisation of the right to sufficient food and water, for example.¹⁸⁸⁸

In terms of the water sector, section 3(3) of the *Water Services Act* imposes an obligation on water services authorities to include a Water Services Development Plan (WSDP) in their IDPs.¹⁸⁸⁹ Furthermore, in the energy sector, the *White Paper on Energy* (1998)¹⁸⁹⁰ requires that electricity be linked to every municipality's Infrastructure Investment Plan (IIP) and that an Integrated Energy Plan (IEP) be part of the IDP.¹⁸⁹¹ Through its WSDP and IEP, a municipality could ensure that impoverished people have access to potable water supply and electricity. Access to potable water supply could reduce the spread of communicable diseases amongst people living in poverty, for example. Moreover, access to potable water supply and electricity could improve economic productivity levels of people living in poverty and generally improve their quality of life.¹⁸⁹² In addition, as part of the IDP, section 33 of the *National Health Act* requires health managers of all metropolitan and district municipalities, to develop a district health plan that will ensure that residents have access to primary healthcare services. The lack of access to basic services such as potable water, electricity and healthcare services is seen as a symptom of poverty.¹⁸⁹³ Through sector-specific plans that address human needs such as water, electricity and

1888 See Preamble to SPLUMA. The principle of spatial justice seeks to correct past injustices as they relate to access to and use of land.

1889 See *IDP Guide V* (2001) 65.

1890 DME *White Paper on the Energy Policy of the Republic of South Africa* (1998).

1891 See "8.1 Integrated energy planning" in *White Paper on the Energy Policy of the Republic of South Africa* (1998) at 72-73; *IDP Guide V* (2001) 56.

1892 See *IDP Guide Pack V* (2001) 63.

1893 See *IDP Guide Pack V* (2001) 63.

healthcare services, *inter alia*, municipalities could (re)distribute resources to impoverished communities.¹⁸⁹⁴

It is also important to note that legislation in the field of environmental law, oblige municipalities to include Waste Management Plans (WMPs)¹⁸⁹⁵ and Air Quality Management Plans (AQMPs) in their IDPs.¹⁸⁹⁶ These plans are important in managing and controlling pollution and waste disposal, for example. Waste management and pollution control are important in preventing ecological degradation and ensuring that people live in healthy environments that are capable of supporting their socio-economic advancement and sustainable development.¹⁸⁹⁷ The inclusion of WMPs and AQMPs caters, *inter alia*, for the well-being of impoverished communities who suffer a higher burden of negative health impacts associated with polluted ambient air and improper waste management practices.¹⁸⁹⁸

The relevance of the different sectors in the IDP in this context lies in the fact that several of them are directly linked to the various socio-economic rights that local government is mandated to jointly realise with other spheres of government. This means that, depending on the priority needs of communities, municipalities could develop strategies and instruments which prioritise the needs of impoverished people in a wide range of sectors. This indicates the flexible and inclusive nature of the IDP as a local governance instrument. The above discussion also shows that in addition to prescribed content, an IDP may include "voluntary" content. The multitude of sectors that converge in the IDP makes it directly relevant and theoretically gives it significant potential to contribute towards the pursuit of social justice because depending on the context, strategies could be directed to respond to the needs of impoverished people in diverse areas. In addition, the integration of diverse sectoral strategies in an IDP allows for the dedicated allocation of

1894 See Table 1 in 2.4.3.

1895 See s 11(4) of NEMWA.

1896 See s 15(2) of NEMAQA.

1897 See Preamble to NEMAQA and Preamble to NEMWA.

1898 See Preamble of NEMAQA and Preamble to NEMWA..

limited resources to various sectors and across communities in a manner that promotes (re)distribution and empowerment of people living in poverty.¹⁸⁹⁹

Despite the potential that this multi-sectoral approach to planning may hold, De Visser argues that:

In this framework, the municipality is expected to be the pivot that skilfully mediates the tremendous and varied needs of a municipal community with the requirements of departments and parastatals in two other spheres of government....The intergovernmental aspiration, embedded in the planning framework, which envisages the IDP to be a reflection of the entire government's vision for the municipal area may be an ambitious attempt at cooperative planning across the three spheres. However, the insistence on this wholesale alignment of municipal budgets and plans may also just be an offshoot of the distrust of municipalities as custodians of local development. There is no doubt that pervasive trends of corruption, mismanagement, immature politics and a skills deficit in many municipalities do little to dispel this distrust.¹⁹⁰⁰

The above extract suggests that the potential of IDPs in contributing towards meeting the needs of communities is seriously diminished by high levels of corruption, maladministration and the lack of skilled personnel in most municipalities.

5.3.2.2 *Interconnected and cooperative strategic planning*

The generic benchmarks in Table 1 indicate that the three spheres of government should share the responsibility of pursuing social justice.¹⁹⁰¹ This suggests that social justice cannot be pursued by one sphere in isolation. This benchmark is important in the context of South Africa with its multi-sphere system of government which must operate in accordance with the constitutionally entrenched principles of co-operative government.¹⁹⁰²

1899 Sowman and Brown 2006 *Journal of Environmental Planning and Management* 699. See Table 1 in 2.4.3.

1900 De Visser 2009 *CJLG* 22-23.

1901 See Table 1 in 2.4.3.

1902 See Du Plessis 2008 *SAPL* 90-92; Layman *Intergovernmental Relations and Service Delivery in South Africa* (2003) 8; De Villiers and Sindane *Cooperative Government: The Oil in the Engine* (2011); De Visser *Developmental Local Government: A Case Study* 209-254.

In South Africa, the IDP is part of government's interconnected planning system.¹⁹⁰³ The IDP is supposed to link, integrate and co-ordinate the policies, plans and strategies of a municipality with those of national and provincial government (especially at various sectoral levels) as well as those of other affected municipalities – in the case of district and local municipalities.¹⁹⁰⁴ This obligation is reinforced by the requirement that municipalities must participate in national and provincial development programmes.¹⁹⁰⁵

Each of the sectors discussed above¹⁹⁰⁶ has national and at times, provincial departments with sector-specific policies and programmes that must be taken into consideration by municipalities in designing IDPs.¹⁹⁰⁷ This ensures that policies, plans and other strategies adopted by municipalities are coordinated with those of national and provincial government. One of the objectives of coordinated planning is to ensure that integrated development planning reflects the vision of the entire government.¹⁹⁰⁸ The emphasis on coordinated planning highlights the strong concern for policy coherence across all spheres of government.¹⁹⁰⁹ Through a municipality's IDP, for example, different plans and strategies are integrated, co-ordinated and linked to the use of financial, natural, physical and human resources.¹⁹¹⁰ From this point of view, it could be argued that an interconnected approach to planning may prevent wastage of limited resources and promote a more coherent response to priorities defined by national and provincial governments (such as eliminating poverty and extreme inequalities) as well as those specifically identified by municipalities.

1903 See De Visser 2009 *CJLG* 22-23; Cloete and Thornhill *South African Municipal Government and Administration* 121; Sowman and Brown 2006 *Journal of Environmental Planning and Management* 700.

1904 See *Integrated Development Plan of the Tlokwe City Council* (2011) 15; Cloete and Thornhill *South African Municipal Government and Administration* 121; Sowman and Brown 2006 *Journal of Environmental Planning and Management* 700; Ss 24 and 29(1)(b)(iii) of the *Systems Act*.

1905 See s 153(b) of the Constitution and s 24(2) of the *Systems Act*.

1906 See 5.3.2.1.

1907 See *IDP Guide Pack V* (2001) 38.

1908 De Visser 2009 *CJLG* 22-23.

1909 Harrison 'The Origins and Outcomes of South Africa's Integrated Development Plans' in Van Donk *et al Consolidating Developmental Local Government* 33.

1910 *Integrated Development Plan of the Tlokwe City Council* (2011) 18.

National and provincial departments are obliged to assist municipalities meet prescribed time limits and any other requirements relevant to IDPs.¹⁹¹¹ In addition to financial assistance, support by national and provincial governments may take different forms.¹⁹¹² For example, the national sphere of government could support the IDP process by providing a broad framework within which co-ordinated action and integrated planning can take place. This can be done by prescribing minimum standards in the various sectors, such as water and electricity, which then constitutes the basis for linkages between the different spheres of government.¹⁹¹³ The national sphere of government can also support municipalities when, for example, the Minister for Co-operative Government and Traditional Affairs issues guidelines to further regulate minimum levels of free basic services to be provided to impoverished households or the process for the amendment of IDPs, for example.¹⁹¹⁴ Furthermore, strategic sector officials in relevant government departments could support the IDP process by providing technical sector-specific information as well as departmental operational and capital budgetary information during the IDP design process.¹⁹¹⁵

In addition to the various types of support described above, the provincial department of local government could support integration in the IDP process by performing its oversight role.¹⁹¹⁶ Specifically, the MEC for local government in each province is expected to *inter alia*, monitor the prescribed IDP process; assist municipalities with planning, drafting, adoption and review of IDPs; facilitate the alignment and co-ordination of IDPs of different municipalities (especially district and local municipalities); ensure the integration of IDPs with provincial and national plans, strategies and programmes; and take any appropriate steps to resolve IDP-related disputes/differences, especially between district and local municipalities.¹⁹¹⁷ Where an IDP-related dispute

1911 See s 24(4) of the *Systems Act*.

1912 See "Basics of IDPs" in *IDP Guide Pack* (2001) 8-9.

1913 CoGTA (*Final Draft*) *Policy Paper on Integrated Development Planning* (2000) 8.

1914 See generally, s 37 of the *Systems Act*.

1915 See *Integrated Development Plan of the Tlokwe City Council* (2011) 25.

1916 See s 31 of the *Systems Act*.

1917 See s 31(a) to (d) of the *Systems Act*. Municipalities are expected to submit a copy of adopted IDPs to the MEC of the province, together with the "Process Plan" and the

cannot be resolved by the MEC for local government, such dispute could be referred to an *ad hoc* committee by the MEC for a decision.¹⁹¹⁸ The MEC for local government appoints the *ad hoc* committee which consists of members representing the three spheres of government.¹⁹¹⁹ A matter before an *ad hoc* committee is decided if at least two spheres of government agree on the matter.¹⁹²⁰

Furthermore, the MEC for local government in each province is required to annually compile and submit to their respective provincial legislatures, to the Minister and the NCOP, a consolidated report on the performance of municipalities in their respective provinces. The reports must identify municipalities that under-performed during the year and propose necessary remedial action.¹⁹²¹ This oversight role at the provincial level could ensure that struggling municipalities are provided context-specific support which will enable them adopt and implement their IDPs, for example.

The Premier has an important role to play in resolving IDP-related conflicts and ensuring integrated spatial planning. In terms of spatial planning, where a provincial SDF is inconsistent with a municipal SDF, the Premier must in accordance with the IRFA, take the steps needed to support the revision of those spatial development frameworks in order to ensure consistency.¹⁹²² It can be argued that because a municipal SDF constitutes a component of an IDP, this provision leads to a duplication of function due to the fact that the *Systems Act* obliges the MEC for local government to co-ordinate and facilitate the alignment of the IDP with plans, programmes and strategies of national and provincial organs of state.¹⁹²³

"Framework for the IDP" (in the case of district municipalities) within 10 days after adoption, for assessment.

1918 See s 32(2)-(4) of the *Systems Act*.

1919 See generally, s 33 of the *Systems Act*. The procedure and manner of referring an objection to an *ad hoc* committee as well as the proceeding are respectively outlined in sections 4 and 5 of the *Local Government: Municipal Planning and Performance Management Regulations* (2001) GN R796 in GG 22605 of 24 August 2001.

1920 See s 33(4) of the *Systems Act*.

1921 See s 47 of the *Systems Act*. See also s 48 under which the Minister may annually compile and submit a consolidated report on the performance of local government to Parliament and the MECs for local government.

1922 See s 22(3) of the *Spatial Planning and Land Use Management Act*.

1923 See s 31(c) of the *Systems Act*.

Harrison suggests that, while the Department of Co-operative Governance and Traditional Affairs has provided municipalities the much needed support in developing and implementing IDPs, provincial support is weak and that, provinces often display low levels of commitment and engagement to the IDP process.¹⁹²⁴ However, recent reports indicate that national and provincial governments have adopted a series of measures to support municipalities fulfil their developmental mandate.¹⁹²⁵ For example, at the beginning of 2012, pursuant to their constitutional powers,¹⁹²⁶ the Nelson Mandela Bay Municipality became the first metro to be placed under administration by national and provincial government in order to restore full functionality.¹⁹²⁷ By providing policy guidance and financial support that may be needed by municipalities, national and provincial governments facilitate the ability of municipalities to develop capacity for service delivery; promote sustainable development; fulfil its human rights obligations; identify and address causes of socio-economic inequalities; and redistribute resources to meet the needs of impoverished people.¹⁹²⁸ The numerous legal provisions that oblige national and provincial governments to share responsibility with municipalities in solving challenges faced in, *inter alia*, designing and implementing IDPs, strengthens the relevance and potential of IDPs in the pursuit of social justice.¹⁹²⁹

1924 Harrison 'The Origins and Outcomes of South Africa's Integrated Development Plans' in Van Donk *et al Consolidating Developmental Local Government* 331. See *Consolidated General Report on the Audit Outcomes of Local Government 2011-2012* (2013) 104.

1925 Chapters 4 and 5 of the *2011 Local Government Budgets and Expenditure Review 2006/2007-2012/2013* (2011) describes a series of measures that have been put in place to ensure that national and provincial governments provide municipalities the support needed to realise their mandates. See also *Consolidated General Report on the Audit Outcomes of Local Government 2011-2012* (2013) 154-168; *Local Government Turn Around Strategy* (2009) 19-25.

1926 S 100 of the Constitution deals with the powers of national government to intervene in a provincial administration whereas s 139 gives provincial executives the powers to intervene in a municipality when it fails to perform its executive functions.

1927 See <http://www.wylie.co.za/NewsItem/226> [date of use 14 March 2013].

1928 See Table 1 in 2.4.3.

1929 See Table 1 in 2.4.3.

5.3.2.3 *Implementation, monitoring and performance management*

As indicated above,¹⁹³⁰ once a municipal council adopts an IDP, it becomes the principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development in the municipality.¹⁹³¹ Streib and Poister argue that:

The more important issue, however, concerns putting plans into action. Strategic planning is an action-oriented type of planning that is useful only if it is carefully linked to implementation – and this is often where the process breaks down. Strategic plans do not implement themselves...¹⁹³²

What is evident from the above extract is that, without implementation, the potential of strategic plans such as IDPs is seriously diminished. A municipality that cannot implement the plans and strategies contained in its adopted IDP, arguably cannot meaningfully contribute towards the pursuit of its expanded developmental mandate, and by extension, the pursuit of social justice. In addition, it is important to ensure that the implementation of a strategic plan is constantly monitored and reviewed.¹⁹³³ This means that, during the implementation of a strategic plan, municipalities should put in place mechanisms to continuously check the extent to which the IDPs respond to institutional and community needs. Where it is observed that implementation of the strategic plan does not contribute towards achieving defined objectives, it should be revised accordingly to cater for changing circumstances.¹⁹³⁴ This is to ensure that the implementation of adopted plans and strategies achieve defined objectives.

One of the strengths of the system of integrated development planning is that, in order to ensure effective implementation of adopted plans and strategies, municipalities are obliged to establish a performance management system.¹⁹³⁵ Established performance management systems may be context-

1930 See 5.3.1.

1931 See s 35(1)(a) of the *Systems Act*.

1932 Streib and Poister 2005 *Public Administration Review* 46.

1933 Gordon *Strategic Planning for Local Government* 12.

1934 See Gordon *Strategic Planning for Local Government* 12.

1935 See ch 6 (ss 38-49) of the *Systems Act*.

specific, equal to the resources of a municipality and in line with the priorities, objectives, and targets contained in an IDP.¹⁹³⁶ Each municipality is required to promote a culture of performance management amongst its political structures, political office-bearers and councillors, including its general administration in order to ensure that the council is run in an economical, effective, efficient and accountable manner.¹⁹³⁷ The performance management system must set appropriate key performance indicators.¹⁹³⁸ Key performance indicators serve as a yardstick for measuring individual and municipal performance, including outcomes and impact in relation to the development priorities and objectives set out in the IDP. Through key performance indicators, it is possible to assess the extent to which a municipality has succeeded in achieving its goals and objectives, including the extent to which it succeeds in combating poverty and extreme inequalities in access to social services. Key performance indicators can help in enhancing accountability in the IDP process.¹⁹³⁹

Also linked to performance management and the IDP is municipal finance management. The key piece of legislation on municipal finance management is the *Local Government: Municipal Finance Management Act*.¹⁹⁴⁰ Generally, the *Municipal Finance Management Act* aims to secure sound and sustainable management of the fiscal and financial affairs of municipalities by establishing norms and standards for *inter alia* ensuring transparency, accountability and appropriate lines of responsibility in the fiscal and financial affairs of municipalities; the management of municipal revenues, expenditures, assets, liabilities, financial dealings and budgetary and financial planning processes as well as the coordination of those processes with those of other organs of state in other spheres of government; the handling of financial problems in municipalities; and supply chain management.¹⁹⁴¹ As already mentioned, a key component of the IDP is a financial plan which must

1936 See s 38(a)(i)-(iii) of the *Systems Act*.

1937 See s 38(b) and (c) of the *Systems Act*.

1938 See s 41(1)(a)-(b) of the *Systems Act*.

1939 For details, see ss 42 and 43 of the *Systems Act*.

1940 *Local Government: Municipal Finance Management Act* 56 of 2003.

1941 See Preamble and s 2 of the *Municipal Finance Management Act*.

include a budget projection for at least the next three years.¹⁹⁴² Each municipal council must each financial year, approve an annual budget for the municipality before the start of the financial year.¹⁹⁴³ The mayor is obliged to co-ordinate the processes for preparing the annual budget and for reviewing the municipality's IDP and budget-related policies to ensure that the tabled budget and any revisions of the IDP and budget related policies are mutually consistent and credible.¹⁹⁴⁴ Furthermore, when preparing the annual budget, the mayor of the municipality must take into account: the municipality's IDP; the national budget, the relevant provincial budget, the national government's fiscal and macro-economic policy; and take all reasonable steps to ensure that the municipality revises the IDP, taking into account realistic revenue and expenditure projections for future years.¹⁹⁴⁵ Once a budget is approved, a municipality can only incur expenditure in terms of an approved budget and within the limits of the amounts appropriated for the different votes in the approved budget.¹⁹⁴⁶

In terms of the *Municipal Financial Management Act*, long term budgetary commitments for the implementation of IDPs often require a broad range of support across all spheres of government. For example, although a municipal council may enter into a contract which may impose financial obligations on the municipality beyond the three years covered in the annual budget of that year, it may only do so after the support of the national and provincial treasury, the national department responsible for local government, and if the contract involves the provision of water, sanitation, electricity or any other prescribed service, the support of the responsible national department.¹⁹⁴⁷ The multitude of actors that must be consulted in long term contracts involving the provision of basic services such as water, sanitation and electricity may generally enhance transparency and accountability in the provision of these services.

1942 See 4.1 above and s 26(h) of the *Systems Act*.

1943 See s 16(1)-(3) of the *Municipal Finance Management Act* for details.

1944 See s 21(1)(a) of the *Municipal Finance Management Act*.

1945 See generally s 21(2) of the *Municipal Finance Management Act*.

1946 S 15(a) and (b) of the *Municipal Finance Management Act*.

1947 See generally s 33(1)(a) of the *Municipal Finance Management Act*.

However, it is hoped that when the *Infrastructure Development Bill*¹⁹⁴⁸ becomes law, responsibility for the implementation of bulk infrastructure in the areas of water, sanitation and electricity may be shared between municipalities and the Presidential Infrastructure Co-ordinating Commission (PICC).¹⁹⁴⁹ The PICC is expected to facilitate and co-ordinate the development of all infrastructure and strategic projects with significant economic and social importance to South Africa.¹⁹⁵⁰ The type of infrastructure and strategic projects envisaged by the *Infrastructure Development Bill* include the construction of: electricity transmission lines; power stations or installations for harnessing any source of energy; health care facilities; human settlements and related infrastructure and facilities; sewage works; waste management and disposal facilities; and water works and water infrastructure.¹⁹⁵¹ This indicates that although the IDPs of municipalities will contain defined objectives in relation to the provision of basic services such as water, electricity and sanitation to communities, the responsibility for the development of the necessary infrastructure may in future, lie with the PICC. This demonstrates that although attention will be given to the development of the necessary infrastructure at the highest level, close partnership and co-operation between different spheres of government will remain important in ensuring that the IDPs are implemented.¹⁹⁵²

It is important to note that, in designing and implementing budgets and IDPs generally, councillors, IDP managers and other council officials must be guided by the basic values and principles governing public administration, the Code of Conduct for Councillors and the Code of Conduct for Municipal Employees.¹⁹⁵³ Public administration principles, the Code of Conduct for Councillors and the Code for Municipal Employees demand *inter alia* that municipal councillors, managers and other council officials should: ensure the

1948 *Infrastructure Development Bill* (2013) GG No36980 of 30 October 2013.

1949 For the composition of the Presidential Infrastructure Co-ordinating Commission, see s 3 of *Infrastructure Development Bill* (2013). The chairperson of SALGA represents the interest of municipalities.

1950 See s 4 of *Infrastructure Development Bill* (2013).

1951 See s 7 read with Schedule 1 of *Infrastructure Development Bill* (2013).

1952 The need to share responsibility between the various spheres/levels of government is a benchmark for the pursuit of social justice. See Table 1 in 2.4.3.

1953 See s 195 of the Constitution; Ss 50, 54 and Schedules 1 and 2 of the *Systems Act*.

efficient, economic and effective use of resources; provide services impartially, fairly, equitably and without bias; respond to people's needs; and promote accountability. If these values and principles, together with the norms and standards outlined in the *Municipal Finance Management Act* are respected, this could ensure that municipal resources are effectively managed to enable equitable (re)distribution of resources to impoverished households. Through such redistribution, municipalities foster the pursuit of social justice.¹⁹⁵⁴

5.3.2.4 *Public participation*

Facilitating public participation in decision-making is a mandatory requirement for state authorities' pursuit of social justice.¹⁹⁵⁵ This benchmark is also an important feature of integrated development planning and budgeting.¹⁹⁵⁶ Municipalities are obliged to facilitate the participation of local communities in the preparation, implementation and review of IDPs.¹⁹⁵⁷ In drafting an IDP, each municipality is required to use the mechanisms, processes and procedures established in accordance with chapter 4 of the *Systems Act* to ensure that local communities are consulted about their development needs and priorities and that they participate in drafting the IDP.¹⁹⁵⁸ In addition, municipalities are obliged to identify and consult traditional authorities and other role players such as civil society organisations in the process of drafting IDPs.¹⁹⁵⁹ As part of the obligation to facilitate public participation in the IDP process, municipalities are required to use their resources and annually allocate funds for building the capacity of community members, councillors and council officials to enable them participate in local governance generally.¹⁹⁶⁰ The *Systems Act* also requires municipalities to put in place specific measures to ensure that people who cannot read or write, women,

1954 See Table 1 in 2.4.3.

1955 See Table 1 in 2.4.3; Pieterse 2007 *Human Rights Quarterly* 819; Pieterse 2005 *SAPL*159; Liebenberg *Socio-Economic Rights* 31; Sen 2005 *Journal of Human Development* 157-160.

1956 S 23(1)(a) of the *Municipal Finance Management Act* requires that when the annual budget is tabled, a Municipal Council should consider the views of the community.

1957 See s 16(1)(a) of the *Systems Act*.

1958 See s 29(1)(b)(i)-(ii) of the *Systems Act*. For a detailed discussion of ch 4 of the *Systems Act*, revert to 4.2.2.

1959 See s 29(1)(b)(iii) of the *Systems Act*.

1960 See s 16(1)(b)-(c) of the *Systems Act*. See also Table 1 in 2.4.3.

people with disabilities and other disadvantaged people, participate in the IDP process.¹⁹⁶¹ In some municipalities, IDP Representative Forums and ward committees are the preferred channels used to ensure that community residents and civil society organisations participate in the IDP process.¹⁹⁶²

Despite the elaborate legislative framework and guarantees of the right to public participation in local governance, the potential impact of such provisions in guiding the IDP design and implementation process is doubted given the absence of quality participation at the local government level.¹⁹⁶³ As already indicated,¹⁹⁶⁴ apart from the fact that communities often ignore the mechanisms created for public participation in favour of street protests, some municipal officials implement the legal framework for public participation for mere formality.¹⁹⁶⁵ As already indicated, De Visser is of the view that quality public participation at the local government level will not come from the framework of the *Systems Act per se* but from the creativity that municipalities will display in their own policies and by-laws.¹⁹⁶⁶ In 4.2, it was argued that in the absence of creativity on the part of municipalities, the Constitutional Court's jurisprudence on meaningful engagement can provide a useful guide for local government authorities.¹⁹⁶⁷ It is argued that by applying, for example, the courts' jurisprudence on meaningful engagement, municipalities will facilitate quality public participation in the IDP process; contribute towards building local capacity; enhance the realisation of socio-economic rights; build group solidarity and ensure that strategies and instruments that form part of the IDP speak to the real needs of local communities.¹⁹⁶⁸

1961 See s 17(3)(a)-(d) of the *Systems Act*. See 4.2.2.

1962 See *Integrated Development Plan of the Tlokwe City Council* (2011) 26; *Mangaung Metropolitan Municipality: Integrated Development Plan 2012-2016* (2012) 13-14.

1963 De Visser *Developmental Local Government: A Case Study* 106; Holness 2011 *SAPL* 11; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 477.

1964 See 4.4.2.

1965 De Visser *Developmental Local Government: A Case Study* 106. See De Visser 2009 *CJLG* 18-19; Chenwi 2011 *SAPL* 128-129; Holness 2011 *SAPL* 9.

1966 De Visser *Developmental Local Government: A Case Study* 106. Own emphasis.

1967 For a detailed discussion of the Constitutional Court's jurisprudence on this topic, see: 4.2.2 above; Chenwi 2011 *SAPL* 128-156; Holness 2011 *SAPL* 1-36; Muller 2011 *Stell Law Rev* 742-758.

1968 See the benchmarks in Table 1 in 2.4.3.

5.4 Legal status of IDP

After drafting an IDP, it must be adopted by the council of a municipality. A majority of the members of a Municipal Council must be present before a vote may be taken on the adoption of the IDP.¹⁹⁶⁹ Adoption of the IDP is then decided by a majority of the votes cast.¹⁹⁷⁰ Upon adoption, the IDP becomes the principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development.¹⁹⁷¹ An adopted IDP binds a municipality in the exercise of its executive authority, except where it is inconsistent with national or provincial legislation.¹⁹⁷² This means that a municipality must conduct its affairs in a manner that is consistent with the content of its IDP and may not deviate from it.¹⁹⁷³ For example, the manner in which a municipality utilises its financial resources must be consistent with budgetary allocations made in the financial plan – which is part and parcel of the IDP. However, the IDP is not a static plan as it is supposed to be (annually) reviewed and amended by a municipality in accordance with prescribed procedure.¹⁹⁷⁴ An amendment of the IDP could ordinarily suggest a modification of commitments in plans (sectoral and financial plans) and strategies as well as the concomitant reallocation of resources, for example.

Due to the fact that IDPs are tied to the elected term of councillors, a specific IDP shall guide and inform all planning, management and development in a municipality for a period of five years. But, a newly elected municipal council can still adopt the IDP of its predecessor with or without amendments after consultation with all relevant stakeholders.¹⁹⁷⁵ This opens up potential for continuity in the implementation of the same plans and programmes that constituted part of a previously adopted IDP. This smooth transition may avoid

1969 This is inferred from a reading of s 160(3) of the Constitution.

1970 See 160(3)(c) of the Constitution.

1971 See s 35(1)(a) of the *Systems Act*.

1972 See s 35(1)(b) of the *Systems Act*.

1973 See s 36 of the *Systems Act*.

1974 See s 34 of the *Systems Act*. The process for amending an IDP is spelt out in s 3 of the *Local Government: Municipal Planning and Performance Management Regulations* (2001) GN R796 in GG 22605 of 24 August 2001.

1975 See ss 25(2)-(3) and 34 of the *Systems Act*.

disruptions in planning and potentially ensure that people have sustainable access to municipal services.

It should be noted that an IDP "binds all other persons to the extent that those parts of the integrated development plan that impose duties or affect the rights of those persons have been passed as a by-law."¹⁹⁷⁶ This suggests that without transformation into by-laws, for example, the IDP is an internally binding document. It binds councillors, executive and administrative officials of a municipality. Based on its legal status, the IDP can be described as the pivot upon which all development activities in a municipality revolve. The fact that an IDP is internally binding, can be reviewed and "amended", suggests that it could be considered a legal governance instrument albeit without externally binding effect.

5.5 Potential of IDPs in local government's pursuit of social justice

The legal and policy framework for IDPs provide a scheme through which diverse sector-specific components that cater for a wide range of basic human needs converge in one strategic instrument - the IDP. Through the IDP, municipalities are expected to work closely with communities and the other spheres of government to identify priorities, define goals and objectives and develop strategies directed towards eradicating poverty and reducing extreme inequalities. Due to the fact that the IDP remains the pivot upon which all development activities in a municipality revolve,¹⁹⁷⁷ it is possible to link, to an extent, successes recorded by municipalities in discharging their expanded developmental duties to the extent to which they have complied with the applicable legal framework.

Since IDPs came into operation in 2000, municipalities have "made significant progress in both planning and service delivery in a more inclusive and integrated manner".¹⁹⁷⁸ More poor people have access to basic needs such

1976 See s 35(1)(c) of the *Systems Act*.

1977 See s 35(1)(a) of the *Systems Act*.

1978 Western Cape Department of Local Government and Housing *Summary: IDP Hearings 2005* (2005) 2.

as water, electricity and sanitation.¹⁹⁷⁹ As indicated in chapter one, at the dawn of democracy, only about 38 percent of households were electrified, about 42 percent lacked access to the basic level of basic sanitation and less than 60 percent had access to clean drinking water.¹⁹⁸⁰ Recent statistics of the 2011 Census support the view that municipalities have made significant progress in satisfying the basic needs of all South Africans.¹⁹⁸¹ Although the figures demonstrate laudable progress from the pre 2000 era,¹⁹⁸² the percentage of South Africans who do not have access to basic services translates to millions of people in terms of numbers.

Despite progress in providing households with access to basic services, there are still problems relating to the design and implementation of IDPs which could partly be attributed to the legal and policy framework. In assessing the potential of the IDP in promoting the country's broad developmental goals at the local level, De Visser argues that:

The IDP has become a tightly regulated process that must absorb the input of a multitude of development actors towards the adoption of a document within tight deadlines. This process has thus become a 'pressure cooker', which is incompatible with unwieldy community input which tends to disrupt intergovernmental cohesion and adherence to intergovernmental deadlines...There is then a real danger that communities and community organisations will become disgruntled with the IDP, as they perceive the process to be inadequate in responding to their needs. A more realistic approach to intergovernmental planning and alignment may be apposite. It may be worthwhile to consider the identification of a number of national key priorities and insist on their alignment, while relaxing the effort towards synchronisation on other, less important policy areas. This may provide the necessary room for municipalities to develop their planning capabilities, devise mechanisms for genuine interaction with communities, and display creativity.¹⁹⁸³

Some of the concerns expressed by De Visser above are reflected in Coetzee's argument that, in its current form, the rigid and structured process of the IDP system is yet to prove that it can facilitate the type of development that is urgently needed to address deep rooted poverty at the local level.¹⁹⁸⁴

1979 See 1.1.

1980 See Algotsson and Murombo *Water Supply and Sanitation in South Africa: Environmental Rights and Municipal Accountability* (2009) 8.

1981 Statistics South Africa *Census 2011: Highlights of Key Results* (2012) 12-19.

1982 See Statistics South Africa *Census 2011: Highlights of Key Results* (2012) 12-19.

1983 De Visser 2009 *CJLG* 23.

1984 Coetzee 2010 *SSB/TRP/MDM* 25.

To Coetzee, the IDP system is not well understood, supported and respected by the various role players and "has become an octopus with too many tentacles", creating confusion and frustration in local government.¹⁹⁸⁵ Coetzee argues that:

Despite all the critique on the IDP system, which in recent years has experienced a painful transformation and development process, it is however, not suggested that the IDP system be abandoned and replaced with a new one. *On the contrary, the IDP could, in view of its integrated, participatory and potentially strategic and developmental nature be the ideal mechanism to make planning, (state) government, our regions and country more developmental, and to create ultimate sustainable human development...* The IDP can only fulfil a developmental function if it becomes an integral part of not only the various government (alignment) but also society (embedded) and more specifically the private sector and business communities (partnerships for implementation).¹⁹⁸⁶

Although Coetzee's concession in the above extract is formed within the broader context of the country's developmental aspirations, it is worth quoting in this context because it highlights that despite its challenges, the relevant generic features discussed above increase the relevance and potential of IDPs as a local governance instrument in the pursuit of social justice.¹⁹⁸⁷ In addition, there seems to be agreement that as planning and strategic frameworks, the effective implementation of IDPs have significant potential to enhance sustainable development, meet the basic needs of all and enable municipalities to realise socio-economic rights.¹⁹⁸⁸ It is understood that the said potential may be attributed to the fact that local government strategic planning:

- enables municipalities to align financial and institutional resources with agreed policy objectives and programmes;
- ensures the integration of local government activities with development planning activities at the provincial and national government levels

1985 Coetzee J 2010 *SSB/TRP/MDM* 25.

1986 Coetzee J 2010 *SSB/TRP/MDM* 25. Own emphasis.

1987 See Visser 2003 *South African Geographical Journal* 99-111.

1988 See Cloete and Thornhill *South African Municipal Government and Administration* 121-122; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 464-469; Coetzee 2010 *SSB/TRP/MDM* 25.

thereby enhancing co-operative governance amongst all spheres of government;

- facilitates interaction, engagement, communication and the building of alliances within and between the various spheres of government thereby strengthening intergovernmental co-operation;
- provides a basis for democratic engagement between local government and local communities since the content of IDPs is supposed to be informed by local needs that are identified through a process of public participation;
- enables local leaders to gain access to development resources, promotes the effective use of limited resources and ensures accountability of local leaders;
- enables municipalities to reflect on their obligations and systematically prioritise their programmes and resource allocation in a manner that meets the urgent needs of communities;
- assists municipalities to focus on environmental sustainability as a key component of their service delivery and development strategies;
- enables local authorities to discharge obligations flowing from South Africa's commitment to *Local Agenda 21*;
- helps municipalities to develop a holistic strategy for poverty alleviation and other associated socio-economic challenges; and
- enables development to remain abreast with the dynamic nature of society given the in-built performance monitoring and review processes of IDP.¹⁹⁸⁹

5.6 Critical perspectives

Although there is consensus on the conventional process of local government strategic planning,¹⁹⁹⁰ experts share the view that a blanket approach to

1989 See Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 464-466; Cloete and Thornhill *South African Municipal Government and Administration* 121-122; (Draft) *Policy Paper on Integrated Development Planning* (2000) 22-23; Coetzee 2010 *SSB/TRP/MDM* 25; "3.1.1 Why do integrated development planning?" in the WPLG (1998); Harrison 'The Origins and Outcomes of South Africa's Integrated Development Plans' in Van Donk *et al Consolidating Developmental Local Government* 321.

strategic planning cannot be prescribed to all municipalities due to the diversity of local conditions.¹⁹⁹¹ Despite this reservation, the *Systems Act* prescribes in detail the process that must be followed by all municipalities in planning, drafting, adopting and reviewing IDPs.¹⁹⁹² The danger of this blanket approach to local government strategic planning is that it stifles innovation at the local level.¹⁹⁹³ This somehow restricts the ability of municipalities to take local specific initiative in strategic planning and may prejudice municipalities that have limited human and financial resources needed to comply with the numerous requirements of the *Systems Act*.¹⁹⁹⁴ As Gordon indicates, where law extensively regulates the scope of local government strategic planning, the law itself then constrains innovation in strategic planning.¹⁹⁹⁵ The prescription of a general approach to strategic planning and the consequent over-regulation of the strategic planning process are also evident from the extent to which a detail procedure is prescribed for the amendment of adopted IDPs.¹⁹⁹⁶ The detail regulation of IDP processes adopted by the *Systems Act* suggests a general lack of confidence on the ability of municipalities to take local initiatives given the fact that capacity for integrated development planning is low in most municipalities.¹⁹⁹⁷ Over regulation constrains local initiative and limits the ability of most municipalities to develop capacity for integrated development planning. Failure to develop local capacity is detrimental to the pursuit of social justice.¹⁹⁹⁸ To relax over regulation, it may be necessary to consider the possibility of ensuring that

1990 For details of the conventional strategic planning process, see: Streib and Poister 2005 *Public Administration Review* 46; Roering and Bryson 'Initiation of Strategic Planning by Governments' 1988 *Public Administration Review* 995; Mercer *Strategic Planning for Public Managers* 2 and 5; Clarke and Stewart *Planning for Change* 9; Gordon *Strategic Planning for Local Government* 77; Bryson 1988 *Long Range Planning* 73-81; 2.6.2 above.

1991 Clarke and Stewart *Planning for Change: Strategic Planning in Local Government* vii; Bertocci *Strategic Planning and Management* 40; Streib 2005 *Public Administration Review* 45-46.

1992 See generally ss 27-34 of the *Systems Act*.

1993 Gordon *Strategic Planning for Local Government* 16.

1994 See De Visser 2009 *CJLG* 22-23.

1995 Gordon *Strategic Planning for Local Government* 16.

1996 See s 34 of the *Systems Act*. The process for amending an IDP is spelt out in s 3 of the *Local Government: Municipal Planning and Performance Management Regulations* (2001) GN R796 in GG 22605 of 24 August 2001.

1997 De Visser 2009 *CJLG* 22-23. See 2011 *Local Government Budgets and Expenditure Review* (2011) 87-88.

1998 See Table 1 in 2.4.3 above.

IDPs comply with the generic processes of local government strategic planning rather than all the detail requirements of the *Systems Act*. Although overregulation may be informed by the lack of confidence on the ability of most municipalities to fulfil their developmental obligations,¹⁹⁹⁹ De Visser suggests that it may be necessary to start considering the possibility of identifying key national priorities that should be aligned in the IDP process while relaxing the requirements of synchronisation in other less important areas.²⁰⁰⁰ This could enable municipalities take initiatives in local planning and eventually develop the capacity needed to design and implement IDPs. By developing the capacity required to design and implement IDPs, municipalities enhance their ability to contribute towards the pursuit of social justice.²⁰⁰¹

The attempt to condense national, provincial and local priorities in one plan has led some writers to caution that the IDP appears to be too ambitious given the limited financial resources at the disposal of municipalities and the severe shortage of skilled personnel.²⁰⁰² The severe shortage of skilled personnel across most municipalities is expressed in a recent government report as follows:

In most municipalities, there is a general lack of the technical skills and knowledge necessary for performing key duties in financial management from an operational perspective. This is a major constraint and one of the biggest challenges facing municipalities. These technical skills include planning, engineering, project management and plant operating. Inadequate capacity at the senior management level and a lack of appropriate financial management skills in municipalities result in poor service delivery. Furthermore, a high turnover of senior management in municipalities, particularly chief financial officers, is a major issue affecting municipalities' capacity to manage their finances properly and thus lay a sound foundation to expand and improve service delivery.²⁰⁰³

It is estimated that more than 50 percent of spatial planners employed across municipalities in the country are in metros and the majority in the City of Cape

1999 De Visser 2009 *CJLG* 22-23.

2000 See De Visser 2009 *CJLG* 23.

2001 See Table 1 in 2.4.3 above.

2002 See De Visser 2009 *CJLG* 22-23; Coetzee 2010 *SSB/TRP/MDM* 25.

2003 See 2011 *Local Government Budgets and Expenditure Review* (2011) 87-88. See *State Municipal Assessment 2010/2011: National Trends in Municipal Capacity* (2012).

Town alone.²⁰⁰⁴ This means that there is a severe shortage of planners across the country. The lack of capacity at the local government level means that municipalities have increasingly resorted to the use of consultants to realise the objectives of integrated development planning.²⁰⁰⁵ Some scholars argue that the use of consultants to advise government on anti-poverty strategies and instrumentation often leads to the exclusion of impoverished people from the formal processes of engagement.²⁰⁰⁶ Where this happens, impoverished people are denied social recognition and the opportunity to participate in making life choices. This practice is inimical to the pursuit of social justice.²⁰⁰⁷

Furthermore, reports of corruption, mismanagement, nepotism and lack of accountability at the level of many municipalities limit the developmental potential of IDPs.²⁰⁰⁸ If this practice continues unabated, this may obstruct progress in the pursuit of social justice. Finally, public participation in the design and implementation of IDPs remains a sham in most municipalities.²⁰⁰⁹ The absence of quality public participation in the IDP process may limit its social justice potential.

5.7 Chapter summary

Following the transition to democracy, local government became a co-responsible sphere of government with a wide range of powers and functions and specifically mandated to play an expanded developmental role. This mandate requires *inter alia* that, municipalities promote sustainable development, meet the basic needs of communities and contribute towards realising defined constitutional socio-economic rights. As a co-responsible

2004 *State Municipal Assessment 2010/2011: National Trends in Municipal Capacity* (2012) 58-60.

2005 *Consolidated General Report on the Audit Outcomes of Local Government* (2013) 17, 101 and 114-118; De Visser 2009 *CJLG* 22-23.

2006 See Brand *Courts, Socio-Economic Rights and Transformative Politics* 65-66, 151-152, 176-180, 182-186; Stewart 2011 *Diritto Pubblico Comparato Ed Europeo* 1525.

2007 See Table 1 in 2.4.3; 2.3.3.3 above.

2008 See *Consolidated General Report on the Audit Outcomes of Local Government* (2012) 50-57 and 63-64; *Consolidated General Report on the Audit Outcomes of Local Government* (2013) 21, 62-85; CoGTA *State of Local Government in South Africa* (2009) 10; De Visser 2009 *CJLG* 23.

2009 De Visser *Developmental Local Government: A Case Study* 106; Holness 2011 *SAPL* 11; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 477.

sphere of government, local government is obliged to contribute towards achieving the transformative commitments of the Constitution, including the pursuit of social justice. Although the pursuit of social justice remains a constitutional commitment which may never be completely realised, it requires all spheres of government to implement measures that combat poverty and extreme inequalities in access to basic services.

In addition to the above reforms, a conscious effort was made by the ANC led government to correct the weaknesses of apartheid development planning and ensure that municipalities plan and execute their developmental mandate in a strategic, co-ordinated and fiscally responsible manner. The system of IDPs was introduced in response to this need. The IDP remains the main legally prescribed local governance instrument to be used by municipalities to realise their constitutional mandate.

This chapter specifically explored and critically investigated the relevance and potential of IDPs in contributing towards the pursuit of social justice in South Africa. An analysis of the legal and policy framework underpinning IDPs as well as the implementation thereof, revealed mixed results about their potential in contributing towards the pursuit of social justice in South Africa. Following the implementation of the IDP system, municipalities have made great progress in planning and providing basic services to communities in a more inclusive and integrated manner. Recent statistics show that significant progress has been made by municipalities to respond to the basic needs of communities such as housing, water, electricity and sanitation. It was argued that the multitude of sectors that converge in an IDP - addressing diverse areas of human needs - gives it significant potential as an instrument that could be tailored, depending on the context, to contribute towards the pursuit of social justice by specifically responding to the different needs of people living in poverty. Moreover, it was established that the legal and policy framework on IDPs have generic features that could increase their relevance and potential in the pursuit of social justice, including the mandatory requirements for: public participation; intergovernmental co-ordination and cooperation; establishing performance management systems; and financial

management. Through integrated development planning, the IDP system further seeks to give effect to local government's constitutional socio-economic rights obligations. It was argued that the greatest strength of IDP lies in its deliberate attempt to produce positive change at the grass root level and that it provides a structured planning scheme that could be used by municipalities to pursue constitutional objectives.

Despite its potential, the design and implementation of IDPs is constrained by limited financial resources, corruption, mismanagement and the severe shortage of skilled personnel across most municipalities in the country. In addition, although experts suggest that a blanket approach to strategic planning cannot be prescribed to municipalities, the *Systems Act* prescribes in detail, the approach and process that must be followed by municipalities. It was argued that compliance with the tightly regulated system restricts the ability of municipalities to take specific local initiatives and puts undue pressure on municipalities with limited resources to comply with the legal framework.

Although there are mechanisms that have been put in place to resolve potential conflicts of interests in the IDP process, their effectiveness will largely depend on political will. Furthermore, the social justice potential of IDPs is constrained by the lack of quality public participation at the level of most municipalities.

It is suggested that despite the challenges faced in the implementation of the IDP system, it has the potential to contribute towards the pursuit of justice. This potential is attributed to some of the features of the IDP legal and policy framework including: the commitment to contribute towards the realisation of socio-economic rights; the mandatory requirements for public participation; the sharing of planning responsibilities between the three spheres of government; the commitment to promote sustainable development,²⁰¹⁰ and the mandatory requirements for financial and performance management. In addition, due to the legal nature of IDPs, municipalities can only utilise resources in accordance with budgetary allocations made in their financial

2010 See Table 1 in 2.4.3 above.

plans. This has the potential to minimise erratic expenditures, enhance accountability and prevent wastage of limited resources.

It is argued that instead of jettisoning the IDP system, national and provincial governments should increase their support to struggling municipalities. A concerted effort must be made by all role players to co-operate in the design and implementation of IDPs. Where conflicts of interests arise in the planning process, affected parties should exhaust the established channels for resolving intergovernmental disputes before resorting to courts. In addition, municipalities should explore innovative ways to redirect the energy currently expend on street protests about poor service delivery (or the lack thereof) into some form of constructive engagement between communities and local government officials. It is suggested that the Constitutional Court's jurisprudence on meaningful engagement could provide a useful starting point for engagement between local government officials and communities.

The next chapter explores and critically investigates the relevance and potential of local government's indigent policies in the pursuit of social justice.

CHAPTER 6
INDIGENT POLICIES AS A LOCAL GOVERNANCE
INSTRUMENT FOR PURSUING SOCIAL JUSTICE

6.1	Introduction	380
6.2	Background to indigent policies in South Africa	382
6.3	Legal and policy framework to indigent policies	384
6.3.1	<i>Relevant generic features of municipal indigent policies</i>	<i>391</i>
6.3.1.1	Gaining access to free basic services	391
6.3.1.2	Maintaining access to free basic services	393
6.3.1.3	Targeting methods	396
6.3.1.4	Design and implementation of municipal indigent policies	402
6.4	Legal status of municipal indigent policies	405
6.5	Critical perspectives	409
6.6	Chapter summary	411

6.1 Introduction

As earlier indicated, governments need a variety of governance instruments through which they can govern.²⁰¹¹ Policies have been identified as one of the instruments used by governments to govern, generally.²⁰¹² Policies could typically be used to allocate resources, regulate people's behaviour, promote public participation and communicate public authorities' understanding of the problems confronting society and its vision for the future.²⁰¹³

Although policy studies and policy-making is still evolving in South Africa,²⁰¹⁴ policy is arguably one of the legally prescribed governance instruments which could be used by municipalities to realise their developmental mandate.²⁰¹⁵ Despite the potential of policies as a governance instrument, there is no "generally-accepted prescriptive model" for policy-making.²⁰¹⁶ Generically, policy-making involves the following process: identification of matters needing new policies; authorisation by the relevant executive authority or party; a public statement of intent; public consultation; policy design and adoption.²⁰¹⁷ The need to facilitate public participation in the policy-making process is often stressed because this could ensure *inter alia* that, the needs of communities

2011 See Salamon 2000-2001 *Fordham Urban Law Journal* 1624; 4.5.1.

2012 See 4.5.1; Steytler 2011 *SAPL* 484-496; Salamon 2000-2001 *Fordham Urban Law Journal* 1623-1641; Patel 'Tools and Trade-offs in Environmental Decision making' in Van Donk *et al Consolidating Developmental Local Government* 363-368; Du Plessis 2010 *Stell LR* 274-275; Bovaird 2005 *International Review of Administrative Sciences* 217-221.

2013 See Peters and Van Nispen 'Prologue' in Peters and Van Nispen *Public Policy Instruments: Evaluating the Tools of Public Administration* 3; Linder and Peters 'The study of policy instruments: Four schools of thought' in Peters and Van Nispen *Public Policy Instruments: Evaluating the Tools of Public Administration* 34; Salamon 'The New Governance and Tools of Public Action: An Introduction' in Salamon *The Tools of Government: A Guide to the New Governance* 1-41.

2014 See 4.5.2; Gumede 'Public policy making in South Africa' in Venter and Landsberg *Government and Politics in South Africa* 166.

2015 See s 11(3)(a) of the *Systems Act*.

2016 Cloete *Public Administration and Management: New Constitutional Dispensation* 107; Cloete *South African Public Administration and Management* 141-142; De Coning and Cloete 'Theories and models for analysing public policy' in Cloete and Wissink *Public Management: Improving public Policy* 29-30 and 50. For a definition of policy models and a detailed discussion of the various policy models, see De Coning and Cloete 'Theories and models for analysing public policy' in Cloete and Wissink *Public Management: Improving public Policy* 24, 29-50.

2017 See De Coning and Cloete 'Theories and models for analysing public policy' in Cloete and Wissink *Public Management: Improving public Policy* 29; Cloete *South African Public Administration and Management* 138. For a detailed discussion of the generic administrative functions that produces a policy, see Cloete and Wissink *Public Management: Improving Public Policy* 97-163.

are taken into consideration.²⁰¹⁸ In chapter four, it was established that there are at least two types of policies that are applicable at the local government level namely: executive and administrative policies.²⁰¹⁹ This classification of policy instruments is important because it also indicates different associated functions.²⁰²⁰

In earlier parts of this study, it was established that as a co-responsible sphere of government, local government is equally obliged to contribute, together with the other two spheres of government, towards the pursuit of social justice.²⁰²¹ It was established that social justice is primarily concerned with eradicating poverty and extreme forms of inequalities in order to ensure that impoverished people have access to basic needs that would enable them participate in socio-political life as true equals.²⁰²² Furthermore, it was established that for state authorities to contribute towards the pursuit of social justice, they should: implement redistributive measures such as policies that will ensure that impoverished people have access to basic needs; build capacity; protect and fulfil human rights; facilitate public participation in decision-making; address structural causes of inequalities; promote sustainable development; promote group solidarity; address stigma associated with welfare beneficiaries; avoid privatising basic services; and share responsibility between all levels of government.²⁰²³ In 2.4.2, it was argued that Fraser's multi-dimensional conception of social justice should be adopted in the South African context on the basis that, it is consistent with the values of the Constitution, *inter alia*. This means her proposals could be useful in guiding (local) government's pursuit of social justice. Moreover, as evident from the discussion in 2.3.3.3 above, Fraser is of the view that means-tested welfare policies (and programmes) that specifically target the needs of

2018 See 4.5.2; De Coning and Cloete 'Theories and models for analysing public policy' in Cloete and Wissink *Public Management: Improving public Policy* 27 and 50; Cloete *South African Public Administration and Management* 139 and 143.

2019 See 4.5.2.1.

2020 See 4.5.2.1.

2021 See 2.2 and 2.4.4.

2022 See 2.4.2.

2023 See 2.4.3.

impoverished people represent the main "affirmative" redistributive reform strategy that could be used by government to pursue social justice.²⁰²⁴

The purpose of this chapter 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. In order to achieve this objective, this chapter is structured into five main parts. The first part provides a brief background to local government indigent policies in South Africa. This is followed by a discussion of the legal and policy framework in order to establish the potential of municipal indigent policies in contributing towards the pursuit of social justice. Against this background, part three provides an overall assessment of the potential of municipal indigent policies in contributing towards the pursuit of social justice. Part four reflects on the legal status of municipal indigent policies. This is followed by a critique of the local indigent policies examined in this study. The chapter ends with a conclusion. The discussion that follows, also generally takes into account the benchmarks for state authorities' pursuit of social justice in Table 1.²⁰²⁵

As indicated in chapter one, in order to assess the extent to which municipal indigent policies can contribute towards the pursuit of social justice, the chapter draws from the indigent policies of seven municipalities (representing the urban, semi-urban and rural matrix of municipalities in the country) in order to illustrate arguments raised.²⁰²⁶

6.2 Background to indigent policies in South Africa

In 2000, President Thabo Mbeki announced the intention of government to provide free basic services such as water, electricity and sanitation to impoverished households.²⁰²⁷ This decision marked a dramatic shift in the

2024 See Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' 48; Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 65 and 74.

2025 See Table 1 in 2.4.3.

2026 See 1.4 above.

2027 This announcement was made at the 7th National Congress of South African Trade Unions, Gallagher Estate, 18 September 2000. For a detail background discussion, see Mosdell 'Free basic services: The evolution and impact of free basic water policy

government's policy relating to the provision of basic services which had hitherto focused on paying for the capital costs of these services while obliging beneficiaries to pay recurrent costs.²⁰²⁸ In line with government's announcement to provide free basic services to impoverished households, the national government adopted several sector-specific policies and guidelines in the area of water, electricity and sanitation between 2001 and 2005.²⁰²⁹ 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.²⁰³⁰ In 2006, the *Draft Municipal Indigent Policy Framework* was replaced by the *National Framework for Municipal Indigent Policies (NIP)*²⁰³¹ and has effectively replaced "former indigent policies and free basic services policies" used by the Department of Co-operative Governance and Traditional Affairs.²⁰³² 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."²⁰³³ The overall objective of the NIP is to ensure that all indigents have access to prescribed levels of basic water supply, sanitation, supply of basic energy and refuse removal services in areas with dense settlements.²⁰³⁴ The NIP defines an indigent to include anyone who does not have access to the following services: sufficient

in South Africa' in Pillay *et al Democracy and Delivery: Urban Policy in South Africa* 283-290.

2028 See Mosdell 'Free basic services: The evolution and impact of free basic water policy in South Africa' in Pillay *et al Democracy and Delivery: Urban Policy in South Africa* 283.

2029 These include: *Regulations Relating to Compulsory National Standards and Measures to Conserve Water* (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); *Draft Framework for a Municipal Indigent Policy* (2005) 2. For a detailed historical account on developments prior to the adoption of the *National Indigent Policy* (2006), see Mosdell 'Free basic services: The evolution and impact of free basic water policy in South Africa' in Pillay *et al Democracy and Delivery: Urban Policy in South Africa* 283-289; Muller 2008 *Environment and Urbanisation* 67 and 72-74.

2030 *National Indigent Policy* (2006) 2.

2031 See DPLG (now CoGTA) *National Framework for Municipal Indigent Policies* (2006). Hereafter, also referred to as the *National Indigent Policy* (2006).

2032 *National Indigent Policy* (2006) 6-7.

2033 *National Indigent Policy* (2006) 3 and 9; DPLG (now CoGTA) *Guidelines for the Implementation of Municipal Indigent Policies* (2006)10.

2034 *National Indigent Policy* (2006) 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.

water; basic sanitation; refuse removal in denser settlements; environmental health; basic energy; health care; housing; food and clothing.²⁰³⁵ This broad definition of an indigent is commendable and suggests that individuals can only exit the indigent bracket if they have access to this range of services.

6.3 Legal and policy framework to indigent policies in South Africa

By now, it is trite that 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.²⁰³⁶ The Constitution obliges the entire government to adopt "legislative and other measures" to progressively realise these rights.²⁰³⁷ This obligation has been interpreted to mean *inter alia* that, in addition to legislation, the executive arm of government can adopt policies to give effect to socio-economic rights.²⁰³⁸ This means that policies fall within the range of "other measures" contemplated by the Constitution as necessary to give effect to socio-economic rights.²⁰³⁹ Furthermore, as part of its socio-economic rights obligations, government is required to prioritise and attend to the needs of those in desperate situations.²⁰⁴⁰ In the same vein, the developmental mandate of local government requires that municipalities prioritise and meet the needs of local communities.²⁰⁴¹ In terms of local government legislation, section 108(1) of the *Systems Act* grants the Minister of the Department of Co-operative Governance and Traditional Affairs powers to set essential minimum or national standards, in consultation with relevant stakeholders, for the provision of free services to impoverished households in

2035 See *National Indigent Policy* (2006) 13.

2036 See 3.2.1; Bilchitz 2010 *SALJ* 591; Du Plessis 2011 *SAJHR* 285, 294 and 298; Du Plessis 2010 *RECIEL* 319; Dugard 'Power to the people? A rights-based analysis of South Africa's electricity services' in McDonald *Electric Capitalism* 266-268; Joseph, par 34-47.

2037 See s 24(b), 25(5), 26(2), 27(2) and 29(1)(b) of the Constitution.

2038 See Brand 'Introduction to Socio-Economic Rights' in Brand and Heyns *Socio-Economic Rights in South Africa* 12 and 14; Mazibuko, par 66; Grootboom, par 42; Pieterse 2010 *Law, Democracy and Development* 232.

2039 See Mazibuko, par 66; Grootboom, par 42. See Brand 'Introduction to Socio-Economic Rights' in Brand and Heyns *Socio-Economic Rights in South Africa* 12 and 14.

2040 *Grootboom*, par 44.

2041 See 2.5.4.5.

situations where framework legislation does not clearly define such standards.²⁰⁴²

As indicated in 6.2 above, in order to assist municipalities to better respond to the basic needs of indigent households such as water, electricity and sanitation, the national government adopted the NIP in 2006.²⁰⁴³ The NIP guarantees a basic level of free 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.²⁰⁴⁴ Table 4 below shows the range and levels of free basic services that municipalities should provide to indigent households across the country.²⁰⁴⁵

2042 This provision should be read in line with the obligation imposed on municipalities by s 4(2)(j) of the *Systems Act* to "contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution."

2043 See DPLG (now CoGTA) *National Framework for Municipal Indigent Policies* (2006). Hereafter, also referred to as the *National Indigent Policy* (2006).

2044 *National Indigent Policy* (2006) 6.

2045 The basic service level refers to the level of services required to maintain basic health and safety. See *National Indigent Policy* (2006) 21.

Table 4: Range and levels of services in the NIP²⁰⁴⁶

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.
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.

2046 Table 4 is based on information obtained from the NIP. See *National Indigent Policy* (2006) 21-23.

The service levels in Table 4 remain minimum levels which are subject to revision and increase by national government, in consultation with the other two spheres of government, periodically in accordance with changing circumstances.²⁰⁴⁷ The government's *Strategic Framework for Water Services* (2003)²⁰⁴⁸ 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.²⁰⁴⁹ Unfortunately, the basic national standards giving effect to the constitutional right of access to sufficient water has not been revised till date.²⁰⁵⁰ As suggested by expert evidence and as confirmed by the High Court and Supreme Court of Appeal in the *Mazibuko* cases,²⁰⁵¹ 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.²⁰⁵² 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.²⁰⁵³ 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.²⁰⁵⁴

In terms of electricity, as already indicated in 3.2.3.6 above, a quantitative survey conducted by *Earthlife Africa Johannesburg* in 2009 found that the national minimum standard was inadequate in meeting its objective.²⁰⁵⁵ In view of this finding, *Earthlife Africa Johannesburg* suggests that 200kWh of electricity is adequate to address the needs of urban households living in poverty.²⁰⁵⁶

2047 *National Framework for a Municipal Indigent Policies* (2006) 23.

2048 DWAF *Strategic Framework for Water Services: Water is Life, Sanitation is Dignity* (2003).

2049 DWAF *Strategic Framework for Water Services: Water is Life, Sanitation is Dignity* (2003) 45-47; Heleba "The Right of Access to Sufficient Water in South Africa: How Far Have we Come?" 2011 15 *Law, Democracy and Development* 1at 15.

2050 Heleba 2011 *Law, Democracy and Development* 15.

2051 For a discussion of the various court judgment, see for example: Jansen van Rensburg 2008 *Stell LR* 415; Dugard and Liebenberg 2009 *ESR* 11; Kotze 2010 *Journal of Human Rights and the Environment* 156-160; Stewart 2010 *Penn State International Law Review* 487-512.

2052 Jansen van Rensburg 2008 *Stell LR* 417.

2053 *Mazibuko* (CC), par 67.

2054 *Mazibuko* (CC), pars 48-49. For a critique of the Court's methodology in this case, see Stewart 2010 *Penn State International Law Review* 487 at 506-508.

2055 Adam *Free Basic Electricity: A better life for all* (2011) 29.

2056 Adam *Free Basic Electricity: A better life for all* (2011) 29.

The adequacy of the level of free essential services (outlined in Table 4 above) in addressing the basic needs of indigent households has been the subject of significant criticism.²⁰⁵⁷ Critics argue that a low level 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.²⁰⁵⁸ 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.²⁰⁵⁹

Despite the minimal level of free basic services adopted at the national level, the NIP encourages municipalities that can afford to provide service levels higher than those outlined at the national level or even expand the range of free services.²⁰⁶⁰ This shows that municipal indigent policies are very flexible instruments that can be used by municipalities to respond to context-specific needs of indigent households. For example, while Tswelopele Local Municipality may be content that it has ensured that one hundred percent of households within the municipal area have access to the basic, nationally prescribed, level of water supply, sanitation and electricity,²⁰⁶¹ the City of Johannesburg's "Expanded Social Package" programme goes beyond the range of the social services package

2057 Mosdell 'Free basic services: The evolution and impact of free basic water policy in South Africa' in Pillay *et al* *Democracy and Delivery: Urban Policy in South Africa* 296; Muller 2008 *Environment and Urbanisation* 76; Ruiters 'Free basic electricity in South Africa: a strategy for helping or containing the poor?' in McDonald *Electric Capitalism: Recolonising Africa on the Power Grid* 248; Dugard 'Power to the people? A rights-based analysis of South Africa's electricity services' in McDonald *Electric Capitalism* 276; Adam *Free Basic Electricity: A better life for all* 15.

2058 Mosdell 'Free basic services: The evolution and impact of free basic water policy in South Africa' in Pillay *et al* *Democracy and Delivery: Urban Policy in South Africa* 296 and 298; Ruiters 'Free basic electricity in South Africa: a strategy for helping or containing the poor?' in McDonald *Electric Capitalism: Recolonising Africa* 251; Dugard 'Power to the people? A rights-based analysis of South Africa's electricity services' in McDonald *Electric Capitalism* 276; Adam *Free Basic Electricity: A better life for all* 15.

2059 Ruiters 'Free basic electricity in South Africa: a strategy for helping or containing the poor?' in McDonald *Electric Capitalism: Recolonising Africa* 248-249; Dugard 'Power to the people? A rights-based analysis of South Africa's electricity services' in McDonald *Electric Capitalism* 265.

2060 *National Indigent Policy* (2006) 23; *Guidelines for the Implementation of Municipal Indigent Policies* (2006) 19.

2061 See *Tswelopele Local Municipality: 2011-2012 Tswelopele Local Municipality Annual Report* (2012) 25-32.

promoted by the NIP.²⁰⁶² In addition to water, electricity and sanitation services, the "Expanded Social Package" purports to use a poverty index to provide different forms of context-specific assistance to different categories of indigents, making it possible for more assistance to be provided to those most in need.²⁰⁶³ In addition, it is possible for registered indigents to open a tenant account for the provision of municipal services in the City of Johannesburg.²⁰⁶⁴ This means that the indigent policy can also target individuals rather than households. However, the opening of a tenant account is subject to authorisation of an "authorised" council official, the consent of the owner of the property and the payment of a deposit to the equivalent of three to six months deemed consumption.²⁰⁶⁵ The fact that the NIP encourages municipalities that have the necessary resources to go beyond its scope is commendable. This flexibility mechanism can be used by municipalities to ensure that indigent households have a higher level and wider range of basic services. This makes it possible, at least theoretically, for municipalities to adopt and implement context-specific indigent policies that address the actual needs of impoverished households.

Just like the City of Johannesburg, the level and range of free basic services offered to indigent households by the City of Tshwane goes beyond those prescribed in the NIP.²⁰⁶⁶ This once more confirms the flexible nature of municipal indigent policies. For example, the indigent policy includes free burial services for indigents.²⁰⁶⁷ It is suggested that although burial services may not constitute a social commodity such as water and electricity, money saved by family members of a deceased can be used for other purposes, for example. Furthermore, when a tenant with a valid lease with the City of Tshwane is registered as an indigent, his/her rental arrears are suspended.²⁰⁶⁸ The monthly rent is then calculated at 25 percent of the family income or the full cost recovery of the specific housing

2062 *City of Johannesburg: Expanded Social Package Policy and Strategy* (2008) 2.

2063 For details, see *City of Johannesburg: Expanded Social Package Policy and Strategy* (2008) 1-21; www.joburg.org.za/index.php?option=com_content&task=view&id=4012&Itemid=114 [Date of use 20 March 2013].

2064 See "10. Indigents" in *City of Johannesburg Credit Control and Debt Collection Policy* (2009).

2065 See "10. Indigents" in *City of Johannesburg Credit Control and Debt Collection Policy* (2009).

2066 See *City of Tshwane Indigent Policy Review 2010* (2010).

2067 See *City of Tshwane Indigent Policy Review 2010* (2010) 3 and 7.

2068 For details, see *City of Tshwane Indigent Policy Review 2010* (2010) 7.

scheme.²⁰⁶⁹ In terms of electricity, the City of Tshwane provides free basic electricity of 100kWh per household per month subject to any increase as determined by the municipal council.²⁰⁷⁰ While the range of services may be broader than that contained in the NIP, 100kWh of electricity cannot adequately meet the needs of indigent households.²⁰⁷¹

The NIP indicates that the range and basic service levels may vary across settlement conditions and across municipalities in the sense that "what is appropriate in a deep rural area will not be appropriate in an inner city situation."²⁰⁷² This suggests, for example that, while metered house connections may be appropriate for providing potable water in urban areas, wells or public standpipes may be appropriate in deep rural areas.²⁰⁷³ This suggests that what is appropriate in any given context, should be determined by municipalities and communities through the various mechanisms for facilitating public participation such as ward committees, for example.²⁰⁷⁴

In terms of the NIP, only indigent households that are connected to the electricity grid qualify for the 50 kWh free basic electricity supply.²⁰⁷⁵ This means that impoverished households not connected to the electricity grid still rely on candles and paraffin lamps for lighting. Without access to electricity, such "households cannot sufficiently respond to aspects of health, welfare, education and safety."²⁰⁷⁶ This means that these households continue to be subjected to different forms of social hardship.

The preceding paragraphs show that, while some municipalities are striving towards realising the basic standards set by the NIP for impoverished households, some have set higher standards for themselves by expanding the level and range of free basic services provided to indigent households. However, in terms of water, electricity and sanitation, the levels guaranteed in all indigent policies

2069 For details, see *City of Tshwane Indigent Policy Review 2010* (2010) 7.

2070 See *City of Tshwane Indigent Policy Review 2010* (2010) 8.

2071 Adam *Free Basic Electricity: A better life for all* (2011) 29.

2072 *National Indigent Policy* (2006) 24-25. See also *Guidelines for the Implementation of Municipal Indigent Policies* (2006) 11 and 19; Muller 2008 *Environment and Urbanisation* 78.

2073 *National Indigent Policy* (2006) 25; *Guidelines for the Implementation of Municipal Indigent Policies* (2006) 11.

2074 For a discussion on ward committees, see 3.3.6 above.

2075 Mosdell 'Free basic services: The evolution and impact of free basic water policy in South Africa' in Pillay *et al Democracy and Delivery: Urban Policy in South Africa* 298.

2076 Adam *Free Basic Electricity: A better life for all* 8.

cannot meet the actual needs of impoverished households. It is argued that if an indigent is defined as anyone without access to sufficient water or electricity, providing indigent households with potable water and electricity supply that is inadequate in meeting their basic needs does not remove them from the indigent bracket. This may contradict the *raison d'être* of the NIP and reinforce socio-economic inequalities and stigmatisation rather than reversing the situation. Failure to address the actual needs of people facing poverty amounts to a denial of social recognition or denial of access to the social resources needed to facilitate their participation in socio-political life as equals. This reinforces (economic) class subordination.²⁰⁷⁷

6.3.1 Relevant generic features of municipal indigent policies

According to the NIP, there are three main features of a "well-functioning" indigent policy: gaining access; maintaining access and targeting the poor.²⁰⁷⁸ This section discusses some generic features of municipal indigent policies with the aim to illustrate how they assist in ensuring that indigent households receive the range and levels of free basic services. In this process, this section highlights tension that could arise from the need to balance the welfare objectives of indigent policies and the long term financial sustainability of municipal services.

6.3.1.1 Gaining access to free basic services

The need for accessibility of free basic services to indigent households is catered for in the NIP.²⁰⁷⁹ The NIP prescribes that for an indigent policy to be considered "well-functioning", indigents must be able to have physical access to the package of essential services and this must be catered for in indigent policies.²⁰⁸⁰ The requirement of physical accessibility is consistent with the socio-economic rights obligations imposed on government as interpreted by the African Commission on Human and Peoples Rights (ACHPR), for example.²⁰⁸¹ In interpreting the general obligation imposed on State parties to take measures that will enable people enjoy socio-economic rights, the ACHPR held that government must ensure

2077 See Liebenberg 2012 *African Human Rights Law Journal* 9.

2078 *National Indigent Policy* (2006) 19.

2079 See *National Indigent Policy* (2006) 19; *Guidelines for the Implementation of Municipal Indigent Policies* (2005) 12.

2080 *National Indigent Policy* (2006) 19; *Guidelines for the Implementation of Municipal Indigent Policies* (2005) 12.

2081 See ACHPR *Principles and Guidelines* (2010) 10.

"physical and economic accessibility" of rights to "particularly vulnerable and disadvantaged groups."²⁰⁸² According to the ACHPR, physical accessibility means that the provision of goods and services required for the enjoyment of socio-economic rights "should be available to everyone, including members of disadvantaged and vulnerable groups, for whom special measures may be necessary."²⁰⁸³ This requirement suggests that governments should ensure that socio-economic rights policies and programmes that are designed to meet the needs of impoverished people should guarantee that the necessary goods and services are available and accessible to beneficiaries.²⁰⁸⁴ This means that, for pro-poor policies to be able to contribute towards the pursuit of social justice, impoverished people must be able to access the range of services promised by that policy.

In order to ensure that indigents have physical access to the package of free essential services, government should first and foremost, construct the infrastructure required for the delivery of such services. The construction of infrastructure is often costly and may require co-operation between the various spheres of government. As indicated above, although municipalities are responsible for the provision of basic services such as water, electricity and sanitation to indigent households, when the *Infrastructure Development Bill* becomes law, the responsibility for the development of the necessary infrastructure will lie with the PICC.²⁰⁸⁵ As required by the benchmarks in Table 1, this is an example of how municipalities share the responsibility for pursuing social justice and constitutional objectives with the other two spheres of government.²⁰⁸⁶ This enhances the potential of municipal indigent policies in the pursuit of social justice because it makes it possible for other spheres of government to support municipalities.

Furthermore, it is expected that the cost required to provide the level of relevant essential services to indigent households should be funded from different

2082 See ACHPR *Principles and Guidelines* (2010) 10.

2083 See ACHPR *Principles and Guidelines* (2010) 10.

2084 See ACHPR *Principles and Guidelines* (2010) 10.

2085 See 5.3.2.3 above.

2086 See 2.4.3.

sources.²⁰⁸⁷ According to the NIP, municipal indigent policies can be financed through three main sources: cross subsidies from non-residential and high income consumers using the same services; the equitable share grant from national government; and property rates and taxes.²⁰⁸⁸ Although the funds needed for establishing the required infrastructure, can be raised by some municipalities through a variety of internal measures such as public-private partnerships, for example, the NIP suggests that it is ideal for national government to provide the financing of the required infrastructure through the municipal infrastructure grant (MIG).²⁰⁸⁹

Despite the above sources of funding, most municipalities, especially in rural areas, do not have sufficient funds to provide all indigent households with the prescribed levels of essential services.²⁰⁹⁰ Apart from tensions which at times arise from efforts at cross-subsidisation, allocation from national government is often inadequate to address the financial shortfalls experienced by some municipalities.²⁰⁹¹ In addition, while most municipalities in rural areas lack the capacity to implement relevant projects and the necessary tax base to generate revenue to finance such projects, those in urban areas continue to be challenged by the influx of migrants from rural areas.²⁰⁹² This suggests that provincial and national governments could check the influx of migrants from rural to urban areas and improve the delivery of services in rural municipalities by increasing the level of financial and technical support to struggling municipalities.

2087 *National Indigent Policy* (2006) 26 and 31; Mosdell 'Free basic services: The evolution and impact of free basic water policy in South Africa' in Pillay *et al* *Democracy and Delivery: Urban Policy in South Africa* 299.

2088 *National Indigent Policy* (2006) 26 and 31; *Guidelines for the Implementation of Municipal Indigent Policies* (2006) 13; Ryneveld 'The development of policy on the financing of municipalities' in Pillay *et al* *Democracy and Delivery: Urban Policy in South Africa* 160-161; Mosdell 'Free basic services: The evolution and impact of free basic water policy in South Africa' in Pillay *et al* *Democracy and Delivery: Urban Policy in South Africa* 299.

2089 *National Indigent Policy* (2006) 19; *Guidelines for the Implementation of Municipal Indigent Policies* (2006) 12.

2090 *National Indigent Policy* (2006) 19; Van Ryneveld 'The development of policy on the financing of municipalities' in Pillay *et al* *Democracy and Delivery: Urban Policy in South Africa* 160-161.

2091 Van Ryneveld 'The development of policy on the financing of municipalities' in Pillay *et al* *Democracy and Delivery: Urban Policy in South Africa* 160-161 and 179.

2092 See 3.3.2; National Treasury *2011 Local Government Budget and Expenditure Review 2006/07-2012/13* (2011)10-11; Nealer 'Local Government and service delivery' in Van der Walt *Municipal Management: Serving the People* 158; *National Indigent Policy* (2006) 19.

6.3.1.2 *Maintaining access to free basic services*

The NIP indicates further that a well-functioning indigent policy is one that provides free basic services to indigent households on a continuous and long term basis in order to achieve their desired effect.²⁰⁹³ 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 package over an extended period of time. Without continuous access, indigents will be forced to live without the basic necessities of life and this will undermine the quest for social justice.

The requirement that a well-functioning indigent policy should ensure that impoverished people have sustainable access to basic services over an extended period of time is also consistent with the obligation imposed on governments to ensure that "the necessary goods and services needed to enjoy" socio-economic rights are practically available to individuals on a "sufficient and continuous" basis.²⁰⁹⁴ This obligation suggests, for example, that goods and services provided by government in a pro-poor policy be available to people living in poverty on a continuous basis if they are to achieve desired objectives. In the same vein, Fraser suggests that means-tested welfare policies that specifically target people living in poverty can only contribute towards the pursuit of social justice if persistently pursued on a long term basis by government.²⁰⁹⁵

The need to sustainably manage water and electricity infrastructure has led some municipalities to intensify cost-recovery programmes often leading to disconnections and disruption of supplies in some indigent households.²⁰⁹⁶ As part of resistance to the apartheid system of government, some South Africans withheld the payment of rates for municipal services.²⁰⁹⁷ This practice developed into a culture of non-payment for municipal services which persisted even after

2093 *National Indigent Policy* (2006) 20; *Guidelines for the Implementation of Municipal Indigent Policies* (2006) 13.

2094 ACHPR *Principles and Guidelines* (2010) 10.

2095 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in Fraser and Honneth *Redistribution or Recognition* 78-79.

2096 Dugard 'Power to the people? A rights-based analysis of South Africa's electricity services' in McDonald *Electric Capitalism: Recolonising Africa* 272 and 277-278.

2097 See Dugard 'Civic Action and Legal Mobilisation: the Phiri water meters case' in Handmaker and Berkhout *Mobilising Social Justice in South Africa* 81-83.

the transition to democracy.²⁰⁹⁸ This practice, together with wasteful consumption habits, has made it difficult for some municipalities to generate the finances needed to revamp their aging infrastructure.²⁰⁹⁹ In order to address these problems, recover cost for services provided and ensure sustainable provision of basic services, some municipalities introduced cost-recovery measures which often included the installation of prepaid meters.²¹⁰⁰ With the use of pre-paid meters, indigent households that cannot purchase additional electricity credits are cut-off from supply after consuming their free basic levels.²¹⁰¹ This means that, some indigent households continue to live without continuous access to basic needs such as water and electricity.

Dugard argues that cost-recovery principles are intensified by municipal distributors because they increasingly function as "corporatised entities according to business plans."²¹⁰² 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.²¹⁰³ 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.²¹⁰⁴ The need for cost-recovery in order to be able to sustainably provide services to communities, therefore, raises a dilemma between the redistributive potential of indigent policies and the long term financial sustainability of municipalities.²¹⁰⁵ In addition, the continuous provision of a free basic service such as potable water, a natural resource, is often constrained by external factors such as droughts.²¹⁰⁶ This often requires a careful

2098 See Dugard 'Civic Action and Legal Mobilisation: the Phiri water meters case' in Handmaker and Berkhout *Mobilising Social Justice in South Africa* 81-83.

2099 See Dugard 'Civic Action and Legal Mobilisation: the Phiri water meters case' in Handmaker and Berkhout *Mobilising Social Justice in South Africa* 81-83.

2100 See Dugard 'Civic Action and Legal Mobilisation: the Phiri water meters case' in Handmaker and Berkhout *Mobilising Social Justice in South Africa* 81-83.

2101 Dugard 'Power to the people? A rights-based analysis of South Africa's electricity services' in McDonald *Electric Capitalism* 272 and 277-278.

2102 Dugard 'Power to the people? A rights-based analysis of South Africa's electricity services' in McDonald *Electric Capitalism* 265.

2103 Dugard 'Power to the people? A rights-based analysis of South Africa's electricity services' in McDonald *Electric Capitalism* 265.

2104 Dugard 'Power to the people? A rights-based analysis of South Africa's electricity services' in McDonald *Electric Capitalism* 265.

2105 Dugard 'Power to the people? A rights-based analysis of South Africa's electricity services' in McDonald *Electric Capitalism* 272.

2106 See *Mazibuko* Case, par 3.

management of natural resources, a responsibility shared by all spheres of government.²¹⁰⁷

In order to ensure sustainable access, municipalities are further required to plan realistic exit strategies for indigent populations so that where the circumstances of indigents improve significantly, those who can afford to pay, should pay for municipal services.²¹⁰⁸ However, it is suggested that it can be difficult for municipalities to plan realistic exit strategies for indigent households in the current socio-economic context which is generally characterised by high unemployment, low skills development and constrained economic growth.

To ensure long term sustainability, municipal indigent policies must be an integral part of the IDP financial planning processes.²¹⁰⁹ Since an adopted IDP is the main strategic planning instrument which guides and informs all planning, management and development in a municipality,²¹¹⁰ this can ensure that municipal budgets reflect the cost for providing indigent households with basic services, for example. It is expected that municipal expenditures should follow budgetary allocations outlined in the financial plan, a key component of the IDP.²¹¹¹

6.3.1.3 Targeting methods

The NIP requires that in implementing municipal indigent policies, municipalities should target indigent households that do not have access to basic services and ensure that people who can afford such services pay for them.²¹¹² However, as the *Mazibuko* case demonstrates, what constitutes a household in the South African context can be complex.²¹¹³ According to the NIP, targeting indigent households will ensure that municipalities remain financially viable, thereby, strengthening the long term sustainability of municipal indigent policies.²¹¹⁴ The NIP provides a range of options that can be used by municipalities to specifically target indigent households.²¹¹⁵ Municipalities can use, for example, "service level

2107 See *Mazibuko* Case, par 3. See generally the Preamble and Chapter 2 of NEMA.

2108 *Guidelines for the Implementation of Municipal Indigent Policies* (2006) 12-13.

2109 *Guidelines for the Implementation of Municipal Indigent Policies* (2006) 11 and 17.

2110 See s 35(1)(a) of the *Systems Act*.

2111 See s 26(h) of the *Systems Act* and 5.3.2.1.

2112 *National Indigent Policy* (2006) 20; *Guidelines for the Implementation of Municipal Indigent Policies* (2006) 13.

2113 In this case, 20 people lived on a stand. See *Mazibuko*, par 4.

2114 *National Indigent Policy* (2006) 20.

2115 See *National Indigent Policy* (2006) 26.

targeting";²¹¹⁶ "consumption-based targeting";²¹¹⁷ property value;²¹¹⁸ means testing;²¹¹⁹ plot size;²¹²⁰ geographic targeting;²¹²¹ "demand side subsidies";²¹²² and targeting through the lack of credit control.²¹²³

According to the NIP, it "is the responsibility of each municipality to select the targeting mechanism which suits it best."²¹²⁴ This flexible standard for targeting takes into consideration, the fact that the circumstances of municipalities differ and that what is appropriate in any context, will depend of local circumstances. However, for municipalities with limited capacity, this arguably leaves room for confusion as they may be unable to critically evaluate and select the most appropriate targeting mechanism in a given circumstance. The NIP acknowledges that, often, subsidies meant for indigent households "are badly targeted and wealthy or middle income people benefit from subsidised services while the indigents have to pay or do not receive a service at all."²¹²⁵

The advantages and disadvantages associated with the various targeting options²¹²⁶ and the flexibility accorded municipalities to select context-suited targeting options indicate the complex nature of implementing indigent policies. To minimise confusion, while upholding the need for flexibility in targeting options, the

2116 In this option, a particular service level is provided free to the poor. This could be the case with public standpipe water, for example. See *National Indigent Policy* (2006) 26; *Guidelines for the Implementation of Municipal Indigent Polices* (2006) 22.

2117 Through this option, those using a low amount of a service are provided with this for free. For example, through this option, everyone using less than 60kWh of electricity per month could be provided this level of electricity for free by a municipality. See *National Indigent Policy* (2006) 26; *Guidelines for the Implementation of Municipal Indigent Polices* (2006) 22.

2118 Through this option, the municipality uses the property value as an indication of household wealth and income. See *National Indigent Policy* (2006) 26.

2119 When the means test is applied, households which are below a pre-determined household income are given service subsidies *National Indigent Policy* (2006) 26; *Guidelines for the Implementation of Municipal Indigent Polices* (2006) 22.

2120 Through this option, municipalities exempt plot sizes with a zero pre-determined property rating from charges. *National Indigent Policy* (2006) 26; *Guidelines for the Implementation of Municipal Indigent Polices* (2006) 23.

2121 Through this option, municipalities identify poor areas and adjust their charges accordingly. *National Indigent Policy* (2006) 26; *Guidelines for the Implementation of Municipal Indigent Polices* (2006) 23.

2122 Under this option, individual households are given coupons to enable them purchase services. *National Indigent Policy* (2006) 26; *Guidelines for the Implementation of Municipal Indigent Polices* (2006) 23.

2123 Under this option, consumers are billed for services provided but there is lack of adequate follow-up to ensure payment. *National Indigent Policy* (2006) 26; *Guidelines for the Implementation of Municipal Indigent Polices* (2006) 23.

2124 See *National Indigent Policy* (2006) 27.

2125 See *National Indigent Policy* (2006) 26.

2126 The advantages and disadvantages of the various targeting options are set out in the NIP. See *National Indigent Policy* (2006) 28-29.

NIP prefers "service level targeting" in the areas of water and sanitation and consumption-based tariff in the area of electricity.²¹²⁷ Due to the fact that this preference is not prescriptive, it may not necessarily dispel confusion during implementation. However, some municipalities in the country prefer using the means-test as the most effective way of tracking and targeting indigent households.²¹²⁸ For example, in terms of the Indigent By-laws of the Tlokwe City Council,²¹²⁹ indigents are old age pensioners, the unemployed and households whose total monthly income does not exceed two old age social assistance grants.²¹³⁰ The applicant for indigent status and any other member of the household may not own any other fixed property, including fixed deposits and investments, other than the house/property in which they reside.²¹³¹ In Tshwane Metropolitan Municipality, as part of the means test, indigent households are required to comply with the following requirements: the gross monthly income of all members of the household must not exceed the total amount of two state old age pensions; the applicant as well as any member of the household should not own other fixed property than the one in which they reside; the person applying on behalf of a household must be above the age of 21 years, except if the child is appointed as executor by a court of law; the applicant must reside in the house where the services will be provided except where he/she applies on behalf of a child-headed household; the applicant must be the owner or tenant (as defined by the council) except when applying for a child-headed household; and the applicant must be a South African citizen.²¹³² In addition to these requirements, there is an elaborate list of onerous responsibilities which must be met by registered indigent households in the Tshwane Metropolitan Municipality.²¹³³ Examples of such requirements are: indigent households must always ensure that their consumption does not exceed the limited level of services; indigent households must accept the installation of a "device" to control consumption; and indigent households are

2127 See *National Indigent Policy* (2006) 30.

2128 *National Indigent Policy* (2006) 28-30; *Guidelines for the Implementation of Municipal Indigent Policies* (2006)12, 22-23.

2129 See *Potchefstroom City Council Credit Control, Debt Collection and Indigent By-laws* (2006). Tlokwe City Council still uses the 2006 Indigent By-laws. Accessed at <http://www.potch.co.za/pdf/bylaws/creditcontroldebtcollectionandindigentbylaw.pdf> [date of use 10 April 2013].

2130 See "An Indigent Policy for Potchefstroom" in *Potchefstroom City Council Credit Control, Debt Collection and Indigent By-laws* (2006)

2131 See "An Indigent Policy for Potchefstroom" in *Potchefstroom City Council Credit Control, Debt Collection and Indigent By-laws* (2006).

2132 See *City of Tshwane Indigent Policy Review 2010* (2010) 5.

2133 See *City of Tshwane Indigent Policy Review 2010* (2010) 6.

responsible for current accounts.²¹³⁴ These requirements constitute a means of controlling levels of consumption and ensuring long-term sustainability of municipal services. However, these sustainability requirements may also delimit the extent to which indigent households can use the range of municipal services irrespective of their actual needs. This once more raises the complex challenge faced by municipalities as they continue to struggle between meeting the actual needs of the poor and maintaining long-term sustainability of municipal services.

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.²¹³⁵ 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.²¹³⁶ 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.²¹³⁷ This suggests that municipalities should also implement measures that specifically seek to address the stigmatisation of indigents as "lesser" citizens.²¹³⁸ In line with the generic benchmarks for authorities' pursuit of social justice, Fraser suggests that unless means-tested welfare programmes address the stigma usually associated with beneficiaries, they may undermine rather than enhance the capacity of impoverished people to participate as true equals in social and political life.²¹³⁹ In

2134 See *City of Tshwane Indigent Policy Review 2010* (2010) 6.

2135 Van Ryneveld 'The development of policy on the financing of municipalities' in Pillay *et al Democracy and Delivery: Urban Policy in South Africa* 179. See Mosdell 'Free basic services: The evolution and impact of free basic water policy in South Africa' in Pillay *et al Democracy and Delivery: Urban Policy in South Africa* 298.

2136 See *National Indigent Policy* (2006) 28-30; Van Ryneveld 'The development of policy on the financing of municipalities' in Pillay *et al Democracy and Delivery: Urban Policy in South Africa* 179; Ruiters 'Free basic electricity in South Africa: a strategy for helping or containing the poor?' in McDonald *Electric Capitalism: Recolonising Africa on the Power Grid* 253-254.

2137 See Van Ryneveld 'The development of policy on the financing of municipalities' in Pillay *et al Democracy and Delivery: Urban Policy in South Africa* 179; Ruiters 'Free basic electricity in South Africa: a strategy for helping or containing the poor?' in McDonald *Electric Capitalism: Recolonising Africa on the Power Grid* 253-254.

2138 See Table 1 in 2.4.3.

2139 See Table 1 in 2.4.3; Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 48; Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Fraser and Honneth *Redistribution or Recognition* 76-77.

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 the recognition of recipients as full partners in socio-political and cultural interactions.²¹⁴⁰ The denial of social recognition reinforces class subordination which is inimical to local government's pursuit of social justice.²¹⁴¹

Although there seems to be no "best" method of targeting, it is the responsibility of each municipality to select the target mechanism best suited to its context and this often incorporates a mixture of options.²¹⁴² Selecting an appropriate targeting option requires that a municipality takes into consideration, the need for equity, efficiency, environmental sustainability, economic growth and implementability.²¹⁴³

In service areas such as water and electricity, the approach that is currently widely practised throughout the country, is the blanket or "rising block tariff" system.²¹⁴⁴ This system ensures the provision of a free basic amount of water and electricity to all households within the jurisdiction of a municipality which consume within the "first block" – a level of free basic water and electricity supply as determined by a municipality. After the first block, the other blocks are often unaffordable by some poor households, leading to service disconnections.²¹⁴⁵ It has been suggested that the block tariff system of targeting is sustainable only in areas with a large number of middle to high income users.²¹⁴⁶ In addition, it may require that municipalities develop special measures to deal with indigent

2140 Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' 49.

2141 See Table 1 in 2.4.3; Liebenberg 2012 *African Human Rights Law Journal* 9.

2142 *National Indigent Policy* (2006) 28-29; Mosdell 'Free basic services: The evolution and impact of free basic water policy in South Africa' in Pillay *et al Democracy and Delivery: Urban Policy in South Africa* 292; Muller 2008 *Environment and Urbanisation* 78.

2143 *National Indigent Policy* (2006) 27; Van Ryneveld 'The development of policy on the financing of municipalities' in Pillay *et al Democracy and Delivery: Urban Policy in South Africa* 179.

2144 See DWAF *Free Basic Water Implementation Strategy* (2007)16; Mosdell 'Free basic services: The evolution and impact of free basic water policy in South Africa' in Pillay *et al Democracy and Delivery: Urban Policy in South Africa* 292; Muller 2008 *Environment and Urbanisation* 76; Ruiters 'Free basic electricity in South Africa: a strategy for helping or containing the poor?' in McDonald *Electric Capitalism: Recolonising Africa* 254.

2145 Muller 2008 *Environment and Urbanisation* 76 and 83; Ruiters 'Free basic electricity in South Africa: a strategy for helping or containing the poor?' in McDonald *Electric Capitalism: Recolonising Africa* 254.

2146 Mosdell 'Free basic services: The evolution and impact of free basic water policy in South Africa' in Pillay *et al Democracy and Delivery: Urban Policy in South Africa* 292.

households that cannot stay within the limits of the level of the first block of consumption.²¹⁴⁷

In order to check negative consumption habits such as non-payment for services amongst South Africans and ensure that indigent households remain within the limits of the free basic water and electricity service levels, some municipalities have intensified the installation of prepaid meters.²¹⁴⁸ For example, in Tlokwe City Council, after an indigent is approved as eligible for free basic services, a prepaid meter must be installed in the indigent household within fourteen days prior to the registration of the indigent on the system.²¹⁴⁹ A similar position is adopted by Johannesburg Metropolitan Municipality, which "may install prepaid meters for all registered indigents."²¹⁵⁰ In the case of electricity supply, the prepaid meters ensure that after the basic service level has run out, indigent households must credit their meters before they can enjoy further access. Those who cannot afford to purchase extra units are thus automatically cut-off from supply. Furthermore, in the case of electricity, for households that cannot afford to buy a month's supply but rely on repeated purchases of few units, this may mean incurring extra transport cost.²¹⁵¹ In addition, the use of prepaid meters compels the poor to accept "sub-standard services" because some prepaid electricity meters have a limited supply of between 10 to 30 ampere, making it impossible for several appliances to be used concurrently.²¹⁵² In the case of water, Regulation 4 of the *Regulations Relating to Compulsory National Standards and Measures to Conserve Water*, read together with section 4(3)(c) of the *Water Services Act*,

2147 Ruiters 'Free basic electricity in South Africa: a strategy for helping or containing the poor?' in McDonald *Electric Capitalism: Recolonising Africa* 254.

2148 For a detailed account of this practice, see: Van Heusden 'Discipline and the new 'logic of delivery': Prepaid electricity in South Africa and beyond' in McDonald *Electric Capitalism: Recolonising Africa* 229-244; Ruiters 'Free basic electricity in South Africa: a strategy for helping or containing the poor?' in McDonald *Electric Capitalism: Recolonising Africa* 249, 256-259; Dugard 'Power to the people? A rights-based analysis of South Africa's electricity services' in McDonald *Electric Capitalism: Recolonising Africa* 264-265, 278-279; Von Schnitzler 2008 *Journal of Southern African Studies* 899-917.

2149 See "An Indigent Policy for Potchefstroom" in *Potchefstroom City Council Credit Control, Debt Collection and Indigent By-laws* (2006)

2150 See "9. Prepaid Meters" in *City of Johannesburg Credit Control and Debt Collection Policy* (2009).

2151 See Ruiters 'Free basic electricity in South Africa: a strategy for helping or containing the poor?' in McDonald *Electric Capitalism: Recolonising Africa* 258; Dugard 'Power to the people? A rights-based analysis of South Africa's electricity services' in McDonald *Electric Capitalism* 265 and 278-279.

2152 Ruiters 'Free basic electricity in South Africa: a strategy for helping or containing the poor?' in McDonald *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 *City of Tshwane Indigent Policy Review 2010* (2010) 8.

prohibits complete water disconnection on grounds for non-payment of bills. Where a household proves that it is unable to pay for water services, it cannot be denied access to basic water supply.²¹⁵³

Together, the above illustrates that the three key requirements of a "well-functioning" indigent policy potentially pose complex challenges to municipalities in their pursuit of social justice. Firstly, although municipalities are responsible for the provision of free basic services to indigent households, the responsibility for developing the necessary infrastructure lies especially with the national sphere of government. It was established that because local government is not responsible for establishing physical infrastructure for the provision of water, electricity and sanitation services, municipalities can only effectively respond to the needs of the poor through close co-operation with other spheres of government. The NIP acknowledges the importance of co-operative government in successfully implementing municipal indigent policies and outlines the part to be played by different role players at the national and provincial level.

Secondly, it was established that the need to ensure that municipal services are provided on a sustainable basis has led to the implementation of measures which often limits the extent to which indigent households can access basic services such as water and electricity, irrespective of their actual needs. It was argued that this reinforces socio-economic hardship and class subordination which is inimical to the pursuit of social justice.²¹⁵⁴ This is a complex dilemma because without prudent financial management, continuous access to free basic services for indigent households cannot be maintained in the long-term. Moreover, the flexibility provided to municipalities in selecting targeting options may pose significant challenges since all the targeting options have potential advantages and disadvantages. Although the means-test seems to be the preferred option for most municipalities, it is difficult to administer and is often identified as a source of stigmatisation to beneficiaries of indigent policies.²¹⁵⁵

2153 See s 4(3)(c) of the *Water Services Act*.

2154 See Liebenberg 2012 *African Human Rights Law Journal* 9.

2155 See Van Ryneveld 'The development of policy on the financing of municipalities' in Pillay *et al Democracy and Delivery: Urban Policy in South Africa* 179; Ruiters 'Free basic electricity in South Africa: a strategy for helping or containing the poor?' in McDonald *Electric Capitalism* 253-254.

6.3.1.4 Design and implementation of municipal indigent policies

While prescribing that every municipal indigent policy should be "developed in compliance with nationally set norms and standards", the *Guidelines for the Implementation of Municipal Indigent Policies* details six minimum steps which must be followed by municipalities in designing and implementing context-specific indigent policies.²¹⁵⁶ Each municipality is required to: undertake "planning activities" in order 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 facilitate public participation; establish a process for verifying residents/households that are eligible for free basic services where targeting methods are used; monitor and assess the extent to which the implementation of its indigent policy meets its defined objectives; and work in partnership with other spheres of government to alleviate poverty in indigent households to enable them move out of their indigent status.²¹⁵⁷ It is suggested that although it may not be necessary to reproduce the details of the process for designing, adopting and implementing municipal indigent policies in this context, it is necessary to make some observations about the six minimum steps prescribed by the *Guidelines for the Implementation of Municipal Indigent Policies*:

Firstly, as required by most experts on policy-making and consistent with local government's obligation to facilitate public participation in policy-making/local governance,²¹⁵⁸ the *Guidelines for the Implementation of Municipal Indigent Policies* require public participation in the indigent policy-making process. This is also in line with the benchmarks in Table 1.²¹⁵⁹ As already argued, facilitating public participation in decision-making shows equal respect for all those who engage in the process, builds local capacity and solidarity and ensures that the actual needs of communities are taken into consideration.²¹⁶⁰ The mandatory requirement for public participation in the process of designing indigent policies enhances their potential in contributing towards the pursuit of social justice.

2156 See *Guidelines for the Implementation of the National Indigent Policy by Municipalities* (2006) 23-39.

2157 See *Guidelines for the Implementation of the National Indigent Policy by Municipalities* (2006) 23-24.

2158 For a detailed discussion of the obligation to promote public participation in local government matters, see 4.2.2 above.

2159 See Table 1 in 2.4.3.

2160 See 4.2.2; Table 1 in 2.4.3.

However, as earlier mentioned, public participation at the level of most municipalities remains a sham.²¹⁶¹ This practically diminishes the extent to which indigent policies can reflect the actual needs of indigent households.

Secondly, the *Guidelines for the Implementation of Municipal Indigent Policies* clearly define the role of various actors.²¹⁶² For example, because both the legislative and executive authority of a municipality are vested in the Municipal Council,²¹⁶³ it obliges councils to initiate the process for the design of municipal indigent policies.²¹⁶⁴ This is then followed by the appointment of specific role-players to design the indigent policy in accordance with defined processes.²¹⁶⁵ The clear division of roles possibly avoids confusion in the allocation of tasks. In addition, the planning process in indigent policy-making requires municipalities to integrate the indigent policy process with that of the IDP.²¹⁶⁶ Specifically, it is required that the Chief Financial Officer and the IDP Manager should review draft indigent policies to ensure that they are aligned to other plans in the IDP such as the financial plan.²¹⁶⁷ However, unlike the IDP,²¹⁶⁸ municipal indigent policies are not expressly linked to the elected term of councillors.²¹⁶⁹ This suggests that they may enjoy a greater degree of flexibility and can be frequently revised taking into consideration changing local needs.

Another important feature in the implementation of municipal indigent policies is the requirement that municipalities should put in place, performance management mechanisms to monitor and evaluate "whether the service implemented is appropriate, functioning adequately and directed at the correct people."²¹⁷⁰ This

2161 See 4.2.2.

2162 See *Guidelines for the Implementation of the National Indigent Policy by Municipalities* (2006) 25.

2163 See s 151(2) of the Constitution; S 18(1) of the *Structures Act*, S 11(1) of the *Systems Act*.

2164 See *Guidelines for the Implementation of the National Indigent Policy by Municipalities* (2006) 25.

2165 See *Guidelines for the Implementation of the National Indigent Policy by Municipalities* (2006) 25.

2166 See *Guidelines for the Implementation of the National Indigent Policy by Municipalities* (2006) 26-27.

2167 See *Guidelines for the Implementation of the National Indigent Policy by Municipalities* (2006) 26.

2168 For details on the legal framework for IDPs, see Chapter 5 of the *Systems Act* and the discussion in Chapter 5 of this thesis.

2169 The term of office for councillors is 5 years. See s 159(1) of the Constitution.

2170 See *Guidelines for the Implementation of the National Indigent Policy by Municipalities* (2006) 37-38.

includes the development and implementation of performance indicators.²¹⁷¹ Although the implementation of performance management systems has the potential of improving efficiency and ensuring that defined objectives are met, the inadequate levels of basic services in the indigent policies under consideration raises doubts as to the effectiveness of existing performance management mechanisms in evaluating the adequacy of local indigent policies – if they exist in the first place.

The *Guidelines for the Implementation of Municipal Indigent Policies* indicate that, the Municipal Council has the power to adopt the indigent policy.²¹⁷² However, it does not specify how an indigent policy should be adopted. Due to the fact that the implementation of indigent policies has budgetary implications and relate to municipal "rates and taxes, levies and duties", it can be argued that it will require that a majority of the members of a Municipal Council must be present before a vote can be taken on the final indigent policy and that its adoption should be determined by a supporting vote of a majority of its members.²¹⁷³

The NIP, the *Guidelines for the Implementation of Municipal Indigent Policies* and local government law are generally mute on the legal status of municipal indigent policies.²¹⁷⁴ The section that follows specifically examines the legal nature of a municipal indigent policy.

6.4 Legal status of municipal indigent policies

In earlier parts of this study, it was indicated that national and municipal indigent policies fall within the category of policies referred to as "executive policies."²¹⁷⁵ It was also indicated that as executive policies, once adopted, indigent policies are enforceable irrespective of whether they have been transformed into by-laws or

2171 See *Guidelines for the Implementation of the National Indigent Policy by Municipalities* (2006) 38.

2172 See *Guidelines for the Implementation of the National Indigent Policy by Municipalities* (2006) 26.

2173 This opinion is informed by a reading of s 160(1)-(3) of the Constitution.

2174 In South Africa, there seems to be confusion on the legal nature of policies. See Bilchitz 2010 SALJ 598; *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* [2001] ZASCA 59 at par 7; *Minister of Education v Harris* 2001 11 BCLR 1157 (CC) at pars 10-11. In a paper approved for publication by the *Potchefstroom Electronic Law Journal* entitled: "Constitutional basis for the enforcement of 'executive policies' that give effect to socio-economic rights in South Africa", the research has attempted to clarify this confusion. However, in order to remain focused, this chapter does not venture into the details of this debate but rather, focuses specifically on the legal nature of municipal indigent policies.

2175 See 4.5.2.1.

not.²¹⁷⁶ This sub-section further explains why the rights of access to free basic water and electricity supply as well as sanitation contained in an adopted municipal indigent policy can be judicially enforceable.

It can be argued that the content of an adopted municipal indigent policy, to the extent that it creates a defined right to water, electricity and sanitation, can be enforced based on the interpretation of the positive duty imposed on government (the state) by *inter alia*, sections 24(b), 26(2), 27(2) and 29(1)(b) of the Constitution to "take reasonable legislative and other measures" to give effect to relevant socio-economic rights. As discussed above,²¹⁷⁷ the "abstract" nature of the socio-economic rights guaranteed in the Constitution requires that they should be transformed into concrete legal entitlements.²¹⁷⁸ The task to translate constitutional socio-economic rights into concrete entitlements is supposed to be executed broadly by the legislature, the executive and state administration and their respective organs of state through various processes, including law and policy-making and implementation.²¹⁷⁹ The responsibility to implement the socio-economic rights in the Constitution is shared by all three spheres of government and line functionaries within those spheres.²¹⁸⁰

The Court has expressed the view that the "*contours and content of the measures to be adopted*" to give effect to socio-economic rights "*are primarily a matter for the legislature and the executive.*"²¹⁸¹ This expression of the Court seems to suggest that the executive can use the governance instruments at its disposal to determine the content and scope/'contour' of socio-economic rights. For local government, this obligation entails that, in addition to by-laws, local government should adopt policies, plans and programmes that would contribute to the realisation of socio-economic rights.²¹⁸² However, by-laws, policies and plans

2176 See For a detailed argument on the constitutional basis for the enforcement of executive policies that give effect to constitutional socio-economic rights in South Africa, see: Fuo 2013 16(3) *PER* (forthcoming).

2177 See 3.2.1 and 3.2.2 above.

2178 Brand 'Introduction to Socio-Economic Rights' in Brand and Heyns *Socio-Economic Rights in South Africa* 12 and 14; Pieterse 2010 *Law, Democracy and Development* 232.

2179 Brand 'Introduction to Socio-Economic Rights' in Brand and Heyns *Socio-Economic Rights in South Africa* 12; Pieterse 2010 *Law, Democracy and Development* 232.

2180 See *Grootboom*, par 38, 40-66. S 40(1) of the Constitution outlines the three spheres of government.

2181 *Grootboom*, par 41. Own emphasis. See also *B and Others v Minister of Correctional Services*, pars 32 and 34.

2182 Du Plessis and Du Plessis 'The Balancing of Sustainability Interests in South Africa' in Faure and Du Plessis *The Balancing of Interests in Environmental Law in Africa* 432.

adopted to give effect to socio-economic rights must be reasonable.²¹⁸³ The Court has stressed that a wide range of measures could be adopted by government to meet its socio-economic rights obligations and that many of them would meet the requirements of reasonableness.²¹⁸⁴ This illustrates the very flexible nature of the reasonableness standard. Government can use a variety of measures to give effect to socio-economic rights.²¹⁸⁵ In view of the fact that policy constitutes the main governance instrument for executive office-bearers, this implies that where the executive adopts specific policies to give effect to socio-economic rights, the executive acts within the prescripts of the Constitution. This constitutional context informs Brand's argument that where the executive adopts policies that create concrete socio-economic rights or entitlements to particular social goods for defined categories of persons, these entitlements can be claimed and that courts can easily uphold such claims.²¹⁸⁶ The duty on the executive to adopt measures, including policies, to give effect to socio-economic rights is informed by the Constitution. Brand has indicated in the context of socio-economic rights jurisprudence that policies aimed at giving effect to socio-economic rights *inter alia*, define the obligations of the executive arm of government in relation to those rights and that they are enforceable to the extent that they create concrete rights or entitlements.²¹⁸⁷ This means that in the context of a municipality, the municipal council can give effect to socio-economic rights through by-laws and policies. From the above jurisprudence of the Court, it appears that sections 24(b), 26(2), 27(2) and 29(1)(b) of the Constitution also confer authority on the executive arm of municipalities to give effect to constitutional socio-economic rights. As such, it could be argued that, in practice, where adopted indigent policies give content to socio-economic rights as envisaged by the Constitution, such policies should have the force of law.

Despite the above position, it is argued that where an adopted indigent policy is subsequently transformed into a by-law (indigent policy by-law), only the adopted by-law giving effect to socio-economic rights may be enforceable in the case

2183 See *Grootboom*, par 39-44.

2184 *Grootboom*, par 41.

2185 See *Grootboom*, par 41.

2186 See Brand 'Introduction to Socio-Economic Rights' in Brand and Heyns *Socio-Economic Rights in South Africa* 13-14; See par 66 of *Mazibuko*; and pars 47-51 of *Nkotyana*.

2187 See Brand 'Introduction to Socio-Economic Rights' in Brand and Heyns *Socio-Economic Rights in South Africa* 16-19.

where they conflict.²¹⁸⁸ By-laws constitute original legislation, enacted by a deliberative assembly with express law-making powers.²¹⁸⁹ As original legislation, by-laws are superior to instruments adopted by municipal executives.²¹⁹⁰ However, this distinction is blurred in the context of municipal indigent policies adopted by councils that exercise both executive and legislative powers. The suggestion that an indigent by-law has superior force and should be enforceable over an indigent policy, is based on the fact that the *Systems Act* specifically requires that policies which create basic entitlements to free basic services to indigent households should subsequently be transformed into by-laws. According to section 74(2)(c) of the *Systems Act*, a tariff policy adopted and implemented by a municipal council must ensure that poor households have access to basic services through various mechanisms – including direct and indirect subsidisation. In the same vein, a municipality's credit control and debt collection policy must make "provision for indigent debtors that is consistent with its rates and tariff policies and any national policy on indigents".²¹⁹¹ The *Systems Act* specifically provides that each "municipal council must adopt by-laws" to give effect to the implementation and enforcement of its tariff policy as well as debt and credit control policy.²¹⁹²

From the above provisions, it appears that while the needs of indigent households can be addressed in an indigent policy, such a policy should be transformed into a by-law. Still, as Steytler indicates, in practice, municipalities do not consistently apply the relevant provisions of the *Systems Act*.²¹⁹³ In such instances, he argues that interested and affected persons could use a policy against a municipality because municipalities must operate consistently with their own policies in order to avoid arbitrary and irrational conduct.²¹⁹⁴ This suggests that even where municipalities fail to transform their indigent policies into by-laws, beneficiaries can use such policies to hold municipalities accountable. This enhances their social justice potential.

2188 Elsewhere, this researcher has argued that an executive policy is only enforceable to the extent that it complements legislation and cannot override or be in conflict with original legislation. See Fuo 2013 *PER* (forthcoming).

2189 Du Plessis *Re-Interpretation of Statutes* 45-47.

2190 Du Plessis *Re-Interpretation of Statutes* 45-47.

2191 See s 97(1)(c) of the *Systems Act*.

2192 See ss 75(1) and 98(1) of the *Systems Act*.

2193 See Steytler 2011 *SAPL* 491.

2194 See Steytler 2011 *SAPL* 488-489 and 491.

The ability of impoverished people to enforce adopted municipal indigent policies before they have been transformed into by-laws may help in addressing hardships that may arise from undue delays by some municipalities to transform such policies into indigent by-laws. One of the implications of the ability to enforce indigent policies giving effect to socio-economic rights at the local government level is that, it has the potential of creating many avenues through which socio-economic rights claims could be located. For example, a community resident could claim a right of access to sufficient water either based on the Constitution, legislation or a municipal indigent policy. In the absence of awareness, it becomes difficult for community residents to legally ground their claims. In other words, they may for example, demand that their right of access to water be fulfilled and in the absence of awareness, it becomes difficult to identify if this claim should be grounded in a municipal indigent policy, the NIP, a by-law, legislation or the Constitution.

6.5 Critical perspectives

Social justice cannot be achieved when people lack access to the basic needs of life.²¹⁹⁵ This means that, where government policies fail to address the actual needs of people living in poverty, they reinforce socio-economic hardships and fail to create the conditions needed to sustain participatory parity.²¹⁹⁶

Despite the degree of flexibility enjoyed by municipalities in setting the range and levels of free basic services that should be provided to indigents, most municipalities especially in previously disadvantaged areas, lack the financial resources to go above the basic standards set by the NIP.²¹⁹⁷ In contrast to the examples of the Cities of Johannesburg and Tshwane referred to above, the indigent policies of some other 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 Tlokwe City Council currently provides indigent households: 6kl of water free of charge per month; 50kWh of electricity per month; free education on how to repair water leaks; free installation of prepaid meters;

2195 See 2.2.2; 2.4.2 above.

2196 See 2.3.3.3; 2.2.2; 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.

2197 See National Treasury *2011 Local Government Budget and Expenditure Review 2006/07-2012/13* (2011) 191-210; Zybrands 'Local government' in Venter and Landsberg *Government and Politics in South Africa* 136.

interests-free arrangements for the payment of outstanding municipal bills; and free refuse removal.²¹⁹⁸ Furthermore, all indigent households in the Tswaing Local Municipality qualify for property, sewage and refuse removal charges and get 6kl of water and 50kWh of electricity free per month.²¹⁹⁹ Any consumption exceeding the basic level of 60kl of water and 50kWh of electricity is supposed to be paid by indigent households.²²⁰⁰ In addition, in the City of Cape Town, indigent households are entitled to the same range and basic levels of essential services outlined in the NIP.²²⁰¹ Mangaung Metropolitan Municipality provides the same range and levels of essential services to indigent households.²²⁰² This review shows that differences in the levels of free basic water and electricity services provided by different municipal indigent policies are minimal. This suggests that the flexibility mechanism in the NIP is underutilised even by municipalities with arguably more resources. This defeats the welfare objectives of the NIP at the local level.

It has been argued that the minimalist approach to the level of free basic services adopted by national government and some municipalities may maintain rather than alleviate social hardships occasioned by poverty.²²⁰³ This means that, where indigent policies fail to meet the actual needs of impoverished households, they minimise their social justice potential and reinforce rather than address class subordination.²²⁰⁴ 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

2198 See Tlokwe City Council *Draft Service Delivery and Budget Implementation Plan 2012-2013* (2012) 88 and 92; 'An Indigent Policy for Potchefstroom' in *Potchefstroom City Council Credit Control, Debt Collection and Indigent By-laws* (2006) GN 270 in NWP GG 6315 of 19 September 2006.

2199 *Tswaing Local Municipality: Amended Integrated Development Plan 2007-2011*(2009) at 44.

2200 For details, see *Tswaing Local Municipality: Amended Integrated Development Plan 2007-2011*(2009) at 44-46.

2201 See <http://www.capetown.gov.za/en/Pages/Indigentpolicy.aspx> [date of use 25 March 2013].

2202 The Mangaung Metropolitan Municipality is still using the indigent policy that was approved by its council on the 16 of May 2008. See *Mangaung Local Municipality Indigent Policy* (2008) 4. This policy was accessed at <http://www.mangaung.co.za/legal-services/documents/Indigent%20Policy.pdf> [date of use 25 of March 2013].

2203 Ruiters 'Free basic electricity in South Africa: a strategy for helping or containing the poor?' in McDonald *Electric Capitalism: Recolonising Africa on the Power Grid* 252; Dugard 'Power to the people? A rights-based analysis of South Africa's electricity services' in McDonald *Electric Capitalism: Recolonising Africa* 276.

2204 Table 1 in 2.4.3 indicates that redistributive measures should meet basic needs. See also Liebenberg 2012 *African Human Rights Law Journal* 9.

the actual needs of those in desperate need. In this manner, they reinforce rather than alleviate social hardships occasioned by poverty.

Furthermore, contrary to the benchmarks 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. The failure to address stigma associated with beneficiaries of municipal indigent policies amounts to a denial of social recognition which reinforces socio-economic inequalities.²²⁰⁵ This minimises the social justice potential of the municipal indigent policies under consideration.

6.6 Chapter summary

This chapter has demonstrated that local government indigent policies are relevant and have the potential to contribute towards the pursuit of social justice generally because, they seek to specifically ensure that impoverished households have sustainable access to at least water, electricity and sanitation services. It was established that the relevance and potential of municipal indigent policies in the pursuit of social justice is enhanced by the fact that they specifically seek to give effect to the socio-economic rights of impoverished households, promote public participation in the design and implementation process and require the sharing of responsibilities between different actors at the national, provincial and local government level. In addition, although the NIP specifically aims at establishing a framework that could be used by municipalities to provide the indigent access to basic sanitation, water and electricity supply, its broad definition of an indigent is commendable. The definition includes those without access to food, clothing, healthcare services and housing. From the broad definition of an indigent, the NIP makes it possible for municipalities that have the resources to expand the range of free basic services that could be provided to indigent households taking into consideration the local context.

However, it was established that 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 and does not speak to the full spectrum of social justice issues captured in the benchmarks in Table 1. If an

2205 See Liebenberg 2012 *African Human Rights Law Journal* 9.

indigent is defined as anyone without access to sufficient water or access to basic sanitation and electricity, providing indigent households with potable water, sanitation services and electricity supply that is inadequate in meeting their basic needs does not remove them from the indigent bracket. It was argued that this contradicts the very lofty welfare objectives of the NIP, reinforces socio-economic inequalities and stigmatises beneficiaries of municipal indigent policies. It was further argued that the failure to address the actual needs of impoverished households amount to a denial of social recognition or denial of access to the social resources needed to facilitate their participation in socio-political life as equals. This reinforces (economic) class subordination and is antithetical to the pursuit of social justice. It was established that, in their current form, the potential of the indigent policies specifically 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. In their current guise, the indigent policies considered in this study may reinforce rather than alleviate social hardships occasioned by poverty. To enhance their social justice potential, it is suggested that the indigent policies of the municipalities reviewed in this study be revised to reflect the actual needs of impoverished households.

It was argued that the welfare objectives of municipal indigent policies often conflict with the need for long term financial sustainability. Although the various targeting mechanisms for municipal indigent policies are intended to prevent the wastage of limited available resources and potentially increase long-term continuity of municipal services, their implementation is often problematic. The installation of pre-paid meters exposes beneficiaries to difficult situations where they are forced to go without access to basic energy supply for weeks. It was also argued that, the means-test, the preferred choice of most municipalities, is difficult to administer and often leads to the stigmatisation of beneficiaries of municipal indigent policies. This form of stigma denies beneficiaries social recognition thereby reinforcing socio-economic inequalities. It was stated that the absence of any strategy to deal with stigma attached to beneficiaries of municipal indigent policies minimises the social justice potential of these policies. The absence of a prescriptive targeting option does not dispel confusion on the most adequate targeting methods. It is submitted that the need to balance the welfare objectives

of municipal indigent policies and their long-term financial sustainability present a complex challenge to some municipalities.

However, it was established that there are some positive features built into municipal indigent policies which could be utilised to enhance their responsiveness to the basic needs of impoverished households and the pursuit of social justice in general. Firstly, it was established that the nationally defined range and levels of free basic services are merely minimum guidelines that could be improved by municipalities. This means that indigent policies are flexible instruments which could be given context-specific content by municipalities. Instead of using these guidelines as prescribed standards, municipalities should understand them as mere guidelines and engage with affected households to ensure that their living conditions are taken into account in designing context-specific indigent policies. Furthermore, in line with the benchmarks for state authorities' pursuit of social justice, the NIP recognises the importance of partnership between different actors in all spheres of government. This is important given the fact that the infrastructure required for the provision of free basic services such as water and electricity for indigents is expensive and has to be constructed by role players in the other two spheres of government such as ESKOM, for example. Due to this fact, the nature of support municipalities receive from other spheres of government will also impact on the content and implementation of municipal indigent policies. In the absence of national and provincial support, municipalities without a viable tax base may not be able to go above the minimum levels prescribed by the NIP. It is argued that municipalities may not be able to effectively balance the competing welfare and sustainability objectives of the NIP without sufficient support from national and provincial governments. Moreover, the requirements for public participation could also be used to facilitate quality community participation in the design and implementation of municipal indigent policies. This may ensure that adopted policies reflect the actual needs of indigent households.

It was established that neither the NIP nor the *Guidelines for the Implementation of Municipal Indigent Policies* specifies the legal status of municipal indigent policies. This chapter argued, based on the positive duties imposed on the state to adopt reasonable legislative and other measures to realise constitutional socio-economic rights that, adopted municipal indigent policies are enforceable against

a municipality to the extent that they create rights and impose duties even though they have not been transformed into by-laws. However, it was indicated that where municipal indigent policies have been transformed into by-laws pursuant to relevant provisions of the *Systems Act*, interested and affected persons can only enforce the relevant by-law especially where both instruments conflict. This means that in cases of delays in transforming an adopted indigent policy into a by-law, indigent households can use an adopted municipal indigent policy to hold a municipality to account through litigation, for example.

The chapter that follows offers recommendations aimed at optimising the role of local government in realising the constitutional socio-economic rights underpinning social justice and transformative constitutionalism with specific reference to IDPs and local government indigent policies.

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

7.1	General background	416
7.2	Definitions, concepts and categories of rights	418
7.2.1	Transformative constitutionalism	418
7.2.2	Social justice: Objective of transformative constitutionalism	419
7.2.3	<i>Developmental local government</i>	<i>421</i>
7.2.4	<i>Social justice as a mandate of local government</i>	<i>422</i>
7.2.5	<i>Socio-economic rights responsibilities of local government</i>	<i>424</i>
7.2.6	<i>Categorisation of rights</i>	<i>425</i>
7.2.7	<i>Local governance instrumentation</i>	<i>426</i>
7.3	Elements for pursuing social justice at the local sphere	428
7.4	Main findings	429
7.4.1	<i>Social justice</i>	<i>430</i>
7.4.2	<i>Socio-economic rights</i>	<i>431</i>
7.4.3	<i>Developmental local government</i>	<i>432</i>
7.4.4	<i>Generic measures towards pursuing social justice</i>	<i>433</i>
7.4.5	<i>Local governance instrumentation</i>	<i>433</i>
7.4.6	<i>Relevance and potential of IDPs</i>	<i>434</i>
7.4.7	<i>Relevance and potential of indigent policies</i>	<i>435</i>
7.4.8	<i>The role of public participation</i>	<i>437</i>
7.5	Recommendations	437
7.5.1	<i>Means and methods to optimise the role and place of local government in the pursuit of social justice</i>	<i>437</i>
7.5.2	<i>Optimising the potential of IDPs</i>	<i>439</i>
7.5.3	<i>Optimising potential of local government indigent policies</i>	<i>439</i>
7.5.4	<i>Promoting public participation</i>	<i>440</i>
7.6	Limitations and needs for future research	441
7.7	Conclusion	441

7.1 General background

In South Africa, the Constitution is expressly committed to addressing the injustices of the past and to establishing a society based on social justice, human rights and democratic values through the principle of constitutionalism. The constitutional commitment to pursue social justice is since 1996, firmly rooted in the vision of transformative constitutionalism.²²⁰⁶ As an objective of transformative constitutionalism, this study adopts the view 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 for them to function as true equals in society.²²⁰⁷ The variety of rights in the Bill of Rights represents one of the mechanisms that could be used to establish a socially just society.²²⁰⁸ Despite the interrelated and interdependent nature of human rights, the socio-economic rights contained in the Bill of Rights appear to be the most important for the pursuit of social justice because if realised, this could ensure that impoverished people have access to their material needs.²²⁰⁹ Furthermore, the transformative potential of socio-economic rights lies in the fact that, in addition to the duty to respect, protect, promote and fulfil these rights, the government is obliged to adopt and implement reasonable legislative and other measures to ensure their realisation.²²¹⁰ Moreover, where government and other organs of state fail to comply with their socio-economic rights obligations, affected and interested parties could rely on the procedural rights in the Bill of Rights to hold the state accountable.²²¹¹

The apartheid state machinery had been fundamentally altered in terms of constitutional theory by a number of basic principles or abstract foundational norms that underlie South Africa's constitutional order informing the interpretation of the Constitution. These principles include constitutionalism; the rule of law, democracy and accountability; separation of powers and checks and balances; co-operative government and devolution of power.²²¹² Constitutionalism "is the idea that government should derive its powers from a written constitution and its

2206 See 2.2 above.

2207 See 2.2.2; 2.4.2 above.

2208 See 2.2.2; 3.2 above.

2209 See 3.2.1; 3.2.2 above.

2210 See 1.2; 3.4.5 above. The Court's current application of the reasonableness standard limits the transformative potential of socio-economic rights. See 3.2.1 and 3.2.2.3.

2211 See 3.3 above.

2212 See 2.5.4 above.

powers should be limited to those set out in the constitution."²²¹³ The Constitution provides for procedural and substantive limitations on the power of government. Structural and procedural limitations on government specify the functions of different state institutions while substantive limitations are imposed by the Bill of Rights. These limitations on state power can only be effective with three associated principles of law: supremacy (the constitution is the highest law in the country and binds all branches of government), justiciability (the judiciary must have the power to enforce the supreme constitution) and entrenchment (the protection of the constitutional text requiring a certain majority vote before the constitution can be amended).

As part of these basic principles or abstract foundational norms that underlie South Africa's constitutional order, the Constitution entrenched three spheres of government (national, provincial and local) which are distinct, interrelated and interdependent. Local government is a co-responsible sphere of government with substantive constitutionally defined powers and functions.²²¹⁴ In addition, local government is mandated to play an expanded developmental role.²²¹⁵ As a co-responsible sphere of government, local government is obliged, for example, to contribute, together with the other spheres of government, to achieve constitutional objectives and realise constitutional socio-economic rights.²²¹⁶ It was argued in this study that, by virtue of it being a co-responsible sphere of government, local government has an important role to play in contributing towards the pursuit of the transformative constitutional mandate and social justice.

The main objective of this study was to examine the extent to which South Africa's legal and policy framework facilitates local government's contribution towards the pursuit of the transformative constitutional mandate and social justice, against the backdrop of a justiciable Bill of Rights, which oblige all spheres of government to realise socio-economic rights.²²¹⁷ In order to achieve this objective, the researcher analysed the legal and policy framework on local government in South Africa, reviewed and established links between the theoretical concepts underpinning this study, examined the socio-economic rights duties of municipalities and specifically

2213 See 2.2.2 above.

2214 See 2.5.4.1; 2.5.4.3 above.

2215 See 2.5.4.5 above.

2216 See 2.5.4.5.7 above.

2217 See generally 1.3 above.

explored the relevance and potential of IDPs and local government indigent policies as legally prescribed local governance instruments to address poverty and inequality in the pursuit social justice.

It was argued in the study that, as a co-responsible sphere of government, municipalities can contribute towards the pursuit of transformative constitutionalism and social justice by respecting, protecting, promoting and fulfilling socio-economic rights (specifically those fitting its areas of legislative and executive competence) and by adopting and implementing other measures such as municipal indigent policies and IDPs. This argument is supported by the fact that by respecting, protecting, promoting and fulfilling socio-economic rights, impoverished people could have access to their basic needs on a continuous basis. In addition, both IDPs and municipal indigent policies expressly seek to further give effect to constitutional socio-economic rights and are to an extent flexible, instruments that could be used by municipalities to prioritise the needs of people living in poverty. The position adopted in this study is that the satisfaction of basic needs is a pre-condition for establishing a society based on social justice.²²¹⁸ It is further argued in this study that, where municipalities fail to meet the needs of local communities as required by their socio-economic rights duties, affected communities and interested persons could use the procedural rights in the Constitution to hold them accountable.²²¹⁹

7.2 Definitions, concepts, and categories of rights

A number of key concepts were defined in order to provide the context to the discussion in this study. The concepts and definitions below underpinned the research.

7.2.1 Transformative constitutionalism

Broadly speaking and within the context of this research, transformative constitutionalism is to be understood as a long term social, economic and political vision of post-apartheid South Africa, as perceived through the framework of the Constitution aimed at restructuring society towards a more just society.²²²⁰ One of the core objectives of transformative constitutionalism is the pursuit of social

2218 See 2.4.2 above.

2219 See 3.3 above.

2220 See generally 2.2 above.

justice which corresponds with the objectives of the Constitution.²²²¹ Transformative constitutionalism requires that all spheres of government and organs of state must pursue social justice through a rights lens.²²²² It was argued that government can establish a society based on social justice by realising the socio-economic rights entrenched in the Constitution.²²²³ This argument is supported by the fact that when government complies with its socio-economic rights duties, it becomes possible for impoverished people to have access to the material resources needed to participate in decision-making processes as true equals. Without basic material needs, people living in poverty cannot participate equally in decision-making. The position adopted in this study is that the satisfaction of basic needs is a pre-condition for establishing socially just communities.²²²⁴ This means that the realisation of socio-economic rights contributes towards meeting this pre-condition.

7.2.2 Social justice: objective of transformative constitutionalism

Although there is consensus that the pursuit of social justice is the core objective of transformative constitutionalism, there is no universally acceptable definition of social justice.²²²⁵ After a review of different theories underlying the concept of social justice and considering institutional perspectives on social justice,²²²⁶ it was argued in this study that any conception of social justice that is adopted in the South African context must be consistent with the rights and values of the Constitution and the vision of transformative constitutionalism.²²²⁷ The need for contextually suited conception of social justice was justified by the fact that theories and perspectives in the social sciences are generally relative and cannot be completely divorced from time and politics. Against this backdrop, this research motivated and adopted Fraser's conception of social justice based on "participatory parity."²²²⁸ It was explained that Fraser is of the view that a society in which there is social justice is one where there is "participatory parity."²²²⁹ According to Fraser, for social justice to be achieved, the social arrangements in

2221 See 2.2.2 above.

2222 See 2.2.2 above.

2223 See 2.2.2; 3.2.1 above.

2224 See the discussion in 2.3 above.

2225 See 2.3 above.

2226 See 2.3 above.

2227 See 2.4.2 above.

2228 See 2.4.2 above.

2229 See 2.3.3.3 above.

any given society must permit all adult members of that society to interact with each other as true equals.²²³⁰ However, the type of social arrangements required for achieving social justice do not yet exist in South Africa. Fraser argues that for social justice to be achieved, two conditions must be met: material resources must be (re)distributed to ensure that people have an independent voice; and that cultural and institutional values should express equal respect for all people.²²³¹ According to Fraser, the first condition - the (re)distribution of material resources to meet the basic needs of people living in poverty – is the pre-condition for establishing a society based on social justice.²²³² However, the two conditions proposed by Fraser do not directly solve some structural causes of poverty and inequality such as neo-liberal market policies.

Despite motivating and adopting Fraser's conception of social justice, it was illustrated that there is agreement amongst theorists, institutions and other experts that social justice is primarily concerned with the eradication of poverty and extreme inequalities in access to basic needs in order to ensure that impoverished people have the material resources needed to enable them interact as true equals in socio-political life.²²³³

Based on different definitions and theories on social justice, ten benchmarks were distilled to assist state institutions pursue social justice. It was established that in order to contribute towards the pursuit of social justice, state authorities (inclusive of municipalities) must:

- redistribute resources through measures such as policies;²²³⁴
- facilitate public participation in decision-making;²²³⁵
- address the structural causes of inequalities;²²³⁶
- build capacity;²²³⁷
- guarantee and fulfil human rights;²²³⁸

2230 See 2.3.3.3 above.

2231 See 2.3.3.3 above.

2232 See 2.3.3.3 above.

2233 See 2.4.1; 2.4.2 above.

2234 See Table 1 in 2.4.3 above.

2235 See Table 1 in 2.4.3 above.

2236 See Table 1 in 2.4.3 above.

2237 See Table 1 in 2.4.3 above.

2238 See Table 1 in 2.4.3 above.

- promote sustainable development;²²³⁹
- address stigma associated with welfare beneficiaries;²²⁴⁰
- avoid privatisation of basic services;²²⁴¹
- promote group solidarity,²²⁴² and
- share responsibility between the three spheres of government.²²⁴³

These benchmarks were found to be not hierarchical. The protection and fulfilment of constitutional socio-economic rights represent (only) one of the mechanisms that can be used by municipalities to pursue social justice.²²⁴⁴

7.2.3 Developmental local government

Local government specifically has undergone fundamental transformation following South Africa's transition to constitutional democracy.²²⁴⁵ Based on its broad constitutional obligations, it was argued that local government has an expanded developmental mandate.²²⁴⁶ Today, local government is constitutionally obliged to fulfil extensive developmental duties.²²⁴⁷ This far-reaching mandate requires that, as local developmental agents of the state, municipalities should provide democratic and accountable government for local communities; ensure the provision of services to communities in a sustainable manner; promote socio-economic development; promote a safe and healthy environment; facilitate the involvement of communities in the matters of local government; participate in national and provincial development programmes; and contribute towards the realisation of constitutional socio-economic rights.²²⁴⁸ The WPLG (1998) draws from these constitutional duties to emphasise that the notion of "developmental local government" obliges municipalities to work together with citizens and community organisations within their jurisdictions to find sustainable ways to meet their socio-economic and material needs.²²⁴⁹ It was argued that, to be "developmental", municipalities must strive towards realising all the constitutional

2239 See Table 1 in 2.4.3 above.

2240 See Table 1 in 2.4.3 above.

2241 See Table 1 in 2.4.3 above.

2242 See Table 1 in 2.4.3 above.

2243 See Table 1 in 2.4.3 above.

2244 See 2.2.2; 3.2 above.

2245 See 2.5.4 above.

2246 See 2.5.4.5 above.

2247 See 2.5.4.2; 2.5.4.5 above.

2248 See 2.5.4.5 above.

2249 See 2.5.4.2.1 above.

obligations of local government. Despite the ambitious aspirations of developmental local government, most municipalities lack the type of resources needed to translate its ideals into reality. Some municipalities do not have the necessary tax base to generate funding required to effectively play a developmental role.²²⁵⁰

The new constitutional mandate of local government was aligned with substantive governing powers for municipalities. Municipalities operate as a distinct (but interrelated and interdependent) sphere of government with constitutionally defined "original" powers and functions.²²⁵¹ The original legislative and executive powers and functions of local government are extensive and cannot be curtailed by statute except through a constitutional amendment.²²⁵² In addition to these powers and functions, and in line with the principle of allocative subsidiarity, national and provincial government can assign additional functions to municipalities.²²⁵³ In governing local communities, each municipality is encouraged to use its own initiative, subject only to national and provincial legislation, as envisaged by the Constitution.²²⁵⁴ This means that municipalities can design and implement any activity or instrument that will further their developmental agenda even if not specifically contemplated by legislation. This is lawful to the extent that such powers comply with the overall constitutional framework. The nature of local government's legislative and executive powers indicate that every municipality can in principle, adopt and implement policies, by-laws, plans, budgets, engage in public-private partnerships, cooperate with international donors, establish performance management systems, generate internal revenue through taxes and rates on property and engage traditional leaders in development related matters, for example.²²⁵⁵ Municipalities therefore, have extensive legislative and executive powers and functions.

7.2.4 Social justice as a mandate of local government

The constitutional commitment towards establishing a society based on social justice translates into a mandate which must be pursued by the government of

2250 See 4.3 above.
2251 See 2.5.3; 2.5.4.3 above.
2252 See 2.5.4.3 above.
2253 See 2.5.4.4 above.
2254 See 2.5.4.3 above.
2255 See 2.5.4.3; 4.5.1.

South Africa. Mindful of the fact that three distinct, interrelated and independent spheres constitute government in South Africa, this mandate by default, becomes a shared one which must be executed within the constitutional principle of co-operative government.²²⁵⁶ As a co-responsible sphere of government, municipalities share the responsibility of fostering and pursuing social justice with each other as well as with national and provincial government.²²⁵⁷

However, there is no provision expressly calling for the pursuit of social justice in the expanded developmental mandate of local government.²²⁵⁸ Nonetheless, it was argued that social justice forms part of local government's developmental objectives²²⁵⁹ when considering Fraser's norm of participatory parity²²⁶⁰ and combining it with the benchmarks for state authorities in the pursuit of social justice.²²⁶¹ This argument is reinforced by complementarities established between the basic meaning of social justice and the benchmarks for state authorities' pursuit of social justice on the one hand, and on the other hand, the objects and features of "developmental local government." It was established that their complementarities lie in their shared emphasis on the need to: redistribute resources in order to meet the basic needs of people living in poverty; facilitate public participation in decision-making; promote sustainable development; build local capacity; fulfil human rights; and share responsibilities with national and provincial government.²²⁶² In addition, it was argued that part of social justice in the context of this study is the notion of sustainable development which constitutes the bedrock of local government's developmental mandate.²²⁶³ Based on these complementarities, it was argued that municipalities could use their extensive governing powers to adopt and implement different measures that will redistribute resources to people living in poverty, facilitate public participation in local government matters, promote sustainable development, build local capacity, fulfil human rights and partner with national and provincial government to realise constitutional objectives.²²⁶⁴ These actions are compatible with the broad developmental duties of municipalities (directly emanating from applicable law and

2256 See 1.1; 2.5.4.1; 4.4.7 above.

2257 See 2.2.2 above.

2258 See 2.5.4.6 above.

2259 See 2.5.4.6 above.

2260 See 2.3.3.3 above.

2261 See Table 1 in 2.4.3.

2262 See 2.5.4.6 above.

2263 See 2.5.4.2.2 above.

2264 See 2.5.4.6 above.

policy) and six of the generic benchmarks for state authorities' pursuit of social justice.²²⁶⁵ In addition to the direct legal and policy obligations to implement the above actions, it was established in this study that, municipalities have powers to adopt and implement whatever measure that will foster constitutional objectives provided such measures are not in conflict with the broad constitutional framework.²²⁶⁶ The direct implication of this power is that, municipalities can adopt and implement any measure that will foster the pursuit of transformative constitutionalism and social justice provided the Constitution is not violated. This means that, in principle, municipalities have the potential to contribute towards the pursuit of social justice by adopting and implementing any action or instrument that could lead to the implementation of the benchmarks in Table 1, subject to the Constitution.²²⁶⁷

7.2.5 Socio-economic rights responsibilities of local government

Municipalities must respect, protect, promote and fulfil all rights in the Constitution.²²⁶⁸ As a co-responsible sphere of government, local government is obliged to contribute towards the realisation of the socio-economic rights entrenched in sections 24, 25, 26, 27 and 29 of the Constitution.²²⁶⁹ The obligation to contribute towards the realisation of constitutional socio-economic rights must be understood taking into consideration, the original powers and functions of local government and any additional obligations imposed by legislation and policies adopted by national and provincial government.²²⁷⁰ The socio-economic rights responsibilities of municipalities may vary from one context to another because national and provincial government can further assign socio-economic rights duties to specific municipalities.²²⁷¹ For example, municipalities that have the capacity can be assigned full housing functions.²²⁷² This demonstrates that although municipalities have certain autonomous governing powers, they are subject to regulation and monitoring by national and provincial government.²²⁷³ However, the overlap in powers and functions regarding various

2265 See 2.5.4.6 above.

2266 See 2.5.4.3 above.

2267 See 2.5.4.6 above.

2268 See 3.4 above.

2269 See 2.5.4.5.7 above.

2270 See 3.2.3 above.

2271 See 3.2.3 above.

2272 See 3.2.3.3 above.

2273 See 3.2.3 above.

socio-economic rights areas between the three spheres of government reinforces the need for co-operative governance in realising socio-economic rights.²²⁷⁴

Understanding the obligation of local government to contribute towards the pursuit of social justice against the backdrop of the socio-economic rights entrenched in the Constitution has the advantage of stressing the legal obligations of local government to provide the basic needs of people living in poverty.²²⁷⁵ This means that people living in poverty should not be seen as benefiting from the largesse of local government but rather as enjoying legal entitlements to basic needs. It was argued in this study that, where municipalities fail to meet the basic needs of impoverished people as required by their socio-economic rights obligations, or where municipalities infringe the socio-economic rights of communities, affected and interested persons can *inter alia*, use the procedural rights in the Constitution to hold municipalities accountable.²²⁷⁶ It was further argued that the use of procedural rights (such as the right of access to courts) can help unpack the social justice potential of socio-economic rights.²²⁷⁷ Procedural rights can be used to ensure sustainable access to social goods and services, expand existing access to social goods and services and enable municipalities understand the scope of their socio-economic rights duties emanating from the Constitution, legislation and policies.²²⁷⁸

7.2.6 Categorisation of rights

This researcher has been cautious about the categorisation of the rights in the Constitution on the basis of the type of obligations they impose.²²⁷⁹ However, in order to facilitate the discussion in this research, a distinction was made between socio-economic and procedural rights. It was argued that by fulfilling its socio-economic rights obligations, local government satisfies the basic needs of impoverished people thereby enabling them to access the resources needed to participate in socio-political life as true equals.

As organs of state with some autonomous governing powers, it was established in this study that, municipalities need governance instruments through which they

2274 See 3.2.3 above.

2275 See 3.2.1 above.

2276 See 3.3 above.

2277 See 3.3 above.

2278 See 3.3; 3.3.1 above.

2279 See 1.1; 3.3.1 above.

can realise their constitutional mandate, including their socio-economic rights responsibilities.²²⁸⁰

7.2.7 Local governance instrumentation

Local governance was defined as the process of decision-making by a municipal council and other relevant stakeholders on matters of local development and includes how they design and implement development plans, budgets, policies, by-laws and other strategies and how they provide basic services in order to achieve defined objectives.²²⁸¹ Local governance is closely linked to the constitutional principle of devolution of powers where municipalities are capable and responsive to the needs and rights of community residents.²²⁸² As representatives of local communities, municipalities are accountable to community residents and where they are unable to solve community problems, seek assistance from other spheres of government.²²⁸³ The process of administering municipalities is an integral part of local governance.

By-laws, resolutions, IDPs and policies (inclusive of indigent policies) were identified, *inter alia*, as legally prescribed local governance instruments.²²⁸⁴ This means that IDPs and policies are amongst the instruments which could essentially be used by municipalities to realise their constitutional mandate. The study specifically explored the relevance and potential of IDPs and local indigent policies in contributing towards the pursuit of the transformative constitutional mandate.²²⁸⁵ The choice of these instruments was largely informed by the fact that they are flexible and can be used to achieve different objectives.²²⁸⁶

Decentralisation denotes the right of municipalities to conduct their affairs within specified geographic and legal parameters without arbitrary interference from provincial and national governments.²²⁸⁷ In the absence of arbitrary interference from national and provincial government, municipalities can take local initiative that will enable respond to context-specific needs. Decentralisation is underpinned

2280 See 4.5 above.

2281 See 2.4.4.

2282 See 2.5.

2283 See 2.5.4.1.

2284 See 4.5.

2285 See chapters 5 and 6.

2286 See 1.4 and 4.5.

2287 See 2.5.

by the principle of institutional subsidiarity which requires that government decisions be taken at the level appropriate to the type of decision.²²⁸⁸ The principle of institutional subsidiarity holds that decisions should be made and implemented at the local government level, which is closest to citizens, unless it is unreasonable to do so.²²⁸⁹ In the context of South African local government, the equivalent of this principle is described as the principle of allocative subsidiarity.²²⁹⁰ The application of this principle means that more powers and functions can be allocated by national and provincial government to municipalities that have the capacity to administer such matters.²²⁹¹ This enhances the role of municipalities in the pursuit of social justice.

Traditional authorities are a key role player in the local sphere who could also contribute towards the pursuit of social justice.²²⁹² Due to the fact that traditional authorities enjoy recognition and wield significant administrative powers in some rural areas, they could contribute to the realisation of socio-economic rights by respecting and protecting existing rights of access to social goods, and by promoting educational awareness about the programmes, policies and structures established by municipalities in their communities to give effect to the socio-economic rights of their subjects.²²⁹³ In addition, they could assist in the housing process and in the general development of communities by allocating land under their administration for such purposes.²²⁹⁴

Co-operative governance seeks to prevent fragmentation in government's efforts to achieve its developmental objectives.²²⁹⁵ The principles of co-operative governance dictate that all spheres of government should: respect the constitutional status, powers and functions of other spheres; refrain from encroaching on the geographical, functional or institutional integrity of government in other spheres; not assume powers or functions except those conferred on them by the Constitution; and cooperate with one another in mutual trust and good faith by assisting and supporting one another, co-ordinating their actions and legislation with one another, adhering to agreed procedures and avoiding legal

2288 See 2.5.4.4.

2289 See 2.5.4.4.

2290 See 2.5.4.4.

2291 See 2.5.4.4 above.

2292 See 4.4.4.

2293 See 4.4.4.

2294 See 4.4.4.

2295 See 4.4.7.

proceedings against one another.²²⁹⁶ Through "supervision" and the provision of different types of support, national and provincial government can ensure that struggling municipalities have the financial and human resources needed to effectively contribute to the pursuit of social justice, for example.²²⁹⁷

7.3 Elements for pursuing social justice at the local sphere

This study distilled, from theories and perspectives of social justice, ten generic benchmarks that should guide local government's pursuit of social justice.²²⁹⁸ Although these benchmarks may not be exhaustive of what can be done by municipalities to foster the pursuit of social justice, they are informed by definitions, theories and institutional viewpoints covered in this study.²²⁹⁹ It was established that for local government to contribute towards the pursuit social justice, municipalities must: adopt and implement redistributive measures such as policies that will ensure that the basic needs of impoverished people are met; build local capacity; facilitate public participation in decision-making; address the structural causes of inequalities; promote group solidarity; avoid the privatisation of basic services; protect and fulfil human rights; and work in partnership with other spheres of government to jointly achieve constitutional objectives.²³⁰⁰

In addition to implementing the above measures, local government can also contribute towards the pursuit of social justice when municipalities respect, protect, promote and fulfil the rights entrenched in the Constitution. The obligation to respect, protect, promote and fulfil human rights requires multiple actions from municipalities which cut across the adoption and implementation of administrative, socio-economic, legal and educational measures.²³⁰¹

In the area of socio-economic rights, it was argued that the obligation to respect, protect, promote and fulfil requires that municipalities should: adopt and implement by-laws, policies, plans, programmes and any other strategies that could facilitate the realisation of socio-economic rights; review existing by-laws, policies and programmes to ensure that they are consistent with the objectives of

2296 See 4.4.7.

2297 See 4.4.7.

2298 See Table 1 in 2.4.3.

2299 For a detail discussion of the various theories and institutional perspectives on social justice, see 2.3 above.

2300 See Table 1 in 2.4.3.

2301 See generally 3.4.

socio-economic rights; make provision for enforceable remedies in cases of rights violations; establish and clearly define roles and functions of implementing administrative units; implement educational and public awareness measures that enables right-holders to *inter alia*, know measures that have been adopted to give effect to socio-economic rights; ensure that access to programmes giving effect to socio-economic rights are sustainable on an intergenerational basis; cooperate with international actors; engage in public private-partnerships; allocate sufficient resources, including finances, needed to implement adopted strategies; promote socio-economic development; and to implement any other public administrative action that may further the realisation of socio-economic rights.²³⁰² In addition, it was established that in designing, implementing and reviewing by-laws, policies, plans and programmes that give effect to socio-economic rights, municipalities should facilitate public participation.²³⁰³ Finally, because the obligation to realise socio-economic rights is shared among different spheres of government, there should be co-ordination and integration of efforts.²³⁰⁴

7.4 Main findings

This study examined the extent to which legislative and other measures applicable to local government enables municipalities to contribute towards the pursuit of social justice as an objective of transformative constitutionalism, against the setting of an enforceable Bill of Rights, which mandates the three spheres of government to concretise socio-economic rights into social goods and services in order to meet the needs of impoverished people, especially. In line with this overarching objective, this study analysed South Africa's legal and policy framework on local government, reviewed relevant theories and established links between the concepts that underpin this study, established and analysed the socio-economic rights duties of municipalities, and precisely investigated the relevance and potential of two legally prescribed governance instruments - IDPs and local indigent policies - in contributing towards the pursuit of social justice. The main findings of this study are outlined below.

2302 See generally 3.4.

2303 See generally 3.4.

2304 See generally 3.4.

7.4.1 Social justice

Although the pursuit of social justice remain an ideal which every society should gear towards, as argued by Sen and others, it is also an ideal which can never be fully achieved. This does not make the pursuit of social justice meaningless because what is needed to transform society is the constant move towards this objective. The main objective in the Constitution is the achievement of a socially just society and this objective is applicable not only to the three branches of government, but also to the different governmental spheres including local government.²³⁰⁵ In the absence of a fixed meaning of social justice in the Constitution and taking into consideration the fact that meaning can never be fixed and have to be dealt with,²³⁰⁶ for purposes of this research, Fraser's conception of social justice based on participatory parity was considered to be consistent with the values of the Constitution.²³⁰⁷ The norm of participatory parity holds that social justice can only be achieved and maintained when all adult members of society have the material resources needed to ensure that they participate in decision-making processes as true equals.²³⁰⁸ The pursuit of social justice translates into a legal mandate which obliges municipalities to adopt and implement measures that will eradicate poverty, minimise extreme forms of socio-economic inequalities and ensure *inter alia* that all communities have access to social services.²³⁰⁹ The Constitution envisages a "thick" conception of democracy which requires municipalities to empower all citizens to partake in decisions crucial to the outcome of their life choices.²³¹⁰

All actions of the different branches of government must be informed by the Constitution, the Bill of Rights and constitutional norms and principles. The rights in the Constitution represent only one mechanism through which municipalities can realise transformative constitutional objectives.²³¹¹ By realising socio-economic rights, municipalities contribute to the pursuit of social justice because this ensures that impoverished people have access to the basic needs of life.²³¹² Due to the fact that local government is co-responsible for the realisation of

2305 See 2.2.2 above.

2306 See 2.2.2 above.

2307 See 2.4.2 above.

2308 See 2.3.3.3; 2.4.2 above.

2309 See 2.2.2 above.

2310 See 2.2.2 above.

2311 See 2.2.2 above.

2312 See 2.2.2; 3.2.1 above.

constitutional socio-economic rights, municipalities can contribute to the pursuit of social justice by complying with their rights-based duties.²³¹³ Based on their rights-based duties,²³¹⁴ municipalities contribute towards the pursuit of social justice when they respect, protect, promote and fulfil the rights in the Bill of Rights and when they adopt and implement by-laws and any other measures that foster the objectives of socio-economic rights.²³¹⁵

7.4.2 Socio-economic rights

It was established in this study that, municipalities can contribute towards the pursuit of transformative constitutionalism and social justice by realising socio-economic rights that fall within their areas of competence.²³¹⁶ However, it is recognised that the socio-economic rights that fall within the areas of competence of local government can only meaningfully contribute towards the pursuit of social justice if the executive and legislative branches of municipalities give them content that reflects the actual needs of rights-holders.²³¹⁷ This requires that in translating constitutional socio-economic rights into by-laws and policies, for example, municipalities must facilitate public participation and ensure that the needs of impoverished people are taken into consideration.²³¹⁸ This is consistent with the deliberative nature of South Africa's democracy.²³¹⁹ It was established in this study that, at the moment, the socio-economic rights entrenched in the Constitution largely simulate a sense of social justice because their translation into by-laws and policies often fails to take into consideration the actual needs of impoverished people.²³²⁰ This has the potential to reinforce rather than address socio-economic inequalities and amounts to a denial of social recognition which is inimical to the pursuit of social justice.²³²¹ This situation is often made worse by the failure of some municipalities to comply with their socio-economic rights obligations arising from the Constitution, legislation and policies.²³²² Where

2313 See the entire chapter 3 for a detailed discussion.

2314 The rights-based duties of municipalities were discussed in detail in 3.4 above.

2315 For details, see 3.4 above.

2316 See 2.2.2 and chapter 3 for details.

2317 For details, see 2.2.2; 3.2.1; 3.5 above.

2318 For details, see 2.2.2; 3.2.1; 3.5 above.

2319 For details, see 2.2.2; 3.5; 4.2 above.

2320 For details, see the discussion in chapter 3.

2321 See 2.3.3.3; Table 1 in 2.4.3 above.

2322 See 3.5 above.

municipalities fail to comply with their rights-based duties, their potential contribution towards the pursuit of social justice is diminished.²³²³

7.4.3 Developmental local government

Municipalities have a direct responsibility to promote the multi-faceted aspects of sustainable development and to adopt and implement positive measures that will ensure that community residents have access to basic services.²³²⁴ The social services provided by municipalities such as potable water, electricity, sanitation, housing, health care and a healthy environment are related to local government's obligations to realise socio-economic rights to meet the needs of local communities.²³²⁵ As a nucleus of the state's governance machinery, municipalities are responsible in ensuring that constitutional objectives are translated into reality at the community level.²³²⁶ They are legally entitled to different forms of support from national and provincial government because the objectives and priorities that they seek to realise, are a macrocosm of the country's developmental objectives and priorities.²³²⁷ In order to enhance their potential to contribute towards the translation of constitutional objectives into reality at the community level, the Constitution aligned the powers and functions of local government to their new mandate.²³²⁸ Municipalities also have the powers to generate internal revenue needed to finance the manifold of activities they execute, subject to the means of their residents. Municipalities have the powers to adopt and implement any activity or instrument that does not conflict with the Constitution.²³²⁹ The conduct of a municipality is not illegal merely because the Constitution or legislation does not expressly authorise it.²³³⁰ This means, for example, that municipalities can contribute to the pursuit of social justice by using even instruments not specifically prescribed by legislation. This study established that municipalities have a degree of self-governing executive and legislative powers. This suggests that municipalities possess the type of powers needed to pursue social justice and realise socio-economic rights.

2323 See 3.5 above.

2324 See 2.5.4.2; 2.5.4.5 above.

2325 See 2.5.4.3; 3.2.3 above.

2326 See 2.5.4.1 above.

2327 See 2.5.4.1; 4.4.7 above.

2328 See 2.5.4.3 above.

2329 See 2.5.4.3 above.

2330 See 2.5.4.3 above.

Despite the above potential, this study established that the ability of local government to contribute towards the pursuit of social justice is likely to be constrained by a number of factors including: large scale corruption and maladministration in most municipalities; insufficient support from national and provincial governments; failures to use intergovernmental channels to resolve disputes with the national and provincial spheres of government; conflicts over the control of resources and confusion over responsibilities between municipal authorities in districts; the lack of direct accountability by proportional representation councillors; limited financial and human resources at the disposal of most district and local municipalities; high levels of rural-urban migration; and the lack of quality public engagement in decision-making.²³³¹

7.4.4 Generic measures towards the pursuit of social justice

It was established in this study that, the constitutional and legislative framework on local government accords municipalities substantial and wide-ranging legislative, executive and administrative powers and functions, necessary to contribute towards the pursuit of the transformative constitutional mandate and social justice by specifically adopting and implementing the plethora of measures that are reflected in the generic benchmarks for state authorities' pursuit of social justice and the obligation to *respect, protect, promote* and *fulfil* socio-economic rights.²³³² The wide range of legislative and executive powers and functions enjoyed by municipalities demonstrate that municipalities that have adequate financial and human resources, can significantly contribute towards the pursuit of social justice by adopting and implementing measures that are aligned to the benchmarks in Table 1.²³³³ However, the benchmarks should not be seen as an exhaustive list of what municipalities should do to foster the pursuit of social justice. The benchmarks are informed by the theories and institutional perspectives reviewed in this study.²³³⁴

7.4.5 Local governance instrumentation

The *Systems Act* prescribes IDPs and policies, *inter alia*, as governance instruments that should be used by municipalities to realise their constitutional

2331 For a detailed discussion of these challenges, see chapter 4.

2332 See 2.5.4.6 above.

2333 See Table 1 in 2.4.3 above.

2334 See 2.3 for the various theories and perspectives on social justice.

mandate. This thesis established that, whereas chapter five of the *Systems Act* regulates the process for designing, adopting and amending IDPs, it is mute on the process for designing, adopting and reviewing policies in general. This *inter alia*, implies uncertainty on how municipalities should use an instrument prescribed by law for purposes of local governance.

7.4.6 Relevance and potential of IDPs

It was established in this study that, the IDP is the principal strategic planning instrument that guides and informs all planning, management and decision-making related to budgets and all development activities in a municipality.²³³⁵ The manifold development activities that take place in municipalities revolve on the IDP. Based on an analysis of the legal and policy framework for IDPs, it was argued in this study that, the IDP is an important legally prescribed local governance instrument that has the potential to contribute towards the pursuit of social justice at the local level for different reasons. Firstly, the IDP is used as a vehicle to plan and manage development activities in a wide range of socio-economic sectors that affect different aspects of human life.²³³⁶ The IDP is used to plan and manage local development in the areas of water, sanitation, electricity supply, housing, health and environmental protection. Due to this broad range of development activities, it becomes possible for a municipality to prioritise its development needs taking into consideration local context.²³³⁷ This means that the IDP is a flexible instrument which allows municipalities to tailor their development strategies in accordance with local circumstances. The broad base of their planning activities also suggests that municipalities can devise and implement strategies that prioritise the needs of impoverished people in a variety of areas. This enhances the social justice potential of IDPs.²³³⁸ The IDP system is expressly committed to bringing about transformation at the local level by undoing the effects of historical racially motivated spatial planning.²³³⁹

It was established that the IDP system has the potential to contribute towards the pursuit of social justice because the legal framework obliges municipalities to use the process to: facilitate the realisation of socio-economic rights; promote

2335 See 5.3 above.

2336 See 5.3.2.1 above.

2337 See 5.3.2.1; 5.5 above.

2338 See 5.3.2.1; 5.5 above.

2339 See 5.3.2.1; 5.5 above.

sustainable development; promote intergovernmental co-operation in planning; facilitate public participation in local development activities; align available resources with agreed policy objectives and programmes; and establish performance and financial management systems that will enable them effectively use limited resources and comply with the norms and standards defined by the *Municipal Finance Management Act*.²³⁴⁰ The implementation of performance management systems and performance indicators has the potential to enhance local accountability and responsiveness. The legal status of the IDP enhances its relevance and potential in contributing towards the pursuit of social justice because it prevents unnecessary deviations from agreed plans and strategies thereby limiting the possible wastage of limited resources.²³⁴¹

It was further determined in this study that, the potential of IDPs is constrained by the severe shortage of skilled personnel (including planners), corruption and mismanagement, as well as limited financial resources at the disposal of most municipalities.²³⁴² It was established that instead of using established intergovernmental channels to settle disputes that arise from uncoordinated planning, the three spheres of government often decide to settle intergovernmental disputes in court.²³⁴³ In addition, it was established that, contrary to the wisdom of conventional local government strategic planning, the *Systems Act* regulates in detail the process that must be followed by all municipalities in designing, adopting and amending IDPs.²³⁴⁴ It was argued that this constrains local initiatives in planning. It was held that the IDP will only improve the lives of people living in poverty if strategies and plans contained therein, are effectively implemented.²³⁴⁵

7.4.7 Relevance and potential of indigent policies

It was established in this study that, local government indigent policies are directly relevant and have the potential to contribute towards the pursuit of social justice because they are expressly aimed at ensuring that impoverished households

2340 See chapter 5 above.

2341 See 5.4 above.

2342 See 5.6 above.

2343 See 5.6 above.

2344 See 5.6 above.

2345 See 5.3.2.3; 5.7 above.

have access to basic needs such as water, electricity and sanitation.²³⁴⁶ They seek to further give effect to some of the socio-economic rights in the Constitution. The NIP sets out basic guidelines regarding the level and range of services which municipalities can provide to indigent households and urges municipalities that can afford to go above the minimum standards set at the national level. It was argued that this flexible nature of the NIP enhances the relevance and social justice potential of local indigent policies because municipalities that have the resources, are at liberty to provide impoverished households a higher level and wider range of free basic services.²³⁴⁷ In addition, it was established that because the legal and policy framework for local indigent policies oblige municipalities to facilitate public participation in the design and implementation process, this theoretically enhances their responsiveness to local needs.²³⁴⁸ In addition, it was determined that because the legal and policy framework for local indigent policies oblige municipalities to share some of the responsibilities for ensuring that impoverished households have access to basic services with role players in the national and provincial sphere, this creates an opportunity for intergovernmental support and partnership.²³⁴⁹

Despite the above potential, it was mooted in this research that, there are some factors that limit the social justice potential of local government indigent policies.²³⁵⁰ Firstly, despite the flexibility mechanism in the NIP, the indigent policies of the municipalities reviewed in this study did not meet the actual needs of indigent households. This reinforces class subordination and fails to meet Fraser's objective pre-condition for achieving social justice.²³⁵¹ Secondly, the indigent policies reviewed in this study do not contain any specific strategies on how to address the stigma usually associated with beneficiaries.²³⁵² Thirdly, the need to balance the welfare objectives of indigent policies with the long term financial sustainability of municipalities poses a complex challenge to some municipalities which may undermine the redistributive potential of the NIP.²³⁵³

2346 See chapter 6 for details.
2347 See 6.2; 6.3 above.
2348 See 6.3.1.4 above.
2349 See 6.3.1.4 above.
2350 See 6.5 above.
2351 See 6.5 above.
2352 See 6.5 above.
2353 See 6.5 above.

7.4.8 The role of public participation

It was established that, public participation in decision-making is an indispensable requirement for the pursuit of transformative constitutionalism and social justice.²³⁵⁴ It was continuously demonstrated that public participation in the design and implementation of (re)distributive strategies such as plans and policies seek to ensure that adopted strategies reflect the actual needs of affected communities.²³⁵⁵ However, it was found that, despite the elaborate legal and policy framework which oblige municipalities to facilitate public participation in local government matters, there is lack of quality public participation at the level of most municipalities.²³⁵⁶ This is evident, amongst others, from the series of violent protests used by community residents to show their frustration over the lack or poor quality of service delivery. It was argued that the proposal by the NPC to create advisory councils bringing together policy-orientated academics and activists to advise government on pro-poor policies, may redirect engagement from the community level to formal processes thereby denying impoverished people the opportunity to participate in deciding their needs.²³⁵⁷ It was submitted that if impoverished communities are excluded from decision-making processes that affect their welfare, this may limit their social recognition. This will be detrimental to the pursuit of social justice.²³⁵⁸

7.5 Recommendations

In view of the foregoing, the following general and specific strategies are proposed to improve the legal and policy framework applicable to local government in order to optimise the role of municipalities in contributing towards the pursuit of social justice in South Africa:

7.5.1 Means and methods to optimise the role of local government in the pursuit of social justice

The context under which municipalities operate and the challenges they face vary across the country. This notwithstanding, it is possible to make some general recommendations that will optimise the role of local government in advancing

2354 See 2.2.2; Table 1 in 2.4.3; 3.5; 4.2.2 above.

2355 See 2.2.2; 3.5; 4.2.2; 5.3.2.4; 6.3 above.

2356 For details, see the discussion in 4.2 above.

2357 See 4.2.2 above.

2358 See 4.2.2 above.

transformative constitutionalism and social justice particularly in relation to the constitutional obligations of municipalities, the role of the different structures and actors as well as the processes of local governance. The recommendations made in this study are informed by knowledge drawn from the legal and extra-legal materials reviewed and analysed in this study.

In order to optimise their contribution towards the pursuit of social justice, municipalities should: adopt and implement measures aimed at realising the benchmarks for state authorities' pursuit of social justice summarised in Table 1;²³⁵⁹ *respect, protect, promote and fulfil* the rights in the Bill of Rights;²³⁶⁰ use their initiative to adopt and implement by-laws, policies, plans and any other measure that will contribute to the realisation of socio-economic rights.²³⁶¹ As established in chapter three, the obligation to respect, protect, promote and fulfil rights requires that municipalities should adopt and implement a variety of legal, socio-economic, administrative and educational measures.²³⁶²

In addition, it is suggested that because district and local municipalities share executive powers and functions, they should operate in close horizontal co-operation in order to optimise their contribution towards the pursuit of social justice.²³⁶³ Although some metropolitan municipalities can succeed with little external support, it is suggested that all municipalities should adopt and implement measures, with the support of SALGA, that seek to strengthen their co-operation with national and provincial government. This is supported by the fact that national and provincial government may assist municipalities with, *inter alia*, financial and human resources needed to realise the transformative objectives of the Constitution.²³⁶⁴ The need for co-operation is reinforced by the fact that the areas of competence of the three spheres of government overlap.²³⁶⁵

In order to optimise the use of policies in local governance and the pursuit of constitutional objectives, it is desirable for the *Systems Act* to be amended to

2359 See 2.4.3; 4.3.7 above.

2360 See 3.4 above.

2361 See 3.4.5 above.

2362 See 3.4.5 above.

2363 See 4.3.3; 4.6 above.

2364 See 4.4.7; 4.6 above.

2365 See 2.5.4.3; 4.6 above.

outline the generic process for policy design, adoption and implementation.²³⁶⁶ This will be in line with the *System Act's* provision for other governance instruments such as IDPs, for example.

7.5.2 Optimising the potential of IDPs

Despite the relevance and potential of IDPs in contributing towards the pursuit of social justice, some factors that inhibit their transformative potential were established in this study.²³⁶⁷ In order to optimise the social justice potential of IDPs, the following measures should be implemented: municipalities, with the assistance of SALGA, should explore and implement strategies that can increase the level of support provided by national and provincial government, based on context-specific needs; municipalities should make concerted efforts to resolve conflicts that arise during the IDP process with national and provincial government through established intergovernmental channels; and municipalities should explore innovative ways of facilitating public participation in the planning and management of development activities at the local level, taking into consideration the Court's jurisprudence on meaningful engagement, for example.²³⁶⁸ It is argued that the effective exercise of oversight duties by national and provincial authorities can minimise corruption and mismanagement that continues to plague many municipalities.

7.5.3 Optimising potential of local government indigent policies

In order to optimise the potential of local government indigent policies in the pursuit of social justice, it is proposed that municipalities should: ensure long term access to free basic services in order to achieve desired impact;²³⁶⁹ design and implement strategies that minimise the social stigma attached to beneficiaries of indigent policies;²³⁷⁰ facilitate the involvement of impoverished people in the design and implementation of indigent policies;²³⁷¹ ensure that indigent policies reflect the actual needs of people living in poverty;²³⁷² create awareness about the

2366 The generic process for designing, adopting and implementing policies was discussed in 4.5.2.2 above.

2367 For details, see 5.6; 7.4.6 above.

2368 See the discussion in 5.5; 5.7 above.

2369 See 6.3.2; 6.6; 2.3.3.3 above.

2370 See 6.3.2; 6.6; 2.3.3.3 above.

2371 See 2.2.2; 3.5; 4.2.2; 2.3.3.3 above.

2372 See 6.3.2; 6.6; 2.3.3.3 above.

existence of an indigent policy and structures in-charge of implementation;²³⁷³ frequently review indigent policies in order to ensure that they remain abreast with changing circumstances;²³⁷⁴ and sustain the commitment of all role players in the implementation process.²³⁷⁵

7.5.4 Promoting public participation

In order to prevent mechanical compliance with the legal prescriptions on public participation, it is recommended that municipalities engage meaningfully with communities in the design and implementation of plans, policies and other strategies that seek to foster their expanded developmental mandate.²³⁷⁶ This requires that municipalities should: actively seek and consider the views of people living in poverty during the design and implementation of policies, by-laws, IDPs and other measures that seek to give effect to socio-economic rights;²³⁷⁷ develop the capacity of impoverished people to participate in local decision-making;²³⁷⁸ approach public consultation processes in good faith;²³⁷⁹ provide complete information to communities so that they can make informed choices;²³⁸⁰ and ensure, in the case of vulnerable people, that the engagement process is managed by people who are careful and sensitive to their needs.²³⁸¹ Where a large number of people are to be affected by a municipal decision, meaningful engagement should take place in a structured, concerted and consistent manner.²³⁸² Meaningful engagement will be more successful if understood as a deliberative partnership whose outcome should be mutually beneficial to participants in the process.²³⁸³ It should be approached in good faith with all participants willing to mutually compromise.²³⁸⁴

2373 This is in line with the duty to promote access to socio-economic rights. See 3.4.3 above.

2374 See 4.5.2.2 above.

2375 See 4.5.2.2 above.

2376 See 4.2.2 above.

2377 See 4.2.2 above.

2378 See 4.2.2 above.

2379 See 4.2.2 above.

2380 See 4.2.2 above.

2381 See 4.2.2 above.

2382 See 4.2.2 above.

2383 See 4.2.2; 4.2.4 above.

2384 See 4.2.2 above.

7.6 Limitations and needs for future research

The main limitation of this research was its inability to use specific "case studies" to test some of the findings of this study. As explained in chapter one, requests to meet various departmental heads of municipalities in the North West Province were evaded.²³⁸⁵ It may be necessary for future research to test some of the findings of this study on the basis of case studies. In addition, this study only explored the relevance and potential of two legally prescribed local governance instruments – IDPs and indigent policies - in contributing towards the pursuit of social justice. It may be necessary for future research to explore the relevance and potential of other legally prescribed governance instruments in contributing towards the pursuit of social justice. Furthermore, it may be necessary for future research to explore and analyse the contributions of municipalities in other countries towards the pursuit of social justice. This point is supported by the fact that although there are international, regional and country-specific commitments confirming the role of local governments towards the pursuit of social justice,²³⁸⁶ there is lack of scholarly research analysing the role of municipalities in various countries.

7.7 Conclusion

One of the objectives of democratic South Africa as enveloped in the mandate of transformative constitutionalism is to establish a society based on social justice. This requires that government should combat poverty and extreme inequalities in access to basic needs by implementing the socio-economic rights entrenched in the Constitution. This is a mandate shared by all spheres of government. This study explored the role that local government could play in realising the constitutional socio-economic rights underpinning social justice. It was demonstrated that, as a co-responsible sphere of government, the Constitution and relevant legislation accord local government adequate powers to contribute towards the pursuit of transformative constitutionalism and social justice in South Africa. It argued that local government could contribute towards pursuing transformative constitutionalism and social justice by: implementing measures such as policies that redistribute resources to people living in poverty; building

2385 See 1.4 above.

2386 See 1.1 above.

local capacity; facilitating public participation in decision-making; promoting group solidarity; addressing the structural causes of inequalities; avoiding the privatisation of basic services; addressing the stigma associated with beneficiaries of welfare programmes; sharing responsibilities with other spheres of government; and by *respecting, protecting, promoting and fulfilling* socio-economic rights, especially. It illustrated that IDPs and local government indigent policies are legally prescribed local governance instruments that are directly relevant and at least theoretically have the potential to contribute towards the pursuit of social justice. However, the true potential of IDPs and indigent policies can only be optimised through implementation. Without implementation, the potential of IDPs and indigent policies is diminished. Implementation requires that different actors and role-players contribute to ensuring that the powers of local government, the potential of IDPs and indigent policies translate into results. In this regard, municipal councillors, municipal managers, other local government officials, SALGA, community residents, NGOs, national and provincial government must all play their role as prescribed by the Constitution, legislation and policies. The transformative constitutional mandate and social justice can only be pursued through co-operative efforts.

It is trusted that this study somehow makes a knowledge contribution to the growing body of academic literature dedicated to fostering transformative constitutionalism in South Africa. It is further believed that, by implementing the suggestions canvassed in this study, municipalities in particular will in principle, be able to make a meaningful contribution towards realising the ever important transformative objectives of the Constitution.

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