

A constitutional law perspective on structural
poverty in South Africa

S C Knox-Mosdell

 **orcid.org/0000-0002-0247-554X**

Thesis accepted for the degree *Doctor of Laws in
Perspectives on Law* at North-West University

Promoter: Prof A A du Plessis

Graduation: July/August 2023

Student number: 23437286

ABSTRACT

Poverty in South Africa is rampant and widespread, and structural in nature. It has persisted after the political transformation of 1994, and has burgeoned and worsened since this time, notwithstanding the constitutional imperative for its amelioration. It must be understood both as a money-metric and a non-money-metric phenomenon. Furthermore, it is associated with failures of social justice and transformative constitutionalism. The fulfilment, or lack thereof, of the constitutional socio-economic rights is closely intertwined with poverty issues.

Perspectives on poverty considered in this thesis include examination of its characteristics, its determinants, and possible solutions for its amelioration. Thirteen notable characteristics of poverty are distilled from literature. Determinants of poverty are multifaceted and are distinguished into six categories – ideological notions, social and economic phenomena, dysfunctionalities in the human rights regime, dysfunctionalities in the legal system, political determinants and a general category of other determinants. Solutions for poverty amelioration are similarly distinguished into six categories, being those associated with political and ideological considerations, sociological solutions, economic solutions, solutions relating to legal matters, an enhanced role for the executive, and multi-pronged and integrated solutions.

Applying insights gained from the consideration of perspectives on poverty, it is possible to conceptualise a role for each of the branches of government in poverty amelioration. In the case of the legislature, this lies in embedding an awareness of poverty related issues in the law-making process, and through enhancement of the legislative oversight function. The executive as the hub of governmental processes has a significant role to play. It may contribute to poverty amelioration *inter alia* through gaining and promoting awareness of the nature and dimensions of poverty, rethinking and repurposing foundational ideologies such as neoliberalism, capitalism and constitutionalism, addressing economic and social governance and power issues, and pursuing means of redress for the poor. The judiciary's role in poverty

amelioration is exercised mainly through its function as an arbiter of disputes relating to socio-economic issues, although there is potential for it to wield influence outside of this function. There are a number of long standing practices of the judiciary which require re-evaluation and purposive redevelopment over time. In addition there are some areas of judicial functionality where shorter term action by the judiciary could produce quick gains. These include rethinking strict adherence to the separation of powers doctrine, actively pursuing stronger relief and remedies, departing from judicial minimalism and legalism, attributing meaning and normative content to legislative precepts, rethinking adherence to the prevailing legal culture, espousing judicial activism and a conscious transformative approach, overcoming judicial situatedness and elitism and arrogance, pursuing innovation in making court orders and judicial consequentialism, adopting a people-centred approach, and pursuing synergies with the legal profession.

In the final chapter of this thesis, the material under consideration in the substantive chapters 2, 3, 4 and 5 is transposed into a set of findings regarding the role of each of the branches of government in poverty amelioration, and a corresponding set of recommendations as to how these roles may be fulfilled. In conclusion, a system of broad-based collaboration between the three branches towards poverty amelioration is envisaged.

KEYWORDS

structural poverty

characteristics

determinants

solutions

roles of branches of government

legislature

executive

judiciary

broad-based collaboration

ACKNOWLEDGEMENTS

This study was born out of a personal passion of mine to research aspects of structural poverty and to seek a deeper understanding thereof, as well as to find solutions towards amelioration. I was very privileged and blessed to find support for this endeavour at North-West University's Law Faculty, and especially from Prof Anél Du Plessis. She stood by me and provided unwavering support and constructive advice, even when I found it difficult to sift through the mountain of available source material and find direction in the development of the thesis, and when my focus was less than optimal due to my work commitments.

I also appreciated the incisive comments of Prof Anél's co-supervisor, Prof Oliver Fuo, who helped enormously to ensure that I remained within the rigorous conventions of academic research and discourse.

I am blessed to have adult children who consistently provided encouragement and support during my doctoral journey. In this regard I owe a debt of thanks to my daughters Natalie and Caitlin Mosdell, and my future son-in-law, Caitlin's fiancé Ralph van der Meulen. Their love and support kept me going, and helped me to focus.

LIST OF ABBREVIATIONS

ANC	African National Congress
BRICS	Brazil, Russia, India, China and South Africa
GDP	Gross Domestic Product
GEAR	Growth, Employment and Redistribution Policy
HIV	Human Immuno-deficiency virus
IMF	International Monetary Fund
MTSF	Medium Term Strategic Framework
NGO	Non-governmental organisation
NDP	National Development Plan
RDP	Reconstruction and Development Programme
SDGs	Sustainable Development Goals
UNDP	United Nations Development Programme
WTO	World Trade Organisation

TABLE OF CONTENTS

ABSTRACT.....	i
LIST OF ABBREVIATIONS.....	v
TABLE OF CONTENTS.....	vi
1 INTRODUCTION.....	1
1.1 Background.....	1
1.2 Conceptualisation of Structural Poverty in South Africa	2
1.3 Poverty and the Pursuit of Social Justice and Transformative Constitutionalism.....	7
1.4 Socio-economic Rights as an Instrument for the Amelioration of Poverty	11
1.4.1 An Environment Not Harmful to Health and Well-being.....	11
1.4.2 Access to Housing	13
1.4.3 Access to Sufficient Food and Water, Healthcare and Social Security	14
1.4.4 Education	17
1.4.5 Socio-Economic Rights, Social Justice and Transformative Constitutionalism.....	18
1.5 Research Question.....	19
1.6 Objectives of Research	19
1.7 Hypothesis	19
1.8 Assumptions	20
1.9 Outline of Study.....	20
1.10 Research Methodology	21
1.11 Limitations of the Study	21

2	PERSPECTIVES ON POVERTY: CHARACTERISTICS, DETERMINANTS AND SOLUTIONS FOR AMELIORATION	23
2.1	<i>Introduction.....</i>	23
2.2	<i>Characteristics of Poverty</i>	24
2.2.1	<i>Poverty is Embedded and Systemic</i>	25
2.2.2	<i>Money-metric Characteristics of Poverty</i>	25
2.2.3	<i>Non-money-metric Characteristics of Poverty.....</i>	26
2.2.4	<i>Poverty as Persistent and Subject to Inertia.....</i>	28
2.2.5	<i>Poverty Associated with Apartheid.....</i>	29
2.2.6	<i>Poverty Associated with the Non-realisation of the Equality and Dignity Rights</i>	31
2.2.7	<i>Poverty Marked by Economic Exclusion.....</i>	32
2.2.8	<i>Non-realisation of the Economic Component of the Socio-economic Rights.....</i>	33
2.2.9	<i>Poverty Associated with Inequalities in Education.....</i>	33
2.2.10	<i>Poverty Associated with Urbanisation</i>	33
2.2.11	<i>Poverty Associated with Developmental Legalism.....</i>	34
2.2.12	<i>Poverty Prevalent in the Minerals-Energy Sector.....</i>	34
2.2.13	<i>Observations on Characteristics of Poverty.....</i>	35
2.3	<i>Determinants of Poverty</i>	36
2.3.1	<i>Ideological Notions.....</i>	36
2.3.1.1	<i>Neoliberalism.....</i>	37
2.3.1.2	<i>Libertarianism</i>	41
2.3.1.3	<i>Capitalism</i>	42
2.3.1.4	<i>Constitutionalism</i>	44
2.3.1.5	<i>Post-colonialism and Neo-colonialism</i>	47

2.3.1.6	Developmentalism	49
2.3.1.7	Utilitarianism	49
2.3.1.8	Observations on Ideological Notions as Determinants of Poverty	50
2.3.2	<i>Social and Economic Phenomena as Determinants of Poverty</i>	<i>51</i>
2.3.2.1	Failure to Achieve Social Justice.....	51
2.3.2.2	Inequality and Indignity	52
2.3.2.3	Identity Politics.....	54
2.3.2.4	Social and Economic Power Structures	54
2.3.2.5	Adverse Incorporation into the Economy	55
2.3.2.6	Weak Policy Responses and Ineffective Bureaucracy	55
2.3.2.7	Routine Functioning of Market Institutions	56
2.3.2.8	Weak Responses by the Courts.....	56
2.3.2.9	Anomalies in Government Policy	57
2.3.2.10	Lack of Capabilities.....	58
2.3.2.11	Pursuit of Economic Growth	59
2.3.2.12	Lack of Social Cohesion	60
2.3.2.13	Social Exclusion.....	61
2.3.2.14	Commodification and Consumerism	62
2.3.2.15	Affirmation of Global Power Structures and Institutional Hegemony	63
2.3.2.16	Resource Extraction.....	63
2.3.2.17	Household Features and Phenomena.....	64
2.3.2.18	Overdensification	64
2.3.2.19	Patrimonialism and Clientilism	65
2.3.2.20	Observations on Social Phenomena and Dysfunctionalities	65

2.3.3	<i>Dysfunctionalities in the Human Rights Regime Serving as Causes and Determinants of Poverty</i>	66
2.3.3.1	Rights Prone to Legalism and Entrenchment of the <i>Status Quo</i>	66
2.3.3.2	Obstacles to Realising Socio-economic Rights	66
2.3.3.3	The Vexed Nature of the Dignity and Equality Rights	67
2.3.3.4	General Shortcomings of Reliance on Rights for Poverty Amelioration	68
2.3.3.5	Conflict between Rights	70
2.3.3.6	Deficiencies in the Implementation of the Right to Healthcare	72
2.3.3.7	Anomalies Relating to the Social Security Right.....	73
2.3.3.8	Weak Implementation of the Right to Education	76
2.3.3.9	The Right to Food Requiring More Attention and Research	77
2.3.3.10	Obstacles to Realising the Right to Housing	78
2.3.4	<i>Dysfunctionalities in the Legal System Serving as Determinants of Poverty</i>	78
2.3.4.1	Legalism	79
2.3.4.2	Conservative Legal Culture and Entrenched Legal Practices	80
2.3.5	<i>Political Dynamics Serving as Determinants of Poverty</i>	85
2.3.5.1	General Political Dynamics Affecting Poverty	85
2.3.5.2	Weak Role Played by the Legislature.....	87
2.3.5.3	Weak Representivity of the Poor	89
2.3.5.4	Corruption and Clientilism	89
2.3.5.5	Elite Capture of Land Reform.....	90
2.3.5.6	Weakness of the NDP	91
2.3.5.7	Observations on Political Dynamics as Determinants of Poverty	91
2.3.6	<i>Other Determinants of Poverty</i>	91

2.3.6.1 Lack of Corporate Accountability.....	92
2.3.6.2 Globalisation, Urbanisation and Free Trade.....	93
2.3.6.3 Climate Change	95
2.3.6.4 Labour-related Issues	96
2.4 Solutions for Amelioration of Poverty.....	97
<i>2.4.1 Proposed Poverty Amelioration Solutions Related to Political and Ideological Considerations</i>	<i>97</i>
2.4.1.1 Understanding the Ideological Foundations and Dimensions of Poverty Studies	97
2.4.1.2 Understanding Poverty in the Context of Social Justice.....	99
2.4.1.3 Acknowledging the Primacy of Constitutional Values	102
2.4.1.4 Focusing on Substantive Transformation and Supplementing the Income of the Poor	103
2.4.1.5 Revisiting Traditional Ideologies and Considering New Ideologies in the Context of Poverty Studies	104
2.4.1.6 Pursuing Social Democracy and Socialism.....	107
2.4.1.7 Partnerships between Government and Non-governmental Organisations as a Means to Address Poverty.....	109
2.4.1.8 Reverting to the Macro-economic Orientation of the RDP	110
2.4.1.9 Observations on Proposed Poverty Amelioration Solutions Related to Political and Ideological Considerations.....	110
<i>2.4.2 Possible Social Solutions for Poverty Amelioration.....</i>	<i>111</i>
2.4.2.1 Potential of Human Agency to Overcome Poverty	111
2.4.2.2 Utopian Thought as a Vision Underpinning Poverty Amelioration...	115
2.4.2.3 Invoking Morality and Ethics and Establishing Norms and Values ..	116
2.4.2.4 Addressing the Psycho-social Aspects of Poverty.....	118

2.4.2.5	<i>Ubuntu</i>	119
2.4.2.6	Acknowledging the Limits of Socio-economic Rights.....	120
2.4.2.7	The Potential of the Right to Dignity as a Vehicle for Poverty Amelioration	121
2.4.2.8	Conceptualising a Role for Business in Addressing Poverty	122
2.4.2.9	Observations on Possible Social Solutions for Poverty Amelioration	122
2.4.3	<i>Poverty Amelioration Solutions in the Realm of Economics</i>	123
2.4.3.1	Questioning the Economic World Order	123
2.4.3.2	Executive Budgeting	127
2.4.3.3	Linking Economics and Ethics	129
2.4.3.4	Linking Economics and Development Theory	130
2.4.3.5	Linking Economics and Distributive Justice	131
2.4.3.6	Observations on Poverty Amelioration Solutions in the Realm of Economics	131
2.4.4	<i>Poverty Amelioration Solutions relating to Legal Matters</i>	132
2.4.4.1	Judicial Innovation.....	132
2.4.4.2	Making Orders of Wider Application	132
2.4.4.3	Law to be Guided by Social Sciences.....	133
2.4.4.4	Law to Take Cognisance of Economic and Monetary Issues.....	136
2.4.4.5	Law to Take Cognisance of Politics	137
2.4.4.6	Collaboration between Courts and State.....	138
2.4.4.7	Courts as an Agency for Transformation.....	138
2.4.4.8	Targeted Judicial Remedies for the Realisation of Socio-economic Rights.....	140

2.4.4.9	Judiciary to Pursue a Consequentialist Standard	140
2.4.4.10	Acknowledging the Limits of the Law and Seeking Extra-legal Solutions	141
2.4.4.11	The Role of the Legal Profession in Poverty Amelioration	141
2.4.4.12	Reconciling Competing Interests	142
2.4.4.13	Summary of Observations with Regard to Legal Solutions	142
2.4.5	<i>An Enhanced Role for the Executive</i>	<i>143</i>
2.4.6	<i>Multi-pronged and Integrated Solutions for Poverty Amelioration ...</i>	<i>144</i>
2.4.6.1	Understanding the Self-perpetuating Nature of Poverty	144
2.4.6.2	Understanding Poverty from a Transdisciplinary and Multidisciplinary Perspective	145
2.4.6.3	Poverty Amelioration Solutions in the Realm of Climate Change....	146
2.4.6.4	Reforming Urban Geography and Pursuing Environmental Constitutionalism.....	149
2.4.7	<i>Observations.....</i>	<i>149</i>
2.5	<i>Chapter Summary.....</i>	<i>150</i>
3	THE ROLE OF THE LEGISLATURE IN THE AMELIORATION OF POVERTY	152
3.1	<i>Introduction.....</i>	<i>152</i>
3.2	<i>The South African Legislative System</i>	<i>153</i>
3.3	<i>Efficacy of South African National Legislation in Dealing with Poverty: An Overview</i>	<i>154</i>
3.3.1	<i>The Constitution.....</i>	<i>155</i>
3.3.2	<i>Statutes Dealing with Broad Public Law Issues.....</i>	<i>157</i>
3.3.3	<i>Legislation Dealing with Land Rights and Land Administration.....</i>	<i>160</i>
3.3.4	<i>Legislation Dealing with Energy and Associated Resources.....</i>	<i>161</i>

3.3.5	<i>Health Legislation</i>	163
3.3.6	<i>Legislation Dealing with Education</i>	165
3.3.7	<i>Environmental Legislation</i>	166
3.3.8	<i>Labour Legislation</i>	167
3.3.9	<i>Observations</i>	169
3.4	<i>Features of the Legislative System: A Critical Reflection ...</i>	169
3.4.1	<i>Separation of Powers as an Impediment to Effective Parliamentary Oversight</i>	169
3.4.2	<i>Dominance of the Political Party System</i>	171
3.5	<i>Possible Mechanisms for the Legislature to Contribute to Poverty Amelioration</i>	174
3.5.1	<i>Awareness of the Fundamental Duty to Ameliorate Poverty</i>	174
3.5.2	<i>Enhancement of Oversight Functions</i>	174
3.6	<i>Chapter Summary</i>	180
4	THE ROLE OF THE EXECUTIVE IN THE AMELIORATION OF POVERTY	182
4.1	<i>Introduction</i>	182
4.2	<i>The Executive in South Africa</i>	182
4.3	<i>National Government Policy Relevant to Poverty</i>	185
4.3.1	<i>The Freedom Charter and the RDP</i>	185
4.3.2	<i>The GEAR Policy</i>	186
4.3.3	<i>The Social Welfare White Paper 1997</i>	187
4.3.4	<i>The NDP</i>	188
4.3.5	<i>Observations on National Government Policy Relevant to Poverty</i> ...	190
4.4	<i>Possible Mechanisms for the Executive to Pursue Poverty Amelioration</i>	191

4.4.1	<i>Gaining and Promoting Awareness of the Nature and Dimensions of Poverty.....</i>	191
4.4.2	<i>Rethinking the Neoliberal Governance Model.....</i>	196
4.4.3	<i>Rethinking the Value of the Capitalist Governance Model in South Africa</i>	200
4.4.4	<i>Rethinking the Dominance of Constitutionalism.....</i>	203
4.4.5	<i>Economic Power and Policy Issues</i>	206
4.4.6	<i>Addressing Issues of Social Policy, Social Power and Adverse Incorporation.....</i>	214
4.4.7	<i>Achieving Redress for the Poor.....</i>	215
4.4.8	<i>Miscellaneous Socio-economic Phenomena to be Addressed by the Executive.....</i>	222
4.5	<i>Chapter Summary.....</i>	225

5	THE ROLE OF THE JUDICIARY IN THE AMELIORATION OF POVERTY.....	229
5.1	<i>Introduction.....</i>	229
5.2	<i>The Judiciary in South Africa.....</i>	229
5.3	<i>Separation of Powers and Judicial Deference as Inhibitor.</i>	231
5.4	<i>Judicial Approaches to Poverty after the Political Transition</i>	238
5.4.1	<i>Approaches to Poverty Reflected in Case Law</i>	238
5.4.2	<i>Aspects of the Judicial Process which Thwart or Frustrate Poverty Amelioration</i>	247
5.4.2.1	Judicial Conservatism and Legal Culture	247
5.4.2.2	Formality and Procedural Strictness	248
5.4.2.3	The Adversarial Nature of Judicial Adjudication.....	248

5.4.2.4	Failure of the Judiciary to Embrace Transformation.....	249
5.4.2.5	Limiting Adjudication to Issues in the Papers.....	251
5.4.2.6	Disjuncture between Judicial Process and Constitutional Values....	252
5.4.2.7	Legalism	253
5.4.2.8	Access to Justice	253
5.4.2.9	Embeddedness and Situatedness of the Judiciary	254
5.4.2.10	Intransigence on the Part of the Judiciary	254
5.5	<i>Possible Courses of Action for the Judiciary in Pursuing Poverty Amelioration.....</i>	257
5.5.1	<i>Fostering Awareness</i>	<i>258</i>
5.5.2	<i>Actions to Optimise Potential</i>	<i>261</i>
5.5.2.1	Rethinking Adherence to Separation of Powers and Judicial Deference.....	261
5.5.2.2	Pursuing Stronger Relief and Remedies.....	262
5.5.2.3	Departure from Judicial Minimalism	262
5.5.2.4	Attribution of Meaning and Normative Content	263
5.5.2.5	Departure from Legalism.....	264
5.5.2.6	Rethinking Adherence to the Prevailing Legal Culture.....	264
5.5.2.7	Espousing Judicial Activism.....	265
5.5.2.8	Adoption a Conscious Transformative Approach.....	266
5.5.2.9	Overcoming the Constraints of Situatedness.....	267
5.5.2.10	Overcoming Elitism and Arrogance	267
5.5.2.11	Addressing Unequal Power Relations	267
5.5.2.12	Innovation in Court Orders	267
5.5.2.13	Judicial Consequentialism	268

5.5.2.14	Adopting a People-centric Approach	268
5.5.2.15	Pursuing Synergies with the Legal Profession	269
5.6	Chapter Summary.....	269
6	CONCLUSIONS AND RECOMMENDATIONS.....	274
6.1	Study Background	274
6.2	Method and Limitations of the Study	275
6.3	Research Findings.....	275
6.3.1	<i>Findings Emerging from the Theoretical Perspectives on Poverty....</i>	<i>275</i>
6.3.1.1	Characteristics of Poverty	276
6.3.1.2	Determinants of Poverty	276
6.3.1.3	Solutions for Amelioration of Poverty	279
6.3.2	<i>Findings: Role of the Legislature</i>	<i>281</i>
6.3.2.1	Fostering and Promotion of Awareness of the Imperative to Ameliorate Poverty	281
6.3.2.2	Enhancement of the Legislative Oversight Function	282
6.3.3	<i>Findings: Role of the Executive</i>	<i>282</i>
6.3.3.1	Awareness of Poverty-related Issues.....	282
6.3.3.2	Prevailing Neoliberal Governance Model	283
6.3.3.3	Prevalence of Capitalism	283
6.3.3.4	Prevalence of Constitutionalism	284
6.3.3.5	Economic Issues.....	284
6.3.3.6	Poverty and Sociological Issues	285
6.3.3.7	Policy Issues which Thwart Redress for the Poor	285
6.3.4	<i>Findings: Role of the Judiciary</i>	<i>286</i>
6.4	Recommendations.....	288

6.4.1	<i>Role of the Legislature</i>	288
6.4.1.1	Awareness of Ethos and Ideology	288
6.4.1.2	The Legislative Oversight Function.....	289
6.4.2	<i>Role of the Executive</i>	290
6.4.2.1	Awareness of Poverty-related Issues.....	290
6.4.2.2	The Prevailing Neoliberal Governance Model.....	291
6.4.2.3	Prevalence of Capitalism	292
6.4.2.4	Prevalence of Constitutionalism	292
6.4.2.5	Economic Issues.....	293
6.4.2.6	Sociological Issues.....	294
6.4.2.7	Policy Issues Which Thwart Redress for the Poor	294
6.4.3	<i>Role of the Judiciary</i>	295
6.4.3.1	Longer Term Functionality of the Judiciary	295
6.4.3.2	Urgent Action by the Judiciary	296
6.5	<i>Future Research Agenda</i>	297
6.6	<i>Conclusion</i>	298
	BIBLIOGRAPHY	302

CHAPTER 1

INTRODUCTION

1.1 Background

The existence of rampant and widespread poverty in South Africa is apparent to all its inhabitants. Informal settlements in which people live in conditions of dire poverty, sometimes without basic services, are prominently visible in both urban and rural landscapes. This remains unaltered notwithstanding the constitutional transformation that occurred in the mid-nineties, and despite the promise it brought of “a better life for all”, this being the main election slogan of the African National Congress (hereafter, ANC) in the first democratic election which took place in 1994.¹ The imperative to improve the socio-economic circumstances of the poor and move towards a more egalitarian society with less disparity of wealth, is clear in the *Constitution of the Republic of South Africa, 1996* (hereafter, the *Constitution*) and much subsequent legislation and policy.² This is particularly strongly articulated through the inclusion of socio-economic rights in the Bill of Rights enshrined in the *Constitution*,³ and in the constitutional preamble.⁴

This study is primarily motivated by a desire to understand why, despite the constitutional system coming into being and having constitutional tools at its disposal for alleviating poverty,⁵ structural poverty has persisted in South Africa.⁶ This study constitutes an in-depth investigation of poverty within the context of its

¹ See South African History Online date unknown <https://www.sahistory.org.za/archive/better-life-all>.

² See section 5.4 for an account of how South African legislation deals with poverty.

³ The socio-economic rights are the right to an environment not harmful to health and well-being (s 24), the right of access to housing (s 26), the right to healthcare, food, water and social security (s 27) and the right to education (s 29).

⁴ The preamble of the *Constitution* speaks of healing the divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights. It also speaks of improving the quality of life of all citizens and freeing the potential of each person.

⁵ The most notable tools at the disposal of the constitutional legal system which could be used towards the alleviation of poverty are the justiciability of the socio-economic rights as provided for in sections 7 and 8 of the *Constitution*, enabling the poor to demand relief via the courts, and the wide *locus standi* provisions outlined in s 38, which entitle a wide spectrum of actors to approach the courts for such relief.

⁶ The conceptualisation of structural poverty in South Africa is dealt with in section 1.2.

political, social and economic settings, and a consideration of the roles of the three branches of government (the legislature, executive and judiciary) with regard to poverty, and seeks to identify possible strategies and methodologies to achieve poverty amelioration. The general perspective of the study is focused on the roles of the three branches of government, these being constitutional institutions – hence the study is grounded in constitutional law.

1.2 Conceptualisation of Structural Poverty in South Africa

In this thesis, structural poverty is understood as a condition of multifaceted deprivation and marginalisation, entrenched within South Africa's sociological, economic and political milieu, to which a high percentage of the population is victim, and from which there is no escape.⁷ It is distinct from other types of poverty which may be transient.⁸ The structural aspect of structural poverty lies in the fact that in addition to being ongoing and chronic, it is an in-built feature of the economy and of society, such that it has become endemic and immutable.⁹ The multifaceted dimensions of structural poverty include, but are not necessarily limited to, monetary deprivation, unemployment, lack of necessary amenities of life, and social marginalisation and exclusion.¹⁰ Deprivation in these dimensions remains constant and does not change over the passage of time.

Since the social, economic and political milieu of any country are established by way of human agency, it is possible to deduce that structural poverty is a product of such agency. It is a fundamental tenet of this thesis that human, societal and institutional interventions, whether legal, sociological, economic or political, or a

⁷ The concept of structural poverty is articulated in Du Toit 2005 *PLAAS Chronic and Development Studies* 8, Du Toit and Neves 2014 *Journal of Peasant Studies* 840 and in Adato, Carter and May 2006 *Journal of Development Studies* 226.

⁸ Du Toit and Neves 2014 *Journal of Peasant Studies* 840.

⁹ Du Toit 2005 *PLAAS Chronic and Development Studies* 8 explains that the underlying situation of the chronically poor, or their structural situation, determines whether they are likely to be able to escape chronic poverty. If this is very unlikely or impossible, they are victims of structural poverty. Characteristics and determinants of structural poverty as conceived in this way are discussed further in Chapter 2.

¹⁰ Several scholars acknowledge the endemic and multifaceted nature of structural poverty. See: Du Toit 2005 *PLAAS Chronic and Development Studies*; Du Toit *Chronic and Structural Poverty in South Africa: Challenges for Action and Research* and Adato, Carter and May 2006 *Journal of Development Studies* 226.

combination of these, can be employed to ameliorate it, even if a lengthy period of time is needed to accomplish this goal. This argument is supported by Williams,¹¹ who undertook a comparative study of poverty reduction efforts in South Africa and the United States of America. He states that access to assets and resources is determined by social policy, which is implemented by legal and political institutions. From this analysis, it emerges that legal, social, economic and political institutions, established by humans, play a strong role in creating and maintaining structural poverty. By extrapolation, it can be argued that human agency can change such institutions and the policies they implement, with a view to ameliorating structural poverty.

In the remainder of this thesis, the term 'poverty' must be understood to denote structural poverty as described in the preceding paragraphs.

A number of statistical analyses of poverty in South Africa are available. The majority of these consider poverty to be an economic or monetary issue, and some seek to set a monetary standard or poverty line below which people are categorised as poor.¹² A money-metric view of poverty is limited in that it only takes into account quantitative, and not qualitative, aspects of the lives of the poor.¹³

Statistics pertaining to poverty in South Africa also feature in a number of international studies, some using monetary thresholds below which people are considered to be in poverty,¹⁴ and others using multilateral poverty indices. The United Nations Development Programme (UNDP) Human Development Reports are a limited example of the latter, incorporating non-monetary benefits such as healthcare and education, although failing to address economic and socio-political issues which may be determinants of poverty. Another yardstick used for the measurement of poverty is the Gini coefficient,¹⁵ which highlights the gap between

¹¹ Williams 2005 *South African Journal on Human Rights* 436.

¹² See for example Magombeyi and Odihambo 2015 *Socioeconomica* 333.

¹³ See Du Toit "The Proper Subject for Poverty Research is Inequality" 133.

¹⁴ These include the UNDP *Human Development Report* 2015 http://hdr.undp.org/sites/default/files/2015_human_development_report.pdf.

¹⁵ For a description of how the coefficient operates, see Investopedia date unknown <https://www.investopedia.com/terms/n/neoclassical-growth-theory.asp>.

rich and poor. South Africa's coefficient¹⁶ score is one of the highest in the world.¹⁷ A 2019 report by Statistics South Africa indicates the coefficient to be in the region of 0.65.¹⁸ This reflects that the poorest twenty percent of the population consume approximately three percent of total expenditure, compared to the wealthiest twenty percent who consume sixty-five percent.

Statistical analyses of poverty, assuming that the information they impart is accurate, offer valuable information regarding the monetary aspects thereof, but they present a unidimensional and therefore somewhat limited view of the phenomenon, in that they fail to deal with the non-monetary aspects thereof. Their value lies in their serving as a marker of the severity of poverty. As mentioned, statistical analyses fail to capture the human side of poverty, which is associated with hardships of a less tangible nature and relates to matters traditionally studied within the realm of the social sciences, such as social marginalisation, lack of capability and resources, and psycho-social hardships. Social marginalisation and psycho-social hardships are intertwined with issues of human equality and dignity, which are protected as fundamental rights in the *Constitution*.¹⁹ The non-economic aspects of poverty furthermore play a cardinal role in rendering it immutable, because they are deeply entrenched in society and are self-perpetuating. Their intangible nature makes it difficult to study and monitor them.

It is important to understand the phenomenon of poverty in South Africa in its socio-historical context. It is commonly associated with extreme and cumulative disadvantage suffered by people of colour during apartheid,²⁰ and with their

¹⁶ The Gini coefficient is a measure of the distribution of income across a population developed by the Italian statistician Corrado Gini in 1912. It is used as a gauge of economic inequality, measuring income distribution or, less commonly, wealth distribution among a population. See Investopedia <https://www.investopedia.com/terms/g/gini-index.asp>.

¹⁷ Deneulin explains the calculation methodology and significance of the Gini coefficient in Deneulin 1974 "Introduction" 1.

¹⁸ Department of Statistics 2019 <https://www.statssa.gov.za/publications/Report-03-10-192017.pdf> 5. This is the most recent report on the matter that can be accessed on the internet.

¹⁹ Sections 9 and 10 of the *Constitution* respectively.

²⁰ Gradin 2012 *Journal of African Economies* 219. See also Carter and May 2001 *World Development* 2012-2014 1-37 and Leibbrandt, Finn and Woolard 2012 *Development Southern Africa* 19.

exclusion from many facets of social and economic life. Prior to the political transition in 1994, dire conditions of poverty prevailed in the rural areas constituting the former homelands, as they were then known.²¹ Poverty was also endemic in a variety of other settings including cities, which included separate areas occupied by people of colour, in which they were deprived of basic services and amenities.²² After apartheid, although no longer officially circumscribed by race, poverty has been perpetuated largely along racial lines, but is gradually evolving into a situation of class distinction rather than strictly racial deprivation and marginalisation.²³ Taking the authors cited in this paragraph into account, it is warranted to conclude that poverty in contemporary South Africa has a residual race bias, as well as class and gender biases.

Seen in the context of the welfare of its victims and of the country as a whole, poverty has profound negative outcomes. On a personal level for its victims, these include not only economic but also psycho-social hardships.²⁴ On a more general level, it hampers the attainment of social justice and the realisation of transformative constitutionalism. It also stifles sustainable development.²⁵

Although statistics published by the government indicate that poverty has diminished since the political transition,²⁶ it may be questioned whether this is true and of tangible benefit to the people, given for example that unemployment has increased in the concomitant period.²⁷ The provision of a vastly increased number of social grants since the end of apartheid has been limited to specific categories of needy people, and these provide only a subsistence income and not a way out of

²¹ See for example Mukonoweshuro 1991 *Social Justice* 175.

²² Mabin "Dispossession, Exploitation and Struggle: An Historical Overview of South African Urbanisation" contains a useful account of the phenomenon of structural poverty in black and coloured urban townships under apartheid.

²³ Kehler 2001 *Journal of Women's Studies* 50.

²⁴ Metz 2016 *Res Publica* 328.

²⁵ Rapatsa 2015 *Euro Economica* 41.

²⁶ The Statistics SA Poverty Report 2006-2011, released in 2014, avers that the incidence of poverty dropped in the period under study, but concedes that this is largely due to an expanding social security net rather than an improvement in the financial means of the poor. See Statistics SA <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf> 12. This is the latest report of its kind from the national statistics department that could be found.

²⁷ Magombeyi and Odihambo 2015 *Socioeconomica* 333.

poverty.²⁸ Other factors which inhibit poverty amelioration are low skill and education levels, weak economic growth, and restrictive labour market practices engendering job insecurity.²⁹ Finn *et al*³⁰ have conducted a decomposition analysis relating to poverty trends over the post-apartheid period, which shows that consumption amongst the extreme poor has not increased since the demise of apartheid. This is an indicator of the perpetuation of poverty.

Poverty is also an important issue from a constitutional law perspective. The indirect reference to poverty in the preamble of the *Constitution*³¹ makes it clear that poverty alleviation is a constitutional imperative. This has been confirmed by the Constitutional Court.³² The hardship that poverty causes further interferes with the enjoyment of many of the socio-economic and other rights articulated in the *Constitution*.³³

Aside from being an economic and a legal issue, as explained above, poverty is a social problem. Research done for this thesis has found a vast volume of writings on poverty with a sociological orientation.³⁴ Poverty is also a consequence and a manifestation of the prevailing political ideology as explained further in section

²⁸ Finn, Leibbrandt and Oosthuizen *Poverty, Economy and Prices in Post-Apartheid South Africa* 33.

²⁹ Magombeyi and Odihambo 2015 *Socioeconomica* 346.

³⁰ Finn, Leibbrandt and Oosthuizen *Poverty, Economy and Prices in Post-Apartheid South Africa* 1-69.

³¹ It is stated that it is an imperative to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights. Pursuit of this vision is aligned to the imperative to ameliorate poverty.

³² See in particular the statement of Chaskalson CJ in *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 1 SA 765 (CC)(hereafter 'Soobramoney') para 8: "Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the *Constitution* was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."

³³ For example, freedom of trade, occupation and profession conferred in s 22 of the *Constitution* may not be meaningful to those in a poverty trap, who are unemployed and deprived of the education and means to undertake a profession or trade.

³⁴ By way of example, see Du Toit and Neves 2014 *Journal of Peasant Studies*, who write of the race and class dimensions of poverty (these being sociological phenomena), Crocker 2014 *Journal of Global Ethics* 245-253 who writes of inequality as a sociological phenomenon, and Das 2009 *Bangladesh E-journal of Sociology* 67-82 who provides an account of how identity politics may serve as a determinant of poverty.

2.3.1, where the role of ideological notions as determinants of poverty is explored. It is furthermore a subject warranting analysis from an economic perspective. All of these dimensions of poverty are apparent from the literature review undertaken in chapter 2. An understanding thereof enables identification of the roles and responsibilities of the three branches of government (legislature, executive and judiciary) in poverty amelioration.

1.3 Poverty and the Pursuit of Social Justice and Transformative Constitutionalism

The discussion in this section is focused on the concepts of social justice and transformative constitutionalism, as underpinning imperatives for poverty amelioration. In addition, consideration is given to the equality and dignity rights and their interwovenness with poverty-related matters. These concepts will be referred to during subsequent chapters as fundamental values that motivate the pursuit of such amelioration.

It is logical to assume that the notion of 'social justice' is founded upon the attainment of a fair and just society. It is a subjective notion in the sense that it is coloured by the world views and ideological positions of its various proponents, and it thus also has a socio-political dimension. For example, one's conceptualisation of social justice could be influenced by whether one is a neoliberal capitalist or an adherent of socialism.

There can be no doubt that social justice is a central tenet of the *Constitution*. This is borne out by the inclusion of social justice imperatives in the constitutional preamble. It purports to recognise the injustices of the past and articulates the imperative of healing long-standing divisions and establishing a society based on democratic values, social justice and fundamental human rights. In section 7 of the *Constitution*, the Bill of Rights, which contains the socio-economic rights and therefore favours social justice, is described as the "cornerstone of democracy". This reinforces the notion that the attainment of social justice is a strong constitutional imperative. Poverty is by its nature interrelated with socio-economic status, and the prevalence of poverty is associated with non-realisation of the socio-economic rights

and social justice. Given that the subject of this study is poverty, socio-economic justice is the form of social justice that will be primarily under consideration.

Socio-economic justice in South Africa is closely linked to distributive justice, given the history of unequal distribution of socio-economic goods and benefits under apartheid, which has persisted post-apartheid as class-based deprivation, as alluded to earlier.³⁵ Distributive justice relates to the fair distribution of socio-economic resources in society. Where such distribution is unfair, inequality will prevail, with the poor not enjoying a proportional share of resources. Thus there is a strong link between poverty and inequality. Social justice, of which distributive justice is an important part, is portrayed as being part of transitional justice processes, in countries in transition.³⁶ This is particularly so in the case of societies emerging from periods of human rights abuses, such as South Africa after apartheid.³⁷

The attainment of distributive justice may depend upon relational and resource constraints present in society.³⁸ It is imperative that the three branches of government understand these constraints when planning and making decisions which may have an impact upon poverty.³⁹

Inaction in addressing issues of social justice, particularly distributive justice issues, may in itself amount to injustice.⁴⁰ There is a heavy onus on the legislature, executive and judiciary to be proactive in addressing social justice issues, especially

³⁵ Du Toit and Neves 2014 *Journal of Peasant Studies* 833 explain how race-based poverty has transformed into class-based poverty, with the poor no longer defined by race, but in a structural poverty trap on the margins of the economy. See also Carter and May 2001 *World Development* 1987.

³⁶ According to Arbour 2007 *New York University Journal of International Law and Policy* 1 issues of distributive justice need to be considered as part of transitional justice processes. In this regard see also Opotow 2001 *Social Justice Research* 149.

³⁷ Opotow 2001 *Social Justice Research* 149. See also Catala 2017 *Philosophical Studies* 529.

³⁸ Tyler 1994 *Journal of Personality and Social Psychology* 850. This article explores how social group relations, linked to identity and status, impact upon how social justice issues are dealt with in any society.

³⁹ Dugard 2008 *South African Journal on Human Rights* 214.

⁴⁰ Miller 2008 *Critical Review of International Political and Social Philosophy* 383.

the phenomenon of poverty. This is particularly necessary given that the victims of poverty are not strongly positioned to demand social justice.⁴¹

'Transformative constitutionalism' in South Africa is broadly conceptualised as the deployment of the *Constitution* as an instrument to effect transformation.⁴² In the preamble to the *Constitution*, its envisaged transformative purpose is clear. It speaks of healing the divisions of the past, establishing a society based on democratic values, social justice and fundamental human rights, laying the foundations for a democratic and open society, improving the quality of life of all citizens, and freeing the potential of each person. Analysts of transformative constitutionalism writing in more recent times acknowledge that it has not materialised in the socio-economic realm, and that it cannot do so as long as poverty persists.⁴³ The value of the concept for socio-economic transformation is therefore open to question.⁴⁴

Research for purposes of this thesis has found that academic writing relating to social justice and transformative constitutionalism is often undertaken outside of the realm of jurisprudence – often in the social sciences, and sometimes in writings on economics and political theory.⁴⁵ There has been little meaningful judicial discourse relating to the attainment of transformative constitutionalism in recent years.⁴⁶ It has become evident that transformative constitutionalism, albeit a legal

⁴¹ Bilchitz 2015 *South African Journal on Human Rights* 86.

⁴² The term was notably used by Karl Klare in his well-known article "Legal Culture and Transformative Constitutionalism", and referred to in the lecture by Langa CJ entitled "Transformative Constitutionalism". See Klare 1998 *South African Journal on Human Rights* 146-188 and Langa 2011 *Stellenbosch Law Review* 446-451.

⁴³ Evans in "Land, Socio-economic Rights and Transformative Justice" 1-30 explains this position thoroughly. See also Moyo "Transformative Constitutionalism, Substantive Inequality and the Role of the Courts – Lessons from South Africa and Zimbabwe" 1-26; Langa 2006 *Stellenbosch Law Review* 351; McDougall 2015-2016 *New York School of Law Review* 25; and Rapatsa 2015 *Juridical Tribune* 208.

⁴⁴ In this regard see Bond 2014 *Politikon* 41.

⁴⁵ See for example Rapatsa 2015 *Euro Economica* 41, who discusses the interplay between social justice and sustainable development, Crocker 2014 *Journal of Global Ethics* 245-253 who explores social justice as an ethical issue, Inchauste *et al* "The Distributional Impact of Fiscal Policy in South Africa" 1-50 who considers the impacts of the social grants system, and Emery 2006 *Social Justice* 6-19, who explores social justice in a socio-political context.

⁴⁶ See Mangu "Nelson Mandela's Contribution to Constitutionalism and the Rule of Law in South Africa" 1-38, in which the author cites three cases as the cardinal examples of the application of transformative constitutionalism by the courts. These are *Government of the Republic of*

concept, needs to be understood in the extra-legal realms of sociology and economics, and in addition needs political will to drive it.⁴⁷ These considerations are significant in a determination of the roles and responsibilities of the three branches of government in poverty amelioration.

The constitutional rights to equality and dignity respectively guaranteed in sections 9 and 10 of the *Constitution* are closely interwoven with issues pertaining to social justice and transformative constitutionalism. Non-fulfilment of these rights is linked to non-fulfilment of the socio-economic rights. Poverty arguably vitiates the rights to dignity and equality, and the socio-economic rights. In South Africa, which is a highly unequal society, the poor suffer from diminished social status.⁴⁸

Inequality undermines the potential of each person, with the effect that human resources are not fully deployed for the benefit of society generally.⁴⁹ Inequality is also anathema to the concept of a free democratic society, since it is associated with manifestations of privilege and deprivation, which are either really, or are perceived to be, undeserved. As such it is morally indefensible.⁵⁰

With persistent poverty in South Africa, it is opportune to consider whether its amelioration under the current constitutional governance regime is feasible. It appears that it is possibly not, given that poverty has worsened and become more deeply entrenched since the political transition in 1994.⁵¹ The remediation of the

South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) (hereafter "Grootboom"), *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) (hereafter "SARFU"), and *S v Makwanyane and another* 1995 (3) SA 391 (CC) (hereafter "Makwanyane"). These all hail from the early days of constitutional democracy, being dated 2000, 1999 and 1995 respectively. The article was published in 2014 and it appears that no transformative cases newer than *Grootboom* were considered worthy of citation.

⁴⁷ Sibanda 2011 *Stellenbosch Law Review* 482.

⁴⁸ Moav and Neeman 2010 *Journal of the European Economic Association* 413.

⁴⁹ Crocker 2014 *Journal of Global Ethics* 245.

⁵⁰ Scheffler 2003 *Philosophy and Public Affairs* 5 posits equality as a moral value or normative ideal.

⁵¹ This is argued in Bond 2014 *Politikon* 461.

inequality associated with poverty is a pressing need, for the reasons already explained, and to avert widespread social unrest and instability.⁵²

Indignity, like inequality, is widely associated with structural poverty,⁵³ but is more abstract and less tangible than inequality. Dignity is associated with the equal worth of people and rejects the idea of any person being marginalised.⁵⁴ It is sometimes depicted as a right to live a full and functional social life.⁵⁵ As described by the late Chaskalson CJ, dignity is an abstract value, which strengthens and informs the other rights, and plays a role in balancing rights against each other.⁵⁶ However the concept of dignity cannot be disassociated from its subjective nature - this has negative implications for its usefulness in supporting the socio-economic rights.⁵⁷

1.4 Socio-economic Rights as an Instrument for the Amelioration of Poverty

The status of the constitutional socio-economic rights as an instrument for the amelioration of poverty is an important theme that underpins the discussion in the chapters to follow. For contextual purposes, consideration is given below to the various rights and their application in the sequence in which they appear in the Bill of Rights.

1.4.1 An Environment Not Harmful to Health and Well-being

The environmental right, as per section 24 of the *Constitution*, is framed negatively in that it confers a right to an environment that is "not harmful to health and well-being".⁵⁸ Thus the imposition upon citizens of an environment which is less than

⁵² See Swilling, Musango and Wakeford 2015 *Journal of Environmental Policy and Planning* 1. The point made is borne out by the increasing prevalence of protest action in South Africa, usually referred to as "service delivery protest", but in fact broadly associated with poverty and inequality.

⁵³ See for example Chaskalson 2000 *South African Journal on Human Rights* 193, Liebenberg 2005 *South African Journal on Human Rights* 1, 20 and Mc Crudden 2008 *European Journal of International Law* 655.

⁵⁴ Liebenberg 2005 *South African Journal on Human Rights* 31.

⁵⁵ Vaisvila 2009 *Jurisprudence* 111.

⁵⁶ Chaskalson 2000 *South African Journal on Human Rights* 193.

⁵⁷ O'Connell 2008 *International Journal of Constitutional Law* 111 argues that when reference is made to dignity in legal argument, it is necessary to support the concept by articulating the values underpinning it.

⁵⁸ Section 24 of the *Constitution*.

ideal but does not harm health and well-being, does not violate the right. Environmental degradation is often associated with poverty.⁵⁹ For example, the spatial location of polluting industries is commonly in close proximity to poor communities.⁶⁰

According to the 2016 Environmental Outlook published by the national Department of Environmental Affairs, the status with regard to the overwhelming majority of environmental indicators in South Africa is declining.⁶¹ This is confirmed by the 2019 State of the Environment Report.⁶² Given the lapse of close to thirty years since the political transformation, it appears that the prospects for the fulfilment of the environmental right are not good.⁶³ Clean air, clean water and environmental health remain elusive in many areas.⁶⁴ It is arguable that generally, the use of rights discourse to deal with environmental degradation is not successful in South Africa. As a corollary to this, it is arguable that a stronger reading of the right is needed.⁶⁵ The jurisprudence relating to environmental matters is focused predominantly on administrative law principles, and there has to date been little exposition of the content and scope of the right.⁶⁶ There are however some indications of a more pro-

⁵⁹ In this regard, see Du Plessis 2011 *South African Journal on Human Rights* 270, in which this connection is explored.

⁶⁰ Hallows in *Planning Poverty: The NDP and the Infrastructure of Destruction* 1-94 describes the effects of planning in terms of the National Development Plan, which, it is argued, places poor communities in degraded areas, citing South Durban as an example.

⁶¹ Department of Environmental Affairs *Environmental Outlook 2016*. 1-60. See also the United Nations *World Economic and Social Survey 2016* 1-177 chapter entitled "Climate Change Resilience: An Opportunity for Reducing Inequalities" where the vicious cycle of mutual exacerbation of climate change, environmental degradation and poverty is described.

⁶² Department of Forestry, Fisheries and the Environment *Environmental Outlook* (available for online reading – pages unnumbered).

⁶³ Kota *Realising the Right to a Healthy Environment: An Analysis of the Policy Efforts, Budgeting and Enjoyment of the Right to a Healthy Environment in South Africa* 1-113.

⁶⁴ Fourie "Tales from the Trenches: The Unfulfilled Promise of the Constitutional Environmental Right in South Africa" 1-39 provides an enlightening general discussion of the status of fulfilment of the environmental right as at 2014.

⁶⁵ Hallows and Butler *The Balance of Rights: Constitutional Promises and Struggles for Environmental Justice* argue 1-96 in chapters 3 and 4 of their report that a stronger interpretation of the environmental right is necessary to ameliorate the destructive effects of environmental degradation on the poor.

⁶⁶ For example in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) (hereafter "*Fuel Retailers*") the court expounded upon the importance of the environmental right but did so in a somewhat vague and wordy manner, leaving some uncertainty regarding its meaning and content.

active and content driven approach by the courts in the '*Deadly Air*' case, decided in 2022, in which the court found that the poor air quality in the Highveld Priority Area constituted a violation of section 24, affording some content to the right in the context of air pollution.⁶⁷ Still, scope remains for the interpretation and application of the environmental right in useful and creative ways to contribute to the amelioration of structural poverty. This is so because it has elements other than a clean environment *per se*, these being "well-being", "sustainable development" and "legislative and other measures" for the protection of the environment.⁶⁸ If these concepts were to be developed to their full potential, they could be deployed towards strengthening the right. For example, the concepts of well-being and sustainable development could be used to foster an approach of pro-active positive environmental benefits, with components relating to poverty amelioration.

1.4.2 Access to Housing

In terms of section 26 of the *Constitution*, everyone is entitled to access to adequate housing. This right is progressively realisable and as such appears to be dependent upon the available resources of the state. Arbitrary evictions from and demolitions of homes are prohibited without an order of court, made after consideration of all relevant circumstances.⁶⁹

There are two realms within which consideration can be given to the current status and interpretation of the right of access to housing. The first is evictions, in relation to which there is an extensive body of case law. The most fundamental developments in this case law are: a) the *Grootboom* standard, requiring that the state must have a reasonable housing development programme in place including

⁶⁷ *Trustees of the Time Being of the Groundwork Trust and another v Minister of Environmental Affairs and others* 2022 ZAGPPHC 208 [18 March 2022] paras 76-82 (hereafter '*Deadly Air*').

⁶⁸ Du Plessis 2011 *South African Journal on Human Rights* 279 argues persuasively that there is scope for a generous interpretation of s 24 to have positive impacts upon poverty alleviation. This remains untested in the courts, however. "Well-being" and "sustainable development" are broad concepts with possible socio-economic dimensions, and the requirement for "legislative and other measures" suggests not only the making of law but policy and operational initiatives for the fulfilment of the right, including its socio-economic dimensions.

⁶⁹ *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998.

an emergency plan to assist those in desperate circumstances;⁷⁰ b) the more recent jurisprudence requiring meaningful engagement by the state with potential evictees,⁷¹ and c) the determination that evictions rendering any evictees, including evictees from private property, homeless, are unlawful.⁷²

The proliferation of jurisprudence on evictions contrasts with a notable lack of jurisprudence in the second realm, namely the substantive content of the nature of the right of access to adequate housing. Although the jurisprudence tells us that the state must have reasonable programmes for fulfilment of the right, and emergency programmes to assist those who are most desperate, it does not deal with what constitutes the minimum core of the right, either for ordinary applicants or those in emergency circumstances.⁷³

1.4.3 Access to Sufficient Food and Water, Healthcare and Social Security

In terms of section 27 of the *Constitution* everyone is entitled to access to sufficient food and water. There is a dearth of both jurisprudence and legislative material⁷⁴ on the nature and content of the right to food. An Integrated Food Security Strategy was published by government in 2002.⁷⁵ This strategy rightly acknowledges that food security is a complex issue, which overlaps with considerations pertaining to food safety, capacity building, social security and community development.⁷⁶ The authors of the strategy pronounced South Africa to be food secure at the time, but

⁷⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (hereafter 'Grootboom') para 66.

⁷¹ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3)SA 208 (CC) (hereafter "Olivia Road") para 22.

⁷² *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 (2) SA 104 (CC) (hereafter "Blue Moonlight") para 39.

⁷³ The courts' disinclination to determine the minimum core content of socio-economic rights is problematic for the amelioration of structural poverty. In this regard, see Bilchitz 2002 *South African Law Journal* 484, who advocates that minimum core is necessary in order to give the socio-economic rights "teeth".

⁷⁴ Khoza 2004 *South African Journal on Human Rights* 664 bemoans the fact that there is no framework legislation giving effect to the right of access to food.

⁷⁵ Department of Agriculture *Integrated Food Security Strategy* 1-47.

⁷⁶ Department of Agriculture *Integrated Food Security Strategy* 8.

predicted that this would change as demand for staple foods would outstrip supply over time.⁷⁷ These predictions have in fact materialised.⁷⁸

It is notable that in South Africa prices of food are not comprehensively regulated, as is the case with other commodities such as electricity.⁷⁹ The right of access to food in a free market, capitalist society such as South Africa is therefore essentially the right of access to food one can pay for. This has obvious negative implications for those living in poverty.

In the realm of water governance, the post-constitutional period brought substantive changes in water law, with the *Water Services Act*⁸⁰ creating a new system of water governance structures, and the *National Water Act*⁸¹ reforming the regime of water ownership to place water resources in the hands of the state, and establishing a governance regime including licensing of the use of water.

The national standard for free basic water in South Africa is 6000 litres per household per month.⁸² Although municipalities are permitted to deviate from this standard, it remains the national guideline. The implementation of this policy has been variable.⁸³

Jurisprudence with regard to the right to water is somewhat limited. In the *Mazibuko* matter,⁸⁴ the Constitutional Court took a deferential stance with regard to the water provision policies of the City of Johannesburg then applied in Phiri, Soweto. The court did not deal with the substantive content of the right as framed in section 27.

⁷⁷ Department of Agriculture *Integrated Food Security Strategy* 19-20.

⁷⁸ See Battersby 2011 *Development South Africa* 545; Drimie and Ruysenaar 2010 *Agrekon* 316; Koch *The Food Security Policy Context in South Africa* 1-49, and Jacobs 2009 *Agrekon* 410, all of which confirm that food security in South Africa is at risk as of approximately 2011, particularly in poor and rural communities.

⁷⁹ Electricity prices are determined via an interactive process between Eskom, the hegemonic power utility, and the National Energy Regulator.

⁸⁰ Act 107 of 1997.

⁸¹ Act 36 of 1998.

⁸² This policy position is referred to by Farrar, cited in the next footnote. It has not been possible to find the policy document by way of an internet search.

⁸³ In a Master of Civil Engineering dissertation on the subject entitled *The Free Basic Water Policy of South Africa – An Evaluation of its Implementation*, Farrar concludes that the implementation of the policy has at best been variable.

⁸⁴ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) (hereafter “*Mazibuko*”).

Other cases relating to provision of access to water have dealt with the right only indirectly,⁸⁵ allowing relief for curtailment of water supply based on alleged spoliation.

The right to water is likely to become the subject of contestation in the future with the effects of climate change being felt, particularly recurrent droughts in parts of South Africa.⁸⁶ It is likely that poor communities may suffer the most in water shortage scenarios, particularly if water becomes an expensive commodity. Complex governance and jurisprudential issues around fulfilment of the right of access to sufficient water are therefore likely to arise in the near future.

The right of access to social security includes a right of access to social assistance for those unable to support themselves and their dependants.⁸⁷ A recent annual report of the South African Social Security Agency⁸⁸ indicates that just short of thirty two percent of the population of the country receives social security grants, and that this represents a substantial increase over the past few years. The report hails this as an achievement in addressing poverty in South Africa.⁸⁹ However it must be asked whether the payment of social grants to an ever-increasing number of beneficiaries is aligned to the imperatives of transformative constitutionalism and social justice. Whether or not social grants ameliorate or exacerbate poverty in the long term, remains a vexed question.⁹⁰

The right of access to healthcare is a further component of the rights contained in section 27 of the *Constitution*. It too is subject to progressive realisation, like the right to sufficient food and water. It is not framed with reference to a specific

⁸⁵ *City of Cape Town v Marcel Mouzakis Strümpher* 2012 ZASCA 34; *Farai Mushoriwa v City of Harare* 2014 ZWHHC 195.

⁸⁶ Couzens 2015 *Potchefstroom Electronic Law Journal* 1168.

⁸⁷ Section 27(1)(c) of the *Constitution*.

⁸⁸ South African Social Security Agency *Annual Report 2015/2016* 26.

⁸⁹ South African Social Security Agency *Annual Report 2015/2016* 12.

⁹⁰ In this regard see Inchauste *et al* "The Distributional Impact of Fiscal Policy in South Africa" 1-50, Triegaardt 2009 *Social Work* 1, and Neves and Du Toit 2013 *Journal of Agrarian Change* 1, all of which highlight the positive effects of social grants on the lives of the poor. However, Wright *et al* 2015 *Development South Africa* 443 writes of the indignities associated with the child support grant, and Leibbrandt, Finn and Woolard 2012 *Development South Africa* 19 argue that whilst social grants help the poorest members of society, they do nothing to address endemic income inequality.

standard of healthcare, but only to access to healthcare. Whilst section 27 clearly aspires towards making healthcare accessible to all, the right is still an unrealised aspiration, twenty-plus years after the political transition. Constraints to access prevail for approximately eighty percent of the population,⁹¹ and there are wide geographical disparities with regard thereto.⁹² These demographics are residual of the patterns of healthcare provision under apartheid.⁹³

Constitutional Court jurisprudence with regard to the right of access to healthcare is centred upon two matters. In the *Soobramoney* case the court denied access to renal dialysis at the cost of the state, basing its finding on the disentitlement of the individual to demand scarce healthcare resources. In the case of *Treatment Action Campaign*,⁹⁴ a widely hailed decision, the court ensured the accessibility across the country to anti-retroviral treatment to prevent mother to child transmission of the HIV virus. Although this was a landmark decision that demonstrated the willingness of the court to pronounce on access to life-saving medication, it does not serve to give substantive content to the right outside of the issue of HIV prevention.

Given the ineffectiveness of the legislative and policy framework relating to the healthcare right, as explained above, and the lack of jurisprudence circumscribing its content, its potential realisation could remain elusive for victims of poverty.

1.4.4 Education

The right to education is entrenched in section 29 of the *Constitution*, with basic education being an absolute right and further education being a progressively realisable right.

⁹¹ Ataguba, Day and McIntyre 2014 *Plos Medicine* 1 explain that approximately twenty percent of South Africans utilise privately funded healthcare providers, in which approximately seventy percent of medical practitioners practice. The remainder utilise government hospitals and clinics, hosting only thirty percent of medical practitioners.

⁹² Marten *et al* 2014 *Health Policy* 2167.

⁹³ McLaren, Ardlington and Leibbrandt 2014 *BMC Health Services Research* 5.

⁹⁴ *Minister of Health v Treatment Action Campaign* 2002(5) SA 703 (CC) (hereafter "*Treatment Action Campaign*").

Education under apartheid was grossly unequal for different racial groups, and remains so notwithstanding twenty years plus of democratic government.⁹⁵ This is anomalous, because of the absolute nature of the right to basic education. The courts have on many occasions enunciated the importance of adequate and equal education in the transformative context, and the links between the right to education and the equality and dignity rights.⁹⁶ The fact that education remains in crisis, with the poor bearing the brunt of ongoing deficiencies, is arguably one of the worst indictments upon the potential of the socio-economic rights to facilitate positive change.⁹⁷

1.4.5 Socio-Economic Rights, Social Justice and Transformative Constitutionalism

Taking the circumstances described above with regard to the various socio-economic rights into account, it is justified to conclude that the suitability and efficacy of the socio-economic rights as an instrument for the achievement of social justice and transformative constitutionalism, and for ameliorating poverty, has proven to be at best variable, and at worst poor. In chapters 3 to 5 of this thesis, consideration will be given to the roles of the three branches of government with regard to the amelioration of structural poverty, an aspect of which is the utilisation of the socio-economic rights for this purpose. Possibilities relating to innovative deployment of the rights for poverty amelioration purposes will be considered, as

⁹⁵ Spaul 2013 *South African Journal of Educational Development* 436 describes the education system as "grossly inefficient, severely underperforming and egregiously unfair". Kang'ethe and Chivanga 2016 *International Journal of Educational Sciences* 255 bemoan the fact that there are residual traces of apartheid in education. Christie 2010 *International Journal of Educational Development* 3 bemoans the fact that the state has not made an effort to realise the right to education and that structural inequalities prevail in the education system.

⁹⁶ The leading cases in this regard are *Governing Body of the Juma Masjid Primary School v Essay, Head of Department, Department of Education* 2011 (8) BCLR 761 (CC) (hereafter "Juma Masjid"); *Free State Province v Welkom High School*; *Head of Department, Department of Education, Free State Province v Harmony High School* 2014 2 SA 228 (CC); and *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* 2014 6 SA 582 (CC).

⁹⁷ Moseneke J in *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng* 2016 ZACC 14 (hereafter "FEDSAS") paras 1-4 outlines the dire condition of South African education and the importance of education to transformation and social justice.

well as ascribing content to the rights and exploring supplementation of rights-based action.

1.5 Research Question

The central question underpinning this research is what the role and responsibility of each of the three branches of government in South Africa is with regard to the amelioration of poverty. This question is examined in the context of poverty studies across a multidisciplinary spectrum, against the backdrop of the constitutional delineation of the three branches of government – the legislature, executive and judiciary, the socio-economic rights, and legislative and jurisprudential content. The study is however limited from an empirical perspective to the role of the three branches in national government.

1.6 Objectives of Research

The main objective of the research is to determine how the three branches of government in South Africa could contribute towards the amelioration of the poverty which prevails in the country.

Various subsidiary objectives are pursued within the framework of the main objective as described above. These are:

- to identify and describe the various dimensions of poverty through a multidisciplinary lens, in the South African and wider context;
- to formulate an understanding of the functionality and responsibilities of the three branches of government in the context of poverty studies; and
- to seek enablers, and ways to overcome impediments, towards the three branches of government ameliorating poverty.

1.7 Hypothesis

The research is based upon the hypothesis that structural poverty in South Africa could potentially be alleviated by identifying relevant enablers and impediments

towards such amelioration, as well as solutions, in the general context, and specifically by the three branches of government, and applying these accordingly.

1.8 Assumptions

Underpinning the hypothesis are a number of assumptions:

- Poverty is an endemic and undesirable problem in South Africa with severe adverse consequences for its victims.
- Poverty is at odds with the constitutional imperatives to improve the quality of life and realise the potential of people.
- Since poverty is a multifaceted phenomenon, it is best understood through an interdisciplinary lens, in particular by considering theory from the realms of law, sociology, economics and political theory.
- The legislature, executive and judiciary may each have distinct roles and responsibilities (which may be potential and unrealised) with regard to the amelioration of structural poverty.

1.9 Outline of Study

In chapter 2, the phenomenon of poverty is considered with reference to scholarly writings from various disciplines dealing with or referring thereto. The writings are categorised into three categories according to whether they outline the characteristics of structural poverty, describe the determinants thereof, or suggest solutions for its amelioration. The purpose of chapter 2 is to articulate a broad-based understanding of the phenomenon generally, and in the context of its manifestations in South Africa.

Leading on from the insights gained in chapter 2, the potential role of each branch of government in South Africa with regard to the alleviation of structural poverty is considered in a separate chapter for each branch (chapters 3 - executive, 4 - legislature and 5 - judiciary).

Chapter 6 concludes the study by consolidating and rationalising the legal and other material in chapters 3 to 5 and making recommendations towards conceptualising a role for each branch of government in poverty amelioration. The concluding chapter also reflects on the remaining research to be done in this field.

1.10 Research Methodology

The research question and objectives cited above lend themselves to desktop research. This is because there is a large body of writing on poverty-related matters both domestically and internationally, contained in academic journals and other literature sources, and an analysis thereof renders it possible to conceptualise a role for each branch of government in poverty amelioration.

The methodology includes a cross-disciplinary consideration of poverty as reflected in a broad spectrum of theoretical realms, including legal theory, economics, sociology and political theory, and as contained in a variety of source materials, including legislative instruments, case law, books, academic journals and internet and other reference sources. The purpose of the presentation of these various perspectives and sources is to seek enablers and impediments for the amelioration of poverty, with a view to using these as source material for finding an answer to the research question of this thesis.

The study embodies a range of stylistic research methodologies. It is partly observational and exploratory, looking at the characteristics of poverty, and at the functional roles of the three branches of government as understood to date. It is also causal, considering its main determinants. In addition it is deductive, conceptualising solutions for poverty amelioration.

1.11 Limitations of the Study

With the study being a desktop study, incorporating observational, causal and deductive reasoning, it is inevitably somewhat theoretical and conceptual. The solutions to poverty amelioration proffered in chapters 3 to 6 thus constitute theoretical notions of how the three branches of government could contribute to poverty amelioration. Due to limitations of length applicable to academic doctoral

research, the study does not explore the views and responses of the branches to the proposed solutions. This could be an avenue for further and supplementary empirical research.

A further limitation of the study is that, although the principles enunciated on the roles of the three branches of government in poverty amelioration are potentially of wide application across the three spheres of government, the research done for the study related primarily to the national sphere of government. Expansion of the study into the realm of provincial and local government could be an avenue for further research.

CHAPTER 2

PERSPECTIVES ON POVERTY: CHARACTERISTICS, DETERMINANTS AND SOLUTIONS FOR AMELIORATION

2.1 Introduction

Structural poverty (referred to in this thesis as 'poverty') is understood to be a form of poverty which is ongoing, chronic and endemic, and is in-built in the economy and society, and reinforced by legal, economic, social and political institutions. As alluded to in Chapter 1, the term "structural poverty" has been utilised and developed for example in the writings of Du Toit, in particular in his article entitled "Poverty Measurement Blues: Some Reflections on the Space for Understanding Chronic and Structural Poverty in South Africa",⁹⁸ which provides a clear conceptualisation of the term. Du Toit explains that the structurally poor are situated or 'inserted' in society in such a way that they are unlikely to escape poverty in the long term.⁹⁹ The situation of poverty referred to is a multi-faceted one, in that it does not only consist of cash and asset poverty, but of multi-dimensional deprivation. An example of such multidimensionality may be extrapolated from the writings of Du Toit, who takes a deep look at the social dimensions of poverty, explaining that that social power relations that govern access to assets and resources are a major determinant of poverty, and indeed of structural poverty.¹⁰⁰

The work of Du Toit, which is primarily sociological but also touches on economics and the politics of power relations, is illustrative of the importance of understanding poverty from a multidisciplinary perspective. As such, it supports the premise that a full understanding of poverty must necessarily involve a multidisciplinary approach.

Besides Du Toit, there are other writers who venture into the realm of sociological analysis with reference to poverty. This represents by far the greatest volume of

⁹⁸ Du Toit 2005 *PLAAS Chronic and Development Studies* 1-33.

⁹⁹ Du Toit 2005 *PLAAS Chronic and Development Studies* 8.

¹⁰⁰ Du Toit 2005 *PLAAS Chronic and Development Studies* 9.

writing on the subject found in the course of research. Other writers consider the phenomenon from a political perspective, and yet others from an economic perspective. As one would expect, there are a number of overlaps in these various viewpoints. What is noteworthy however is that there is no research contemplating structural poverty simultaneously from legal, economic, sociological and political perspectives. This chapter reviews literature across all of these fields to subsequently inform the identification of possible paths for state initiatives to address structural poverty. It is a tentative first step towards a multidisciplinary perspective on poverty issues. It is hoped that this analysis will:

- a) assist legal and other theorists in understanding the phenomenon of structural poverty in a broader context; and
- b) help create possible paths for initiatives, via the three branches of government, towards amelioration of structural poverty.

This chapter is divided into four parts. Firstly, the characteristics of poverty are explored.¹⁰¹ Secondly, consideration is given to the determinants of poverty.¹⁰² Thirdly and importantly, possible solutions for the amelioration of poverty are discussed.¹⁰³ A concluding subchapter with observations follows.¹⁰⁴

2.2 Characteristics of Poverty

This section contains a desktop review and critique of literature in which the authors seek to identify the characteristics of poverty in South Africa.¹⁰⁵ The insights gained from the review arguably assist in conceptualising possible ways in which the South African legislature, executive and judiciary could seek to ameliorate poverty. In this regard it can be assumed that insight into the characteristics of the phenomenon of poverty is a necessary precursor to suggesting solutions for its amelioration.

¹⁰¹ Section 2.2.

¹⁰² Section 2.3.

¹⁰³ Section 2.4.

¹⁰⁴ Section 2.5.

¹⁰⁵ The material has been sourced via internet searching and following up references to other relevant material in that initially sourced.

2.2.1 *Poverty is Embedded and Systemic*

One of the most significant features of poverty in South Africa is its embedded and systemic nature.¹⁰⁶ Entrenched structural poverty is described as one of the most pressing social and economic problems experienced in contemporary South Africa.¹⁰⁷ The systemic nature of poverty has been pervasive over the course of recent South African history. For example, systemic inequalities associated with poverty have been found to be still prevalent in South Africa twenty years after the political transformation.¹⁰⁸

Associated with the position that poverty is systemic is the fact that it is linked to endemic or pre-existing circumstances, with historically disadvantaged people experiencing little change in their circumstances over time.¹⁰⁹ Entrenched privilege and concomitant entrenched deprivation afforded historically to groups along class and ethnic lines may establish which groups will be victims of poverty.¹¹⁰ Age, household size and employment status within households may provide indicators as to the likelihood of their experiencing poverty.¹¹¹ The authors cited in this section are all *ad idem* regarding the systemic and entrenched nature of poverty in South Africa, albeit that they analyse this characteristic from different perspectives.

2.2.2 *Money-metric Characteristics of Poverty*

Poverty is often conceptualised as a lack of financial means, measurable in monetary terms. For example, Borat, Oosthuizen and Van der Westhuizen advocate the determination of a “poverty line” based on similar means testing to that used for social grants, for purposes of determining who is classified as poor and accordingly entitled to free basic municipal services.¹¹² It is arguable that measurement in

¹⁰⁶ Sibanda 2011 *Stellenbosch Law Review* 482.

¹⁰⁷ Sibanda 2011 *Stellenbosch Law Review* 482.

¹⁰⁸ Badat and Sayed 2014 *Annals of the American Academy* 127.

¹⁰⁹ Cole Bailey and New 2017 *Sustainability Science* 829.

¹¹⁰ Schroeder 2008 *Society and Natural Resources* 553.

¹¹¹ Sekhampu 2013 *Journal of Social Sciences* 145. This article reflects the outcome of research pertaining to these factors, undertaken in Bophelong, near Vanderbijlpark.

¹¹² Borat, Oosthuizen and Van der Westhuizen 2012 *Development Southern Africa* 77.

quantifiable terms is a useful tool for understanding any phenomenon,¹¹³ but it is undoubtedly so that poverty is much more than a purely monetary issue, and that viewing it as such carries a risk of losing sight of its other dimensions, and particularly of the human aspects thereof such as social marginalisation and human suffering.¹¹⁴

2.2.3 *Non-money-metric Characteristics of Poverty*

Poverty has a number of characteristics, not all of which relate to monetary deprivation. Material deprivation may be the most obvious of these, but in addition poverty is characterised by deprivations of a non-material kind which relate to the social and political elements of life. Rosa states that “psycho-social-political deficiencies” are aspects of the deprivation suffered by the poor.¹¹⁵ These are described in terms of inhibition of the full enjoyment by the poor of the benefits of democracy, as well of subjective experiences of inadequacy and inferiority.¹¹⁶ His articulation of the social and political dimensions of poverty reinforces the position taken in this thesis that poverty must be viewed in a cross-disciplinary way, and, as will be suggested, by the three branches of government.

Hart writes powerfully of the Fanonesque elements of poverty in South Africa, these being focused upon the psychological hardships suffered by the poor.¹¹⁷ Lephakga explains vividly how the poor in South Africa are disturbed, exploited and psychologically fearful.¹¹⁸ Metz portrays poverty as an inhumane condition, both physically and socially.¹¹⁹ Samuel *et al*/write vividly of the lived experience of poverty,

¹¹³ May 2012 *Development Southern Africa* 63 posits the need for measurement in financial terms in order to understand the phenomenon of poverty.

¹¹⁴ Du Toit 2005 *PLAAS Chronic and Development Studies* 8.

¹¹⁵ Rosa 2011 *Stellenbosch Law Review* 542. See also Adato, Carter and May 2006 *Journal of Development Studies* 231.

¹¹⁶ Rosa 2011 *Stellenbosch Law Review* 542.

¹¹⁷ Hart 2008 *Antipode* 678 describes poverty in this way, with reference to the poignant writings of Frantz Fanon who authored *The Wretched of the Earth* in 1961, outlining the psycho-social dimensions of colonialism and decolonisation. Fanon highlights the psychological hardships of being a member of a subjugated group in society, which Hart aligns to psychological struggles of the poor in South Africa.

¹¹⁸ Lephakga 2016 *Studia Historicae Ecclesiasticae* 10.

¹¹⁹ Metz 2016 *Res Publica* 333.

which is associated with isolation, marginalisation and exclusion.¹²⁰ Collectively these authors paint a dismal but consensual picture of poverty as a trigger for psychological suffering on the part of its victims.

A thorough overall view of the various characteristics of poverty is provided by Woolard in her "Overview of Poverty and Inequality in South Africa".¹²¹ She highlights alienation from kinship, food insecurity, crowded homes, energy poverty, unemployment and fragmentation of families as salient aspects of poverty, providing a broad overview of its multidimensionality.¹²²

Du Toit is a strong advocate for understanding poverty in a broader sense. He describes the money-metric view of poverty as reductionist, using the term "econometric imaginary" to account for the false outcomes of taking such a view.¹²³ He argues that a full understanding of the phenomenon must extend to dealing with its sociological dimensions. In his consideration of poverty from a sociological perspective, he demonstrates a depth of understanding of its complexity which shows clearly that it is much more than a matter for money-metric analysis only. It is apparent however from Du Toit's scholarship that there is no easy solution to finding a methodology for fully understanding poverty. He refers to the difficulty in integrating quantitative and qualitative considerations in poverty studies.¹²⁴ He also bemoans the fact that academic material considering poverty from a sociological perspective is marginalised by theorists favouring an econometric approach.¹²⁵ He complains of the depoliticisation of poverty issues,¹²⁶ thus suggesting that it is appropriate to seek to understand poverty from a political perspective as well. Du Toit's standpoint in this regard is underpinned by his emphasis on social power

¹²⁰ Samuel et al 2014 *Social Isolation and its Relationship to Multidimensional Poverty* 20. The writer posits the view that fostering social connectedness is an important component of poverty amelioration.

¹²¹ Woolard 2002 *Overview of Poverty and Inequality in South Africa* 1-15.

¹²² Food poverty is also the focus of an article by Charlton and Rose who record the vast differential between the expenditure on food of the poor and non-poor – see Charlton and Rose 2002 *Public Health Nutrition* 383.

¹²³ Du Toit 2005 *PLAAS Chronic and Development Studies* 2.

¹²⁴ Du Toit 2005 *PLAAS Chronic and Development Studies* 2.

¹²⁵ Du Toit 2005 *PLAAS Chronic and Development Studies* 12.

¹²⁶ Du Toit *Chronic and Structural Poverty in South Africa: Challenges for Action and Research* 1-33.

relations, the exercise of which, he says, leads to marginalisation of the poor and exacerbates their vulnerability, and also on a socio-historical account of how the poor have been victim to capitalism, authoritarianism and modernisation over the course of history.¹²⁷

Other theorists have also argued that it is simplistic to view poverty as a money-metric issue. For example, Klasen¹²⁸ argues persuasively that poverty is a condition of multifaceted deprivation and should be measured by a deprivation index, which takes into account all factors which may negatively affect human well-being, including for example access to housing and basic services.

It follows that the existing scholarship persuasively paints a vivid picture of poverty as characterised by more than money-metric issues, many of which are of a deep and profound nature. Instead, authors in this field advance an argument in favour of understanding poverty as a multi-faceted, widely pervasive issue.

2.2.4 Poverty as Persistent and Subject to Inertia

The prevalence of poverty in society is characterised by its persistence over time and inertia against change.¹²⁹ Dugard emphasises that severe poverty still prevails eighteen years after the advent of democracy (at the time of writing in 2013),¹³⁰ which, she avers, is an indictment upon the constitutional transformative project.¹³¹

Poverty is further characterised by inertia, according to Baxi,¹³² who argues that this is possibly due to the fact that theoretical approaches to transformative constitutionalism are disinclined to suggest radical remedies. One of the most cogent characteristics of poverty in South Africa is that it is a burgeoning and worsening problem which has deepened since 1994. McLean ascribes this to government policy shifting from a pro-poor position in the early 1990s to a

¹²⁷ Du Toit *Chronic and Structural Poverty in South Africa: Challenges for Action and Research* 2.

¹²⁸ Klasen 2000 *Review of Income and Wealth* 33.

¹²⁹ See also section 2.1 of this thesis in which structural poverty is broadly conceptualised.

¹³⁰ Dugard 2013 *The Activist* 1.

¹³¹ Calland "Chimera or Real: How Robust is South Africa's 1994 Post-Constitutional Order?" 1-9.

¹³² Baxi "Preliminary Notes on Transformative Constitutionalism" 49.

programme of structural adjustment in 1996.¹³³ This shift worsened the lot of the poor. In more recent times the COVID 19 pandemic has had profound effects on the poor, attributable largely to loss of income-earning opportunities in consequence of the pandemic.¹³⁴

2.2.5 Poverty Associated with Apartheid

There is broad consensus that poverty in South Africa is associated with apartheid. The plight of the poor is described by Christiansen¹³⁵ as a struggle, likened to the apartheid struggle. He describes poverty as a form of “socio-economic apartheid”, likening the inequalities associated with poverty to those experienced under apartheid. Other writers too have emphasised the links between poverty in contemporary South Africa and apartheid. According to Pieterse, it is a consequence of the deprivations of apartheid.¹³⁶ He also describes poverty as the outcome of apartheid, colonialism and patriarchy.¹³⁷ Dugard explains that poverty has remained racialised after the demise of these phenomena.¹³⁸ These writings collectively paint a picture of a society riddled with poverty associated with segregation and deprivation that is racially based, notwithstanding the fact that racial discrimination is no longer official government policy and the right to equality is enshrined in the Constitution, as explained earlier.

Rapatsa uses evocative language to describe the current social-economic-political milieu in South Africa insofar as it relates to poverty. He refers to “distressing levels of poverty”¹³⁹ and to perpetuation of the “documented cruelty of apartheid”.¹⁴⁰ These descriptions of the *status quo* with regard to poverty serve to highlight the human suffering associated therewith in the context of the post-apartheid society. As such they are valuable contributions to the legal academic literature on the

¹³³ Mc Lean *Constitutional Courts, Deference and Socio-economic Rights in South Africa* 220.

¹³⁴ Arndt *et al* 2020 *Global Food Security* 1.

¹³⁵ Christiansen 2007 *Columbia Human Rights Law Review* 330.

¹³⁶ Pieterse 2004 *Human Rights Quarterly* 887.

¹³⁷ Pieterse 2005 *SA Public Law* 158.

¹³⁸ Dugard 2013 *The Activist* 3.

¹³⁹ Rapatsa 2015 *Judicial Tribune* 218.

¹⁴⁰ Rapatsa 2015 *Judicial Tribune* 217.

subject, which otherwise could be prone to using legal terminology and rights discourse, neglecting the psycho-social aspects thereof.

There is a body of theoretical writing reflecting poverty as a class issue. For example Burger *et al* have undertaken research via the Stellenbosch University Bureau for Economic Research into the nature of the middle class in South Africa, and in so doing have identified poverty as being a class issue, also noting that there are strong correlations between class and race.¹⁴¹ Seekings reinforces this position, noting that income inequality persists along class but also along racial lines in South Africa, despite the constitutional entrenchment of equality as a right and legal sanctions against discrimination.¹⁴² The phenomenon of class and race-based poverty, as described by these authors, is indicative of a failure to achieve socio-economic transformation as mandated by the *Constitution*.

There are residual elements of apartheid present in the education system, which affect the quality of education and therefore the employability of citizens.¹⁴³ These include the failure of the education system to cater for self-employment,¹⁴⁴ it being mismatched to the labour market,¹⁴⁵ and its forcible incorporation of Western-crafted curricula in the African context.¹⁴⁶

Poverty in contemporary times is associated with the fact that economic power structures remained intact at the time of the political transition.¹⁴⁷ This is manifested *inter alia* in resource depletion which has disproportionately affected the poor.¹⁴⁸

Apartheid spatial layouts of towns and cities occurred in a way that prejudiced poor communities by placing them in far-flung and unfavourable locations. Mushongera,

¹⁴¹ Burger *et al* *The Middle Class in Contemporary South Africa: Comparing Rival Approaches* 1-20. The authors have identified that race remains a strong marker of financial class in South Africa, with the lower income class remaining predominantly black, approximately twenty years after the political transition.

¹⁴² Seekings *The Colour of Desert: Class and Distributive Justice in Post-Apartheid South Africa* 1-43.

¹⁴³ Kang'ethe and Chivanga 2016 *International Journal of Science Education* 258.

¹⁴⁴ Kang'ethe and Chivanga 2016 *International Journal of Science Education* 258.

¹⁴⁵ Kang'ethe and Chivanga 2016 *International Journal of Science Education* 259.

¹⁴⁶ Kang'ethe and Chivanga 2016 *International Journal of Science Education* 259.

¹⁴⁷ Swilling, Musango and Wakeford 2015 *Journal of Environmental Policy and Planning* 9.

¹⁴⁸ Swilling, Musango and Wakeford 2015 *Journal of Environmental Policy and Planning* 15.

Zikhali and Ngwenya¹⁴⁹ have researched poverty in Gauteng from the perspective of spatial distribution, and have found that the spatial skewing of wealth (spatial inequality) which prevailed during apartheid has continued largely unchanged. Thus they illustrate how spatial skewing contributes to upholding of the dismal economic situation of poor communities.

The authors cited in this section present a persuasive collection of writings linking poverty to the legacy of apartheid. This is a noteworthy and somewhat unique characteristic of poverty in the South African context.

2.2.6 Poverty Associated with the Non-realisation of the Equality and Dignity Rights

Poverty restricts the enjoyment of human rights.¹⁵⁰ In addition, poverty is frequently associated with non-realisation of human rights such as the rights to dignity and equality. This is particularly pronounced in societies in which socio-economic rights are constitutionally entrenched but weakly implemented, such as South Africa.¹⁵¹ Dignity is associated with social standing, with such standing being diminished in poor communities.¹⁵² It is trite that polarisation of wealth and poverty does not make for a substantively equal society.

Dugard writes vividly of the link between poverty and inequality, pointing out that the two phenomena have persisted in co-existence with each other after the political transition.¹⁵³ By contrast, the links between poverty and dignity are explored somewhat tenuously in academic writing. The indignity of poverty is dealt with as a phenomenon in itself, without consideration of poverty still being racialised in South Africa, and without considering that the indignities of the racial oppression of apartheid may have been perpetuated into contemporary times.¹⁵⁴ Thus it may be

¹⁴⁹ Mushongera, Zikhali and Ngwenya 2017 *Social Indicators Research* 277.

¹⁵⁰ Human Rights Watch *World Report* 2019 at 525; Mubangizi 2005 *South African Journal of Environmental Policy and Planning* 9.

¹⁵¹ Human Rights Watch *World Report* 2019 at 525.

¹⁵¹ Swilling, Musango and Wakeford 2015 *Journal of Environmental Policy and Planning* 15.

¹⁵² Waldron 2012 *Cambridge Law Journal* 203. Poverty is associated with low social standing and accordingly with a lack of dignity.

¹⁵³ Dugard 2013 *The Activist* 3.

¹⁵⁴ See for example Liebenberg 2005 *South African Journal on Human Rights* 1 which contains an erudite theoretical analysis of the value of dignity in the interpretation of socio-economic

said that lack of dignity as a feature of poverty is dealt with in a vague and inadequate manner.

The obligations of government with regard to upholding equality and dignity are framed by the fact that these are constitutional rights. Given that government is enjoined to uphold the *Constitution*,¹⁵⁵ it has a cogent responsibility to seek solutions associated with addressing inequality and indignity.

2.2.7 Poverty Marked by Economic Exclusion

The need to achieve inclusion of the poor into the economy of South Africa is much spoken of.¹⁵⁶ It appears that the concept of inclusion relates to participation in the economy and in decisions about economic matters, and also to sharing in the benefits of the economy.¹⁵⁷ The available economic literature on the exact nature of economic inclusion seems however to be scant.¹⁵⁸ Thus it appears that the concept is one espoused by policy makers and policy advocates, but it is not fully dealt with on a theoretical level, neither translated into implementable terms. Nevertheless it remains a cogent characteristic of poverty.

rights, with wide reference to international writings and jurisprudence, but without reference to the racialised nature of dignity and equality issues in South Africa.

¹⁵⁵ As per section 7(2) of the *Constitution*.

¹⁵⁶ See for example Fourie *How Inclusive is Economic Growth in South Africa?* in which the concept of inclusive growth is explained and discussed. The causes of lack of inclusiveness are stated to be due to a low labour absorption rate and high income inequality.

¹⁵⁷ See Ramos, cited in Fourie *How Inclusive is Economic Growth?* 3, who outlines the two components.

¹⁵⁸ The search conducted for purposes of this thesis for material on economic inclusion and inclusive economic growth in South Africa has yielded some results, but no academic literature. The references found that refer to such growth include the *National Development Plan 2030*, where it is mentioned but not defined. The inclusive growth index provided by the International Policy Centre for Inclusive Growth of the United Nations Development Programme indicates a consistent relatively high index for South Africa, which means that inclusive growth is not being achieved. Again, however, it does not contain a definition of inclusive growth. Similarly, the World Bank *South Africa Economic Update 2018* 1-64 refers to the need to foster economic inclusion, without defining the term. In the realm of sociological writing however there is some reference to unfulfilled promise of inclusion of the poor and marginalised into the economy – see Lephakga 2016 *Studia Historiae Ecclesiasticae* 1, for example. The focus of Lephakga's work is however not to explore economic theory but rather to highlight the failure to achieve socio-economic transformation.

2.2.8 *Non-realisation of the Economic Component of the Socio-economic Rights*

Poverty is characterised *inter alia* by a failure to realise the economic component of the socio-economic rights enshrined in the *Constitution*. These rights are undoubtedly at least as much economic as they are social, since they confer rights to economic resources such as housing, food, water and education. It is arguable that the rights need to be given impetus, or “teeth”,¹⁵⁹ so that the benefits to the poor can be tangible. There is a clearly identifiable need to set a minimum core content, with resource allocation and economic standards, for the rights, which could be achieved by way of determination of a minimum core content of the rights. Pursuit of this position could arguably lead to upliftment of the living standards of the poor. It is regrettable that the fulfilment of rights through the setting of core content standards does not seem to have gained the attention of economic theorists.¹⁶⁰

2.2.9 *Poverty Associated with Inequalities in Education*

Inequalities in education are a persistent and endemic feature of poverty in South Africa.¹⁶¹ These have persisted after the political transformation notwithstanding the fact that the right to basic education is an absolute right, and notwithstanding the passage of a considerable length of time to allow for education reform.¹⁶²

2.2.10 *Poverty Associated with Urbanisation*

Poverty and urbanisation have a closely intertwined relationship. This is apparent from the Department of Cooperative Governance and Traditional Affairs *Integrated*

¹⁵⁹ Bilchitz 2002 *South African Law Journal* 119.

¹⁶⁰ Research for this thesis has found writings on “core” or basic economic standards imperilled by non-fulfilment of the socio-economic rights only in legal but not economic journals. See for example Pieterse 2004 *Human Rights Quarterly* 904.

¹⁶¹ For example, Spaul 2013 *International Journal of Educational Development* 436-447 undertook and records a study of the bimodal manifestations of poverty and privilege in South African primary schools. See also Badat and Sayed 2014 *Annals of the American Academy* 127 who similarly bemoan inequalities in education in South Africa post 1994.

¹⁶² The writers cited both wrote approximately twenty years after the first democratic election and approximately eighteen years after the adoption of the 1996 *Constitution*.

Urban Development Framework,¹⁶³ which describes the links between the two phenomena in detail. In particular, poverty is linked to spatial segregation emanating from apartheid times, as alluded to earlier.¹⁶⁴ Proportionally high expenditure on transport afflicts the poor, who may live far from their places of work.¹⁶⁵ Also, climate change vulnerability, such as susceptibility to fires and floods, afflicts poor communities in urban areas disproportionately highly.¹⁶⁶ Thus it is clear that urban living entails dealing with a range of phenomena associated with poverty.

2.2.11 *Poverty Associated with Developmental Legalism*

Writing about poverty as a global phenomenon, Mc Evoy¹⁶⁷ describes how poverty amelioration can become disconnected from developmental imperatives. He explains how a developmental state can become legalistic and hence unable to focus on humanitarian issues such as poverty. This may occur when transitional processes, including the implementation of socio-economic rights, is dominated by a narrow legalistic lens, thus ousting legal humility and the possibility of interpreting human rights as developmental.¹⁶⁸ Thus the paradoxical situation prevails that, although poverty is characterised by underdevelopment, developmentalism may co-exist with poverty and thus present as a characteristic of poverty. An awareness of this phenomenon on the part of government would assist in enabling the forging of poverty amelioration solutions.

2.2.12 *Poverty Prevalent in the Minerals-Energy Sector*

The minerals-energy sector has for many years dominated the South African economy, and has been managed historically by large corporations in a manner

¹⁶³ Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* 1-114.

¹⁶⁴ Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* 22.

¹⁶⁵ Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* 52.

¹⁶⁶ Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* 103.

¹⁶⁷ Mc Evoy 2007 *Journal of Law and Society* 418.

¹⁶⁸ Mc Evoy 2007 *Journal of Law and Society* 413.

which has contributed substantially to poverty and deprivation.¹⁶⁹ Poverty in the minerals-energy sector has become entrenched in South Africa, such that it may be said that poverty-stricken mining communities, comprising mining workers, are a prominent feature of the poverty landscape. Humby highlights the inhumanity of conditions foisted upon mine workers, for example.¹⁷⁰ Further explaining such conditions, Claassens and Matala describe the various struggles of communities in the platinum belt.¹⁷¹ These include deprivation of land, subjection of rural communities to Western power regimes, and lack of consultative processes when decisions which are life-changing for people are made. Thus they account for the deprived economic existence of workers in the sector as an entrenched aspect of poverty in the country.

2.2.13 Observations on Characteristics of Poverty

The above discussion offered an overview of writings describing a variety of characteristics of poverty. Taken collectively, these paint a detailed picture of the phenomenon. Characteristics which are arguably core to a full understanding of poverty are mentioned first. These include the embedded and systemic nature of poverty, its money-metric and non-money-metric features, its persistent, inertia-saddled and burgeoning nature, its association with apartheid, and its association with non-realisation of the rights to equality and dignity. The discussion of these core characteristics is followed by one on ancillary but not insignificant characteristics – association with economic exclusion, failure of economic theory to address poverty, association with inequalities in education, association with urbanisation, association with developmental legalism, and prevalence in the minerals and energy sector.

The value of an analysis of the characteristics of poverty lies in it enabling the identification and understanding of poverty as a pervasive phenomenon relevant to

¹⁶⁹ Humby 2016 *Journal of Business Ethics* 662.

¹⁷⁰ Humby 2016 *Journal of Business Ethics* 658.

¹⁷¹ Claassens and Matala 2014 *New South Africa Review* 117. The struggles referred to include dispossession of land, failure of the corporations to understand social hierarchies in communities, legislation disregarding customary entitlements, and the like.

the powers and functions and the work of the three branches of the South African government. In these branches, an understanding of the characteristics of poverty is a necessary precursor to identifying solutions for its amelioration.

It is noteworthy that none of the writers cited attempt a holistic assessment of the characteristics of poverty, but all present a partisan view based on their particular area of research. This trend is understandable given their respective theoretical *foci*, but is regrettable in the context of the need to develop a fully-fledged and deep understanding of the phenomenon, so as to inform possible action by government.¹⁷²

The discussion to follow reflects on determinants of poverty with a view to further inform and direct the possible paths for initiatives, via the legislature, executive and judiciary to address poverty.

2.3 Determinants of Poverty

There is a diverse body of writing on the determinants of poverty, straddling many disciplines such as law, sociology, economics and political theory. It has been possible to distil these determinants into six distinct causal themes, as will appear more fully from the discussion that follows.

2.3.1 Ideological Notions

The pursuit by government and private sector actors of ideologies and may serve to create and sustain poverty. Adherence to specific ideologies such as neoliberalism and capitalism in an unquestioning manner can have a dampening effect on pursuing poverty amelioration in that it encourages a unidimensional and therefore restricted view of the phenomenon.¹⁷³ The discussion that follows explores specific

¹⁷² See chapter 6 for a fuller discussion of this point.

¹⁷³ Ngwane "Ideologies, Strategies and Tactics of Township Protest" 381-398. See also Williams 2005 *South African Journal on Human Rights* 457, who writes "The persistence of poverty under modern economic conditions is a product of legal and political institutions designed to serve certain social policies".

ideologies, the adherence to which may determine poverty and poverty-related outcomes.

2.3.1.1 Neoliberalism

As will be apparent from the discussion in this section, a neoliberal ideology, which translates into a neoliberal governance approach, prevails in South Africa. It is cited frequently as a cause of poverty. In its traditional form, neoliberalism is understood to be a policy model in terms of which economic influence is wielded by the private sector rather than the public sector.¹⁷⁴ It essentially embodies a theory of how the economy should be organised, which is predominantly via the promotion of free markets and the restriction of state intervention in those markets.¹⁷⁵ Thus, in terms of neoliberal theory free rein is given to market forces to determine economic outcomes, and these outcomes may include poverty. In contemporary times neoliberal theory has come to be tempered and slightly refocused. It remains conceptually centred around liberalism and capitalism, but these features are now supplemented by an affirmation of constitutional democracy, and by welfare measures.¹⁷⁶ It is however debatable whether this tempering changes the fundamental nature of the neoliberal position.

The switch from socialism to neoliberalism by the ruling party in South Africa in the 1990s, arguably had the effect of impeding the struggle for equality and social justice.¹⁷⁷ This shift was primarily characterised by the shift by the ruling ANC from the *Freedom Charter*¹⁷⁸ and the *Reconstruction and Development Programme* (RDP)¹⁷⁹ towards a neoliberal governance model. The *Freedom Charter*, which was

¹⁷⁴ See the definition of neoliberalism provided by the online resource Investopedia: "Neoliberalism is a policy model that encompasses both politics and economics and seeks to transfer the control of economic factors from the public sector to the private sector. Many neoliberalism policies enhance the workings of free market capitalism and attempt to place limits on government spending, government regulation, and public ownership." <https://www.investopedia.com/terms/n/neoliberalism.asp>. See also Mc Carthy and Prudham 2004 *Geoforum* 275.

¹⁷⁵ Moyo and Mamabolo 2014 *Journal of Public Administration* 949.

¹⁷⁶ Vallier 2021 <https://plato.stanford.edu/entries/neoliberalism>.

¹⁷⁷ Emery 2006 *Social Justice* 11.

¹⁷⁸ African National Congress 1955 *The Freedom Charter*.

¹⁷⁹ African National Congress 1994 *Reconstruction and Development Programme*.

the fundamental ideological manifesto of the ANC from 1955 to the early 1990s, was socialist in its orientation, leaning towards the collective good and socio-economic equality. This contrasts with neoliberalism which is an each-man-for-himself ethos, rather than a collective struggle for transformation.¹⁸⁰ Thus, the shift towards neoliberalism has weakened the social transformation imperative. It is arguable that pursuit of the *Freedom Charter* would have been beneficial to the poor.¹⁸¹ Thus the adoption of neoliberalism at the time of introduction of the *Growth, Employment and Redistribution Policy* (GEAR), which is associated with the abandonment of the *Freedom Charter* and the RDP, may be seen as a determinant of poverty.¹⁸² The introduction of the GEAR policy in 1996 brought with it an orientation towards favouring doing business with the World Bank and the International Monetary Fund (IMF), both of which favour a neoliberal governance model.¹⁸³ This shift was another aspect of an orientation away from the redistributive slant of the RDP and the earlier *Freedom Charter*. The 'structural adjustment' programmes advocated by the IMF had exacerbatory effects on poverty.¹⁸⁴ These programmes tended towards preservation of upper class power, entrepreneurialism, consumerism and imperialism, which are preservative of the status of the wealthy.¹⁸⁵

Neoliberalism has a poor record with regard to stimulation of economic growth, and it causes polarisation of wealth, accumulation by the wealthy, and dispossession of the poor, with the poor paradoxically being blamed for their own misfortune.¹⁸⁶ Neoliberalism is also not favourable for development.¹⁸⁷ Neoliberal policy, with its attendant sanctioning of corporate power, is a force which renders the constitutional

¹⁸⁰ See section 4.3 for a more detailed discussion of the *Freedom Charter* and the RDP as government policy influencing the trajectory of poverty.

¹⁸¹ Mtshiselwa 2016 *Theological Studies* 4. See also Peet 2002 *Antipode* 54, who argues that the South African government's fundamental ideology as reflected in the RDP, which was socialist in orientation, was colonised by global hegemonic discourses favouring neoliberalism.

¹⁸² See also Adelzadeh 1996 *Transformation* 66 and Hanson and Hentz 1999 *Political Science Quarterly* 491.

¹⁸³ The influence of the World Bank and the IMF on the GEAR principles is documented in Adelzadeh 1996 *Transformation* 67.

¹⁸⁴ Adelzadeh 1996 *Transformation* 91.

¹⁸⁵ Harvey 2006 *Geografiska Annaler* 149-151.

¹⁸⁶ Harvey 2006 *Geografiska Annaler* 151.

¹⁸⁷ Sai-wing Ho and Schneider 2002 *Journal of Economic Issues* 507. See also Emery 2006 *Social Justice* 6 and Hanson and Hentz 1999 *Political Science Quarterly* 479.

system unable to address the needs of the poor because it is marred by having to function within the context of this power structure.¹⁸⁸ Thus neoliberal policy viewed in this context is seen as a factor which inhibits poverty amelioration.

There is inherent and entrenched disparity between the *Constitution*, which has a redistributive and socialist orientation, and the neoliberal, market-driven practices of government, with the latter causing entrenched institutionalised exclusion of the poor.¹⁸⁹ Thus neoliberalism may be seen as a factor undermining the *Constitution*.

A direct link may be forged between neoliberal theory and poverty, with poverty being marginalised by neoliberal economists, and perpetuation of a form of "racial capitalism".¹⁹⁰ This brings with it a disregard for and thwarting of initiatives towards redistribution of wealth.¹⁹¹

Neoliberalism as manifested in contemporary South Africa, may be described as being resilient, and characterised by six salient features.¹⁹² Firstly, there is no deliberative process for formulation of economic policy.¹⁹³ Secondly, there is a shortfall in democratic oversight by Parliament.¹⁹⁴ Thirdly, there is autonomism and a disinclination to interrogate proposed policy for decision.¹⁹⁵ Fourthly, there is the phenomenon of macroeconomics being free from scrutiny, even though microeconomics is tightly regulated.¹⁹⁶ Fifthly, there is a failure by macroeconomics to address redistribution and inequality.¹⁹⁷ Sixthly, there is a failure by government to interrogate neoliberal deepening.¹⁹⁸ Taken collectively, these attributes serve to entrench neoliberalism as a force determinative of poverty.

¹⁸⁸ Bond 2014 *Politikon* 461.

¹⁸⁹ Lemanski 2017 *International Development Planning Review* 20.

¹⁹⁰ Schneider 2003 *Review of Social Economy* 26, 48.

¹⁹¹ Schneider 2003 *Review of Social Economy* 26.

¹⁹² Segatti and Pons Vignon 2013 *Review of African Political Economy* 537.

¹⁹³ Segatti and Pons Vignon 2013 *Review of African Political Economy* 547.

¹⁹⁴ Segatti and Pons Vignon 2013 *Review of African Political Economy* 548.

¹⁹⁵ Segatti and Pons Vignon 2013 *Review of African Political Economy* 549.

¹⁹⁶ Segatti and Pons Vignon 2013 *Review of African Political Economy* 550.

¹⁹⁷ Segatti and Pons Vignon 2013 *Review of African Political Economy* 538.

¹⁹⁸ Segatti and Pons Vignon 2013 *Review of African Political Economy* 538.

Neoliberalism as practised in contemporary times undermines social justice and economic justice.¹⁹⁹ It does so by imposing a market rationale on issues which relate to the social and economic well-being of people, which constitutes a mismatch. It does not promote economic and social development but rather leads to increasing wage differentials and inequality. As such, it may be seen as a system or policy approach which has the effect of exacerbating poverty.²⁰⁰ In addition, neoliberalism may be seen to perpetuate 'economic apartheid', with the focus on the certainty and stability that a market-oriented approach entails creating an 'ideology of the market'.²⁰¹

Neoliberalism is associated with negative backwash economic effects.²⁰² These include 'brain drain', capital flight and difficulty attracting investment.²⁰³ These phenomena are pronounced in South Africa due to its colonial history, and they serve to entrench inequality and poverty in a circular and cumulative way.²⁰⁴

The *National Development Plan 2030* (NDP)²⁰⁵ has been criticised for not providing a clearly articulated political programme but rather adhering to neoliberal values.²⁰⁶ It is a plan which purportedly seeks to guide the developmental trajectory of South Africa up to 2030.²⁰⁷

¹⁹⁹ Astroulakis 2014 *Ethics and Economics* 94.

²⁰⁰ Astroulakis 2014 *Ethics and Economics* 96, 99. The author states that under neoliberalism market forces are seen as an ethic in themselves, to the detriment of acknowledging ethical dimensions in economics. He goes further to state at 99 that neoliberalism has failed to effect social and economic development, rather entrenching the *status quo*. At 104 he posits development ethics as an alternative to neoliberalism, explaining that the former enhances life sustenance, dignity, honour and recognition, all of which are of value in ameliorating poverty. See also Emery 2006 *Social Justice* 6, who argues that the struggle for equality and social justice is impeded by the neoliberal economic agenda.

²⁰¹ Schneider 2003 *Review of Social Economy* 23. In this article the argument is developed that fundamental change in the lives of black South Africans has been frustrated by liberal economic theory, and that neoliberal economics marginalises the problems created by poverty and inequality and disregards the possibility of redistribution.

²⁰² Sai-wing Ho and Schneider 2002 *Journal of Economic Issues* 507.

²⁰³ Sai-wing Ho and Schneider 2002 *Journal of Economic Issues* 509.

²⁰⁴ Sai-wing Ho and Schneider 2002 *Journal of Economic Issues* 510.

²⁰⁵ Presidency of the Republic of South Africa *National Development Plan 2030* 1-489.

²⁰⁶ Allogio and Thomas 2013 *Social Dynamics* 110.

²⁰⁷ See also Moyo and Mmamabolo 2014 *Journal of Public Administration* 946. In addition see Mc Donald and Smith 2004 *Urban Studies*, which describes vividly the "privatisation" of Cape Town associated with the prevalence of a neo-liberal governance model in the various spheres of government.

The writings cited in this section reflect a broad spectrum of authors who are *ad idem* that neoliberalism is a governance model that has had fundamental negative ramifications for the potential improvement of the lot of the poor in South Africa. As such it is a powerful determinant of poverty of which government should be aware. Such an awareness could serve as a foundation for government initiatives to ameliorate poverty.²⁰⁸ It is noteworthy that there does not appear to be any self-conscious scrutiny on the part of government of the legitimacy of a neoliberal governance model, but only critique from academia.²⁰⁹ This is a *lacuna* warranting the attention of the three branches of government.

2.3.1.2 Libertarianism

Libertarianism is an ideological model, associated with liberalism,²¹⁰ which is the construct from which neoliberalism flows. The pursuit of libertarianism also tends to serve as a cause or determinant of poverty. Libertarianism refers to the pursuit of liberalism in the economic context. It is an economic theory which does not favour the poor, and its application thus serves as a cause or determinant of poverty. Libertarianism takes the view that the interests of everybody, including the poor, are best served by a limited government with minimal distributive and regulatory oversight.²¹¹ Associated with this is the notion that everyone is free to determine his or her own welfare via work or investment, and, as a corollary to this, the poor are presumed to have chosen poverty. Although this research has not been able to find literature in which South Africa is specifically referred to as a libertarian state, the current neoliberal model of governance practised in South Africa seems to emanate

²⁰⁸ See section 2.3.1.1 in which it is suggested that the cause of poverty amelioration could be served by a conscious shift in government policy away from neoliberalism.

²⁰⁹ In the course of research only academic material on the subject has been found. The many government policy documents studied do not refer to the prevalence of neoliberalism in South Africa. For example, it is not mentioned in the NDP.

²¹⁰ "Liberalism" is focused upon personal freedom and liberty. In the economic context this would include the liberty to determine one's own economic destiny through work or other means. In this regard see The Economist <https://www.economist.com/johnson/2010/10/08/the-isms-of-the-week-liberalism-and-libertarianism>. The nature of liberalism versus libertarianism is eloquently explained in Kane 2009 *Philosophical Studies* 35-44.

²¹¹ Maloberti 2015 *The Independent Review* 564.

from and is associated with libertarianism.²¹² Thus libertarianism in the context of this thesis is best understood as a construct underpinning modern neoliberalism rather than as a stand-alone principle. The libertarian position is worthy of criticism for having a disregard of its own consequences, and for its tolerance of great disparities in income and wealth, with adverse consequences for the poor.²¹³ Again, this is an issue worthy of consideration by government, particularly the executive which controls the *fiscus* and is the primary architect of social and economic policy.

2.3.1.3 Capitalism

Capitalism is an economic system based on private ownership, and it is receptive to new capital forces entering the market.²¹⁴ Participation in the market requires capital in advance of such participation.²¹⁵ It is distinct from neoliberalism, which is not purely an economic model but an ideological and philosophical movement.²¹⁶ Neoliberalism therefore takes an activist stance on economic issues, whereas capitalism is a model promoting capital accumulation.

Pro-capitalist policies exacerbate inequality and unemployment, as was evidenced by the Marikana massacre ten years ago and the dynamics surrounding it.²¹⁷ Promotion of capitalism is acknowledged to be adverse for the poor.²¹⁸ Capitalism marginalises the poor because it requires ownership of resources for participation in the economy, and the poor do not have such resources.²¹⁹ The Marikana incident was an extreme manifestation of the marginalisation and dehumanisation of the poor, emanating from a conflict between those benefitting from capital

²¹² Neoliberalism, which, as already explained, is the prevalent governance system in South Africa, is the modern form of liberalism and is developed from liberalism. See Oxford Dictionaries <https://en.oxforddictionaries.com/definition/neo-> at which it is explained that "neo" means "derived from".

²¹³ Maloberti 2015 *The Independent Review* 555-556.

²¹⁴ Hodgson 2016 *Competition and Change* 37.

²¹⁵ Columbia University Centre on Capitalism and Society *Theory of Capitalism* 1.

²¹⁶ Ganti T 2014 *Annual Review of Anthropology* 91.

²¹⁷ Alexander 2013 *Review of African Political Economy* 615. The massacre was the killing in August 2012 of 78 miners who were striking pursuant to a wage dispute, by the South African police. See S A History sahistory.org.za/article/marikana-massacre.

²¹⁸ Le Roux 1991 *Social Justice* 230 at 234. This view is premised on capitalism failing to develop the manufacturing sector and the national skills base.

²¹⁹ Lephakga 2016 *Studia Historiae Ecclesiasticae* 3.

accumulation, and the countermovement.²²⁰ This is effectively a conflict between those at opposite ends of the wealth spectrum. In South Africa the poor seem to be incorporated into a system of racialised capitalism in a forcible manner.²²¹ There is logic inherent in an assumption that capitalism is detrimental to the poor. It allows unfettered accumulation of wealth by the few, which of necessity must be to the detriment of the many, and thus is a system that entrenches poverty at the lower end of the wealth spectrum. Thus it may be deemed a determinant of poverty.²²²

The effect of capitalism on poverty is manifested by the ways in which various markets operating as part of the capitalist system affect the poor. The workings and structure of the mainstream economy perpetuate poverty.²²³ The labour market which functions within the broader ambit of the economy, locks out the poor.²²⁴ The existence of an unfettered capitalist trading market not only exacerbates poverty, but also increases other undesirable phenomena such as pollution, corruption, crime and inequality.²²⁵ Trade liberalisation, which was introduced in South Africa shortly after the political transition, has been shown to induce poverty effects in developing countries, including South Africa.²²⁶

A further manifestation of the effects of capitalism on poverty, lies in the impacts it has on social and power relations. An example of this is the use of the forces of

²²⁰ Schierup 2016 *Critical Sociology* 1062.

²²¹ Mc Chesney and Foster 2010 *Monthly Review Magazine* 1, 6, 10 argue that capitalism has negative effects on social development and creates deep inequalities in society, thus exacerbating poverty. As a corollary to this argument, they argue further that socialisation of the economy is necessary in order to address the needs of people. See also Hickey and Du Toit *Adverse Incorporation, Social Exclusion and Chronic Poverty* 16, where it is stated, citing Harriss-White, that whilst capitalism creates wealth for some, it generates poverty for others.

²²² See also Desai and Maharaj "Debating the First and Second Economy" 54 and Schneider 2008 *Forum for Social Economics* 1162.

²²³ Hickey and Du Toit *Adverse Incorporation, Social Exclusion and Chronic Poverty* 18.

²²⁴ See Ferguson 2013 *Journal of the Royal Anthropological Institute* 232-233, where it is furthermore stated that the effect of lock out from the market is worse than subjection, and that those who are excluded from the markets would wish to gain access thereto even under circumstances of subjection.

²²⁵ Hickey and Du Toit *Adverse Incorporation, Social Exclusion and Chronic Poverty* 19.

²²⁶ Hickey and Du Toit *Adverse Incorporation, Social Exclusion and Chronic Poverty* 19.

capitalism, deployed deliberately during colonial and apartheid times, to cause the destruction of black peasantry and rural livelihoods.²²⁷

To the extent that capitalism allows the incorporation of citizens into the markets, such incorporation has been adverse for some, particularly for citizens who have only labour, and not other resources, to offer in the capitalist markets.²²⁸ For those not accommodated within the markets, their non-accommodation may be worse than subjection *per se*, in that it places them in the position of not being considered worthy of subjection.²²⁹

Social and economic transformation in South Africa thwarted by the fact that there was no transformation away from capitalism at the time of the political transition, but rather a refurbishment thereof.²³⁰ Associated with this is the fact that fundamental features of the apartheid economy have remained intact, and, in particular, economic power has not shifted.²³¹ Levels of economic inequality have remained extreme.²³²

The collection of writers cited with regard to capitalism as a cause or determinant of poverty are all *ad idem* regarding its role as a contributor to and an exacerbator of poverty. As with neoliberalism, it is unfortunate that the predominance of a capitalist economy seems to not be questioned by government. This is a phenomenon worthy of the consideration of government as part of an imperative to ameliorate poverty.²³³

2.3.1.4 Constitutionalism

Constitutionalism is a broad concept which supports various governmental styles and theories, but with a common denominator which is the adherence to a founding

²²⁷ Hickey and Du Toit *Adverse Incorporation, Social Exclusion and Chronic Poverty* 21.

²²⁸ Hickey and Du Toit *Adverse Incorporation, Social Exclusion and Chronic Poverty* 4.

²²⁹ Ferguson 2013 *Journal of the Royal Anthropological Institute* 234.

²³⁰ Southall 2014 *Annals of the American Academy of Political and Social Science* 52.

²³¹ Southall 2014 *Annals of the American Academy of Political and Social Science* 48.

²³² Southall 2014 *Annals of the American Academy of Political and Social Science* 53.

²³³ See section 2.4.1.5.

constitution, which typically defines the limits of governmental authority.²³⁴ This may also serve to structure the various branches and spheres of government and impose rules relating to their powers and functions, and sometimes to establish rights vested in citizens, all of which are features of the South African *Constitution*. In the present context constitutionalism in South Africa will be considered relative to the phenomenon of poverty, and the specific focus for discussion will be the role of the constitutionally entrenched socio-economic rights.

Woolman²³⁵ warns against constitutionalism, in the sense of reliance upon a constitution to cure social ills, as being misguided. He expresses the view that the South African *Constitution* is merely “scaffolding” which creates the space for political action but does not replace such action. Thus, he suggests, fulfilment of socio-economic rights and poverty relief must be driven not by reliance upon the *Constitution* but by political action.²³⁶

The current political milieu in South Africa has been described as “neo-apartheid constitutionalism”, with the majority of the population who suffered discrimination under apartheid not having achieved status as an economically dominant group within society.²³⁷ Liberal democracy only benefits those who were privileged under apartheid, and the rest of society suffers under patronage, appropriation and repression.²³⁸ It is arguable that the *Constitution* is unjustifiably deified in South Africa,²³⁹ whereas it is formulated in such a way that it cannot achieve its stated objectives,²⁴⁰ and it masks white hegemony and historical conquest.²⁴¹ Thus the ability of the constitutional democratic model to ameliorate poverty may be cast into question. Questioning the efficacy of the *Constitution* as a transformative instrument

²³⁴ Waluchow and Kyritsis *Constitutionalism* <https://plato.stanford.edu/entries/constitutionalism> 1.

²³⁵ Woolman 2016 *New York Law School Law Review* 295.

²³⁶ Wooman 2016 *New York Law School Law Review* 295.

²³⁷ Madlingozi 2017 *Stellenbosch Law Review* 124.

²³⁸ Madlingozi 2017 *Stellenbosch Law Review* 125.

²³⁹ Madlingozi 2017 *Stellenbosch Law Review* 129.

²⁴⁰ Madlingozi 2017 *Stellenbosch Law Review* 139.

²⁴¹ Madlingozi 2017 *Stellenbosch Law Review* 139.

and a tool for poverty amelioration is well justified in the context of the prevalence of severe poverty long after the constitutional transformation.

It is further arguable that constitutionalism may be a barrier to the resolution of community protests and rebellions in South Africa, which are largely driven by dissatisfaction with service delivery.²⁴² This may be because the *Constitution* is grounded in property rights which are sometimes seen to trump socio-economic rights.²⁴³ Faith in the *Constitution* tames social activism, and this has a negative influence on societal transformation.²⁴⁴ Constitutional compromises at the time of the political transformation may have hard-wired inequality into the political economy.²⁴⁵ Where this trend is prevalent in South Africa, the pursuit of constitutionalism may have negative impacts upon societal transformation and poverty amelioration. In addition, the constitutional provision for equality before the law may serve to dehistoricise inequality,²⁴⁶ particularly in the context of institutionalised and persistent poverty amongst people of colour.²⁴⁷

The particular flavour of constitutionalism prevalent in South Africa may serve to worsen the lot of the poor and marginalised, because the *Constitution* stops short of addressing their needs and giving flesh to transformation.²⁴⁸ This trend is manifested in Constitutional Court judgments in socio-economic rights matters, which are often incremental and reticent and offer weak remedies.²⁴⁹ Also, the court does not seem to have an appetite to make political decisions, but shields itself behind the doctrine of deference.²⁵⁰ No explicit provision is made in the *Constitution* for the enablement of a new economic order, for example.²⁵¹

²⁴² Bond 2014 *Politikon* 461.

²⁴³ Bond 2014 *Politikon* 464.

²⁴⁴ Bond 2014 *Politikon* 465.

²⁴⁵ Bond 2014 *Politikon* 468.

²⁴⁶ Lephakga 2016 *Studia Historiae Ecclesiasticae* 2.

²⁴⁷ Lephakga 2016 *Studia Historiae Ecclesiasticae* 5.

²⁴⁸ Mc Dougall 2016 *New York Law School Law Review* 33.

²⁴⁹ Mc Dougall 2016 *New York Law School Law Review* 34.

²⁵⁰ Mc Dougall 2016 *New York Law School Law Review* 34.

²⁵¹ Mc Dougall 2016 *New York Law School Law Review* 34.

The discussion in this section points to a notion which is somewhat disturbing – that the constitutional regime may perversely entrench the *status quo* and frustrate the cause of poverty amelioration. This indicates that the *Constitution* may be a source of transformational inertia, and as such a determinant of poverty. This is a phenomenon of which the three branches of government must be aware in seeking remedies for poverty amelioration. This would entail both understanding the limitations of the *Constitution* and considering a possible strengthening of the constitutional provisions relevant to poverty.

2.3.1.5 Post-colonialism and Neo-colonialism

Post-colonialism is a phenomenon which some writers attribute to ongoing impacts of colonial rule in modern times, including adverse impacts on the poor.²⁵² For example, the end of colonisation did not necessarily bring the end of first world domination, and the structural conflicts underpinning colonialism still persist in contemporary times.²⁵³ This has obvious adverse implications for the poor. To interrogate this statement and its relevance to South Africa, it is useful to consider the country's colonial past.

South Africa became a republic in 1961 after approximately three centuries of colonial rule by foreign powers. Its colonial history is complex and chequered.²⁵⁴

²⁵² Postcolonial theory may be defined as “a body of thought primarily concerned with accounting for the political, aesthetic, economic, historical, and social impact of European colonial rule around the world in the 18th through the 20th century. Postcolonial theory takes many different shapes and interventions, but all share a fundamental claim: that the world we inhabit is impossible to understand except in relationship to the history of imperialism and colonial rule”. See <https://www.oxfordbibliographies.com/view/document/obo-9780190221911/obo-9780190221911-0069.xml>.

²⁵³ Shohat 1992 *Social Text* 107.

²⁵⁴ A useful history of colonisation in South Africa is provided in Oliver and Oliver 2017 *HTS Theological Studies* 1-88. The authors point out that there were four phases in South Africa's colonial history being the following. About 2000 years ago: An unofficial colonisation by from the north. This colonisation was ended in 1880 when the country was divided into four polities, two being ruled by the British and two by the Afrikaners. 1652: An official colonisation from the south by the Dutch VOC. This colonisation came to an end when Britain finally took the country from the Netherlands in 1806 (for the second time). 1806: An official colonisation of the country by Great Britain. This era came to an end when the country became a Republic in 1961. 1961: An internal colonisation of the country by the white Afrikaners, which ended in 1994 when the country became a democracy.

Neocolonialism²⁵⁵ has persisted in South Africa notwithstanding its independence from colonial rule and its transition to a democracy.

Neocolonialism defines culture, labour, intersubjective relations and knowledge production.²⁵⁶ It is evidenced by a pernicious clinging in previously colonised states to the notion of the desirability of Western standards, as opposed to post-colonialism which is constituted by the enduring impacts of colonialism after liberation. In terms of the latter, Western models of growth and development are still aspired to despite the colonial era having ended.²⁵⁷ Colonial influence is wielded in modern times by objects, manufacture of desire and commodification.²⁵⁸ This phenomenon is associated with the fact that the colonial and neo-colonial state has created, racinated and rationalised inequality.²⁵⁹

Seekings²⁶⁰ describes the development of colonialism and its successor phenomena (post- and neocolonialism) during the twentieth century in South Africa. He makes the point that during the first half of the twentieth century colonialism was actively pursued, with colonial rule being maintained over Africans for their low cost labour. In the build-up to apartheid the interests of white South Africans were prioritised, with the Carnegie Commission of 1932 seeking to remedy white poverty.²⁶¹ During the apartheid years maintenance of the living standards of whites was achieved directly, indirectly and by omission.²⁶² After the political transition, the welfare system which previously benefitted the erstwhile colonial masters was transformed to benefit the whole population, but social solidarity between rich and poor continues to be bounded.²⁶³ Taking into consideration that the shift from colonialism

²⁵⁵ Neocolonialism is the persistence after liberation from colonial rule of influence by the erstwhile colonial power over the liberated former colony. For a discussion of the theoretical aspects thereof see the Internet Encyclopedia of Philosophy on <https://iep.utm.edu/neocolon/>. See also Uzogiwe 2019 *Journal of Global South Studies* 59.

²⁵⁶ Ndlovu-Gatsheni 2013 *Journal of Developing Societies* 331.

²⁵⁷ Ndlovu-Gatsheni 2013 *Journal of Developing Societies* 337. See also Nkrumah 1966 *Neocolonialism: The Last Stage of Imperialism* in which the author paints a clear picture of neocolonialism as a form of exploitative hegemony.

²⁵⁸ Comaroff 1998 *Social Identities* 331.

²⁵⁹ Comaroff 1998 *Social Identities* 339.

²⁶⁰ Seekings 2016 *European Journal of Social Theory* 196.

²⁶¹ Seekings 2016 *European Journal of Social Theory* 202.

²⁶² Seekings 2016 *European Journal of Social Theory* 204.

²⁶³ Seekings 2016 *European Journal of Social Theory* 207.

to post- and neocolonialism is relatively recent, and that it entailed major shifts in social dynamics, it is understandable that post- and neocolonialism are still pervasive determinants of inequality and poverty.

2.3.1.6 Developmentalism

A further ideological construct, which, if not pursued appropriately, can serve as a determinant of poverty, is developmentalism.²⁶⁴ The focus of developmentalism is on economic imperatives, with social and political dynamics being downplayed or ignored. Its unquestioning adoption in government policy leads to a failure to address the multifaceted aspects of poverty, which in turn frustrates movement away from poverty and inequality.²⁶⁵ Transitional justice and development are often misaligned, with the developmental approach disregarding the need to address social injustices.²⁶⁶ Developmentalism, which may be thought by some to be a panacea for addressing economic ills and therefore a remedy for poverty, may thus perversely serve as a determinant of poverty.

2.3.1.7 Utilitarianism

Utilitarianism, which entails the favouring of actions that enhance happiness or pleasure for the maximum number of beneficiaries, is yet another ideological model which has been blamed for contributing to poverty.²⁶⁷ It has been argued that the prevailing general utilitarian approach to economics is unjustifiable and should be supplemented by the generation of a normative ranking of social outcomes based on a non-utilitarian description of human nature, which would have better outcomes

²⁶⁴ Developmentalism is an economic theory concerned with improving the economy, and hence national autonomy, by fostering the development of internal markets, for example by imposing high tariffs on imported goods. See Lexico <https://www.lexico.com/definition/developmentalism>.

²⁶⁵ Rosa 2011 *Stellenbosch Law Review* 544, 547.

²⁶⁶ Mani 2008 *International Journal of Transitional Justice* 256.

²⁶⁷ Utilitarianism is defined as follows in Investopedia: "Utilitarianism is a theory of morality, which advocates actions that foster happiness or pleasure and opposes actions that cause unhappiness or harm. When directed toward making social, economic, or political decisions, a utilitarian philosophy would aim for the betterment of society as a whole. Utilitarianism would say that an action is right if it results in the happiness of the greatest number of people in a society or a group." Investopedia <https://www.investopedia.com/terms/u/utilitarianism.asp>.

for the poor.²⁶⁸ This is a possible avenue for the three branches of government to consider in conceptualising poverty amelioration solutions.

2.3.1.8 Observations on Ideological Notions as Determinants of Poverty

The discussion in this section on ideological notions as determinants of poverty shows that there is no coherent body of scholarship reflecting the impacts of ideological stances on poverty. The scholarship of Lephakga warrant singling out as being of a less *ad hoc* nature than those of many of his peers, in that he takes a broad and holistic view of the interplay of various ideologically based dynamics contributing to poverty. He highlights the fact that the political transition in South Africa was characterised by contradictory principles of democracy and capitalism being deployed alongside each other.²⁶⁹ These are fundamental ideological positions which do not fit comfortably with each other, with capitalism potentially thwarting democracy. Lephakga also argues that the constitutional system is counterproductive in some respects, in particular that equality before the law dehistoricises inequality.²⁷⁰ He also strongly emphasises that poverty amongst the black population is institutionalised and that this phenomenon still persists.²⁷¹ He furthermore argues that the democratic transition under capitalism does not translate into socio-economic justice but rather maintains the socio-economic order. He shows that competition in a free market system favours the strong and skilful and property owners.²⁷² His writings paint a vivid picture of a transitional process that failed to enable the amelioration of poverty.

Other writers cited in this section point to the nature and influence of individual ideologies as determinants of poverty. These include neoliberalism, libertarianism, capitalism, constitutionalism, post- and neo-colonialism, developmentalism and utilitarianism. All illustrate how strict adherence to these ideologies may stand in the way of poverty amelioration. An awareness of this risk should encourage role

²⁶⁸ Silva-Leander and Seth 2017 *Social Choice and Welfare* 2.

²⁶⁹ Lephakga 2016 *Studia Historiae Ecclesiasticae* 2.

²⁷⁰ Lephakga 2016 *Studia Historiae Ecclesiasticae* 2.

²⁷¹ Lephakga 2016 *Studia Historiae Ecclesiasticae* 5.

²⁷² Lephakga 2016 *Studia Historiae Ecclesiasticae* 15.

players in the three branches of government to develop an open-mindedness towards embracing new ideologies which may be better oriented towards poverty amelioration.

2.3.2 Social and Economic Phenomena as Determinants of Poverty

In the course of research, it has emerged that there are a number of social and economic phenomena which cause or exacerbate poverty, and which accordingly may be categorised as determinants thereof. These include a failure to achieve social justice, inequality and indignity, social and economic power structures, adverse incorporation into the economy, weak policy responses and ineffective bureaucracy, routine functioning of market institutions, weak responses by the courts, anomalies in government policy, lack of capabilities, pursuit of economic growth, lack of social cohesion, social exclusion, affirmation of global power structures and institutional hegemony, resource extraction, household features and phenomena, overdensification, and patrimonialism and clientilism. Each of these phenomena will be discussed in turn and their role as determinants of poverty considered. The purpose of the discussion will be to assist in identifying roles and responsibilities for the three branches of government in the amelioration of poverty.

2.3.2.1 Failure to Achieve Social Justice

Notwithstanding the political and constitutional transformation of the 1990s, and the inclusion of socio-economic and other rights in the *Constitution*, social justice remains elusive.²⁷³ This is borne out in the writing of Chipkin and Meny-Gilbert, who make some cogent observations about the failure of social justice post-apartheid.²⁷⁴ They point out that social justice is associated with fairness, and that fairness is a terrain of severe contestation in post-apartheid South Africa.²⁷⁵ *Inter alia* they point out the need to transform property relations,²⁷⁶ and that although racism is

²⁷³ For a discussion of the importance of social justice for poverty amelioration, see section 1.4.5.

²⁷⁴ Chipkin and Meny-Gilbert 2013 *Understanding the Social Justice Sector in South Africa* 1-94.

²⁷⁵ Chipkin and Meny-Gilbert 2013 *Understanding the Social Justice Sector in South Africa* 5.

²⁷⁶ Chipkin and Meny-Gilbert 2013 *Understanding the Social Justice Sector in South Africa* 9.

addressed, capitalist relations are not.²⁷⁷ Overall their assessment of the social justice sector is that it is “splintered”, and that the state has performed poorly in addressing the legacy of apartheid in the social and economic spheres.²⁷⁸ They advocate a multi-pronged approach to deal with various aspects of social justice.²⁷⁹ From their writing, it may be inferred that the failure to address social justice issues in a coherent manner is a significant determinant of ongoing poverty and inequality.

2.3.2.2 Inequality and Indignity

Associated with the fractured nature of society is the phenomenon of inequality, which remains pervasive notwithstanding the new democratic constitutional order. Race remains a significant marker of inequality, which is a measure of social dysfunctionality in South Africa.²⁸⁰ It is trite that inequality and poverty are closely connected. Notwithstanding theoretical equality as provided for in the Constitution, the material well-being of the majority of the population has not changed since the political transition in 1994.²⁸¹ This is attributable to the complexities of changing power dynamics with the underlying persistence of ethnic identification.²⁸² A salient illustration of inequality in South Africa is the ongoing concentration of income in the top deciles of the population, which occurs at the expense of the poor and therefore tends to entrench poverty.²⁸³

Associated with the persistence of inequality is an inertia against change, which manifests as the poor being stuck in poverty traps. These traps are self-reinforcing and self-perpetuating.²⁸⁴ This phenomenon is associated with the poor having an inability to accumulate sufficient capital to reach the critical asset level at which it becomes possible to lift oneself out of poverty.²⁸⁵

²⁷⁷ Chipkin and Meny-Gilbert 2013 *Understanding the Social Justice Sector in South Africa* 10.

²⁷⁸ Chipkin and Meny-Gilbert 2013 *Understanding the Social Justice Sector in South Africa* 10.

²⁷⁹ Chipkin and Meny-Gilbert 2013 *Understanding the Social Justice Sector in South Africa* 13.

²⁸⁰ Burger *et al* *The Middle Class in Contemporary South Africa: Comparing Rival Approaches* 1-20.

²⁸¹ Finchilescu and Tredoux 2010 *Journal of Social Issues* 227.

²⁸² Finchilescu and Tredoux 2010 *Journal of Social Issues* 232.

²⁸³ Leibbrandt *et al* 2009 *Unemployment and Inequality Outcomes in South Africa* 20.

²⁸⁴ Ikegami *et al* “Poverty Traps and the Social Protection Paradox” 1-34.

²⁸⁵ Ikegami *et al* “Poverty Traps and the Social Protection Paradox” 29.

A factor that serves to determine and entrench inequality and poverty is the exercise of private economic power, which maintains the economic *status quo*. Under the current constitutional system the poor are no longer disenfranchised, but they remain poor and powerless, with the elite using their power to accumulate wealth and status.²⁸⁶

Injustice associated with poverty is caused by the persistence of societal power imbalances.²⁸⁷ These imbalances are felt in the social, political and economic realms, and are a hallmark of general inequality.²⁸⁸ By implication, the marginalised and vulnerable remain as such – their lot does not change.

Poverty is associated with inequality in the social and economic status quo.²⁸⁹ From this it may be deduced that the study of poverty overlaps into the realms of sociology and economics. The inequality associated with poverty is continuously increasing, notwithstanding averments by government that poverty has decreased.²⁹⁰

The *Constitution*, notwithstanding its incorporation of a right to equality, may perversely entrench inequality due to it not incorporating sufficiently radical instruments for transformation.²⁹¹ Formal equality masks underlying inequality and institutionalised privilege. If this is the case, inequality, and thus the poverty associated with those who are deprived and marginalised, is hidden away by privilege conferred by social institutions, and by the formal equality conferred by the constitutional legal system – a disturbing notion.²⁹²

Poverty is further described by some legal theorists as a state of indignity.²⁹³ However it is sometimes questioned whether dignity is a tangible enough concept

²⁸⁶ Davis 2015/2016 *New York Law School Law Review* 302.

²⁸⁷ Crocker 2014 *Journal of Global Ethics* 245.

²⁸⁸ Crocker 2014 *Journal of Global Ethics* 246.

²⁸⁹ Coomans 2005 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 169.

²⁹⁰ Dugard 2013 *The Activist* 4.

²⁹¹ Hodgson "Bridging the Gap between People and the Law: Transformative Constitutionalism and the Right to Constitutional Literacy" 189.

²⁹² Moyo 2014 "Transformative Constitutionalism, Substantive Equality and the Role of the Courts: Lessons from South African and Zimbabwe" 3.

²⁹³ See for example Liebenberg 2005 *South African Journal on Human Rights* 21.

to be of value in legal analysis with a sociological orientation.²⁹⁴ From a theoretical perspective, there is no obvious association between the state of being poor and a lack of dignity – this may account for the lack of literature on the association between the two concepts.

2.3.2.3 Identity Politics

Identity politics is the association by individuals with a particular group in society, which arguably contributes to the fractured nature of the social milieu, which in turn serves to entrench poverty. It has a tendency to result in the marginalisation and identity loss of some groups, which may include those living in poverty.²⁹⁵ For example, dichotomies emerge between majority-minority, immigrants-non-immigrants, locals-outsiders and tribal-non-tribal. It is conceivable that similar identity categories can lead to marginalisation of groups in all countries, especially in a diverse and fragmented society such as South Africa.

2.3.2.4 Social and Economic Power Structures

There is little literature on the subject of how social and economic power structures serve to entrench and reinforce poverty. The writers cited do however offer valuable insights in this regard.

Poverty in contemporary times is attributable to the fact that economic power structures remained intact at the time of the political transition.²⁹⁶ This has been associated with resource depletion under apartheid which has disproportionately affected the poor.²⁹⁷ Sociological relationships underpin poverty dynamics in South Africa – in particular social power relationships and the hierarchical ordering of society.²⁹⁸ Poverty research has not focused on these relationships, but has taken

²⁹⁴ See for example Bagaric and Allan 2006 *Journal of Human Rights* 257, who argue that dignity is not a useful concept in discourse about human rights abuses.

²⁹⁵ Das 2009 *Bangladesh E-journal of Sociology* 67.

²⁹⁶ Swilling, Musango and Wakeford 2015 *Journal of Environmental Policy and Planning* 9.

²⁹⁷ Swilling, Musango and Wakeford 2015 *Journal of Environmental Policy and Planning* 15.

²⁹⁸ Du Toit "The Proper Subject for Poverty Research is Inequality" 133-140.

inequality as a given. Thus solutions towards improving such relationships with a view to ameliorating poverty, are not pursued.

2.3.2.5 Adverse Incorporation into the Economy

Du Toit²⁹⁹ points out that poverty is associated not so much with disconnection from the formal economy, but with incorporation therein on adverse terms. The phenomenon of adverse incorporation is further elaborated on in an article written by Hickey and Du Toit in which they outline a number of social factors prevalent in South Africa which lead to this phenomenon.³⁰⁰ These factors include the following: Poverty is perpetuated by the fundamental workings and structure of the mainstream economy. Spatial legacies of apartheid perpetuate and grow economic disadvantage.³⁰¹ Liberalisation promoted through structural adjustment reforms is related to poverty inducing effects. Financial account liberalisation encourages speculative forms of capitalism rather than those with an interest to invest in productive areas of the economy. There have been three decades of underinvestment in agriculture and agro-processing.³⁰² Historical processes by which labour markets were created have caused impoverishment.³⁰³ These factors together and cumulatively create a milieu of various social and economic processes underway in society and the economy which result in incorporation of the poor into the economy on adverse terms. Such incorporation is counter-productive for poverty amelioration and is a strong determinant of poverty.

2.3.2.6 Weak Policy Responses and Ineffective Bureaucracy

Poor institutional and policy responses to poverty-related issues may serve as a determinant of poverty. This is the case internationally,³⁰⁴ and in South Africa. There are a number of illustrations of the problem. Ineffective bureaucracy in South Africa is a cause of failure to achieve developmental goals which must be attained in order

²⁹⁹ Du Toit "The Proper Subject for Poverty Research is Inequality" 140.

³⁰⁰ Hickey and Du Toit 2007 *Adverse Incorporation, Social Exclusion and Chronic Poverty* 18.

³⁰¹ Hickey and Du Toit 2007 *Adverse Incorporation, Social Exclusion and Chronic Poverty* 18.

³⁰² Hickey and Du Toit 2007 *Adverse Incorporation, Social Exclusion and Chronic Poverty* 19.

³⁰³ Hickey and Du Toit 2007 *Adverse Incorporation, Social Exclusion and Chronic Poverty* 20.

³⁰⁴ Barkan and Pulido 2017 *Annals of the American Association of Geographers* 33.

for poverty to be alleviated.³⁰⁵ Social dynamics and hierarchies affecting governance of rights to land and mineral resources in the platinum belt serve as an illustration of how bureaucratic mismanagement can be a determinant of poverty.³⁰⁶ The failure of government entities to apply consistent criteria for the allocation of free services as grants is a societal phenomenon compromising a meaningful response to poverty.³⁰⁷ Dysfunctionality of the institutions in South Africa responsible for land reform is responsible for thwarting land reform processes which could improve the lot of the poor.³⁰⁸ The phenomena referred to are individually and collectively potential determinants of poverty.

2.3.2.7 Routine Functioning of Market Institutions

Du Toit and Neves³⁰⁹ posit the view that unemployment can be seen as not just an aberration within society but as an outcome of the routine functioning of the core institutions of the market economy and the path of economic growth. Thus the functioning of core market institutions is a key determinant of poverty. It is incumbent upon government, particularly the executive, to address anomalies of this nature via institutional reform.

2.3.2.8 Weak Responses by the Courts

A weak institutional response to poverty on the part of the courts is frequently cited as a contributor towards its perpetuation.³¹⁰ Intransigence on the part of the courts is a factor which prevents the amelioration of poverty.³¹¹ The purpose of the inclusion of the socio-economic rights in the *Constitution* must be understood with reference to the transformative imperatives articulated in its preamble.³¹² Courts

³⁰⁵ Karriem and Hoskins 2016 *Politikon* 15.

³⁰⁶ Claassens and Matala 2014 *New South Africa Review* 136.

³⁰⁷ Borhat Oosthuizen and Van der Westhuizen 2012 *Development Southern Africa* 92.

³⁰⁸ Cousins and Hall *Rights Without Illusions: The Potential and Limits of Rights Based Approaches to Securing Land Tenure in Rural South Africa* 20. The dysfunctionality of the institutions responsible for land reform, they argue, is illustrative of the inherent tensions between constitutional rights and institutional inefficiencies.

³⁰⁹ Du Toit and Neves 2014 *Journal of Peasant Studies* 848.

³¹⁰ See Chapter 5 for a fuller discussion of the role of the courts.

³¹¹ Ngang 2014 *African Human Rights Law Journal* 655.

³¹² Ngang 2014 *African Human Rights Law Journal* 661.

dealing with socio-economic rights issues should understand that they have a distinctive role in effecting transformation, especially via the scrutiny of government processes. This may entail responding to political failure, and assisting the poor who live in a state of deprivation.³¹³ Importantly, it must be noted that courts have powers to enforce socio-economic rights and do not breach the separation of powers doctrine by doing so.³¹⁴ It is arguable that the Constitutional Court has abdicated its authority in this regard to the executive, and that the judiciary generally has been the “architect of its own limitations”.³¹⁵ Chapter 5 of this thesis considers the roles of the judiciary relative to poverty amelioration in more detail.

2.3.2.9 Anomalies in Government Policy

An analysis of the role of the executive with regard to policy responses to poverty will be undertaken in Chapter 4. For present purposes, it is useful to highlight major anomalies in government policy which are stated to have poverty-related impacts.

There are substantial anomalies in South African economic policy represented by the contrast between the socialist RDP and the market-based GEAR Policy, which have been described as a “schizophrenic limbo”.³¹⁶ Anomalies in economic policy have been perpetuated into contemporary times, with the state being both developmental and predatory.³¹⁷

The NDP also contains anomalies which may be exacerbatory of poverty. It reneges on pivotal issues for transformational development, especially in that it disregards the imperative to transform ownership of and access to public resources.³¹⁸ The plan disregards the fundamental need of communities for resources to empower them to make changes to their lives.³¹⁹ Thus the efficacy of the plan to achieve poverty amelioration is highly questionable.

³¹³ Ngang 2014 *African Human Rights Law Journal* 662-3.

³¹⁴ Ngang 2014 *African Human Rights Law Journal* 664.

³¹⁵ Ngang 2014 *African Human Rights Law Journal* 665.

³¹⁶ Karriem and Hoskins 2016 *Politikon* 7.

³¹⁷ Karriem and Hoskins 2016 *Politikon* 15.

³¹⁸ Moyo and Mamabolo 2014 *Journal of Public Administration* 946.

³¹⁹ Moyo and Mamabolo 2014 *Journal of Public Administration* 953.

Government policy is counterproductive for poverty amelioration in a number of respects. Developmental challenges in South Africa show continuity from the apartheid era, and that similar continuity is shown in the structure of the economy, in which large monopoly capital continues to dominate.³²⁰ Service delivery protests subsequent to 2000 show resistance by communities to the neoliberal policies of government, but are not effective, due to a lack of linkages between and coordination of actions.³²¹ Government seems intent on protection of the interests of capital.³²² All of these phenomena, viewed collectively, do not augur well for socio-economic transformation to address poverty.

2.3.2.10 Lack of Capabilities

Amartya Sen has produced an often-quoted body of writing in which he presents capabilities as necessary components of an economically optimal existence.³²³ From his viewpoint, a lack of capabilities serves as a determinant or driver of poverty. In his view, capability is an important component of equality – he posits the position that equality must of necessity be capability equality.³²⁴ The essence of this argument is that without equal capability, people are not able to be truly equal. Sen takes his views into the developmental realm, arguing that development must of necessity entail capability expansion, which must serve to enhance quality of life and fulfil basic needs.³²⁵ Thus, by implication, a lack of capability will serve to impede development, and will erode quality of life and needs fulfilment. Sen furthermore posits the idea that development and freedom are co-existent, citing five types of freedom that serve to foster development and human capability, notably political, economic and social freedom, and transparency guarantees and

³²⁰ Hurt 2017 *Capital and Class* 295-296.

³²¹ Hurt 2017 *Capital and Class* 305.

³²² Hurt 2017 *Capital and Class* 306.

³²³ A selection of these works will be referred to in individual footnotes to follow. Alkire 2005 *Journal of Human Development* 116 provides the following explanation of capability as conceptualised by Sen: "... according to the capability approach, the objective of both justice and poverty reduction (for example) should be to expand the freedom that deprived people have to enjoy 'valuable beings and doings'. They should have access to the necessary positive resources, and they should be able to make choices that matter to them." Thus capability is conceptualised as having the means and resources to attain what is valuable to the subject.

³²⁴ Sen *Equality of What?* 1-26.

³²⁵ Sen "Development as Capability Expansion" 47.

protective security.³²⁶ Extrapolating Sen's capability theory to apply it to poverty, one may conclude that a lack of capability would cause deprivation and would result in poverty.

Sen's theory supports the notion that a lack of capability is associated with deprivation. Extrapolating this notion into the realm of poverty amelioration, it may be concluded that capability enhancement can be a force for poverty relief.

2.3.2.11 Pursuit of Economic Growth

The pursuit of economic growth, as conceptualised in a neoliberal environment, may serve as a causal factor and determinant in relation to poverty. Economic growth is widely understood to have the meaning commonly attributed to it in Western economics, i.e. an increase in the production of economic goods and services over time, measured in terms of gross domestic product.³²⁷ It is tempting to assume that economic growth measured in this way is for the benefit of all and thus would tend to alleviate poverty. However, this is not necessarily the case, and slavish pursuit of economic growth may perversely worsen poverty. For example, economic growth in resource intensive economies can drive environmental degradation, which may fuel poverty.³²⁸

A full analysis of the relationship between economic growth and poverty is too large a topic to fall within the scope of this thesis. The point to be made at this juncture is that not only is it not a given that economic growth as understood in conventional economics ameliorates poverty, but it may actually have an exacerbatory effect. This is borne out by a number of researchers in the field. Gelb for example, writing with reference to South Africa in 1991, before the outcome of the political transition

³²⁶ Sen *Development as Freedom* 4.

³²⁷ See the definition to this effect in Investopedia at <https://www.investopedia.com/terms/e/economicgrowth.asp>.

³²⁸ Rosales 2008 *Conservation Biology* 1411 points out this phenomenon, which he says is anomalous because economic growth is traditionally seen as a remedy for poverty. However, he states, perpetual economic growth is limited by its biophysical environment, and eventually it causes social problems that outweigh its merits. He advocates developing an ethical system of limiting economic growth. See also Verdonck 2015 *Human Rights and International Legal Discourse* 34 who argues that economic growth which is coupled to resource extraction thwarts sustainable development.

process was known, warned about espousing the capitalist growth model in the new South Africa, indicating prophetically that it did not have the potential to address inequality.³²⁹ Writing in 2012, almost twenty years post the transition, Leibbrandt, Finn and Woolard showed that in the period between 1994 and 2012, which coincides with the espousal of a capitalist and neoliberal economic model by national government, income inequality widened vastly.³³⁰ An essential point made by the authors is that the benefits of income increases under the capitalist growth model are not evenly distributed across society, but rather benefit the rich at the expense of the poor, widening the wealth gap.

The new democratically elected government made a conscious choice in 1994, notwithstanding recommendations to the contrary by the Macroeconomic Research Group, to espouse orthodox Western economics.³³¹ Their choice in this regard has led to modest growth, mass unemployment, unprecedented levels of inequality and the ongoing absence of the tools needed to build a skills-based economy. These are all issues which have a determinative effect on poverty. The values of the *Constitution* are overridden or “devoured” economic rationalism and market fundamentalism.³³²

2.3.2.12 Lack of Social Cohesion

A lack of social cohesion is cited by some authors as an exacerbator of poverty. Social cohesion in this context refers to the degree of social integration and inclusion in communities and society at large, and the extent to which mutual solidarity finds expression itself among individuals and communities.³³³ Social cohesion comes with support structures to assist those in poverty, through family, community, cultural and other bonds, and where this cohesion is lacking poverty amelioration is more difficult.³³⁴ There is bounded social solidarity in contemporary South Africa,

³²⁹ Gelb 1991 *Social Justice* 247.

³³⁰ Leibbrandt, Finn and Woolard 2012 *Development Southern Africa* 24.

³³¹ Freund 2013 *Review of African Political Economy* 534-535.

³³² Baxi “Preliminary Notes on Transformative Constitutionalism” 21.

³³³ Department of Sports, Art and Culture <https://www.dac.gov.za/content/2-what-social-cohesion-and-what-department-doing-promote-cohesion>.

³³⁴ Struwig, Roberts and Davids 2011 *Human Sciences Research Council Review* 10-11.

notwithstanding the extension of socio-economic rights, including the right to social assistance, to all citizens.³³⁵

The poor may find it difficult to organise themselves politically due to a lack of resources, and this limits their ability to hold politicians to account.³³⁶ They also do not benefit from public participation due to a lack of alignment with their appointed representatives.³³⁷ Thus politically sanctioned processes intended to achieve representivity may be of little value to the poor.

Lack of coordination in protest action, which is symptomatic of a lack of social cohesion, may limit the ability of the poor to convey their demands to government, and better organisation in this regard would arguably be more constructive in addressing poverty.³³⁸ Failure to achieve socially cohesive protest action may be seen as a factor thwarting, or a determinant of, poverty amelioration.

2.3.2.13 Social Exclusion

Social exclusion has the potential to deepen poverty.³³⁹ Failure to address such exclusion is a determinant of poverty. Social exclusion is more than material deprivation and is more corrosive to society.³⁴⁰ This is particularly relevant to South African society given that it is highly stratified and fragmented.

The lack of socio-economic status amongst the poorest segment of South African society renders it difficult for members of this segment to secure access to resources and opportunities, thereby reinforcing social exclusion.³⁴¹ This is particularly prevalent among poor rural people,³⁴² and is a strong determinant of poverty.

³³⁵ Seekings 2016 *European Journal of Social Theory* 207.

³³⁶ Bilchitz 2015 *South African Journal on Human Rights* 91.

³³⁷ Bilchitz 2015 *South African Journal on Human Rights* 95.

³³⁸ Bond 2013 *Revista Theomai* 60.

³³⁹ Harloe 2001 *International Journal of Urban and Regional Research* 892.

³⁴⁰ Harloe 2001 *International Journal of Urban and Regional Research* 892.

³⁴¹ Kabudala et al 2017 *Social Indicators Research* 1048.

³⁴² Kabudala et al 2017 *Social Indicators Research* 1069.

2.3.2.14 Commodification and Consumerism

The trend in modern society towards commodification of goods and services is a factor which is detrimental to the poor and may thus serve as a determinant of poverty.

The commodification of resources such as water, which arguably should be a public good, serves to entrench poverty. In South Africa, water is the subject of a human right, but is sold as a commodity with full cost recovery.³⁴³ The principle of cost recovery for basic services such as water, sanitation and energy is applied in terms of the *Local Government: Municipal Systems Act*.³⁴⁴ The rigid application of this model in South Africa, with attendant unaffordability of services for the poor is worthy of criticism, and it is arguable that progressive block tariffs whereby larger users pay at a higher rate could be more appropriate.³⁴⁵ It is arguable that with regard to water, full cost recovery is in conflict with human rights.³⁴⁶

Associated with the commodification of services is the trend towards outsourcing their provision to the private sector. Privatisation of services is not in itself objectionable from a rights perspective, but it is deployed in Southern Africa with a disregard for rights and a focus on profit-making and cost recovery, with adverse effects on poverty.³⁴⁷

Issues of commodification of goods and services are linked to consumerism and consumption, which in turn are linked to issues of environmental justice. It is arguable that allowing market forces to dominate the economy fails to recognise moral, economic and environmental imperatives for equitable distribution of

³⁴³ Movik 2014 *Geoforum* 191.

³⁴⁴ Act 32 of 2000. See section 4(1)(c) which empowers municipalities to finance their operations by charging fees. See further section 74(2)(d) which requires that tariffs must reflect the costs reasonably associated with rendering the service, including capital, operating, maintenance, administration and replacement costs, and interest charges.

³⁴⁵ Bond 1999 *Geoforum* 55.

³⁴⁶ Chirwa 2004 *African Human Rights Law Journal* 292.

³⁴⁷ Chirwa 2004 *African Human Rights Law Journal* 290. See also Mc Graw 2011 *Loyola University Chicago International Law Review* 167.

consumption.³⁴⁸ There are many legal and governance instruments which government can use to regulate issues pertaining to commodification and consumerism.

2.3.2.15 Affirmation of Global Power Structures and Institutional Hegemony

The countries comprising the BRICS coalition,³⁴⁹ most of which are developing countries and including South Africa, serve to drive inequality by reaffirming global power structures and driving overproductive and overconsumptive maldevelopment.³⁵⁰ This may cause social and economic problems, including poverty.³⁵¹

Institutional hegemony, wielded by global financial institutions, may have determinative outcomes relating to poverty. Such institutions include the World Bank and the IMF, which shaped the economic and political thinking of the ANC from the early nineties onwards.³⁵²

Whether or not there is adherence to the imperatives of global power structures and hegemonic international financial institutions, is largely a matter for determination by the executive. This is discussed further in chapter 4.

2.3.2.16 Resource Extraction

Resource extraction in pursuit of economic gain can have adverse consequences for the poor in the vicinity of the extractive activity. For example in the case of mining, with mineworkers living in poverty whilst mining corporations reap large profits. The relationship between human rights and development can be problematic, in the context where natural resources are extracted in pursuit of economic growth.³⁵³ This is illustrated by the case of Mokgalakwena Mine in South Africa, for example, where

³⁴⁸ Mc Donald 1998 *Review of African Political Economy* 88.

³⁴⁹ The BRICS coalition comprises Brazil, Russia, India, China and South Africa. See <https://www.investopedia.com/terms/b/brics.asp>.

³⁵⁰ Bond 2013 *New World Quarterly* 252.

³⁵¹ Bond 2013 *New World Quarterly* 267.

³⁵² Peet 2002 *Antipode* 54.

³⁵³ Verdonck 2015 *Human Rights and International Legal Discourse* 39.

the poor suffer extreme poverty in the area in which the resource extraction is taking place.³⁵⁴ The phenomenon is illustrative of the resource extractive industries in the country serving to cause poverty.

2.3.2.17 Household Features and Phenomena

Specific household features and phenomena may serve as causes and determinants of poverty. There are household phenomena which render it difficult for people to rise out of poverty, being adverse household formation such as an overly large household, lack of access to the labour market, a low level of education and lack of productive assets.³⁵⁵ Inequality of opportunities for children, which is associated with a low level of parental education, particularly of mothers, tends to keep children in poverty.³⁵⁶ Government needs to mobilise across various sectors, especially labour and education, to address these issues.

2.3.2.18 Overdensification

Overdensification associated with urban environments can be a cause or determinant of poverty. There may be a significant negative relationship between population density and quality of life.³⁵⁷ This is indicative of a trend for poor high density living areas to be characterised by deprivation and poverty, both economic and non-economic. Thus the commonly held view that cities should densify³⁵⁸ may not be the best approach for addressing poverty, and should be interrogated by government. This is a realm in which clear national legislation or policy by the executive, assisted insofar as is necessary by the legislature, is needed.

³⁵⁴ Verdonck 2015 *Human Rights and International Legal Discourse* 39.

³⁵⁵ Von Fintel, Zoch and Van der Berg 2017 *Child Indicators Research* 966.

³⁵⁶ Zoch 2015 *Development Southern Africa* 273.

³⁵⁷ Greyling and Rossouw 2016 *Non-economic Quality of Life and Population Density in South Africa* 1051-1075.

³⁵⁸ Many towns and cities have densification policies which promote densification. See for example the City of Cape Town Densification Policy, City of Cape Town 2012 http://www.westerncape.gov.za/assets/departments/transport-public-works/Documents/densification_policy.

2.3.2.19 Patrimonialism and Clientilism

Patrimonialism and clientilism within government serve to aggravate and entrench poverty. This is due to the unlawful enrichment of those of high status, at the cost of those at the opposite end of the wealth spectrum. This is explored by Lodge,³⁵⁹ who uses the term “patrimonialism” to describe the conferral of elite status by virtue of ties of family, kinship or friendship. He uses the term “clientilism” to denote the favouring of associates who allow private wealth accumulation on the part of those in government.

Societal change, such as would be necessary to ameliorate poverty, may be frustrated by the persistence of patronage and accumulation, these being central features of capitalism.³⁶⁰ Patronage-based factional struggles overshadow issues of societal transformation and inequality and social justice issues become depoliticised, with attendant inaction on issues such as poverty.³⁶¹

2.3.2.20 Observations on Social Phenomena and Dysfunctionalities

The discussion in this section demonstrates that there is a variety of social phenomena and dysfunctionalities which may be cited as causes and determinants of poverty. It is easy to understand the salience of each of these individually, but it should be borne in mind that they represent a variety of factors which co-exist and overlap, and that there is therefore a possibility of cumulative impacts. As is apparent from the discussion above, poverty is a pervasive phenomenon which touches on many social and economic aspects of life. An understanding of the determinants discussed in this chapter and a pro-active stance on the part of government (in all three spheres, as applicable) is imperative to address poverty.

³⁵⁹ Lodge 2014 *African Affairs* 6, 12.

³⁶⁰ Beresford 2015 *African Affairs* 230.

³⁶¹ Beresford 2015 *African Affairs* 231.

2.3.3 Dysfunctionalities in the Human Rights Regime Serving as Causes and Determinants of Poverty

South Africa is frequently hailed as being a model constitutional democracy. It has a constitution articulating the imperative of poverty relief in its preamble, and incorporating a justiciable bill of rights including socio-economic rights. Yet the spectre of widening inequality and deepening poverty looms large. It is accordingly warranted to examine and critique the functionality of the constitutional provisions in the context of poverty amelioration. There may be deficiencies in application of the rights, and perverse or unintended consequences of having the rights in place. Both of these phenomena tend to serve as causes and determinants of poverty.

2.3.3.1 Rights Prone to Legalism and Entrenchment of the Status Quo

With the rights being justiciable and entrenched in a legislative instrument, they tend to be viewed and implemented in a legalistic manner. Acquiescence in a neoliberal order may emanate from a legalistic view of socio economic issues,³⁶² which is a tendency to view such issues through the lens of the law. There is a focus on civil and political rights, and an acquiescence in neo-liberalism as a social and economic governance model, which leads to a diminished focus on poverty.³⁶³

2.3.3.2 Obstacles to Realising Socio-economic Rights

In many countries including South Africa, human rights are largely aspirational rather than realisable.³⁶⁴ This does not augur well for poverty relief, which of necessity requires realisable socio-economic rights.

Anand³⁶⁵ considers the value of a rights-based perspective in seeking to achieve the Millenium Development Goals which were then in force,³⁶⁶ with specific reference to the right to water. He finds that South Africa has fared better than many other

³⁶² Mc Evoy 2007 *Journal of Law and Society* 411.

³⁶³ Mc Evoy 2007 *Journal of Law and Society* 418.

³⁶⁴ Trispiotis 2010 *Opticon* 8.

³⁶⁵ Anand 2007 *Journal of International Development* 511.

³⁶⁶ These have been supplanted by the Sustainable Development Goals of 2015.

countries in operationalising the right to water, but that its success is due to useful process and discussions leading up to and following on the establishment of the right, rather than the right *per se*.³⁶⁷ His findings suggest that the deployment of a rights framework to address poverty may not in itself be sufficient, but only if it is accompanied by suitable processes to ensure implementation of the rights.

In South Africa the right to healthcare is an illustration of a right which does not of itself assist the poor, in the absence of resources allocated towards its implementation.³⁶⁸ This is illustrative of the point that a pure rights-based approach to addressing socio-economic issues is not sufficient, and that an adequate and targeted allocation of resources, is needed.

2.3.3.3 The Vexed Nature of the Dignity and Equality Rights

The rights to dignity and equality are rights which seem especially elusive, with some authors questioning their value in the context of poverty amelioration.

Uncertainty around the meaning of the right to dignity internationally, and also specifically South Africa, thwarts the realisation of the right.³⁶⁹ In the context of poverty, with poverty and social marginalisation being closely mutually associated, if the right to dignity is not clearly framed and defined, the potential to use the right to overcome poverty is limited. Where society fails to respond to deprivation, this may amount to a failure to value the fundamental dignity of the victims of such deprivation.³⁷⁰ This illustrates how the existence of a human right is only of value if matched by concomitant action towards its fulfilment.

The constitutional right to equality has been unable to effectively address racial discrimination. South African society remains racialised despite the criminalisation

³⁶⁷ Anand 2007 *Journal of International Development* 523.

³⁶⁸ Ataguba, Day and McIntyre 2014 *Plos Medicine* 2.

³⁶⁹ O'Connell 2008 *International Journal of Constitutional Law* 267.

³⁷⁰ Liebenberg 2005 *South African Journal on Human Rights* 22.

of discrimination.³⁷¹ With the prevalence of poverty in South Africa persisting along racial lines post-apartheid, poverty and inequality have a close association.

The human rights discourse tends to preserve inequality.³⁷² The discourse does not challenge the class structure that reproduces racial inequality in South Africa, neither the fact that the pursuit of change is focused on consciousness-raising and recognition rather than redistribution and reparation.³⁷³ Thus, practical measures towards poverty amelioration are lacking. The creation of the constitutional right to equality has dehistoricised past inequality, and as such is contrary to the interests of the poor.³⁷⁴ This illustrates how a constitutional right may have perverse and unintended outcomes for poverty amelioration.

2.3.3.4 General Shortcomings of Reliance on Rights for Poverty Amelioration

Human rights regimes have been criticised for being rhetorical rather than effective.³⁷⁵ Thus human rights law may be a distraction from the necessary diagnosis and remedy of the world's ills. Human rights may be seen to be too minimalistic, especially when they do not provide definitive normative standards.³⁷⁶

The Socio-economic Rights Institute provides a useful example of the dysfunctions of a rights-based regime. It highlights shortcomings of the South African municipal indigent relief systems, which provide a measure of free basic services to indigent beneficiaries.³⁷⁷ These policies are linked to the socio-economic rights regime in that they promote the provision of water and electricity to everyone. However, they are beset by a number of problems which undermine their efficacy.

³⁷¹ Seekings 2005 *The Colour of Desert: Class and Distributive Justice in Post-apartheid South Africa* 1-43.

³⁷² Bond "Capitalism, the Privatisation of Basic Social Services and the Implementation of Socio-Economic Rights: Challenges and Advocacy Strategies for Human Rights and Social Justice Actors, Learning from the Johannesburg Water Defeat" 1-8.

³⁷³ Bond "Capitalism, the Privatisation of Basic Social Services and the Implementation of Socio-Economic Rights: Challenges and Advocacy Strategies for Human Rights and Social Justice Actors, Learning from the Johannesburg Water Defeat" 2.

³⁷⁴ Lephakga 2016 *Studia Historiae Ecclesiasticae* 2.

³⁷⁵ Moyn 2014 *Law and Contemporary Problems* 151.

³⁷⁶ Moyn 2014 *Law and Contemporary Problems* 168.

³⁷⁷ Tissington *Targeting the Poor: An Analysis of Free Basic Services and Municipal Indigent Policies in South Africa* 1-78.

For example, the reach of the policies is poor, with many exclusionary categories, and very low qualifying income thresholds. Municipalities often do not have adequate targeting strategies to determine who should qualify for free services. Administration of free basic services is done in a manner that suggests the beneficiaries are recipients of charity rather than bearers of rights.³⁷⁸ Thus the exercise of socio-economic rights may belie the underlying purpose of the rights.

Socio-economic rights are typically framed in a vague fashion. This along with the complacency that comes from having entrenched and justiciable rights, serves to maintain the *status quo*. These factors would serve to entrench poverty. For example, it is unfortunate that the socio-economic rights are cast in vague terms such as "adequate",³⁷⁹ "sufficient"³⁸⁰ and "basic".³⁸¹ The vagueness of these terms renders judicial interpretation extremely difficult.³⁸² This has negative implications for the realisation of the rights, and in turn for the amelioration of the hardships of poverty that they seek to address.

The human rights discourse does not counteract but rather legitimises neoliberalism.³⁸³ It does this by casting the moral claims associated with human rights into a legal form, and thereby diluting them and robbing them of power.³⁸⁴ In the realm of socio-economic rights, this would mean that the legalisation of rights does not have the effect of assisting with poverty amelioration but rather of constraining it. This position is reinforced in the writings of Bond and Pieterse, who write that the transformative potential of rights is thwarted by their formulation, interpretation and enforcement by institutions that are embedded in the *status*

³⁷⁸ Tissington *Targeting the Poor: An Analysis of Free Basic Services and Municipal Indigent Policies in South Africa* 71-74.

³⁷⁹ Section 26 of the *Constitution* confers a right to "adequate" housing.

³⁸⁰ Section 27(1)(b) confers a right to "sufficient" food and water.

³⁸¹ Section 29(1)(a) confers a right to "basic" education.

³⁸² Ebadolahi 2008 *New York University Law Review* 1587.

³⁸³ Bond "Capitalism, the Privatisation of Basic Social Services and the Implementation of Socio-Economic Rights: Challenges and Advocacy Strategies for Human Rights and Social Justice Actors, Learning from the Johannesburg Water Defeat". A google search indicates that Daria Roithmayr is a professor of law at the University of Southern California – see <https://gould.usc.edu/faculty/?id=399>.

³⁸⁴ Bond "Capitalism, the Privatisation of Basic Social Services and the Implementation of Socio-Economic Rights: Challenges and Advocacy Strategies for Human Rights and Social Justice Actors, Learning from the Johannesburg Water Defeat" 1.

quo.³⁸⁵ It is furthermore arguable that the human rights regime and the law close down spaces for political contestation.³⁸⁶

The discussion in the preceding few paragraphs seeks to illustrate that socio-economic rights may in some instances be ineffective in addressing issues pertaining to poverty, and may even, through their ineffectiveness and preservation of the status quo, undermine any potential shift towards ameliorating the circumstances of the poor. The existence of a right does not always translate into its implementation, and it may even cause complacency or inertia towards change. Accordingly, it is questionable whether a human rights regime is an effective vehicle for poverty relief. This is touched upon in chapters 3, 4 and 5 in which the role of the three branches of government in poverty amelioration is considered.

2.3.3.5 Conflict between Rights

In terms of section 25 of the Constitution, the right to property is enshrined in South African law.³⁸⁷ The exercise of the property right may eclipse socio-economic rights, and this may have the effect of hampering poverty amelioration. This is illustrated

³⁸⁵ Bond "Capitalism, the Privatisation of Basic Social Services and the Implementation of Socio-Economic Rights: Challenges and Advocacy Strategies for Human Rights and Social Justice Actors, Learning from the Johannesburg Water Defeat" 2, citing Pieterse 2007 *Human Rights Quarterly* 796.

³⁸⁶ Bond "Capitalism, the Privatisation of Basic Social Services and the Implementation of Socio-Economic Rights: Challenges and Advocacy Strategies for Human Rights and Social Justice Actors, Learning from the Johannesburg Water Defeat" 4.

³⁸⁷ Section 25 provides: "1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. 2. Property may be expropriated only in terms of law of general application, a. for a public purpose or in the public interest; and b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. 3. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including a. the current use of the property; b. the history of the acquisition and use of the property; c. the market value of the property; d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and e. the purpose of the expropriation. 4. For the purposes of this section a. the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and b. property is not limited to land."

clearly by Ginsburg and Gibson,³⁸⁸ writing with reference to the *Juma Masjid* case³⁸⁹ as example. In this matter, the court had to weigh up the property owner's right to property against the rights of learners to education. The rights of the property owner were given precedence over those of the learners. This case is an illustration of the entrenched nature and primacy of capital and ownership over socio-economic claims. Pro-capitalist theorists may argue that private property is the basis of economic prosperity,³⁹⁰ but there is a dearth of literature illustrating that this has been the case in the general context in South Africa.³⁹¹

Poverty has been perpetuated through the trumping of land reform processes by the constitutional property right.³⁹² This right has been a cornerstone of wealth accumulation in South Africa both pre- and post- the political transition.

When rights conflict with each other, this can hamper the efficacy of one or both of the conflicting rights, with the result that delivery of socio-economic goods needed for poverty amelioration may be stifled. The environmental right and the right to water can potentially come into conflict with one another,³⁹³ as emerged in the *Mazibuko* case. The Constitutional Court adopted a cautious approach with regard to requiring a municipality to provide water in the face of environmental resource constraints. The case illustrates how the conflict of rights has the potential to thwart efforts to overcome water poverty. The exercise of one right may thwart the realisation of another. It is arguable that the state has been focused on the fulfilment of utility-related socio-economic rights, and that this has had negative impacts on the environment.³⁹⁴ As an example, whilst focusing on delivery of

³⁸⁸ Ginsburg & Gibson *The South African Constitutional Court and Socio-economic Rights as Insurance Swaps* 3.

³⁸⁹ *Governing Body of the Juma Masjid Primary School & Others v Essay NO and Others* 2011 (8) BCLR 761 (CC).

³⁹⁰ See for example Hoppe *A Theory of Socialism and Capitalism* 8.

³⁹¹ With regard to the dominance of the property right over socio-economic rights, see also Bond 2014 *Politikon* 461, who argues that the *Constitution* is grounded in property rights which trump socio-economic rights. Constitutionalism is a cause of inequality, he argues, in that it dampens and tames social activism.

³⁹² Hendricks and Ntsebeza "Black Poverty and White Property in South Africa" 227.

³⁹³ Kotze 2010 *Journal of Human Rights and the Environment* 158.

³⁹⁴ Kota *Realising the Right to a Healthy Environment: An Analysis of the Policy Efforts, Budgeting and Enjoyment of the Right to a Healthy Environment in South Africa* 1-113.

services the state has neglected waste management³⁹⁵ and the maintenance of the ecological health of watercourses.³⁹⁶

2.3.3.6 Deficiencies in the Implementation of the Right to Healthcare

The right of access to healthcare is the subject of much writing in which inadequate fulfilment and entrenchment of inequality and deprivation is condemned. There has been a snowball-type effect between inequalities in access to healthcare and other inequalities, with lack of access to healthcare determining and reinforcing other measures of inequality.³⁹⁷ This illustrates how a right can be undermined by inequality dynamics which pervade society on a more general level.

Structural and systemic factors such as demographics and poverty inhibit access to healthcare for adolescents and children in South Africa.³⁹⁸ The realisation of the right may depend on the surrounding circumstances within which it is exercised, and poverty may itself be a factor impeding such realisation.

Affordability of healthcare services is more problematic in the rural than in the urban context.³⁹⁹ This illustrates that the existence of the right to healthcare does not serve the rural poor well. The right to healthcare has little impact upon inequalities in health status, gender and disability, and the right risks becoming a morally compelling but ignored mantra.⁴⁰⁰ In South Africa, the poor who are most in need of healthcare paradoxically have the poorest access.⁴⁰¹ Despite their being a constitutional right of access to healthcare, disparities in healthcare services between state funded and privately funded services, continue to widen.⁴⁰² This is a

³⁹⁵ Kota *Realising the Right to a Healthy Environment: An Analysis of the Policy Efforts, Budgeting and Enjoyment of the Right to a Healthy Environment in South Africa* 46.

³⁹⁶ Kota *Realising the Right to a Healthy Environment: An Analysis of the Policy Efforts, Budgeting and Enjoyment of the Right to a Healthy Environment in South Africa* 49.

³⁹⁷ McLaren Ardlington and Leibbrandt 2014 *BMC Health Services Research* 1.

³⁹⁸ Mokomane *et al* 2017 *Children and Youth Services Review* 131.

³⁹⁹ Cleary *et al* 2013 *Social Science and Medicine* 37.

⁴⁰⁰ Heywood "Justice and the Treatment Action Campaign" 337.

⁴⁰¹ Marten *et al* 2014 *Health Policy* 2168.

⁴⁰² Mayosi and Benatar 2014 *New England Journal of Medicine* 1345.

major deficit in rights realisation which requires the urgent attention of the executive, with possible supplementary action by the legislature and the judiciary.

2.3.3.7 Anomalies Relating to the Social Security Right

Much has been written regarding the right to the efficacy of the social security enshrined in section 27 of the *Constitution*.⁴⁰³

Despite espousing a neoliberal governance model in the general sense, South Africa has for the past several years, in keeping with the right to social security enshrined in the *Constitution*, been moving increasingly towards becoming a welfare state. The South African Social Security Agency 2019-2020 *Annual Performance Plan* is testimony to this. It states: "Over the years the number of social grants paid by government increased from approximately 2 million in 1994 to more than 17.5 million to date."⁴⁰⁴ The shift towards the rollout of large scale social security represents an incongruity, in that it is at odds with the neoliberal orientation of the country's macroeconomic structure.⁴⁰⁵ Thus, it may be said that South Africa is a hybrid of a neoliberal economic and political system combined with a strong social welfare system. The question whether social grants are good or bad for the poor is a vexed one. As explained below, there are scholars who extol the virtues of social grants for the relief they provide to the poor, and others who criticise social grants as being not to the longer term benefit of the poor, and unsustainable. There is a third category of scholars who point out the anomalies inherent in having a

⁴⁰³ Section 27, subsections 1 and 2, of the *Constitution* provide: "1. Everyone has the right to have access to a. health care services, including reproductive health care; b. sufficient food and water; and c. social security, including, if they are unable to support themselves and their dependants, 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."

⁴⁰⁴ South African Social Security Agency 2019-2020 *Annual Performance Plan* at 1.

⁴⁰⁵ This is because neoliberalism posits that each person should fend for him or herself, whereas a social security or welfarist state operates on the assumption that some people cannot fend for themselves and need the assistance of the state. The ANC for many years after the political transition declared on numerous platforms and in numerous public speeches that it was a developmental and not a welfarist government. For a history of declarations made in this regard see Barchiesi 2016 *Journal of Contemporary African Studies* 221.

substantial social grant system within a neoliberal economy. These categories are further explored below.

In the first category, some theorists consider welfarism is to be an alluring idea which can remove the harms resulting from inequality.⁴⁰⁶ The welfare system is sometimes criticised as being tokenistic and inadequate.⁴⁰⁷ It supports only the most vulnerable and as such is arguably not adequate for purposes of poverty amelioration.⁴⁰⁸ It may serve to stave off the worst extremes of poverty and as such arguably serves a useful purpose.⁴⁰⁹ It is further arguable that instead of only serving the “deserving” poor, i.e. excluding able-bodied adults, the social security system should adopt a general pro-poor orientation.⁴¹⁰ Although the system has some shortcomings, it has achieved some success in that it has served to compensate for the government’s failure to successfully pursue a developmental state.⁴¹¹

In the second category, some theorists take the view that the social security system does not serve to remedy inequality, and fails to assist the poor.⁴¹² Their findings are supported by research with regard to aggregate income inequality and within-group inequality, both of which are expanding.⁴¹³ Thus, they suggest that the social security right provides no relief to the poor. Another cogent issue which is not specifically raised by them is the risk of complacency on the part of beneficiaries, which may arise out of the fact that a social grant system is in place.

The adequacy of the child support grant can be called into question, as it may be seen to be too small for the provision of adequate child-care.⁴¹⁴ A further dimension of its inadequacy lies in the indignity suffered by caregivers of the child beneficiaries

⁴⁰⁶ Keller 2009 *Philosophy Compass* 93-94.

⁴⁰⁷ Bond 2014 *Transformation: Critical Perspectives on Southern Africa* 51. The inadequacy complained of is in the size and orientation of the social grants provided by the system.

⁴⁰⁸ Brockhoff 2013 *A Review of the Development of Social Security Policy in South Africa* 1-48.

⁴⁰⁹ Hull and James 2012 *Africa* 10.

⁴¹⁰ Seekings and Matisson 2010 *The Continuing Politics of Basic Income in South Africa*.

⁴¹¹ This is the general thrust of the position of Seekings 2015 *The 'Developmental' and 'Welfare' State in South Africa*.

⁴¹² Leibbrandt, Finn and Woolard 2012 *Development Southern Africa* 19.

⁴¹³ Leibbrandt, Finn and Woolard 2012 *Development Southern Africa* 32.

⁴¹⁴ Vaaltein and Schiller 2017 *Children and Youth Services Review* 235.

who may themselves be dependent on these grants.⁴¹⁵ It appears that the practices emanating from the right may have unfavourable outcomes for the poor.

Arguments against the deployment of state social security policies (the second category) may be linked to the neoliberal notion that the involvement of the state in social security matters should be curtailed and that instead individual resilience promoted.⁴¹⁶

In the third category of scholars highlighting the anomalies in the social security system in South Africa, the view prevails that social grants are placative, palliative and demobilising, and an affront to developmentalism.⁴¹⁷ The undesirability is related to its exclusionary nature – it is only for mothers, the disabled and the elderly.⁴¹⁸ The contrast is drawn between “meagre” handouts to the poor and “hand-ups” to the wealthy.⁴¹⁹ Some theorists highlight the dilemmas and anomalies that beset the social grant system. Its implementation has been *ad hoc*, it is argued, dictated by finances and outcomes of court cases, and discriminatory in that it does not cater for able-bodied adults.⁴²⁰ It is arguable that the fact that the social welfare system is founded on a mix of neoliberalism and social assistance, is not necessarily incongruous.⁴²¹ The apparent incongruity may be addressed by acknowledging that there is a need for a normative framework for welfarism in most countries.⁴²² Such a framework would be of value in South Africa, given that the legislative framework for social welfare comprises a *White Paper on Social Welfare* which dates back to 1997, coupled with the South African *Social Security Agency Act*.⁴²³ Neither of these

⁴¹⁵ Wright et al 2015 *Development Southern Africa* 454.

⁴¹⁶ Barchiesi “Wage Labour, Citizenship and Social Discipline” 226 explains the “prevailing world view” in favour of the rollback of welfare programmes, for economic, moral and incentivisation reasons, notwithstanding the proven deepening of poverty when such programmes are terminated. He provides an account of the many occasions since 1994 on which ANC politicians, including former President Thabo Mbeki, spoke vociferously against the provision of handouts to the poor, advocating the development of self-sufficiency instead.

⁴¹⁷ Khan 2013 *Review of African Political Economy* 575.

⁴¹⁸ Khan 2013 *Review of African Political Economy* 578.

⁴¹⁹ Khan 2013 *Review of African Political Economy* 582 accounts for these “handups” as being corporate welfarism and rampant accumulation by dispossession and exploitation.

⁴²⁰ Brockerhoff 2013 *A Review of the Development of Social Security Policy in South Africa* 41.

⁴²¹ Ferguson 2007 *African Studies Review* 76, 83.

⁴²² Bernheim 2009 *Journal of the European Economic Association* 316.

⁴²³ Act 9 of 2004.

legislative instruments engages meaningfully with the current socio-economic milieu, and neither contains clear norms or policy directives for the South African social welfare system. The NDP reflects the policy imperatives of expanding and improving the social protection system to ensure that everyone has a reasonable quality of life, but it does so only in the high level policy context.⁴²⁴ Its efficacy or lack thereof will be proven with the development of detailed intervention plans for the achievement of its aims.

The discussion above serves to show that there is a broad consensus that there are imperfections in the social security system in South Africa, and that whilst social grants may help some to survive the worst aspects of poverty, they provide no relief at all for those excluded from the system. The ambit and reach of the social security system warrant the attention of government generally, especially the executive which controls the *fiscus* and is the initiator of social security policy and legislation.

2.3.3.8 Weak Implementation of the Right to Education

Many authors write of failures in the realisation of the right to education, some complaining that these failures have the effect of entrenching poverty and inequality.

The South African education system has not been able to transcend class and racial inequalities, with the result that a bimodal education system now prevails, with the only effective entitlement being one to the education one can pay for.⁴²⁵ This has obvious negative ramifications for learners of poor parents and tends to keep them in a state of deprivation.

The education system may justifiably be criticised for a number of failures.⁴²⁶ These are manifested in a number of ways, being the failure of the system to cater for self-employment,⁴²⁷ its mismatch with the labour market,⁴²⁸ and its imposition of

⁴²⁴ NDP Chapter 11.

⁴²⁵ Christie 2010 *International Journal of Educational Development* 9.

⁴²⁶ Kang'ethe and Chivanga 2016 *International Journal of Science Education* 255.

⁴²⁷ Kang'ethe and Chivanga 2016 *International Journal of Science Education* 256.

⁴²⁸ Kang'ethe and Chivanga 2016 *International Journal of Science Education* 259.

Western-crafted curricula on learners.⁴²⁹ All these factors are indicative of the fact that the right to education does not empower the poor or cater for their needs.

It is arguable that the post-apartheid state has failed to take up the challenge of fundamental and socially transformative change in education and training.⁴³⁰ This may be associated with a failure to change pre-existing power relations in education in the realm of racism, gender, class and other discriminatory practices reminiscent of apartheid.⁴³¹ The effect of the entrenchment of pre-existing inequalities and discriminatory practices is be negative for the poor in that it renders change unlikely.

The writers cited in this section are *ad idem* that the right to education is weakly implemented or implemented in an ongoing discriminatory way, with negative ramifications for those who are deprived of quality education, and adverse consequences for poverty amelioration. The executive is primarily responsible for education matters, but it is possible to conceptualise a role for the legislature (in deliberating upon and passing appropriate legislation) and the judiciary (in adjudicating education cases), in this regard.

2.3.3.9 The Right to Food Requiring More Attention and Research

Following a similar pattern, writers on the right to food bemoan the ineffectiveness of the right in addressing the needs of the poor.

Patel argues, in the broader global context, that the right to food does not assist in gaining access to food, but that such access is determined by societal and food industry power dynamics.⁴³² Thus the right to sufficient food is undermined by these dynamics, which prevail over any considerations of government potentially providing food security to the poor. Access to food is dependent upon household resources, with poor households more prone to suffering food deprivation.

⁴²⁹ Kang'ethe and Chivanga 2016 *International Journal of Science Education* 262.

⁴³⁰ Motala Vally and Spreen "Transforming Education and Training, or Reconstituting Power and Privilege?" 241-260.

⁴³¹ Motala Vally and Spreen "Transforming Education and Training, or Reconstituting Power and Privilege?" 246.

⁴³² Patel 2012 *Plos Medicine* 3.

2.3.3.10 Obstacles to Realising the Right to Housing

According to the Department of Human Settlements, as per its policy briefing paper of 2015, the *status quo* at the time with regard to housing provision was far from being oriented towards fulfilment of the right of access to housing.⁴³³ The features of the housing provision programme needing to be addressed include poor spatial planning and governance capability,⁴³⁴ the high cost of well-located land,⁴³⁵ inability to respond to the diverse needs of low to middle income households,⁴³⁶ a dysfunctional property market and inability of poor households to participate,⁴³⁷ poor quality of construction,⁴³⁸ lack of community and civil society involvement,⁴³⁹ and a narrow interpretation of the constitutional right of access to adequate housing.⁴⁴⁰ This briefing paper is an indictment upon government in the realm of housing provision and is illustrative of the failure of a socio-economic right to alleviate the circumstances of the poor.

2.3.4 Dysfunctionalities in the Legal System Serving as Determinants of Poverty

There is a considerable body of writing dealing with issues relating to the attributes and functionality of the legal system which serve to cause or entrench poverty, and of which government generally, and particularly the judiciary, should be aware.

⁴³³ Department of Human Settlements "Towards a Policy Foundation for the Development of Human Settlements" 1-74.

⁴³⁴ Department of Human Settlements "Towards a Policy Foundation for the Development of Human Settlements" 5.

⁴³⁵ Department of Human Settlements "Towards a Policy Foundation for the Development of Human Settlements" 6.

⁴³⁶ Department of Human Settlements "Towards a Policy Foundation for the Development of Human Settlements" 6.

⁴³⁷ Department of Human Settlements "Towards a Policy Foundation for the Development of Human Settlements" 7.

⁴³⁸ Department of Human Settlements "Towards a Policy Foundation for the Development of Human Settlements" 9.

⁴³⁹ Department of Human Settlements "Towards a Policy Foundation for the Development of Human Settlements" 10.

⁴⁴⁰ Department of Human Settlements "Towards a Policy Foundation for the Development of Human Settlements" 10.

2.3.4.1 Legalism

Legalism constitutes an inability to view social issues free from the 'lens of the law'.⁴⁴¹ As alluded to earlier, poverty is an economic, social and political issue, and so a legalistic perspective is extremely limiting as it focuses on adhering to legal process and tends to disregard other dimensions. Such a perspective tends to focus on civil and political rights and is associated with an acquiescence in neoliberalism, with an attendant reduced focus on socio-economic rights.

Legalism may serve as an impediment to the realisation of socio-economic rights, in that it may disregard that transitional justice requires legal humility and the pursuit of human rights via a developmental focus, which are lacking when a legalistic approach is applied.⁴⁴²

Legalism entails dominance of the courts' thinking by legal technicalities, to the exclusion of social realities.⁴⁴³ This detracts from the recognition of the social nature of law, and from the ability of the legal system to appreciate the lived reality of socio-economic deprivation. This is associated with courts ignoring the contextual impacts of policies.⁴⁴⁴

The research of Dugard is seminal in illustrating the effect of a legalistic approach by the courts in socio-economic rights cases, which, she shows, renders them unable to advance transformative justice.⁴⁴⁵ Access by the poor to justice is limited, and the moral basis for judicial adjudication is eroded.⁴⁴⁶ Her views are strongly reflective of the position that default by the judiciary and the legal system, associated with a legalistic approach, is a determinant of poverty. Dugard further bemoans the fact that the courts choose to apply an abstract standard of reasonableness in socio-economic rights cases brought against the state, which is

⁴⁴¹ Mc Evoy 2007 *Journal of Law and Society* 415.

⁴⁴² Mc Evoy 2007 *Journal of Law and Society* 425, 428.

⁴⁴³ Wilson and Dugard 2011 *Stellenbosch Law Review* 665.

⁴⁴⁴ Wilson and Dugard 2011 *Stellenbosch Law Review* 677. See also McGranahan 2015 *World Development* 250, who shows that the pursuit of human rights is not useful in providing sanitation interventions and solutions in poor urban communities in developing countries.

⁴⁴⁵ Dugard 2008 *South African Journal on Human Rights* 214.

⁴⁴⁶ Dugard 2008 *South African Journal on Human Rights* 214.

prejudicial to the poor – instead, she argues, they should analyse the policies and programmes and budgetary practices of government in order to find ways to achieve fulfilment of rights, which would constitute a less legalistic approach.⁴⁴⁷

Liebenberg highlights another form of legalism, being the disinclination of the legal system to develop normative guidelines for deliberative engagement in socio-economic rights cases. This, she says, undermines the potential of human rights adjudication to pose an ethical challenge to systemic forms of social injustice.⁴⁴⁸

The scholars cited in this section have lamented the prevalence of legalism within the legal system as an impediment to social transformation. In the context of this chapter, this suggests that the judiciary in their central role within the legal system have a responsibility to move away from legalism as an adjudicative approach and engage with social justice issues. An initiative to this effect could be supported by the executive and the legislature. The discourse referred to below also points to an inherent attribute of the legal system as such an impediment, namely the prevalence of conservative legal culture and the pursuit of entrenched legal practices.

2.3.4.2 Conservative Legal Culture and Entrenched Legal Practices

A conservative legal culture prevails in South Africa, and this may serve as a hindrance to socio-economic transformation.

Klare, in his seminal article on the subject, is critical of the conservative nature of the adjudicative culture prevailing in the South African legal system, which is not conducive to realising the transformative imperatives in the *Constitution*, including the amelioration of poverty.⁴⁴⁹ Writing in similar vein and quoting Klare, Langa emphasises the need to transform legal culture and the stultifying consequences of

⁴⁴⁷ Dugard 2007 *Leiden Journal of International Law* 975.

⁴⁴⁸ Liebenberg 2012 *African Human Rights Law Journal* 29.

⁴⁴⁹ Klare 1998 *South African Journal on Human Rights* 146. This line of argument is pursued throughout the article – a good example of which is at 156 at which the author emphasises the need for examining judicial mindset and methodology to assess whether societal transformation can be achieved.

failure to do so.⁴⁵⁰ Adherence to the prevailing legal culture discourages the development of new legal methodologies, which would help effect political transformation.⁴⁵¹

The research of Dixon⁴⁵² is also of seminal importance in the discussion about the constraining effects of adherence to legal culture. She argues that the courts are “prone to failures of responsiveness” in socio-economic rights adjudication. She advocates the adoption of a dialogical approach which would empower courts to intervene not only when government is guilty of patent unreasonableness or irrationality, but also when there are failures of foresight, perspective, accommodation or responsiveness. She elucidates the rationale for having a judicial review process to review the decisions taken by government, which is to overcome “blind spots and burdens of inertia” in the political process.⁴⁵³ However she bemoans the fact that this does not work for this purpose, as is illustrated by the fact that weak relief was granted in the *Grootboom* and *Treatment Action Campaign* cases.⁴⁵⁴ She criticises the drafters of the *Constitution* for not having a clear understanding of the relative enforcement and interpretation roles of the legislature, executive and judiciary, with regard to socio-economic rights, evidenced by indeterminacy in the application of sections 26 and 27 of the *Constitution*.⁴⁵⁵ She also argues that the blind spots and burdens of inertia referred to may be common in the legislative process, and may be compounded by the executive.⁴⁵⁶ This, she says, has profound significance for the legitimacy of the constitutional system.⁴⁵⁷ Dixon’s writing is a powerful indictment of conservatism manifesting as unproductive dynamics

⁴⁵⁰ Langa 2006 *Stellenbosch Law Review* 1. At 7 the late former Chief Justice posits that judges must accept that they are prone to preconditioning, which they should avoid, and they must actively engage with the *Constitution*. He further states that formalism in legal reasoning constitutes an avoidance of responsibility.

⁴⁵¹ Davis and Klare 2010 *South African Journal on Human Rights* 411, 509.

⁴⁵² Dixon 2007 *International Journal of Constitutional Law* 407.

⁴⁵³ Dixon 2007 *International Journal of Constitutional Law* 395.

⁴⁵⁴ Dixon 2007 *International Journal of Constitutional Law* 400.

⁴⁵⁵ Dixon 2007 *International Journal of Constitutional Law* 400.

⁴⁵⁶ Dixon 2007 *International Journal of Constitutional Law* 404.

⁴⁵⁷ Dixon 2007 *International Journal of Constitutional Law* 405.

between the various branches of government with regard to enforcement of socio-economic rights, with profound implications for poverty amelioration.

Associated with adherence to legal culture is the tendency of courts to take a classical liberal rather than a transformatory approach to poverty, according to Dugard and Langford, and this impacts upon their ability to craft meaningful solutions.⁴⁵⁸

Pieterse takes the discussion about legal conservatism into the realm of considering judicial accountability for socio-economic transformation.⁴⁵⁹ He articulates the view that the judiciary is accountable for transformation along with the other branches of government, with judicial adjudication being inherently political. He proposes that the judiciary should take on a more activist role with regard to socio-economic rights adjudication, including the scrutiny of budgets and government policy.⁴⁶⁰ He further advocates that the judiciary should embrace the unashamedly political orientation of the *Constitution*.⁴⁶¹ He is a strong and persuasive proponent of the theory that conservative judicial culture and strict judicial deference are phenomena which tend to preserve the socio-economic status quo, and as such are anti-transformative.

A further aspect of legal conservatism which renders it ineffective in addressing poverty-related issues is legal minimalism, which is evident even in constitutional case law, and tends to leave fundamental questions unanswered.⁴⁶² This arises from practices such as only addressing the matter before the court and not broad principles, and only addressing the issues raised in the papers. Both of these practices are elements of a conservative legal culture.

⁴⁵⁸ Dugard and Langford 2011 *South African Journal on Human Rights* 56. The *Mazibuko* matter is cited as an example of the classical liberal approach to adjudication. By contrast the judgment in *Joseph and others v City of Johannesburg and others* 2010 (4) SA 55 (CC) (hereafter "*Joseph*") is cited as an example of a more transformatory mode of adjudication. See also Clark and Esterhuizen "Remembering the Transformative Mandate: An Analysis of Twenty Years of Housing and Eviction Jurisprudence in South Africa", third page (pages unnumbered).

⁴⁵⁹ Pieterse 2004 *South African Journal on Human Rights* 383.

⁴⁶⁰ Pieterse 2004 *South African Journal on Human Rights* 409.

⁴⁶¹ Pieterse 2004 *South African Journal on Human Rights* 418.

⁴⁶² Brickhill "Public Interest Alchemy: Combining Art and Science to Litigate for Social Change" 1-24.

The strict separation of public and private law considerations with regard to issues of redistribution of socio-economic resources is a further element of legal conservatism which may stand in the way of poverty amelioration. Private law does not fully espouse the values of the *Constitution* or accept redistribution of resources as a legitimate goal.⁴⁶³

Law is a sociologically embedded institution and process, the various elements of which are captured by society.⁴⁶⁴ This renders change and transformation difficult. The embeddedness also has a cumulative aspect, which entrenches both advantage and deprivation.⁴⁶⁵

It is important to note that interpreting and applying the law involves the attribution of normative content.⁴⁶⁶ Thus it is arguable that those applying the law have a responsibility to follow the constitutional precepts central to our legal system, including those that relate to poverty, and that fulfilment of this responsibility is lacking in South Africa.

In the context of land reform matters in South Africa, legal conservatism has a pernicious effect of retarding transformation.⁴⁶⁷ Land reform adjudication is typically *ad hoc* in nature and does not address underlying questions of distribution of land – a phenomenon that is preservative of the *status quo*.⁴⁶⁸

Judges are of necessity in a 'situated' position relative to society – this is an inevitable phenomenon but it is determinative of the outcomes of the adjudicative process.⁴⁶⁹ Thus a judge who shies away from or does not support socio-economic transformation may deliver judgments which serve to entrench the *status quo*, with attendant negative implications for poverty amelioration. A further aspect of the

⁴⁶³ Roderer 2015 *Northwestern Journal of International Human Rights* 55. See also Bohler-Muller 2012 *Human Sciences Research Council Review* 20-21.

⁴⁶⁴ Munger 1993 *Loyola of Los Angeles Law Review* 97.

⁴⁶⁵ Munger 1993 *Loyola of Los Angeles Law Review* 97.

⁴⁶⁶ Poscher 2014 "Hermeneutics, Jurisprudence and Law" 1-23.

⁴⁶⁷ Du Toit 2013 *Journal of Agrarian Change* 22.

⁴⁶⁸ Du Toit 2013 *Journal of Agrarian Change* 22.

⁴⁶⁹ Daniel 2013 *De Jure* 25. "Situatedness" is described by the author as a person's highly developed, highly-contextualised, environmentally-produced personal constitution as it exists in relation to the situations of others.

adjudicative process which may limit its potential to contribute towards transformation is the tendency of judges to deal with impoverishment as if it were non-political and to legitimise the liberalist-capitalist ideology.⁴⁷⁰ This inhibits the potential of the process to address poverty-related issues.

Problems of access to the law, which a conservative legal approach does not address, render the value of the legal system as an instrument of the weak against the powerful, questionable.⁴⁷¹ Thus a power dynamic exists in terms of which the wealthy and powerful are able to use their resources and cumulative experience to wield power over the poor in the context of litigation.

Liebenberg points to an important issue that can serve to exacerbate the prevalence of poverty in South Africa. This is the issue of government, in particular the executive, enjoying autonomy with regard to budgetary allocation to carry out its poverty amelioration obligations.⁴⁷² This is an issue that has never been the subject of litigation in South Africa, due to the prevalence of a conservative judicial system which upholds the separation of powers doctrine and would discourage the making of budgetary allocation orders. There is however a compelling argument to be made that if an organ of state has an obligation to pursue a particular course of action, it must by logical deduction have an obligation to frame its budget in such a way that it is able to carry out its obligations. In general terms adherence to conservative legal culture encourages court-centric analysis of socio-economic rights, without consideration of structural economic factors that contribute to poverty and unemployment.⁴⁷³

The scholars cited in this section hone in on various aspects of the operation of the legal system which render it ineffective in or incapable of contributing to transformation of the socio-economic milieu by changing the lot of the poor. This constitutes an overview of general trends in the legal system. In chapter 5 specific

⁴⁷⁰ Brand *Courts, Socio-economic Rights and Transformative Politics* 5.

⁴⁷¹ Brinks and Gauri 2014 *Perspectives on Politics* 379.

⁴⁷² Liebenberg 2001 *South African Journal on Human Rights* 257.

⁴⁷³ Jagwanth and Soltau "Socio-Economic Rights and Implications for Intergovernmental Fiscal Relations in South Africa" 2.

consideration will be given to the issue of the role of the judiciary as a branch of government in addressing structural poverty, and possible paths for it to follow in this regard.

2.3.5 Political Dynamics Serving as Determinants of Poverty

Aspects of the way in which political power is wielded may serve as causes and determinants of poverty. This is manifested in a variety of arenas, as will be apparent from the discussion below.

2.3.5.1 General Political Dynamics Affecting Poverty

Failure of the political transformation of the nineties to improve the lot of the poor is a notable dynamic affecting the lot of poor, which perpetuates a form of socio-economic apartheid.⁴⁷⁴

Phenomena linked to class formation, supported by the political trends of the day, may be a determinant of poverty.⁴⁷⁵ For example, the fundamental configurations of wage determination and distribution of wealth have remained unchanged in post-apartheid South Africa.⁴⁷⁶ The prevalence of the interests of those in political power further tends to maintain the status quo, and hinder socio-economic reforms that could meaningfully address poverty.⁴⁷⁷ Liberal democracy, being the prevailing political ideology in South Africa post the political transition, only benefits the privileged, whilst the rest of society suffers under patronage and repression.⁴⁷⁸ This calls into question the efficacy of the *Constitution* for the achievement of transformation.⁴⁷⁹

The manner in which political power is exercised in South Africa may serve as a cause or determinant of poverty.⁴⁸⁰ The machinations of the political system render

⁴⁷⁴ Christiansen 2007 *Columbia Human Rights Law Review* 330.

⁴⁷⁵ Seekings 2016 *European Journal of Social Theory* 204.

⁴⁷⁶ Seekings 2016 *European Journal of Social Theory* 205.

⁴⁷⁷ Vally "The Political Economy of State Repression in South Africa" 63-66.

⁴⁷⁸ Madlingozi 2017 *Stellenbosch Law Review* 125.

⁴⁷⁹ Madlingozi 2017 *Stellenbosch Law Review* 139.

⁴⁸⁰ Woolman 2016 *New York Law School Law Review* 287.

it incapable of making fundamental social changes, and political elites are held only partially accountable. Thus the economic and political institutions of society have limited ability to bring about change which would serve to ameliorate the plight of the poor and marginalised. Rather they serve to uphold and entrench the positions of their dominant elites. They are thus strong determinants of poverty.

The injustice associated with poverty is caused by the persistence of social, political and economic power imbalances.⁴⁸¹ By implication, the marginalised and vulnerable remain as such – their lot does not change.

It is arguable that in South Africa the poor have political power, but the wealthy have economic power.⁴⁸² Economic power enables the preservation of wealth. Transformation may depend on redressing these power imbalances, in particular on affording economic power to the poor. Initiatives to do this would have to be backed by political will. It is noteworthy that in South Africa, political power relations do not allow for the inclusion of the poor in power structures.⁴⁸³ This limits the ability of the poor to determine their own fate.

Lack of acknowledgement of the political nature of judicial adjudication is in itself a power dynamic which affects the situation of the poor – it enables this branch of government which has the potential to direct political action to act as if such potential did not exist.⁴⁸⁴ It also enables the products of the judiciary to become immune from political criticisms, and this is not favourable to pro-poor transformation.

Gross offers a valuable overview of how political dynamics may have impacts on poverty-related issues. He writes that the “grand narrative” of South Africa, which formed part of its transformation, has failed to give due consideration to historical

⁴⁸¹ Crocker 2014 *Journal of Global Ethics* 245-246

⁴⁸² Lephakga 2016 *Studia Historiae Ecclesiasticae* 11.

⁴⁸³ Fowkes “Transformative Constitutionalism and the Global South: The View from South Africa” 4.

⁴⁸⁴ Fowkes “Transformative Constitutionalism and the Global South: The View from South Africa” 7. He cites an article written in 2010 by Justices Langa and Cameron in which they bemoan the failure of the judiciary to acknowledge the problematic nature of its role in apartheid times.

injustices of the past.⁴⁸⁵ He emphasises that, notwithstanding the political transition, structural inequality remains an ongoing problem in South Africa.⁴⁸⁶ He posits the view that laws and rulings with regard to socio-economic rights are not enough, and that committed officials and budget are required for their fulfilment.⁴⁸⁷ He makes the very poignant argument that the law requires deconstruction in order to enable it to move closer towards achieving social justice.⁴⁸⁸ He also avers that the human rights discourse can be counter-productive and actually serve to hamper socio-economic transformation.⁴⁸⁹ His writings illustrate vividly the argument that a purposefully directed effort to achieve social justice, which would include poverty amelioration, as a part of the South African political transition, has been lacking.

2.3.5.2 Weak Role Played by the Legislature

Aspects of the functioning of Parliament and other legislatures may serve to stifle the possibility of poverty amelioration imperatives succeeding.

The autonomy and accountability of elected political representatives is constrained by the fact that political parties take on an overbearing role and afford no freedom to their members.⁴⁹⁰ The significance of this for purposes of addressing poverty would be that individual politicians who may be inclined to introduce policy measures to achieve poverty amelioration would not have the autonomy to do so in the absence of a party mandate. The ruling ANC uses its party authority to subvert the autonomy of Parliament, with party bosses exercising tight control over members of Parliament.⁴⁹¹ This phenomenon tends to be preservative of the *status quo*, and limits the scope for individual initiatives within the party to tackle transformation issues, including those relating to poverty.

⁴⁸⁵ Gross 2004 *Stanford Journal of International Law* 81.

⁴⁸⁶ Gross 2004 *Stanford Journal of International Law* 94.

⁴⁸⁷ Gross 2004 *Stanford Journal of International Law* 94. See also Liebenberg 2001 *South African Journal on Human Rights* 257, cited in the previous section.

⁴⁸⁸ Gross 2004 *Stanford Journal of International Law* 99.

⁴⁸⁹ Gross 2004 *Stanford Journal of International Law* 98.

⁴⁹⁰ De Vos 2015 *South African Journal on Human Rights* 42.

⁴⁹¹ Southall 2014 *Journal of Contemporary African Studies* 59.

Weakness of legislative oversight in South Africa is a clear determinant of poverty.⁴⁹² An aspect of this is that there may be overlapping roles between members of the executive and members of legislature.⁴⁹³ Other reasons are the adherence to strict party loyalty and discipline, and the practice of holding party caucuses.⁴⁹⁴ The effect of these practices is that it is difficult to hold the executive to account for any of its actions, including those which facilitate or impede poverty amelioration.

Other aspects of the dynamics between the legislature and the executive may not be conducive to poverty amelioration. It is problematic that ministers are drawn from the ranks of members of Parliament, whilst Parliament is meant to oversee government.⁴⁹⁵ Thus they are required simultaneously to take on a legislative and an executive role. This is anomalous and represents a conflict of interest. The political nature of ministerial appointments suggests that ministers have strong party affiliations, and have to toe the ruling party line whether or not it addresses poverty amelioration.

Centralism within a political party, the ANC being a good illustration, stifles innovation and checks and balances of government, especially checks on members of Parliament who are members of the executive.⁴⁹⁶ This may have negative impacts upon initiatives for poverty amelioration.

The prevailing literature thus portrays the legislature as a weak institution, constrained by convention and dysfunctionalities. The implication of this for purposes of the present discussion is that it does not have the power to address issues pertaining to poverty amelioration, if it should wish to do so. The dominance of party politics serves to thwart any individual or sub-party groupings from taking

⁴⁹² Esau *An Exploratory Study into the Views, Understandings and Experiences of Members of the South African Parliament in Comparative Perspective* 1-13.

⁴⁹³ Esau *An Exploratory Study into the Views, Understandings and Experiences of Members of the South African Parliament in Comparative Perspective* 5.

⁴⁹⁴ Esau *An Exploratory Study into the Views, Understandings and Experiences of Members of the South African Parliament in Comparative Perspective* 5.

⁴⁹⁵ Malapane 2016 *Journal of Public Administration and Development Alternatives* 135.

⁴⁹⁶ Mattes 2002 *Journal of Democracy* 26.

any initiative in this regard.⁴⁹⁷ A more comprehensive discussion of the role of the legislature as it pertains to poverty amelioration follows in chapter 3, where possible paths are considered for the legislature to take a more active role in poverty amelioration.

2.3.5.3 Weak Representivity of the Poor

True representivity of the poor may be thwarted by the weakness of social movements. Inadequacy of representation by such movements may worsen the plight of the poor.⁴⁹⁸ This is due in contemporary times to the fact that there has been no continuity between the social movements of the 1980's and 1990's and the representivity of the poor currently, with many of the earlier activists having been absorbed into government.⁴⁹⁹ It has been argued that weakening of such representivity since the democratic transition is a factor which contributed to the Marikana massacre in 2012.⁵⁰⁰

Representivity of the needs and interests of the poor is an under-explored subject. It is trite that mobilisation of the poor and ensuring they enjoy representivity could serve to create pressure for transformation which would ameliorate their hardships. This could be fostered by legislative, executive and judicial actions.

2.3.5.4 Corruption and Clientilism

Corruption and impunity on the part of politicians are cited as negative forces that frustrate change which could benefit the poor.⁵⁰¹ The effect of corruption is simply

⁴⁹⁷ There is potential for the dynamics of party affiliation to be weakened when the legislative reform mandated in *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC) (hereafter "*New Nation Movement*") to allow non-affiliated candidates to run for office, comes into effect. It remains to be seen however how popular such candidacies will become, and how independence will be exercised.

⁴⁹⁸ Ballard 2005 *African Affairs* 1.

⁴⁹⁹ Ballard 2005 *African Affairs* 10.

⁵⁰⁰ Bond and Mottiar 2013 *Journal of Contemporary African Studies* 293. For additional discussion on the Marikana incident, see section 2.3.1.3.

⁵⁰¹ Rosa 2011 *Stellenbosch Law Review* 554.

that it diverts resources from poverty relief programmes to a corrupt few, thus preventing equitable distribution.⁵⁰²

Lodge describes a phenomenon within the ruling ANC which he describes as “neo-patrimonialism”.⁵⁰³ This is characterised by clientilism, in which public goods and resources are offered to selected groups in exchange for political support.⁵⁰⁴ An associated phenomenon is that access to public office is a route for private accumulation.⁵⁰⁵ Lodge does not make specific reference to the impact of neo-patrimonialism on poverty, but it is logical to assume that the accumulation of power and privilege in the hands of a few must diminish resources for distribution to the poor.

Corruption and clientilism are phenomena which require a society-wide effort to combat – including initiatives of the three branches of government.

2.3.5.5 Elite Capture of Land Reform

Hall and Kepe⁵⁰⁶ write that elite capture of the land reform process in South Africa prevents it from achieving its intended purpose of upliftment from poverty, particularly in view of the purchase of farms by the state for provision to beneficiaries on leasehold, which was the stated intent of government at the time of their writing. At the time of writing this thesis, land reform remains a vexed issue in South Africa, with the initiative pending to amend section 25 of the *Constitution*

⁵⁰² Wright *Legal Perspectives on the Prevention and Minimisation of Corruption for Sustainability in South African Municipalities* 1.

⁵⁰³ Lodge 2014 *African Affairs* 1. Patrimonialism is a political system in which a patrimonial ruler controls instruments of power and extends personal graces and favours, undermining traditional limitations on the exercise of authority – see Oxford Dictionaries <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100310690>. The term “neo” means “new,” “recent,” “revived,” “modified,” used in the formation of compound words – see Dictionary.com <https://www.dictionary.com/browse/neo> accessed 27 April 2021. Thus neo-patrimonialism is a new form of patrimonialism, portrayed by Lodge as one which is practised by the ANC as patrimonial leader.

⁵⁰⁴ Lodge 2014 *African Affairs* 3.

⁵⁰⁵ Lodge 2014 *African Affairs* 15.

⁵⁰⁶ Hall and Kepe 2017 *Review of African Political Economy* 7.

to allow for expropriation without compensation.⁵⁰⁷ Reorientation of land reform is necessary to enable the poor to gain access to land – an initiative which should be pursued by the executive with the support of the legislature.

2.3.5.6 Weakness of the NDP

Allogio and Thomas express their regret at the fact that the NDP defers the social change that it purports to promote, through adherence to a neoliberal model and an excessive focus on citizen virtue.⁵⁰⁸ With the plan being a policy instrument of government, it is incumbent upon the executive to find means to strengthen and implement it in the interests of poverty amelioration.

2.3.5.7 Observations on Political Dynamics as Determinants of Poverty

This section has highlighted a number of phenomena which may be categorised as political dynamics, and which serve as determinants of poverty. These include various aspects of power dynamics in government across the three branches, a weak legislature, weak representivity of the poor, corruption and clientilism, elite capture of land reform processes, and a weak NDP. Whilst these are all distinct phenomena with their own attributes, cumulatively they represent a disjointed assortment of dysfunctionalities in political governance which detract from or frustrate poverty amelioration.

2.3.6 Other Determinants of Poverty

The preceding five sections contained a discussion of the major categories of factors found in research for this thesis which serve as determinants of poverty. The discussion aimed to highlight issues which need to be addressed by the three branches of government if poverty is to be ameliorated. The discussion further feeds into the identification and development of possible paths for initiatives, via the three

⁵⁰⁷ Although the ANC has been unable to obtain a parliamentary vote to amend the *Constitution* to allow for expropriation without compensation, it takes the view that such expropriation is still possible given that it is conceivable to determine compensation under section 25 at zero.

⁵⁰⁸ Allogio and Thomas 2013 *Social Dynamics* 110, 111. See reference to the weakness of the NDP in section 2.3.5.6.

branches of government, towards amelioration of structural poverty. This section contains a selection of further not as predominant, but nevertheless significant, *ad hoc* issues which some authors have identified as contributors towards poverty.

2.3.6.1 Lack of Corporate Accountability

Lack of corporate accountability is a worldwide phenomenon which is raised in a number of contexts as a contributor to poverty, marginalisation and environmental degradation. Corporate social responsibility is typically seen as involving corporate citizenship and social investment, but is not based on moral and ethical responsibility.⁵⁰⁹ Business and development are seen as separate endeavours. This conceptual detachment by corporations, which sometimes undertake activities which impact adversely on the lives of the poor,⁵¹⁰ does not augur well for poverty amelioration. There is insufficient research, particularly comparative evidence and qualitative case studies, to determine how corporate social responsibility initiatives impact on poverty reduction generally.⁵¹¹ It is arguable that consideration of power, class and gender roles in corporate social responsibility initiatives needs to be strengthened.⁵¹²

Environmental pollution and degradation by corporations, in violation of section 24 of the *Constitution*, is rife in South Africa. This has negative consequences for the poor, and is attributable partly to corporate political interference exerting influence over environmental regulatory decisions, particularly those pertaining to the extractive industries.⁵¹³ It is noteworthy that there were promises made at the Truth and Reconciliation Commission⁵¹⁴ to address pollution as well as poverty and

⁵⁰⁹ Fig 2005 *International Affairs* 603.

⁵¹⁰ This is well-documented in the environmental realm, as described further. It is not as well documented in the realm of equality and the upholding of socio-economic rights. For example there appears to be a dearth of academic writing on the possible responsibilities of corporations to move towards greater income equality.

⁵¹¹ Prieto-Carron *et al* 2006 *International Affairs* 983.

⁵¹² Prieto-Carron *et al* 2006 *International Affairs* 987.

⁵¹³ Fourie "Tales from the Trenches: The Unfulfilled Promise of the Constitutional Environmental Right in South Africa" 10.

⁵¹⁴ This was a commission established in South Africa by legislation in 1995 to address violence and human rights abuses committed during apartheid.

deprivation in the mining industry, which were belied by the subsequent disinvestment of major mining corporations from South Africa.⁵¹⁵

In the international context, there is research that suggests that strategic management units of corporations typically do not care about corporate governance, social responsibility or business ethics.⁵¹⁶ Thus they lack an inclination to pursue policies which could serve to improve the lives of the poor.

A major indictment of corporate abuses in the BRICS countries emerges from the research of Bond. He is very vociferous about abusive practices by corporations and the impacts such abuses have on the well-being of the poor, which he says represent an “eco-destructive, consumerist-centric, over-financialised, climate-frying maldevelopment model”.⁵¹⁷ His writings are illustrative of a theme appearing consistently in critique of lack of corporate accountability, namely that societal benefits, including for the poor, can be derived from the pursuit of environmental sustainability rather than a consumer-oriented culture. There is however a dearth of writing linking corporate social responsibility directly to poverty relief, and there is a need to pursue further research in this regard.⁵¹⁸

Corporate social responsibility is an issue which can be addressed by legislative measures to compel or incentivise its pursuit, which can be initiated and developed by the executive and enacted by the legislature, and supported by the judiciary via purposive interpretation.

2.3.6.2 Globalisation, Urbanisation and Free Trade

Globalisation is a sociological phenomenon associated with power relations, and it may have impacts upon marginalisation, poverty, powerlessness and lack of representation and freedom.⁵¹⁹ In South Africa the black skilled classes have

⁵¹⁵ Humby 2016 *Journal of Business Ethics* 658.

⁵¹⁶ Taysir and Pazarck 2013 *Procedia – Social and Behavioural Sciences* 302.

⁵¹⁷ Bond 2013 *Third World Quarterly* 266.

⁵¹⁸ Prieto-Carron 2006 *International Affairs* 987.

⁵¹⁹ Ballard 2005 *African Affairs* 8.

benefitted from globalization, but marginalisation of the poor has been exacerbated.⁵²⁰

Another sociological phenomenon which deepens poverty is urbanisation. Especially with regard to food security issues, urban conditions may drive people into poverty.⁵²¹ With urban dwellers not being able to live off the land and being dependent upon having cash for food, food insecurity is worse in urban than in rural areas.⁵²² Urban inequality increases more rapidly than rural inequality, with attendant impacts on poverty in urban areas.⁵²³

In the years following the political transition in South Africa, government embraced the Washington Consensus⁵²⁴ and moved towards free and open international trade policies. It entered into a number of free trade agreements under the auspices of the World Trade Organisation (WTO), which allowed unrestricted international trade in various commodities.⁵²⁵ This had the effect of decimating some sectors of the economy, for example the textile industry, which was impacted upon negatively, mainly by a flood of cheap imports from China. This created unemployment and dependence on the state in affected sectors.⁵²⁶ Thus it may be said that free trade served as a determinant of poverty in these sectors. The negative impacts of free trade in developing countries are also referred to by writers examining this phenomenon from a broader, international perspective. Opong, for example, writes of the inimical effect of trade liberalisation on human rights in developing countries.⁵²⁷ Globalisation of trade in Africa is associated with exploitation,

⁵²⁰ Ballard 2005 *African Affairs* 10.

⁵²¹ Battersby 2011 *Development Southern Africa* 546.

⁵²² Battersby 2011 *Development Southern Africa* 560.

⁵²³ Leibbrandt *et al Unemployment and Inequality Outcomes in South Africa* 1-54. The authors refer to the two categories of urban and rural as "geotypes".

⁵²⁴ This is a set of 10 market-oriented policies that were popular among Washington-based policy institutions in the late 1980s and early 1990s, formulated as policy prescriptions for improving economic performance in Latin American countries. These policies centred upon fiscal discipline, market-oriented domestic reforms, and openness to trade and investment. See <https://www.brookings.edu/blog/africa-in-focus/2021/02/19/how-have-the-washington-consensus-reforms-affected-economic-performance-in-sub-saharan-africa>.

⁵²⁵ Motala 2016 *American University Business Law Review* 36.

⁵²⁶ Motala 2016 *American University Business Law Review* 37.

⁵²⁷ Opong 2006 *African Human Rights Law Journal* 124.

undiversified economies and extractive industries.⁵²⁸ Thus a picture emerges of trade liberalisation and globalisation not only being of little benefit to the poor, but also actively working to their detriment.

The phenomena described in this section individually and collectively act as determinants of poverty. They are cardinal outcomes of economic policy in South Africa and must be monitored and evaluated on an ongoing basis by the executive to assess their efficacy generally and particularly in the realm of poverty amelioration.

2.3.6.3 Climate Change

Climate change is a phenomenon which is widely acknowledged to be more hazardous for the poor than for those with resources. A full analysis of the research and work done in this regard is outside the scope of this thesis, but by way of illustration, the writing of Steigleder is useful – he states clearly that the poor bear a greater risk with regard to the consequences of climate change due to their inability to act in their own interests.⁵²⁹ It is anticipated that major rights infringements will occur as a consequence of climate change, in addition to the adjustments to production and consumption that will be required.⁵³⁰

Climate change is acknowledged as a phenomenon that exacerbates inequality and poverty.⁵³¹ It has impacts on a wide range of human needs including health and food security. It requires acknowledgement and understanding, and remediation by way of mitigation and adaptation measures, by a wide range of role players including government.

⁵²⁸ Schneider 2003 *Journal of Economic Issues* 391, 394.

⁵²⁹ Steigleder 2016 *Journal of Human Rights* 265.

⁵³⁰ Steigleder 2016 *Journal of Human Rights* 269.

⁵³¹ St Clair 2014 *Journal of Global Ethics* 286. The author argues that a new approach to development ethics is needed in order to deal with climate change, taking climate change into account as a developmental rather than an environmental problem.

2.3.6.4 Labour-related Issues

Since for the majority of people income earned from labour is their main means of subsistence, labour market conditions which enhance or detract from earning potential may determine whether or not they find themselves in poverty.⁵³² Examples of such conditions are skills inequality, inequality in returns to skills, unemployment, and low productivity and income in the informal sector.

Law and process with regard to labour market practices may have a dampening effect on the inclination of employers to take on staff, given that labour legislation is typically formulated for the protection of workers.⁵³³ Labour law and policy in South Africa are protective of employees, and correspondingly onerous for employers, who as a result are discouraged from hiring new employees unless absolutely necessary. A study done by the IMF in 2005 showed labour market rigidities to be associated with unemployment.⁵³⁴ The disincentivisation of employers as described contributes to higher rates of unemployment, and thus exacerbates poverty.⁵³⁵

The authors cited in this section illustrate vividly how labour-related circumstances and conditions may have major impacts upon the lives of the poor and determine their prospects of rising out of poverty. This scenario requires of government, particularly the executive which initiates labour policy and legislation, to consider measures to utilise such policy and legislation for improvement of the lives of the poor.

⁵³² Bhorat *et al* 2014 *Economic Policy in South Africa: Past, Present and Future* 17.

⁵³³ For example, the Labour Relations Act 66 of 1995 states in Section 1 thereof that its purpose is to advance economic development, social justice, labour peace and the democratisation of the workplace. These objectives are aligned to Section 23 of the *Constitution* which confers representivity rights on workers.

⁵³⁴ Magombeyi and Odihambo 2015 *Socioeconomica* 345.

⁵³⁵ Leibbrandt 2009 *Unemployment and Inequality Outcomes in South Africa* 32.

2.4 Solutions for Amelioration of Poverty

In a famous speech about poverty, Nelson Mandela stated that:

Like slavery and apartheid, poverty is not natural. It is man-made and can be overcome and eradicated by the actions of human beings.⁵³⁶

The significance of this statement for purposes of this thesis is that it is possible to identify methodologies for amelioration of poverty. This section refers to literature which indicates, either overtly or by implication, ways in which this could be achieved.

2.4.1 Proposed Poverty Amelioration Solutions Related to Political and Ideological Considerations

The conceptualisation of poverty amelioration solutions is potentially assisted by an understanding of the underpinning theories and ideologies that form the basis of the solutions under consideration, as is illustrated by the various categories of solutions under discussion in this section.

2.4.1.1 Understanding the Ideological Foundations and Dimensions of Poverty Studies

Du Toit⁵³⁷ outlines eloquently how poverty studies must be informed by ideological issues. He highlights the fact that poverty is a contested concept underpinned by ideologies about the nature of society, issues pertaining to suffering and humanity, and the obligations associated with citizenship, community membership and solidarity. These insights suggest that understanding the nature of the ideological underpinnings of poverty is a necessary precursor to developing solutions for its amelioration.

Solutions for ameliorating poverty need to be formulated with cognisance of the fact that policy is almost never value-neutral.⁵³⁸ Policy may reflect anomalies such as

⁵³⁶ www.telegraph.co.uk/news/uknews/1482735/Poverty-like-apartheid-is-man-made-says-Mandela.

⁵³⁷ Du Toit "The Proper Subject for Poverty Research is Inequality" 128.

⁵³⁸ Movik 2014 *Geoforum* 187.

having a resource such as water held in trusteeship by the state, but nevertheless having the state regulate its distribution according to the principles governing liberalism and markets.⁵³⁹ Thus, it is well justified to interrogate assumptions and ideologies underpinning policy that has impacts upon the poor, as part of initiatives towards poverty amelioration. Policy innovations can be made through affording due recognition to the role of ideas in driving policy change.⁵⁴⁰

An equity based social regime may have to the potential to limit economic growth in the interests of protecting the environment, and at the same time serve as a tool for redistributing wealth.⁵⁴¹ Consideration for improving the lot of the poor informs this position. Underpinning ideologies of environmental conservation and redistribution of wealth can serve to foster an understanding of how to ameliorate poverty.

Some legal academics venture to indicate that poverty amelioration could and should occur within the political realm. It is arguable that the political dimensions of poverty must be acknowledged in order to forge solutions for its amelioration.⁵⁴² It is furthermore important for legal analysis to consider the role of politics and economics in poverty studies.⁵⁴³

Ideological and factual awareness raising in policy makers is a necessity for moving towards policy amelioration.⁵⁴⁴ This section has served to explain that an understanding of the ideologies that support either poverty itself or poverty amelioration, can aid in conceptualising poverty amelioration solutions. Such an understanding must of necessity underpin and inform the workings of the three branches of government insofar as they relate to poverty issues.

⁵³⁹ Movik 2014 *Geoforum* 191.

⁵⁴⁰ Rodrik 2014 *Journal of Economic Perspectives* 194.

⁵⁴¹ Rosales 2008 *Conservation Biology* 1415, 1416.

⁵⁴² Pieterse 2004 *South African Journal on Human Rights* 404.

⁵⁴³ Sibanda 2011 *Stellenbosch Law Review* 482 at 496.

⁵⁴⁴ Schotte, Zizzamia and Leibbrandt *Social Stratification, Life Chances and Vulnerability to Poverty in South Africa* 39.

2.4.1.2 Understanding Poverty in the Context of Social Justice

Another famous statement by the late Nelson Mandela declares that overcoming poverty is not a matter of charity, but of justice.⁵⁴⁵ This situates poverty amelioration squarely within the area of concern of the justice system.

The sources cited in this section mostly link poverty amelioration to social justice. It would arguably be more correct to view poverty in the context of a broader conceptualisation of justice with social, economic and political dimensions, because many of the conceptualisations of social justice cited overlap into the realms of economics and politics. This should be borne in mind in the discussion that follows.

Aside from being a matter of justice generally or of social justice specifically, poverty is concerned with distributive justice. With political leaders across the world failing to challenge the economic world order, distributive justice has failed to materialise in the global South.⁵⁴⁶ This is associated with ongoing poverty and inequality in developing countries.⁵⁴⁷

It is arguable that the interests of the poor are potentially better served by distributive justice rather than reparative justice.⁵⁴⁸ Reparative justice is the addressing of individual claims as symbols of justice that is required, without taking into account systemic problems.⁵⁴⁹ By contrast, distributive justice is associated with broad social justice and equity.⁵⁵⁰

Bottom-up generative justice may be seen to be the most egalitarian form of justice.⁵⁵¹ This entails peer to peer production, gift exchanges of labour value, community agro-ecology and restorative approaches to civil rights.⁵⁵² Although this

⁵⁴⁵ Mc Crudden 2008 *European Journal of International Law* 661.

⁵⁴⁶ Palat 2008 *Futures* 721.

⁵⁴⁷ Palat 2008 *Futures* 723. See also Waldorf 2012 *Social and Legal Studies* 180-181.

⁵⁴⁸ Du Toit 2013 *Journal of Agrarian Change* 3.

⁵⁴⁹ Du Toit 2013 *Journal of Agrarian Change* 3.

⁵⁵⁰ Du Toit 2013 *Journal of Agrarian Change* 6.

⁵⁵¹ Eglash 2016 *Revista Teknokultura* 369.

⁵⁵² Eglash 2016 *Revista Teknokultura* 369, 373.

is a novel concept, it is strongly arguable that the outcome would be favourable to the poor.

Social justice is associated with the application of egalitarianism.⁵⁵³ An understanding of the doctrine of egalitarianism could be a mechanism to overcome poverty and inequality.⁵⁵⁴ This could help to compensate for the fact that inequality still prevails across the world, despite universal suffrage and capitalism.⁵⁵⁵ However, egalitarianism may not be readily attainable due to citizens making only attenuated demands for redistribution.⁵⁵⁶ This may limit the potential of the doctrine as a basis for poverty amelioration.⁵⁵⁷ By the same token, egalitarianism may be understood to be a potential poverty amelioration solution.

Substantive equality, as endorsed in the *National Coalition for Gay and Lesbian Equality* case,⁵⁵⁸ is essential for justice, and serves to mitigate the adverse effects of inherent differences.⁵⁵⁹ The concept of substantive equality may be used for addressing poverty – it posits the equalisation of society on many levels, including but not limited to material means.⁵⁶⁰

It is arguable that poverty amelioration may depend upon environmental sustainability.⁵⁶¹ Thus it is possible to envision a form of justice in which environmental conservation and reparation are integral components of poverty

⁵⁵³ Egalitarianism is a philosophical perspective that emphasizes equality and equal treatment across gender, religion, economic status, and political beliefs. Egalitarianism may focus on income inequality and distribution, which are ideas that influenced the development of various economic and political systems. Egalitarianism also looks at how individuals are treated under the law. See <https://www.investopedia.com/terms/e/egalitarianism.asp> accessed 12 September 2021.

⁵⁵⁴ Putterman, Roemer and Silvestre 1998 *Journal of Economic Literature* 861.

⁵⁵⁵ Putterman, Roemer and Silvestre 1998 *Journal of Economic Literature* 894.

⁵⁵⁶ Putterman, Roemer and Silvestre 1998 *Journal of Economic Literature* 895.

⁵⁵⁷ Rosales 2008 *Conservation Biology* 1415, 1416 also proposes an egalitarian social regime as a solution for ameliorating poverty.

⁵⁵⁸ *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* 1999 (1) SA 6 (CC) (hereafter "*National Coalition for Gay and Lesbian Equality*").

⁵⁵⁹ Rapatsa 2015 *Acta Universitatis Danubius* 22. The case referred to is *National Coalition for Gay and Lesbian Equality*. In para 61 of its judgment the Constitutional Court indicated that the *Constitution* does indeed require substantive equality be pursued, and that such equality is remedial or restitutionary equality.

⁵⁶⁰ Rapatsa 2015 *Acta Universitatis Danubius Juridica* 30.

⁵⁶¹ Du Plessis 2011 *South African Journal on Human Rights* 285.

amelioration. This position undoubtedly has validity in circumstances where environmental degradation and poverty are mutually entwined.⁵⁶²

Law and social justice must of necessity be intertwined, forming a single coherent whole reflecting justice and fairness, with everybody treated with equal care and concern.⁵⁶³ This would root jurisprudence in social science, with the goal of achieving maximum social welfare.⁵⁶⁴

Poverty in South Africa may be seen as a violation of human rights and thus a social injustice, since the *Constitution* recognises the human right to fulfilment of needs.⁵⁶⁵ The prevalence of poverty is an indication that transformation is not complete.⁵⁶⁶

Where periods of conflict have been endured, as was the case in South Africa during apartheid, transitional justice may require that special provisions of redress be adopted, for example recovery of resources stripped from the economy during time of conflict.⁵⁶⁷ Such an initiative would enhance resources available for development and benefit the poor. It is a central tenet of social justice that the state makes positive provision of socio-economic goods for its citizens, and that inaction in this regard is injustice.⁵⁶⁸ Thus social justice may be conceptualised as a system of proactive welfare provision on the part of the state. Such a system, if implemented, would hold positive benefits for the poor.

Social justice may in addition be conceptualised around understanding what constitutes a 'good life', in its own right, and also as a means of understanding what is lacking in the lives of the poor.⁵⁶⁹ Three features of social justice need to be considered as part of this analysis – acknowledging human "sameness" and needs, affording moral worth and equal respect to everyone, and acknowledging the

⁵⁶² See also Jayathilaka 2015 *International Journal of Conceptions on Management and Social Sciences* 3, where intertwining of the concepts of poverty, environment and development is advocated.

⁵⁶³ Gould 2016 *Ancilla Iuris* 64.

⁵⁶⁴ Gould 2016 *Ancilla Iuris* 82, 83.

⁵⁶⁵ Jansen van Rensburg and Naude 2007 *Public Administration and Development* 396.

⁵⁶⁶ Jansen van Rensburg and Naude 2007 *Public Administration and Development* 407.

⁵⁶⁷ Mani 2008 *International Journal of Transitional Justice* 258.

⁵⁶⁸ Miller 2008 *Critical Review of International Social and Political Philosophy* 392.

⁵⁶⁹ Smith 1997 *Environment and Planning* 20.

arbitrariness of good fortune.⁵⁷⁰ A communal commitment to prioritising the needs of the poor, coupled with an ethic of care, is an important necessary foundation for social justice.⁵⁷¹

The pursuit of social justice entails a positive duty to help those in need, rather than only a passive requirement to do no harm.⁵⁷² It is arguable that a revisiting of the *Constitution* would enable it to become more socially transformative, by the introduction of elements of restorative and reparative justice.⁵⁷³

Societal transformation may entail fostering an understanding of social dynamics from the perspective of those who are subjugated.⁵⁷⁴ This would highlight conflicting rationalities and power dynamics in society, as a basis for social transformation and the achievement of social justice.⁵⁷⁵

The writings cited in this section, read collectively, illustrate that an understanding of the intertwined relationship between poverty and justice can serve as a significant precursor to finding ways to ameliorate poverty. Such an understanding should underpin and inform the position of each of the three branches of government with regard to poverty issues.

2.4.1.3 Acknowledging the Primacy of Constitutional Values

There is an argument to be made for the placing of constitutional values first in the adjudication of matters pertaining to socio-economic rights fulfilment. It is problematic that the legal framework does not allow the values espoused by the *Constitution* to infuse into social reality.⁵⁷⁶ Practices espoused in the courts are arguably not geared towards this purpose.⁵⁷⁷ Courts dealing with issues pertaining to poverty and socio-economic rights should in the first instance consider

⁵⁷⁰ Smith 1997 *Environment and Planning* 27.

⁵⁷¹ Smith 1997 *Environment and Planning* 33.

⁵⁷² Gilibert 2006 *Southern Journal of Philosophy* 210.

⁵⁷³ Madlingozi 2017 *Stellenbosch Law Review* 142.

⁵⁷⁴ Watson 2003 *Planning Theory and Practice* 407.

⁵⁷⁵ Watson 2003 *Planning Theory and Practice* 403.

⁵⁷⁶ Rapatsa 2015 *Acta Universitatis Danubius Juridica* 19.

⁵⁷⁷ For further discussion on this point, see chapter 5.

constitutional norms and values, rather than being focused upon the separation of powers doctrine⁵⁷⁸ and the reasonableness of government programmes.⁵⁷⁹ The judiciary can play a role in acknowledging this as an integral part of its jurisprudence. The executive can similarly do so by using these norms and values as benchmarks in its work. The legislature can also contribute to reinforcing constitutional values in its legislative development work.

2.4.1.4 Focusing on Substantive Transformation and Supplementing the Income of the Poor

Social and institutional reforms are needed in South Africa in order to create a society in which fundamental rights are realised and poverty ameliorated. It is important that substantive transformation should precede or occur concurrently with reconciliation.⁵⁸⁰ Reconciliation is arguably the second best option to substantive transformation, and the economy must provide circumstances which constitute favourable conditions for reconciliation to be possible.⁵⁸¹

There are movements across the world to introduce and implement a basic income grant as a means of equalising humanity, and as such serving as a fundamental transformative and reconciliatory instrument for ameliorating poverty. The feasibility of basic income schemes has been analysed in detail by De Wispelaere and Noguera, who conclude that they require feasibility on four levels to be viable, these levels being strategic and political, institutional, psychological and the labour market level.⁵⁸² A full analysis of the virtues or lack thereof of basic income schemes is outside the ambit of this thesis, however it bears recognising that they constitute a substantive socio-economic and institutional intervention which could have profound significance for ameliorating poverty.

⁵⁷⁸ The *Mazibuko* case is an illustration of rigid application by the courts of separation of powers.

⁵⁷⁹ The *Grootboom* case is an example of the courts focusing on the reasonableness of government programmes rather than considering their adherence to constitutional norms and values.

⁵⁸⁰ Sarkin and Daly 2004 *Columbia Human Rights Law Review* 661.

⁵⁸¹ Sarkin and Daly 2004 *Columbia Human Rights Law Review* 673.

⁵⁸² De Wispelaere and Noguera "On the Political Feasibility of Universal Basic Income – An Analytic Framework" 17.

It is incumbent upon all three branches of government to seek and promote means of ensuring that transformational efforts are substantive in nature and make a real difference to the lives of the poor.

2.4.1.5 Revisiting Traditional Ideologies and Considering New Ideologies in the Context of Poverty Studies

A revisiting or reconsideration of traditional ideologies may serve as a means of finding solutions for poverty amelioration, either directly or indirectly. The adoption of new ideologies may be a valuable means of addressing poverty. The ideologies warranting reconsideration are neoliberalism, liberalism and libertarianism, and colonialism. Those warranting fresh consideration for purposes of addressing poverty are positive discrimination, meritocracy, and developmentalism.

The dismantling or repurposing of neoliberalism may be a means to achieve social and economic goals for the benefit of the population, which in turn would serve to ameliorate poverty. There is an argument to be made for the state having a central role in development theory, with the dismantling of neoliberalism to occur at the same time.⁵⁸³

It is arguable that neoliberalism should be repurposed to take into account the specific circumstances that prevail in the South African context. In this context, where being able-bodied is not a guarantee of finding work, it may be apposite to introduce a basic income grant as a means to alleviate poverty in the neoliberal context.⁵⁸⁴

Liberalism and libertarianism are two ideological positions that have relevance to poverty amelioration, being potential causal factors in creating and entrenching poverty. Vallentyne undertakes an analysis of libertarianism and its functions in the modern world which is relevant to addressing poverty issues. He explains that modern libertarianism recognises the need for some form of material equality

⁵⁸³ Samson 2007 *Africa Development* 27.

⁵⁸⁴ Ferguson 2009 *Antipode* 178.

between people.⁵⁸⁵ It is now possible to argue, he says, that given the failure of markets to achieve an equitable social structure, state intervention may be more effective and open up equality of opportunity.⁵⁸⁶ This position can be extrapolated to posit the theory that state intervention to redress inequality and poverty is necessary.

It may be appropriate to pursue non-eurocentric thought and a decolonial imagination, as well as a recognition of a “sociology of absences”, recognising what is lacking in society, in order to conceptualise solutions to poverty in a neo-colonial milieu such as South Africa.⁵⁸⁷ African societies have historically been entrapped within colonialism, which still pervades their functioning notwithstanding the formal withdrawal of colonial powers. Power relations associated with colonialism continue to define culture, labour, intersubjective relations and knowledge production.⁵⁸⁸ Western models of growth and development, including eurocentrism, have prevailed notwithstanding the modern view that people should be allowed to choose their own destiny.⁵⁸⁹ These social trends have the effect of maintaining the *status quo* and stifling social change in post-colonial societies such as South Africa, and this does not bode well for amelioration of poverty. Overcoming this entrapment would serve to facilitate social transformation and could serve as an underpinning force towards poverty amelioration. This could be achieved with targeted policy and legislative interventions to undo the last vestiges of colonialism, as well as through social programmes to raise awareness of the pernicious nature of the entrapment.

Positive discrimination⁵⁹⁰ may be a methodology to achieve social justice.⁵⁹¹ This entails giving more to those who suffer deprivation than to those who are favoured with privilege. Logically, this must be a vehicle for improving the lot of the deprived,

⁵⁸⁵ Vallentyne 2007 *Social Philosophy and Policy* 1.

⁵⁸⁶ Vallentyne 2007 *Social Philosophy and Policy* 21- 22.

⁵⁸⁷ Savransky 2017 *Sociology* 24, 25.

⁵⁸⁸ Ndlovu-Gatsheni 2013 *Journal of Developing Societies* 331.

⁵⁸⁹ Ndlovu-Gatsheni 2013 *Journal of Developing Societies* 336-337.

⁵⁹⁰ Positive discrimination is the favouring or protection of individuals or groups because they possess a specific characteristic. See <https://www.uk.practicallaw.thomsonreuters.com/5-200-3419>. In the present context it is suggested that positive discrimination in favour of the poor could serve to ameliorate poverty.

⁵⁹¹ Badat and Sayed 2014 *Annals of the American Academy* 129.

and therefore ameliorating poverty, and it is a principle which could be applied more broadly in the allocation of socio-economic resources for purposes of poverty relief.

The concept of meritocracy may be one which is relevant to poverty amelioration. It is founded on the notion that people get what they deserve or have worked for, and on the notion that everyone should enjoy equal opportunities.⁵⁹² However for meritocracy to be of value in poverty amelioration, there would first have to be a levelling of the playing field via a redistributive process, with meritocracy being implemented thereafter.

A developmental approach in dealing with poverty may be useful for amelioration thereof. This may include dealing with poverty issues as a factor in development, and seeking to pursue the social good. A developmental approach to poverty relief entails 'sharpening' of rights and tackling issues of material and resource distribution.⁵⁹³ An approach of democratic experimentalism could be a means of driving development and poverty relief.⁵⁹⁴ It is arguable that a developmental approach to poverty relief holds greater practical value than more theoretical approaches and is likely to produce tangible results as it is focused on hands-on practical relief measures. It may be of value to restructure society into a democratic developmental state which espouses a value system that addresses *inter alia* psycho-social-political matters.⁵⁹⁵ Such a state could provide for collaborative roles for all members of society and the empowerment of the poor.⁵⁹⁶ Substantive social and institutional changes would be needed in South Africa in order to mould the country into a true developmental state, which would help to address poverty.⁵⁹⁷ A developmental state involves active intervention, and discipline and guidance, by the state. It must furthermore be autonomous and embedded in civil society

⁵⁹² Mulligan "What's Wrong with Libertarianism?" 1-27.

⁵⁹³ Rosa 2011 *Stellenbosch Law Review* 545 *et seq.*

⁵⁹⁴ Liebenberg and Young "Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?"

⁵⁹⁵ Rosa 2011 *Stellenbosch Law Review* 542.

⁵⁹⁶ Rosa 2011 *Stellenbosch Law Review* 543.

⁵⁹⁷ Karriem and Hoskins 2016 *Politikon* 1.

networks oriented towards core national development goals, and must be free from elite capture.⁵⁹⁸

A developmental state should arguably be fostered in South Africa comprising a social compact between business, government and labour for investment, innovation and the development of small, medium and micro enterprises. This would lead to economic empowerment and positive spin-offs for the poor.⁵⁹⁹

The literature on the possibility of South Africa becoming a developmental state is largely reflective of an assumption that development *per se* is an instrument for poverty relief, and it does not fully analyse what form of development is desirable. In particular, there is a dearth of writing on whether development should take place within the current neoliberal capitalist political framework prevailing in South Africa, or within an alternative framework.

Revisiting traditional ideologies and pursuing new ideologies should be undertaken by government, in its three branches, as part of a general imperative to ameliorate poverty.

2.4.1.6 Pursuing Social Democracy and Socialism

Social democracy may be a vehicle for ameliorating poverty. It is important to understand the difference between social democracy and socialism. The former is a system whereby private ownership of capital is preserved, and a measure of redistribution of wealth is achieved through taxation of the wealthy. The latter embodies a normative principle of allocation of benefits proportional to labour expended in production.⁶⁰⁰ Both paradigms have potential to uplift the circumstances of the poor.

Le Roux, who wrote on the eve of the political transition, advocated a social democratic model as the underpinning ideological model in South Africa.⁶⁰¹ He

⁵⁹⁸ Karriem and Hoskins 2016 *Politikon* 4.

⁵⁹⁹ Borat *et al* *Economic Policy in South Africa: Past, Present and Future* 1-25.

⁶⁰⁰ Roemer 2008 *Eastern Economic Journal* 14 explains the difference between the two concepts.

⁶⁰¹ Le Roux 1991 *Social Justice* 230.

emphasised the need for redistribution notwithstanding high rates of economic growth.⁶⁰² The model of a social democratic state he advocated entailed democratic decision making with regard to economic decisions, and investment in socio-economic goods such as education, health and housing.⁶⁰³ At the time of Le Roux's writing the dominant ideology within the ruling ANC, as reflected in the RDP, accorded with his views. In hindsight it seems clear that the lot of the poor would have been improved if an ideology of this nature were pursued in South Africa.

Writing prophetically, approximately at the time of the ANC's transition from the RDP to GEAR, Luiz outlined the dire consequences for the poor of leaving the provision of social services to the market, reproaching government for the co-existence of excess and poverty in society.⁶⁰⁴ Luiz is one of a stream of writers in the 1990's who advocated the adoption of a social-democratic model to ease inequality and poverty in South Africa.

The authors cited in the remainder of this section tend towards a socialist position with regard to addressing poverty, and a departure from conventional models of democracy. The common thread running through their writings and those of the writers favouring social democracy is the element of redistribution of resources.

It is arguable that that a new model of distributive justice should be implemented to achieve social justice and poverty amelioration, and that this should directly challenge settled modes of Western thought.⁶⁰⁵ This should be based on a recognition that the prevailing Western model of liberal internationalism cannot bring about economic and social justice.⁶⁰⁶ It should also be utilised to overcome Western liberal assumptions of the superiority of their dogma.⁶⁰⁷

⁶⁰² Le Roux 1991 *Social Justice* 240.

⁶⁰³ Le Roux 1991 *Social Justice* 242.

⁶⁰⁴ Luiz 1996 *International Journal of Social Economics* 148.

⁶⁰⁵ Vieira 2012 *Global Society* 313.

⁶⁰⁶ Vieira 2012 *Global Society* 317.

⁶⁰⁷ Vieira 2012 *Global Society* 319.

The law must be seen as part of the broader socio-economic milieu and not as operating outside of it.⁶⁰⁸ Legal tools offer little to appease those who seek systemic revolution, and that they must be supported by redistribution of social and economic resources.⁶⁰⁹ The three branches of government should be cognisant of the limitations of law and the need to consider the broader socio-economic context in seeking solutions to poverty and other societal problems.

McChesney and Foster favour socialism as a tool for ameliorating poverty, and posit the theory that macroeconomic reform towards the introduction of socialism is desirable, because capitalism has become “an irrational system which survives on bubbles, bloated debt, suicidal military spending and hyper commercialisation”.⁶¹⁰ There is an emerging trend for developing states to challenge Western liberal norms and the global economic institutions they legitimise.⁶¹¹ They seek a macroeconomic shift away from these norms and institutions in the interests of achieving greater equality, with attendant potential positive effects on poverty amelioration.⁶¹² It is arguably desirable that the three branches of government in South Africa consider a shift of this nature.

2.4.1.7 Partnerships between Government and Non-governmental Organisations as a Means to Address Poverty

Partnerships between government and the non-governmental sector may serve as part of a social development agenda for poverty reduction.⁶¹³ This is based on the fact that the sector undertakes watchdog, advocacy and campaigning functions which are characterised by substantive community participation.⁶¹⁴

Non-governmental organisations may play a role in the upholding of economic, social and cultural rights, through investigation and exposure of rights

⁶⁰⁸ Pierce and Martin 2017 *Urban Studies* 259.

⁶⁰⁹ Pierce and Martin 2017 *Urban Studies* 263.

⁶¹⁰ Mc Chesney and Foster 2010 *Monthly Review Magazine* at 9.

⁶¹¹ Vieira 2012 *Global Society* 314.

⁶¹² Vieira 2012 *Global Society* 319.

⁶¹³ Lombard and Du Preez 2004 *Social Work* 231.

⁶¹⁴ Lombard and Du Preez 2004 *Social Work* 242.

transgressions.⁶¹⁵ This is most effective when a violation, a violator and a remedy can be identified.⁶¹⁶ It can be put to use in highlighting societal and governmental failures to address inequality and poverty. As such it can potentially serve as a solution or partial solution for poverty amelioration.

2.4.1.8 Reverting to the Macro-economic Orientation of the RDP

Adelzadeh argues that the modelling of GEAR was deficient in that it failed to take into account the objectives and concerns of the RDP.⁶¹⁷ The argument is essentially that in order to achieve societal transformation the macroeconomic orientation of the RDP should have been followed. The criticism of GEAR is that it was analytically flawed, empirically unsupportable and unsuitable for South Africa, and that once implemented would lead to disappointment and failure in achieving the RDP objectives and transforming inherited patterns of inequality.⁶¹⁸ In the process of research for this thesis, it has not been possible to find an analysis of how the trajectory of poverty in South Africa may have been different if the principles of the RDP had been followed instead of those of GEAR. This is worthy of the attention of the three branches of government and could be an avenue for future research.

2.4.1.9 Observations on Proposed Poverty Amelioration Solutions Related to Political and Ideological Considerations

This section has attempted to highlight the need for poverty amelioration efforts to be informed by a knowledge and awareness of the political and ideological considerations which underpin them. This is a necessary precursor to finding solutions for poverty amelioration. All three branches of government must have an awareness of the theoretical and ideological foundations of the work they must do towards poverty amelioration.

⁶¹⁵ Roth 2004 *Human Rights Quarterly* 63.

⁶¹⁶ Roth 2004 *Human Rights Quarterly* 70.

⁶¹⁷ Adelzadeh 1996 *Transformation* 68.

⁶¹⁸ Adelzadeh 1996 *Transformation* 86.

2.4.2 Possible Social Solutions for Poverty Amelioration

There are a variety of writings which highlight the social dimensions of poverty. Addressing the issues presented by each could constitute poverty amelioration solutions, as will emerge from the discussion to follow.

2.4.2.1 Potential of Human Agency to Overcome Poverty

The notion of human agency as a means to overcome poverty is one which has only been sketchily considered by academics. Constitutional transformation is however fundamentally a people-driven process.⁶¹⁹ The *Constitution* embodies guidelines for human choices, and people can choose to uphold its principles.⁶²⁰ The *Constitution* may be seen as an instrument for the fulfilment of the promise of an egalitarian society in which equality prevails. This position places an onus on people, individually and as a collective, to work towards this goal.

An expanded form of Sen's capability theory may be of value as a means of empowering people and enhancing their human agency, and by implication ameliorating poverty.⁶²¹ This would focus on the enhancement of human capability *per se* rather than on human functionality in an economic context, enhancing *inter alia* genuine choice, agency and personhood.⁶²² This approach represents both an ideology of human empowerment and an emphasis on the agency of humans in moulding their lives and opportunities, and as such could be deployed towards poverty amelioration.

Oxfam proposes a new economic model which, it argues, would serve to overcome inequality and economic hardship.⁶²³ It posits the establishment of a more "human" economy forged through human agency, which puts workers first and disallows corporate profit mining by executives and shareholders.⁶²⁴ It recommends a number

⁶¹⁹ Brand 2011 *Stellenbosch Law Review* 614.

⁶²⁰ Sibanda 2011 *Stellenbosch Law Review* 486.

⁶²¹ Clark 2006 *The Capability Approach: Its Development, Critiques and Recent Advances* 1-18.

⁶²² Clark 2006 *The Capability Approach: Its Development, Critiques and Recent Advances* 10.

⁶²³ Oxfam International "Reward Work, not Wealth" 1-18.

⁶²⁴ Oxfam International "Reward Work, not Wealth" 18.

of social justice interventions in order to achieve a more egalitarian society, such as universal free services, a social protection floor, regulation of wages, gender equality and addressing income inequality.⁶²⁵ These interventions, taken collectively, have the potential to contribute towards poverty amelioration.

Poverty and a lack of social cohesion are closely intertwined in South Africa.⁶²⁶ Poverty, unemployment and service delivery protests are associated with negative social cohesion.⁶²⁷ Social cohesion may be understood as “the extent to which people are co-operative, within and across group boundaries, without coercion or purely self-interested motivation”.⁶²⁸ This is a potential force for mitigating poverty.

An additional focus area of the potential of human agency to overcome poverty lies in encouraging citizens to become fuller and more transformed citizens, rather than citizens interested only in personal gain and well-being.⁶²⁹ Citizens acting collectively to realise the poverty-relief imperatives derived from the *Constitution* could be a powerful force for poverty amelioration.

It is important to understand that social exclusion, which is a feature of poverty, is something that is foisted on people, which means that it is the product of human agency.⁶³⁰ This position is a cogent argument supporting the position that poverty is a creation of society, and therefore its resolution or amelioration must similarly be a social process, effected by societal and human effort. Addressing social isolation suffered by the poor can be a force for mitigation of poverty.⁶³¹ Practices such as othering, labelling and stigmatising create social isolation which perpetuates poverty.⁶³² Practices by communities, individuals and institutions to diminish social

⁶²⁵ Oxfam International “Reward Work, not Wealth” 17.

⁶²⁶ Burns, Lefko-Everett and Njozela *From Definition to Measurement: Constructing a Social Cohesion Index for South Africa* 1-28.

⁶²⁷ Burns, Lefko-Everett and Njozela *From Definition to Measurement: Constructing a Social Cohesion Index for South Africa* 19.

⁶²⁸ Burns, Lefko-Everett and Njozela *From Definition to Measurement: Constructing a Social Cohesion Index for South Africa* 1.

⁶²⁹ Enslin 2003 *Cambridge Journal of Education* 76-80.

⁶³⁰ Harloe 2001 *International Journal of Urban and Regional Research* 894.

⁶³¹ Samuel et al 2014 *Social Isolation and Its Relationship to Multidimensional Poverty* 1-26.

⁶³² Samuel et al 2014 *Social Isolation and Its Relationship to Multidimensional Poverty* 16.

isolation suffered by the poor can serve to ameliorate poverty. This may be done for example through human initiative in the area of public health management.⁶³³

Social justice and poverty amelioration may be dependent upon a communal commitment to prioritising the needs of the poor, and invoking an ethic of care and human empathy.⁶³⁴ Equality is associated with mutual caring between people, with reciprocal care being exchanged without any expectation of benefit.⁶³⁵ Thus communities can benefit their members via mutual support - this is arguably a model that could be useful for poverty amelioration.

The fostering of social solidarity between citizens may be a means of effecting wealth redistribution and thus poverty alleviation.⁶³⁶ It is arguable that the fulfilment of the rights of others should be a positive obligation, rather than just a requirement for no harm or non-aggression.⁶³⁷

Associated with the invocation of human initiative to ameliorate poverty, is the notion that people should collectively be mobilised for this purpose. Dugard enthuses about the community mobilisation which led to the *Mazibuko* case against the City of Johannesburg, as a force for changing circumstances of poverty.⁶³⁸ Her article was written before the Constitutional Court outcome which upheld the position of the City of Johannesburg, but it nevertheless presents an interesting perspective on how community mobilisation can be a force for change. Such mobilisation rather than litigation may be more effective as a mechanism to achieve transformative constitutionalism. Engagement between governors and those governed in order to find solutions for the delivery of tangible solutions to realise rights is arguably the most powerful force for changes necessary to achieve poverty amelioration.⁶³⁹ Political mobilisation is arguably more effective than litigation as a tool for long term change, and that social and political imperatives must of necessity

⁶³³ Sanders and Chopra 2006 *American Journal of Public Health* 76.

⁶³⁴ Smith 1997 *Environment and Planning* 33-34.

⁶³⁵ Olsaretti 2013 *Economics and Philosophy* 461.

⁶³⁶ Seekings 2016 *European Journal of Social Theory* 207.

⁶³⁷ Block 2015 *American Journal of Economics and Sociology* 46.

⁶³⁸ Dugard 2008 *South African Journal on Human Rights* 588.

⁶³⁹ Ndlovu *Transformative Constitutionalism: the Best Tactic to Achieve It* 64.

precede litigation.⁶⁴⁰ If applied this could have positive ramifications for the amelioration of poverty.

Assisting those in poverty with necessities of life is arguably a basic duty of justice.⁶⁴¹ This position is contrary to libertarian arguments against such a duty, which are based on the notion of a duty only to do no harm, but not to do anything positive.⁶⁴² A caring society with members who actively assist one another with fulfilment of their material needs is potentially a powerful vehicle for poverty amelioration. This is illustrated by the survival methodologies used in rural communities in South Africa, with community support being a safety net against poverty, especially to assist the elderly.⁶⁴³

The roles of people in promoting social justice may be enhanced through understanding and applying the principles of distributive and procedural justice. Tyler explains the distinction between the two – distributive justice is concerned with resource matters in society and procedural justice with relations between people.⁶⁴⁴ Social justice may be achieved through the understanding and implementation of these underlying rationales for action.

Where people are able to make unconstrained choices, these choices may determine how just or unjust a society is.⁶⁴⁵ The circumstances of the wealthy are often not meritoriously earned but may be accidental.⁶⁴⁶ People are free to choose against social habit and self-interest.⁶⁴⁷ Societal functioning in the broad sense is thus an aggregate of the social behaviour of individuals. People have the power to pursue and promote distributive justice.

A collective reading of the authors cited in this section establishes clearly that poverty may be seen as a product of human agency, and this allows one to argue

⁶⁴⁰ Ndlovu *Transformative Constitutionalism: the Best Tactic to Achieve It* 65.

⁶⁴¹ Gilibert 2006 *Southern Journal of Philosophy* 193.

⁶⁴² Gilibert 2006 *Southern Journal of Philosophy* 209.

⁶⁴³ Neves & Du Toit 2013 *Journal of Agrarian Change* 103.

⁶⁴⁴ Tyler 1994 *Journal of Personality and Social Psychology* 860.

⁶⁴⁵ Cohen 1997 *Philosophy and Public Affairs* 6.

⁶⁴⁶ Cohen 1997 *Philosophy and Public Affairs* 8.

⁶⁴⁷ Cohen 1997 *Philosophy and Public Affairs* 26.

that it can therefore be ameliorated via human agency. Government can exercise influence over human agency to an extent, through awareness and educational programmes, and possibly through incentivising pro-poor action, for example via tax relief. In the next section the power of utopian thought, also an exercise of human agency, to ameliorate poverty, is considered.

2.4.2.2 Utopian Thought as a Vision Underpinning Poverty Amelioration

Utopian thought and ideology can contribute towards inspiring solutions towards poverty amelioration. Ideology, which is backward-looking, is distinguishable from utopian thought, which is forward-looking.⁶⁴⁸ Utopian thought is useful in that it may suggest the breakdown of existing power relations.⁶⁴⁹ It enables the development of an historical consciousness which allows the imagining of qualitatively new social relationships and the role of people as causal agents in effecting these.⁶⁵⁰ Utopian thought undertaken in the past becomes ideology in hindsight, and it serves to explicate events, situations and causes of human action, also serving as an informant to political action.⁶⁵¹ Ideology is useful for grounding of political actions and the communication of ideals between groups.⁶⁵²

Reforms in modes of thinking in sociology and economics may be a powerful force for poverty amelioration.⁶⁵³ Thus it is possible to develop theories such as one supporting universal basic income, which could create a classless society in which one could choose how to live.⁶⁵⁴ Economics should become aligned to other social sciences, it is arguable, in order to enable this to happen.⁶⁵⁵ Utopian thinking is an innovative idea in the realm of poverty studies which has not yet been widely considered by academic authors, but it is of potential value in that it supports the consideration of how to ameliorate poverty in a forward-looking and innovative way

⁶⁴⁸ Mullins 1972 *The American Political Science Review* 502.

⁶⁴⁹ Mullins 1972 *The American Political Science Review* 503.

⁶⁵⁰ Mullins 1972 *The American Political Science Review* 506.

⁶⁵¹ Mullins 1972 *The American Political Science Review* 509.

⁶⁵² Mullins 1972 *The American Political Science Review* 510.

⁶⁵³ Van Parijs 2013 *Politics and Society* 171.

⁶⁵⁴ Van Parijs 2013 *Politics and Society* 174.

⁶⁵⁵ Van Parijs 2013 *Politics and Society* 173.

without the constraints of existing paradigms and models.⁶⁵⁶ Government could consciously adopt a forward-looking and imaginative position with regard to conceptualising solutions to poverty. This would be driven primarily by the executive, with support from the other branches.

2.4.2.3 Invoking Morality and Ethics and Establishing Norms and Values

The espousal of moral and ethical principles, or norms and values, could assist with poverty amelioration. Conceptually this is an attractive idea, albeit beset by the problem that morals, ethical principles, norms and values may be subjective in nature. Theoretical connections may be forged between ethics and economics, and this would promote the idea of instilling in contemporary life a stance towards understanding the immorality of inequality.⁶⁵⁷

Pieterse⁶⁵⁸ gives consideration to the underpinning ideological foundations of the ways in which the judiciary and society view the fulfilment of socio-economic rights.⁶⁵⁹ Judges need to pursue a shared moral premise grounded in political and legal theory, he indicates. Thus he makes a cogent argument for the infusion of moral considerations into the socio-economic rights realm.

Crocker,⁶⁶⁰ in his writing on development and global ethics, posits consideration of five focus areas in looking at the causes of injustice. His work is not specific to poverty, but he creates an ethical framework for human empowerment which is valuable in understanding how poverty could be overcome. The first of these focus areas is inequality in power, which is stated to be a factor determining the social and economic fate of citizens in developing countries.⁶⁶¹ The second is agency and empowerment, which is the power of self-determination and having external

⁶⁵⁶ See Knowledge date unknown <https://knowledge.insead.edu/blog/insead-blog/the-wise-power-of-utopian-thinking-11471>, at which it is explained that utopian thinking is the imagining of an ideal world, which is a powerful tool for enhancing proactivity and leading organisational transformation.

⁶⁵⁷ Huda 2015 *Journal of Arts and Humanities* 42.

⁶⁵⁸ Pieterse 2004 *South African Journal on Human Rights* 417.

⁶⁵⁹ Pieterse 2004 *South African Journal on Human Rights* 383.

⁶⁶⁰ Crocker 2014 *Journal of Global Ethics* 245.

⁶⁶¹ Crocker 2014 *Journal of Global Ethics* 249.

conditions to realise this.⁶⁶² The third consideration is the fostering of development and democracy – local democracy driving the development agenda, and no risk of elites capturing the development process.⁶⁶³ The fourth focus area is overcoming corruption, which is a major driver of power imbalances.⁶⁶⁴ The fifth consideration is the driving of transitional justice, which is important for reckoning with past wrongs.⁶⁶⁵ He provides a potentially useful ethical framework for the empowerment of the poor and the amelioration of their situation.

Applied ethics is an approach of using an ethics framework to address real world problems, for example issues pertaining to climate change.⁶⁶⁶ The principle of applying ethics in this way may be equally applied to issues pertaining to poverty, with the aim of addressing the real world issues plaguing the poor.

The infusing of the values reflected in the *Constitution* into social reality could further be achieved by the application of normative principles.⁶⁶⁷ The application of norms to social issues could serve to rank outcomes on an ethical-moral scale.⁶⁶⁸ This would provide fresh perspectives on addressing poverty amelioration.

Social and economic development must take place within a moral and ethical framework which is informed by norms and standards, and it is only worthwhile if lives are improved and people are not disadvantaged.⁶⁶⁹ Thus specific moral and ethical dimensions in developmental policy should be pursued in order to better the lives of the poor.

Collectively, the authors cited in this section serve to illustrate how morals, ethics, and norms and values may serve to provide frameworks for finding solutions to poverty amelioration. Thus, they provide important guidelines for the three branches of government to follow in pursuing such solutions.

⁶⁶² Crocker 2014 *Journal of Global Ethics* 249.

⁶⁶³ Crocker 2014 *Journal of Global Ethics* 249.

⁶⁶⁴ Crocker 2014 *Journal of Global Ethics* 249.

⁶⁶⁵ Crocker 2014 *Journal of Global Ethics* 250.

⁶⁶⁶ Becker and Brown 2013 *Ethics, Policy and Environment* 37.

⁶⁶⁷ Rapatsa 2015 *Acta Universitatis Danubius Juridica* 19.

⁶⁶⁸ Silva-Leander and Seth 2017 *Social Choice and Welfare* 2.

⁶⁶⁹ Agbude, Adoba and Etefe 2013 *Research on Humanities and Social Sciences* 8.

2.4.2.4 Addressing the Psycho-social Aspects of Poverty

An understanding of psycho-social phenomena could make a contribution towards framing appropriate responses to poverty, if coupled with a sensitivity to its human and psychological aspects.⁶⁷⁰ Wilson and Dugard⁶⁷¹ bemoan the fact that consideration of poverty is sometimes sidelined as a banal issue. Thus it is downplayed somewhat in theoretical discourse. They argue that in order to understand the phenomenon fully one needs to consider the lived experience associated therewith. In similar fashion Liebenberg⁶⁷² emphasises the need to understand the qualitative experience of poverty. These are useful approaches which serve to create a broader perspective on and a deeper understanding of poverty.

Deutch, writing in 1975, writes of the need for a new "social psychology" to address human needs, and by implication poverty.⁶⁷³ Although his writing emanates from the 1970s, it remains a cogent and relevant critique of issues relating to the orientation of contemporary society. His envisaged new social psychology, which is particularly relevant for developing countries, is based not only on equity, which was the prevailing ideology of the Western world at the time, but on equity, equality and need.⁶⁷⁴ These factors as underpinning values in addressing the amelioration of poverty are no less relevant today than at the time of his writing.

The writings of Du Toit⁶⁷⁵ are probably the most eloquent, especially in the South African context, in describing the vulnerabilities of the poor. He puts forward the position that the amelioration of poverty is dependent upon an understanding of the structural dimensions of vulnerability, one which is lacking in conventional development economics and econometrics. He points out that there is a plethora of academic writing on the links between power, agency, culture, identity and history

⁶⁷⁰ Metz 2016 *Res Publica* 333.

⁶⁷¹ Wilson and Dugard 2011 *Stellenbosch Law Review* 667.

⁶⁷² Liebenberg 2001 *South African Journal on Human Rights* 239.

⁶⁷³ Deutch 1975 *Journal of Social Issues* 137.

⁶⁷⁴ Deutch 1975 *Journal of Social Issues* 149.

⁶⁷⁵ Du Toit 2005 *PLAAS Chronic and Development Studies* 1-18.

which can be deployed to seek reflective and incisive insights into the ways in which these are linked to the distribution of resources in society.⁶⁷⁶ This orientation would obviously lead to a deeper understanding of issues pertaining to poverty.

The prevailing views in the literature referred to above, are premised upon the notion that poverty has psycho-social dimensions, and that these dimensions represent a hardship for the poor. Thus it may be said that they support the position that the lives of the victims of poverty could potentially be improved if their psycho-social hardships were addressed. Regrettably none of the authors cited ventures into the realm of considering how best to remedy psycho-social disadvantage in the context of poverty. This would be a worthy subject of future research by social scientists. The executive could drive a programme to raise awareness and seek solutions in this regard, and the other branches of government could play a supportive role.

2.4.2.5 *Ubuntu*

The inclusion of *Ubuntu*⁶⁷⁷ into policy as a mechanism to deal with poverty and other forms of deprivation and alienation,⁶⁷⁸ is a vast and complex topic which cannot be adequately dealt with in this thesis. It is noteworthy however that it holds vast potential as a foundation for a more humane and caring society which addresses the needs of the poor. This is due to the fact that it posits a social framework of mutual support and caring across society. Government can develop the concept into one which infuses executive action and legislative development, and the judiciary can play a supportive role in acknowledging the importance of the concept in judicial interpretation and orders.

⁶⁷⁶ Du Toit 2005 *PLAAS Chronic and Development Studies* 12.

⁶⁷⁷ The meaning of Ubuntu is described in the following extract from Global Citizen: “‘*Umuntu Ngumuntu Ngabantu*’ or ‘I am, because you are’ is how we describe the meaning of *Ubuntu*. It speaks to the fact that we are all connected and that one can only grow and progress through the growth and progression of others.”
<https://www.globalcitizen.org/en/content/ubuntu-south-africa-together-nelson-mandela/>.

⁶⁷⁸ Nkondo 2007 *International Journal of African Renaissance Studies* 95.

2.4.2.6 Acknowledging the Limits of Socio-economic Rights

The transformative potential of the human rights regime in South Africa may be limited. The fact that rights are formulated, interpreted and enforced by institutions that are embedded in the political, social and economic *status quo*, and thus support the basic tenets of the existing social-political-economic regime, impacts negatively upon their transformative potential.⁶⁷⁹ Institutions involved in the formulation, interpretation and enforcement of rights need to be examined, critiqued and potentially reconfigured in order to provide for the realisation of rights. It is important for scholars in the realm of poverty and its amelioration to understand that the human rights regime, providing for socio-economic rights, may be weak in the face of market fundamentalism.⁶⁸⁰ Challenging this phenomenon may be more meaningful for poverty amelioration than relying on socio-economic rights.⁶⁸¹ In the context of a country mired in social protest and poverty, a realistic tackling of social problems would require a recognition that human rights are not a panacea for deprivation,⁶⁸² largely because they are based on fixed notions of a subject and transcendental values, which do not necessarily accord with reality.⁶⁸³ Fulfilment of rights is dependent on remedies being available for such fulfilment, which includes the right of access to justice.⁶⁸⁴ Accordingly amelioration of poverty is not dependent upon having rights, but on having rights and mechanisms for their fulfilment.

Political will is also necessary for the meaningful pursuit of rights, as is illustrated for example by the series of judgments relating to housing rights in Johannesburg's inner city.⁶⁸⁵ In this context there is a disconnect between the upholding by the courts of the right to housing, and the will of the local government authorities to actively provide solutions.

⁶⁷⁹ Bond "Capitalism, the Privatisation of Basic Social Services and the Implementation of Socio-Economic Rights: Challenges and Advocacy Strategies for Human Rights and Social Justice Actors, Learning from the Johannesburg Water Defeat" 2.

⁶⁸⁰ Moyn 2014 *Law and Contemporary Problems* 169.

⁶⁸¹ Moyn 2014 *Law and Contemporary Problems* 169.

⁶⁸² See section 2.3.3 in which the limited nature of socio-economic rights as a determinant of poverty is discussed.

⁶⁸³ Stewart 2014 *Law, Democracy and Development* 20.

⁶⁸⁴ Holness 2013 *Speculum Iuris* 6.

⁶⁸⁵ Wilson 2011 *South African Journal on Human Rights* 131.

Commodification of resources such as water may be an obstacle to human rights realisation.⁶⁸⁶ A human rights approach puts people first and deals with issues pertaining to participation, accountability, legal enforcement and the needs of marginalised groups.⁶⁸⁷ It is however necessary for a human rights approach to consider practical means for implementation to supplement the theoretical nature of the rights.

2.4.2.7 The Potential of the Right to Dignity as a Vehicle for Poverty Amelioration

A deep understanding of the right to dignity may be of value in seeking solutions to poverty amelioration.⁶⁸⁸ Glensy,⁶⁸⁹ in a comparative study of the understanding of dignity in different legal systems including South Africa, cites with approval the *Grootboom* case in which the Constitutional Court linked the right to dignity to the provision of basic social needs. He posits an understanding of the intertwined relationship between poverty and indignity.

Dignity may be conceptualised differently in different contexts, and it may include the notion that it is achieved when socio-economic goods are equally distributed to everyone's benefit.⁶⁹⁰ Cases in various jurisdictions including South Africa deal with dignity in this context, but often in a somewhat oblique manner as part of an equality investigation.⁶⁹¹ Thus the concept of dignity is blurred somewhat and there is a need for it to be developed and better understood to render it useful as a tool for social change.

Dignity may be seen as a central value informing the interpretation of socio-economic rights.⁶⁹² It is arguable that society must respond to the specific needs of

⁶⁸⁶ Langford 2005 *International Journal of Water Resources Development* 273.

⁶⁸⁷ Langford 2005 *International Journal of Water Resources Development* 280.

⁶⁸⁸ See section 2.3.3.3 in which the vexed nature of the dignity right as a determinant of poverty is discussed.

⁶⁸⁹ Glensy 2011 *Columbia Human Rights Law Review* 65.

⁶⁹⁰ O'Connell 2008 *International Journal of Constitutional Law* 274.

⁶⁹¹ The South African case cited is *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC), in which the relationship of dignity to equality was indeed obliquely referred to. It seems that the author was unaware of the *Grootboom* case, in which the court explicitly linked dignity to socio-economic distribution. The value of the article lies however in the fact that it illustrates the complexities associated with defining and understanding dignity.

⁶⁹² Liebenberg 2005 *South African Journal on Human Rights* 3.

groups and their relative urgency, with failure to do this amounting to an affront to their dignity.⁶⁹³ In this context, poverty may be explicitly associated with indignity.⁶⁹⁴

Dignity is regarded as a useful underpinning value which can serve as a basis for socio-economic rights realisation and poverty relief. Its role in this regard is however somewhat underdeveloped due to it being a somewhat nebulous and vague notion. Nevertheless, it has potential for development by the three branches of government as a theoretical foundation for action towards poverty alleviation.

2.4.2.8 Conceptualising a Role for Business in Addressing Poverty

Business may play a role in addressing the needs of the poor.⁶⁹⁵ There are a number of guidelines issued by international non-governmental organisations for business to adhere to the principles of sustainable development,⁶⁹⁶ but these do not have as strong a pro-poor focus as the Brundtland Report which originally conceptualised this notion.⁶⁹⁷ It is conceivable that government could deploy legislative means and incentive schemes to coerce or incentivise business into taking on an active pro-poor role. This is discussed further in Chapter 4.⁶⁹⁸

2.4.2.9 Observations on Possible Social Solutions for Poverty Amelioration

This section has considered a number of potential solutions for poverty amelioration which originate in considering and possibly re-assessing the roles of social actors in a social milieu in which poverty is prevalent. These solutions are of a general kind and include human agency, utopian thought, deploying morality and ethics, psycho-social interventions, pursuing *Ubuntu*, acknowledging the limits of socio-economic rights, deploying the right to dignity, and carving out a role for business in poverty amelioration. This is a somewhat mixed bag of solutions, but with a common

⁶⁹³ Liebenberg 2005 *South African Journal on Human Rights* 14-15.

⁶⁹⁴ Liebenberg 2005 *South African Journal on Human Rights* 13.

⁶⁹⁵ Barkemeyer 2014 *Sustainable Development* 15.

⁶⁹⁶ These organisations include the United Nations, the Organisation for Economic Co-operation and Development and the International Chamber of Commerce.

⁶⁹⁷ Barkemeyer 2014 *Sustainable Development* 17.

⁶⁹⁸ See also section 6.3.6.1 above where failure of corporate accountability is cited and discussed as a determinant of poverty.

denominator of utilising social dynamics and phenomena for purposes of poverty amelioration. As referenced in each separate section, further attention to the solutions posited appears in chapters 3, 4 and 5.

2.4.3 Poverty Amelioration Solutions in the Realm of Economics

With poverty often thought of as a lack of economic means, it is not surprising that a number of academic writers have conceptualised poverty amelioration solutions of an economic nature.

2.4.3.1 Questioning the Economic World Order

Palat⁶⁹⁹ explains how, with political leaders across the world failing to question the economic world order, distributive justice has failed to materialise in the global South. This is associated with ongoing poverty and inequality in developing countries.⁷⁰⁰ The writings of Palat suggest that questioning the economic world order holds the potential to improve distributive justice and hence to ameliorate poverty.

Part of questioning the economic world order entails recognising new dimensions in economics. It is possible to conceptualise a form of “social economics” in which economics is explained with reference to cultural, political and ethical dimensions.⁷⁰¹ This would be associated with the introduction of ethical dimensions into societal dynamics, to overcome the fact that neoliberal capitalism lacks such dimensions, and suggests a development ethics model instead.⁷⁰² The type of development envisaged is one which leads to a ‘good life’, of which poverty amelioration would be a necessary component, although it deals with the full spectrum of qualitative aspects of human life.⁷⁰³ This is useful in overcoming a major deficiency in economics – the fact that it does not deal with quality of life.⁷⁰⁴ There is a growing trend to look for deeper and more diverse dimensions in economic theory, representing a

⁶⁹⁹ Palat 2008 *Futures* 721.

⁷⁰⁰ Palat 2008 *Futures* 723.

⁷⁰¹ Astroulakis 2014 *Ethics and Economics* 101.

⁷⁰² Astroulakis 2014 *Ethics and Economics* 94-95.

⁷⁰³ Astroulakis 2014 *Ethics and Economics* 101.

⁷⁰⁴ Greyling and Rossouw 2017 *Social Indicators Research* 1053.

new ideological position about the nature of economics. Thus a deeper understanding of economics is fostered, taking into account cultural, political and ethical dimensions and quality of life considerations. This in turn could foster a deeper understanding of poverty and accordingly a better perspective of how it might be ameliorated by the three branches of government.

A number of authors bear testimony to the need for shifts in macroeconomic policy to occur in order to address issues relevant to poverty and climate change. It is documented that climate change impacts are expected to be disproportionately harsh on the poor.⁷⁰⁵ Some scholars working on the economics of climate change express the view that conventional economics lacks the means to deal with climate change issues.⁷⁰⁶ It is noteworthy that the view has been expressed that equilibrium economics, which is posited on market prices reaching an equilibrium, depends on false assumptions and cannot explain observed phenomena associated with climate change.⁷⁰⁷ Fankhauser and Stern aver that the failure of conventional economics to adopt a development economics approach⁷⁰⁸ renders it inadequate to understand and deal with climate change.⁷⁰⁹ Hallegatte, Fay and Barbier⁷¹⁰ write of the inadequacy of GDP, a notion founded in conventional economics, as a measure to

⁷⁰⁵ World Bank *Shock Waves: Managing the Impacts of Climate Change on Poverty* 39.

⁷⁰⁶ They refer to the standard growth model, general equilibrium theory and marginal analysis as being features of conventional economics. The growth model is premised upon two considerations. Firstly, it is premised on labour, capital and technology together being responsible for economic growth. See <https://www.investopedia.com/terms/n/neoclassical-growth-theory.asp>. Secondly, it is centred to a large extent around the notion of gross domestic product, which is the total monetary value of all the goods and services produced in a country in any given period. See <https://www.investopedia.com/terms/g/gdp.asp>. General equilibrium theory is premised on a macroeconomic principle which explains how supply and demand in an economy with many markets interact dynamically and eventually culminate in an equilibrium of prices. Marginal analysis is an examination of the additional benefits of an activity compared to the additional costs incurred by that same activity. Marginal refers to the focus on the cost or benefit of the next unit or individual, for example, the cost to produce one more widget or the profit earned by adding one more worker. See <https://www.investopedia.com/terms/m/marginal-analysis.asp>.

⁷⁰⁷ Barker "The Economics of Dangerous Climate Change" 240.

⁷⁰⁸ Development economics is a branch of economics that focuses on improving fiscal, economic, and social conditions in developing countries. Development economics considers factors such as health, education, working conditions, domestic and international policies, and market conditions with a focus on improving conditions in the world's poorest countries. See Investopedia 2022 <https://www.investopedia.com/terms/d/development-economics.asp>.

⁷⁰⁹ Fankhauser and Stern *Climate Change, Development, Poverty and Economics* 22.

⁷¹⁰ Hallegatte Fay and Barbier 2018 *Environment and Development Economics* 217.

capture the effects of climate change on human well-being. The urgency to address climate change is a strong driver of reassessment of established economic paradigms. If economic reform driven by this impetus is pursued, it will be of benefit to the poor as they are most vulnerable to climate change impacts.

Different proposals have been made on the type of macroeconomic shift that is necessary to deal adequately with climate change. Barker suggests that a “new economics of risk” is necessary which takes insights from other disciplines such as social sciences, meteorology, ethics, history, engineering, and complexity and evolutionary theory.⁷¹¹ These insights must inform risk assessments relating to climate change which in turn must inform mitigatory and adaptatory action. Fankhauser and Stern provide a detailed analysis of the type of developments needed in economics for the discipline to be useful in addressing climate change. Following the Paris Accord,⁷¹² they suggest a reshaping of the global economy is necessary to move towards cleaner production and reorientation of investment.⁷¹³ They go on to say that a new generation of economic models is needed which takes into consideration systemic dynamics and forces of transformative change.⁷¹⁴ In addition they point out that economic policy needs to tackle and address fundamental market failures that frustrate decarbonisation, for example the subsidising of fossil fuels.⁷¹⁵ Economic analysis needs to be deepened, they argue, to include a component of development economics that understands and incorporates climate change.⁷¹⁶ The general thrust of their argument is to suggest analytical processes and consequent actions that will inform action that will serve to protect the poor against climate change.

⁷¹¹ Barker “The Economics of Dangerous Climate Change” 342.

⁷¹² The Paris Accord is an international treaty on climate change, adopted at the 21st Conference of the Parties of the United Nations Framework Convention on Climate Change on 12 December 2015. It contains broad agreement on cleaner production and climate change mitigation and adaptation imperatives.

⁷¹³ Fankhauser and Stern *Climate Change, Development, Poverty and Economics* 3.

⁷¹⁴ Fankhauser and Stern *Climate Change, Development, Poverty and Economics* 15.

⁷¹⁵ Fankhauser and Stern *Climate Change, Development, Poverty and Economics* 20.

⁷¹⁶ Fankhauser and Stern *Climate Change, Development, Poverty and Economics* 22.

Outside of the climate change context a number of researchers reflect on the need for macroeconomic reform for poverty amelioration. Jagwanth and Soltau⁷¹⁷ write of the need for a refocusing of macroeconomic policy to maximise the fiscal pool for realisation of socio-economic rights. By implication, their vision of an enhanced pool of fiscal resources for socio-economic rights realisation would have positive impacts on poverty amelioration as more resources would be available to provide basic socio-economic amenities. A macroeconomic shift towards economic equality, pursued via income equality, may be necessary if poverty amelioration is to be achieved. Such equality would give resources and impetus to socio-economic rights realisation.⁷¹⁸

In the context of pollution control an equity based regime for limiting economic growth, may serve to reduce adverse impacts of pollution on the poor.⁷¹⁹ This would represent a substantial macroeconomic shift for the purpose of poverty amelioration.

A further macro-economic shift to alleviate poverty may involve the rethinking of trade policy, entailing moving towards trade protection, development banks and more expansionary monetary policies, which are arguably necessary to deliver African nations from poverty.⁷²⁰ This would be a shift away from the Washington Consensus model espoused as part of the adoption of GEAR.

A macroeconomic shift towards deploying the concept of sustainable development to develop sustainable economics would arguably be to the benefit of the poor.⁷²¹

A shift in macroeconomic policy towards a recognition of the social and relational nature of poverty would give recognition to the politically charged agency and power dynamics which pervade the issue.⁷²²

⁷¹⁷ Jagwanth and Soltau "Socio-economic Rights and Implications for Intergovernmental Fiscal Relations in South Africa" 2.

⁷¹⁸ Bilchitz 2002 *South African Law Journal* 490. See also Tregenna and Tsela 2012 *Development Southern Africa* 35.

⁷¹⁹ Rosales 2008 *Conservation Biology* 1409.

⁷²⁰ Motala 2016 *American University Business Law Review* 49.

⁷²¹ Dokurno and Fiedor 2016 *Gospodarka Narodowa* 9, 22.

⁷²² Gentle "Poverty and Social Movements" 360.

A macroeconomic system that is beset by consumerism and rampant consumption of resources should be transformed in order to equalise resources across the population.⁷²³ If an ethics of moderate consumption could be restored in developing countries, this would make a positive contribution to the well-being of people including the poor.

Zhanje and Tala⁷²⁴ highlight the need for understanding of a concept referred to as “poverty reduction elasticity” in order to conceptualise how poverty may be ameliorated. This is conceptualised as the extent to which economic growth is able to achieve poverty reduction. They point out the importance of understanding that there is not necessarily any causal relationship between economic growth and poverty amelioration.⁷²⁵ They also refute the suggestion that conventional economic growth improves the lot of the poor through a trickle-down effect. Policy should target poverty instead of growth, they argue, and this may entail anticipating that there may be rises and falls in poverty in the process of securing its longer term amelioration.⁷²⁶ This is a significant paradigm shift in considering whether economic growth is able to reduce poverty.

The scholarship relied on above bears testimony to the fact that a questioning and possible reconsideration of the prevailing economic order is warranted in seeking solutions for poverty amelioration. In particular a number of potential macroeconomic shifts have been referred to which warrant the consideration of the three branches of government. Macroeconomic policy is primarily the concern of the executive, although the other branches of government can lend support to macroeconomic change through legislative and adjudicative reforms.

2.4.3.2 Executive Budgeting

⁷²³ Poruthiyil 2013 *Journal of Business Ethics* 737.

⁷²⁴ Zhanje and Tala 2016 *Journal of Public Administration* 282.

⁷²⁵ Zhanje and Tala 2016 *Journal of Public Administration* 290.

⁷²⁶ Zhanje and Tala 2016 *Journal of Public Administration* 290.

The realisation of socio-economic rights, and accordingly the amelioration of poverty, requires government to develop new decision-making frameworks for budgetary allocation for this purpose. Government must use empirical data to inform budgets that allocate sufficient resources for socio-economic rights realisation and poverty alleviation.⁷²⁷ This must of course be backed up by processes to ensure that data is available with regard to deprivation amongst groups who face discrimination on the basis of race, gender, disability, income and geographical location.⁷²⁸

Baxi⁷²⁹ puts forward a proposal that “constitutional economics” needs to be developed from the perspective of ordinary members of society. An essential component of this is national allocative budgeting, which must be done coherently and transparently. She advocates for the introduction of a “demosprudence” to replace jurisprudence in addressing allocation of resources, which would overcome the shortcomings of jurisprudence as a method of addressing socio-economic rights issues.⁷³⁰ Thus Baxi recommends a system of resource allocation and budgeting which is fully cognisant of the demographics and needs of all citizens including those afflicted by poverty.

Budgetary resource allocation must observe the principle of deploying resources where the greatest need exists.⁷³¹ This is a sound principle for targeting of resources according to the extent of deprivation, which ensures that the poorest are given priority. It also fulfils the imperative of achieving redistributive justice.

The significance of budgetary provision for socio-economic rights fulfilment and poverty amelioration is obvious, but it is noteworthy that it has never been the main subject of socio-economic rights litigation in South Africa. It remains to be seen

⁷²⁷ Matthews and Mc Laren *Budget Analysis for Advancing Socio-economic Rights* 6.

⁷²⁸ Matthews and Mc Laren *Budget Analysis for Advancing Socio-economic Rights* 7.

⁷²⁹ Baxi “Preliminary Notes on Transformative Constitutionalism” 48.

⁷³⁰ Baxi “Preliminary Notes on Transformative Constitutionalism” 49-50. The shortcomings referred to are deference on the part of constitutional justices to the executive, indictment of judges by constitutional scholars, the prevalence of constituency interests in the politics of protest, and the executive having the “last laugh”.

⁷³¹ Motsoeneng *Monitoring and Evaluating the Progressive Realisation of the Right to Water and Sanitation in South Africa* 1-120.

whether the veil of judicial deference, which is a barrier to direct challenges to government processes and decisions, will be pierced in the future, so as to allow challenges of this nature.

2.4.3.3 Linking Economics and Ethics

Addressing poverty amelioration in a meaningful manner requires that government should foster an understanding of the potential role of ethical considerations in economics. Traditionally economics has eschewed ethical considerations and posited self-interest.⁷³² It is arguable that a new line of thinking is needed in economics which entails an ethical methodology and purpose. Traditional economic theory does not explore the moral ecosystem within which economics functions, neither the importance of moral capabilities for inter-human cooperation.⁷³³ An economic system favouring poverty amelioration requires an acknowledgement of its ethical dimensions, in particular that there are flaws in defining economic efficiency as net value created.⁷³⁴

As part of the inclusion of ethical dimensions in economic theory, traditional economic goals should arguably be downgraded and more attention given to redistribution of wealth and the well-being of the poor and marginalised.⁷³⁵ Societal goals may be undermined when economic goals are prioritised.⁷³⁶

The infusion of ethical considerations into economics may assist in the development of a new collective consciousness, which could be incentivised by the state, which encourages a form of collective behaviour that contradicts self-interest and thus encourages poverty amelioration.⁷³⁷

⁷³² Alvey 2015 *Journal of Social Science* 137.

⁷³³ Wight 2015 *Ethics in Economics: A Critical Thinking Approach* 5.

⁷³⁴ Wight 2015 *Ethics in Economics: A Critical Thinking Approach* 8, 11. See also Gasper "The Ethics of Human Development and Economic Displacement" 1-4.

⁷³⁵ Poruthiyil 2013 *Journal of Business Ethics* 735.

⁷³⁶ Poruthiyil 2013 *Journal of Business Ethics* 735. See also Irlenbusch and Villeval 2015 *Current Opinion in Psychology* 91, who say that market participation by individuals and corporations is associated with materialistic values and dilution of individual responsibility.

⁷³⁷ Laffont 1975 *Economica* 433.

Government should be cognisant of the fact that if economic governance were to proceed on the basis that ethical considerations, especially the pursuit of equality and dignity, were to take on a more central role in determining state action, then it may be possible to manage the wealth gap between rich and poor better, and in a manner that ensures that nobody lives in abject poverty. A transformation of this nature in economic governance would have to be accompanied by political championing on the part of political leaders and corresponding buy-in on the part of the citizenry.

2.4.3.4 Linking Economics and Development Theory

Development theory is a concept within the realm of social sciences which seeks to tackle the problem of underdevelopment, with which poverty is associated.⁷³⁸ Borat *et al* have undertaken substantial research with regard to the optimal development theory to be applied in South Africa, and have concluded that it should not be purely statist or marketist but a combination of the two, targeted across time, space and sectors.⁷³⁹ This would enable appropriate *ad hoc* responses to underdevelopment, it is suggested.

The concept of sustainable development is associated with eradication of poverty. The ending of poverty in all its forms, everywhere, is the first of seventeen sustainable development goals (SDGs) established by the United Nations in 2015.⁷⁴⁰ A full discussion of the efficacy of sustainable development for poverty amelioration is outside the scope of this thesis, but it should be noted that there are authors who have mulled over the usefulness of the concept for poverty alleviation and have come to less than favourable conclusions. For example, Barkemeyer *et al* argue, based on their analysis of a myriad of reports and writings on the topic of sustainable development, argue that the concept is overly environmentally oriented and does not adequately address the needs of the world's poor.⁷⁴¹ It is arguable that the pursuit of sustainable development in specific domestic environments must be

⁷³⁸ Hettne 1983 *Acta Sociologica* 247.

⁷³⁹ Borat *et al* *Economic Policy in South Africa: Past Present and Future* 1-25.

⁷⁴⁰ United Nations Department of Economic and Social Affairs <https://www.sdgs.un.org/goals>.

⁷⁴¹ Barkemeyer *et al* 2014 *Sustainable Development* 16.

customised to the needs and circumstances applicable, with targeted action towards implementation.

It is incumbent upon government, especially the executive, to ensure that development theory is part of deliberations around economics, so that economic legislation and poverty becomes oriented towards poverty amelioration.

2.4.3.5 Linking Economics and Distributive Justice

Distributive justice⁷⁴² is an issue that interfaces with economics, because it entails the distribution and potential redistribution of economic resources. The distribution of resources in society has obvious implications for the well-being of the poor, who benefit from a formal and active redistribution system whereby the wealthy are required to cross-subsidise the livelihoods of the poor.

Blake suggests that shared citizenship should foster a concern between citizens of relative deprivation. He favours a legislative obligation to ensure that relative deprivation is controlled and autonomy not denied to anyone.⁷⁴³ If implemented, this would result in a redistribution of economic resources. Such a redistribution would have to be done proportional to the extent of deprivation, with those most deprived receiving more resources. Ideally such a redistribution should follow an ethos allowing for equitable distribution more effectively than conventional economics can.⁷⁴⁴

Implementation of redistributive justice measures would require shifts in fiscal policy which would primarily fall within the ambit of the work of the executive, supported by the legislature in the course of legislative development.

2.4.3.6 Observations on Poverty Amelioration Solutions in the Realm of Economics

⁷⁴² Distributive justice has political dimensions, in that it is premised on socialist notions. See <https://www.investopedia.com/terms/s/socialism.asp>, where it is explained that socialism is both a political and economic system, involving shared ownership of resources and equitable distribution of goods.

⁷⁴³ Blake 2001 *Philosophy and Public Affairs* 262.

⁷⁴⁴ Cohen 1997 *Philosophy and Public Affairs* 7, 12.

The most cogent of the suggested interventions for poverty amelioration mentioned in this section is the proposal for macroeconomic shifts and questioning of the world economic order. This is because the conventional economic models prevalent in much of the world hold little or no potential for solving poverty related issues. Besides this, targeted executive budgeting and the introduction of ethical, development theory and distributive justice considerations into poverty interventions are all purposive and useful suggestions of methods to further the cause of poverty relief.

2.4.4 Poverty Amelioration Solutions relating to Legal Matters

With the socio-economic rights being justiciable in terms of the *Constitution*,⁷⁴⁵ it is natural that their role in poverty amelioration should be considered in the context of how they are dealt with by the judiciary. The way in which the courts deal with adjudication of socio-economic rights cases can potentially have substantive impacts upon poverty amelioration. Various methods to achieve this via the legal system are considered below.

2.4.4.1 Judicial Innovation

Some writers suggest that innovation by the courts could be the panacea to relieve poverty. Kabange suggests that since much reliance is placed on the courts to enable fulfilment of the socio-economic rights, the onus is on them to find innovative ways to do so.⁷⁴⁶ In chapter 5 of this thesis dealing with the role of the judiciary, consideration will be given to specific ways in which the courts could move towards achieving this.

2.4.4.2 Making Orders of Wider Application

Both Rapatsa and Liebenberg venture into the realm of suggesting that it would be valuable if the courts could pronounce upon the content of rights generally, rather

⁷⁴⁵ Justiciability of the rights is confirmed in Sections 7 and 8 of the *Constitution*.

⁷⁴⁶ Kabange "The South African Constitution and Socio-economic Rights: Has Justiciability Made any Difference?" 1-31.

than dealing only with the claim or claims of the individual litigant or litigants.⁷⁴⁷ However orders of wider application are seldom made, given that the courts limit themselves to dealing with the issues on the papers. This trend limits possible outcomes in the realm of socio-economic rights jurisprudence.⁷⁴⁸

2.4.4.3 Law to be Guided by Social Sciences

Gould⁷⁴⁹ puts forward a cogent argument for the law to be guided by the social sciences, and for the judiciary to be cognisant of the social consequences of its actions. This position is not stated with specific reference to South Africa, but its application could be valuable in understanding the role of the judiciary in advancing the needs and interests of the South African poor.

In a PhD thesis dealing with racism and the law, Kruger⁷⁵⁰ argues for the deployment of an empowered model of democracy via a movement known as “law and society”. He argues that the law can be an instrument for social change if it embraces socio-economic change and behavioural change in a bottom-up fashion.⁷⁵¹ The value of this approach for purposes of the present discussion is that it illustrates how the role of law can be better understood by looking at it in its wider societal context rather than as a standalone phenomenon.

Gross⁷⁵² writes insightfully of the need to deconstruct the law in order to help it move towards justice. Thus he advocates interrogating the prevailing legal system in order to understand whether it comes close to achieving identified objectives. He also emphasises that legal rulings are not enough to achieve justice – they must be

⁷⁴⁷ Rapatsa 2015 *Acta Universitatis Danubius Juridica* 32, and Liebenberg 2012 *African Human Rights Law Journal* 29.

⁷⁴⁸ By way of illustration, the *Grootboom* and *Mazibuko* judgments, although they each dealt with the hardships of a particular community in its entirety, have not had major impacts upon the delivery of housing and water services.

⁷⁴⁹ Gould 2016 *Ancilla Iuris* 83-84.

⁷⁵⁰ Kruger *Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts* 1-420. The Law and Society movement, a term coined by L M Friedman in Friedman 1986 *Stanford Law Review* 763, is a collective of social scientists who study law from an external perspective and seek to explain legal phenomena in terms of their social setting.

⁷⁵¹ Kruger *Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts* 12.

⁷⁵² Gross 2004 *Stanford Journal of International Law* 99.

underpinned by committed officials and budget.⁷⁵³ The value of Gross' approach is that it portrays the law as a tool for achievement of social goals, rather than an immutable regime.

As alluded to in several instances in this chapter, poverty may be described as a state of political and socio-economic disempowerment, which places poverty studies within the realm of sociology, but also within economics and political theory.⁷⁵⁴

Legal theorists occasionally encroach into the realm of history, which is also a branch of sociological theory.⁷⁵⁵ The purpose of such encroachment is to enhance perception and understanding of constitutionalism in South Africa as a product of history, and in this way to view it from an appropriate case-specific perspective. This must of necessity entail understanding how poverty, as it is currently manifested, evolved from a state of enforced deprivation and marginalisation under colonialism and apartheid.

Social justice issues are frequently raised by legal writers, and also the issue of access to justice. Rapatsa explicitly equates inequality, and poverty which is closely associated therewith, with injustice.⁷⁵⁶ This, he says, is because with the prevalence of poverty none of the first or second generation rights can be achieved. Thus he is effectively arguing that even the civil and political rights have no value in the face of poverty. Other writers associate poverty with injustice in different contexts. For example, Fourie associates poverty with environmental degradation and injustice.⁷⁵⁷

Lack of access to justice is another sociological phenomenon burdening the poor, which is frequently referred to by legal academics. For example Rapatsa⁷⁵⁸ bemoans the bitter irony that the poor, who have the highest need for socio-

⁷⁵³ Gross 2004 *Stanford Journal of International Law* 94.

⁷⁵⁴ Bilchitz 2015 *South African Journal on Human Rights* 118.

⁷⁵⁵ See for example Du Plessis 2015 *Potchefstroom Electronic Law Journal* 1346, where the case is made for understanding constitutionalism in an historic context, referred to as "memorial constitutionalism".

⁷⁵⁶ Rapatsa 2015 *Judicial Tribune* 218.

⁷⁵⁷ Fourie "Tales from the Trenches: the Unfulfilled Promise of the Constitutional Environmental Right in South Africa" 1-39.

⁷⁵⁸ Rapatsa 2015 *Acta Universitatis Danubius Juridica* 33.

economic assistance and benefits, have the lowest opportunity to access these. Nyenti also writes persuasively of the lack of access to justice in the face of poverty, unemployment and social inequality.⁷⁵⁹

Many other sociological phenomena constituting deprivations associated with poverty are described by legal theorists in writings with a specific focus. These include rural-urban migration,⁷⁶⁰ deficiencies in education,⁷⁶¹ lack of health care,⁷⁶² issues pertaining to access to housing⁷⁶³ and water,⁷⁶⁴ and insufficiency of food.⁷⁶⁵

Perhaps the most cogent issue with regard to poverty when viewed from a sociological perspective – an issue which does not attract much attention from legal scholars – is the psychosocial element thereof. Poverty is associated with degradation of one's personal sense of humanity. This is eloquently conveyed by Metz,⁷⁶⁶ in an article entitled "The Nature of Poverty as an Inhuman Condition". In this article the author takes issue with the capability approach as expounded by Sen,⁷⁶⁷ which posits that poverty is a failure of capability and opportunity, portraying it instead as an infliction of inhuman conditions by people upon others. If Metz is correct in his approach, it is arguable that if human agency is able to create a condition, it is similarly capable of undoing it.

As far as could be established, there are no official legislative, executive or judicial pronouncements in South Africa acknowledging the sociological dimensions of

⁷⁵⁹ Nyenti "The Role of Access to Justice in the Development of Socio-Economic Rights in South Africa" 1-19.

⁷⁶⁰ Sibanda 2011 *Stellenbosch Law Review* 487.

⁷⁶¹ Sibanda 2011 *Stellenbosch Law Review* 488.

⁷⁶² Du Plessis 2011 *South African Journal on Human Rights* 272 emphasises that the state of being poor has negative impacts upon health and well-being as referred to in section 24 of the *Constitution*. See also Liebenberg 2001 *South African Journal on Human Rights* 239.

⁷⁶³ See Dugard "Urban Basic Services: Rights, Realities and Resistances" 275, who explains how structural poverty impacts upon the right of access to housing.

⁷⁶⁴ Dugard 2008 *South African Journal on Human Rights* 214 draws a cogent parallel between poverty and lack of access to water.

⁷⁶⁵ Mechlem 2004 *European Law Journal* 631 accounts for the inequities of food poverty and deprivation, making the astonishing assertion that globally food insecurity is not the result of a lack of food, but rather of inequities in its distribution.

⁷⁶⁶ Metz 2016 *Res Publica* 327.

⁷⁶⁷ Amartya Sen is widely acknowledged as one of the main proponents of "capability theory". See section 2.3.2.10 for additional discussion of the work of Sen.

poverty, and this is therefore an underexplored area. It is however an area which the judiciary should embrace (aided by argument delivered by the parties) in its adjudicative processes when dealing with poverty related issues.

2.4.4.4 Law to Take Cognisance of Economic and Monetary Issues

Besides the writings cited above in which poverty is linked to sociological issues, which are numerous, there are a few legal academics who associate poverty with economic issues. It is noteworthy that these are few and far between – in the course of this research it has been difficult to find any sources associating law and economics in the context of poverty. For the sake of completeness, those that have been found are cited here.

Coomans,⁷⁶⁸ writing from outside of South Africa on the reasonableness test laid down by the Constitutional Court in the *Grootboom* case, states clearly the need for judicial initiative to effect transformation of the unequal social and economic status quo existing within the country. His is a lucid external commentary on the economic (and social) transformation necessary in order to produce an egalitarian society, and, by logical extension, one in which poverty does not prevail.

One of the more sensitive incursions by a legal academic into the terrain of economics is that of Liebenberg.⁷⁶⁹ She argues that the normative commitments of human rights discourse are undertaken in law, but not in a way that engages with issues such as power relations and socio-economic needs, and cultural identities. Thus, she is suggesting, norm setting in rights discourse is not sufficient, but incursion into other disciplines such as finance and economics, is necessary.

In order to bring about the taking into account by the judiciary and legal scholars of economic issues, initiatives are needed at both executive and judicial level to ensure that these issues are pleaded and deliberated upon in the courts.

⁷⁶⁸ Coomans 2005 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 167.

⁷⁶⁹ Liebenberg 2012 *African Human Rights Law Journal* 1.

2.4.4.5 Law to Take Cognisance of Politics

In addition to writing about poverty with reference to sociological and, on occasion, economic issues, some legal authors venture into the terrain of dealing with poverty from a political perspective. These are not as scant as those associating poverty with economics, but they are most certainly not as plentiful as those approaching poverty from a sociological perspective.

Davis writes of the effect of inequality upon democracy in South Africa.⁷⁷⁰ Perpetuation of inequality, he says, is driven by the dominance of private sector forces. His views in this regard represent an incursion of legal theoretical writing into the realm of political theory, and as such they represent a broad and holistic perspective of the ramifications of poverty.

Mc Lean also juxtaposes democracy and freedom on the one hand and poverty on the other hand, suggesting that the prevalence of poverty undermines democracy.⁷⁷¹ Her perspective echoes the position of Davis in highlighting the fundamental incompatibility of endemic structural poverty with democracy. In similar vein, Roderer argues, with reference to the impact of the *Constitution* on private law, that addressing poverty is a prerequisite for transformation to occur.⁷⁷²

Although legal writings on poverty from a political perspective are not plentiful, they are significant in that they address issues which go to the core of the effectiveness of our constitutional system and which question whether the *Constitution* is able to deliver on its promises. This is an issue tackled in a forthright manner by Davis,⁷⁷³ who speaks of “unfulfilled constitutional promises” and emphasises the need to deal with the distributional outcomes of constitutional rights. Distributive justice is naturally a controversial subject, especially for those who stand to lose from

⁷⁷⁰ Davis 2015/2016 *New York Law School Law Review* 47.

⁷⁷¹ Mc Lean *Constitutional Deference, Courts and Socio-economic Rights in South Africa* 23.

⁷⁷² Roderer 2016 *Northwestern Journal of International Human Rights* 1.

⁷⁷³ Davis 2006 *South African Journal on Human Rights* 304.

redistribution of their wealth, but it is an issue that cannot be shied away from in contemporary South Africa with its enormous wealth disparities.

Although there are academic writings on the distributional outcomes of constitutional rights, it would seem that these are not deliberated upon in the adjudicative process in the courts, as no instance of this occurring could be found. Such outcomes, and fulfilling the promises of the *Constitution*, should become an aspect of judicial deliberation, assisted by plea and argument delivered before the courts.

2.4.4.6 Collaboration between Courts and State

It is arguable that there should be closer collaboration between the courts and the state to ensure that socio-economic rights are fulfilled, and, by implication, poverty is ameliorated.⁷⁷⁴ This could take place via the exercise by the courts of supervisory jurisdiction.⁷⁷⁵ Criticising the approach taken by the Constitutional Court in the *Grootboom* and *Treatment Action Campaign* cases for not acknowledging the need for systemic change, Wesson argues that the courts need to become more socially engaged.⁷⁷⁶ This could be an initiative of the judiciary, in collaboration with the executive.

2.4.4.7 Courts as an Agency for Transformation

Courts in South Africa are justifiably criticised for not having pursued a transformative role in the realm of socio-economic rights.⁷⁷⁷ They should shift from an ameliorative to a transformative role in this realm, and they need to develop and be guided by a theory of the needs and purposes of socio-economic rights.⁷⁷⁸

Courts can assist in the achievement of socio-economic transformation by giving a voice to the poor. Thus the countermajoritarian argument against activism by the

⁷⁷⁴ Wesson 2004 *South African Journal on Human Rights* 297.

⁷⁷⁵ Wesson 2004 *South African Journal on Human Rights* 307.

⁷⁷⁶ Wesson 2004 *South African Journal on Human Rights* 308.

⁷⁷⁷ Wilson and Dugard 2011 *Stellenbosch Law Review* 665.

⁷⁷⁸ Wilson and Dugard 2011 *Stellenbosch Law Review* 665-666.

courts, which holds that it is illegitimate for the courts to rule over elected branches of government, is worthy of criticism in this context.⁷⁷⁹

Judges in South Africa should be more open to the disclosure of motives and political principles applied in their adjudication.⁷⁸⁰ Actors other than the courts, for example the legislature, should consider what they can do to effect transformative constitutionalism.⁷⁸¹ This would achieve a multi-pronged approach towards socio-economic transformation. It is arguable that the courts are well placed to take on the specific and targeted role of assigning normative content to rights.⁷⁸² This applies especially to giving content and meaning to the equality right, which the courts should do in collaboration with the other branches of government.⁷⁸³

There is an argument to be made that the courts have a positive duty to provide and that they should move into the realm of distributive decision making.⁷⁸⁴ Failure to do so could be seen to amount to intransigence and abdication of responsibility to uphold the transformative imperatives of the *Constitution* and give meaning to socio-economic rights.⁷⁸⁵ A more activist role for the courts in this regard would contribute to giving a voice to the poor, which would add impetus to poverty amelioration imperatives. There is no justificatory basis for judicial timidity in enforcing socio-economic rights, especially given that the courts do not display such timidity with regard to civil and political rights.⁷⁸⁶ Judicial activism with regard to socio-economic rights should include the development of jurisprudence on fundamental constitutional values such as striving for justice and freedom and healing the divisions of the past.⁷⁸⁷

⁷⁷⁹ Bilchitz 2015 *South African Journal on Human Rights* 110.

⁷⁸⁰ Fowkes "Transformative Constitutionalism and the Global South: The View from South Africa" 7.

⁷⁸¹ Fowkes "Transformative Constitutionalism and the Global South: The View from South Africa" 15.

⁷⁸² Fagan 1998 *South African Journal on Human Rights* 247. The author envisages courts taking on the role of assigning normative content to the equality right.

⁷⁸³ Moyo "Transformative Constitutionalism, Substantive Equality and the Role of the Courts: Lessons from South Africa and Zimbabwe" 1-2.

⁷⁸⁴ Fredman 2005 *South African Journal on Human Rights* 190.

⁷⁸⁵ Pieterse 2004 *South African Journal on Human Rights* 383.

⁷⁸⁶ Dugard 2007 *Leiden Journal of International Law* 977. See also Rapatsa 2015 *Judicial Tribune* 212.

⁷⁸⁷ These are articulated in the preamble of the *Constitution*.

All of the writers cited in connection with the role of the judiciary in the amelioration of poverty are unapologetically of the view that they have a distinct role and responsibility to be proactive in this regard. This issue will be pursued in more detail in Chapter 5 which explores the role of the judiciary in the amelioration of structural poverty.

2.4.4.8 Targeted Judicial Remedies for the Realisation of Socio-economic Rights

The courts could contribute greatly to poverty amelioration by legitimising the political agency of impoverished people.⁷⁸⁸ They should do this by crafting remedies requiring political engagement, and by acknowledging the pliability and indeterminacy of legal interpretation.⁷⁸⁹

The Constitutional Court has authority to make any just and equitable order it deems fit, and should use this power to achieve substantive justice and equality.⁷⁹⁰ This entails that they undertake more than a routine application of the law to the facts, but rather espouse a more ambitious judicial methodology that identifies underlying disputes and forges new tools to bring about justice and equity.⁷⁹¹ An essential aspect of their adjudicative process should be the dismantling of power relations that contribute to or entrench socio-economic marginalisation or deprivation.⁷⁹²

2.4.4.9 Judiciary to Pursue a Consequentialist Standard

There is a strong argument to be made that judicial legitimacy must be assessed by a consequentialist standards, based on outcomes and efficacy.⁷⁹³ This requires that law and politics work synergistically together.⁷⁹⁴ Couching rights as entitlements has

⁷⁸⁸ Brand *Courts, Socio-Economic Rights and Transformative Politics* 5.

⁷⁸⁹ Brand *Courts, Socio-Economic Rights and Transformative Politics* 5.

⁷⁹⁰ Christiansen 2010 *Journal of Gender, Race and Justice* 589.

⁷⁹¹ Clark and Esterhuizen "Remembering the Transformative Mandate: An Analysis of Twenty Years of Housing and Eviction Jurisprudence in South Africa" 14.

⁷⁹² Clark and Esterhuizen "Remembering the Transformative Mandate: An Analysis of Twenty Years of Housing and Eviction Jurisprudence in South Africa" 14-15.

⁷⁹³ Brinks and Gauri 2014 *Perspectives on Politics* 385.

⁷⁹⁴ Brinks and Gauri 2014 *Perspectives on Politics* 385.

an individualising effect, which is not useful where community based mobilisation is needed for effective change.⁷⁹⁵ Thus the judiciary should encourage the pursuit of broader-based remedies rather than pronouncing on individual entitlements to socio-economic rights. This would promote more effective judicial action towards poverty amelioration.

2.4.4.10 Acknowledging the Limits of the Law and Seeking Extra-legal Solutions

Litigation oriented towards fulfilment of socio-economic rights has a role to play, but it necessarily only has the potential to serve as a complement to political mobilisation.⁷⁹⁶ It is arguably important for theorists on poverty amelioration to consider whether legal or political recourse is more effective in achieving poverty amelioration. It is warranted to argue that the ineffectiveness of jurisprudence in the realm of poverty amelioration can be overcome via reforms and activism, and by a shift away from the stranglehold of strict adherence to the separation of powers doctrine and the doctrine of judicial deference.⁷⁹⁷

2.4.4.11 The Role of the Legal Profession in Poverty Amelioration

The focus of academic writing with regard to the potential of the legal system to ameliorate poverty, as described in the previous section, is substantially on the role of the judiciary. In the process of research a related but novel alternative viewpoint has been found, being that of Mc Dougall who suggests that the South African legal profession, which would include practitioners in government service and private practice, should take forward the project of transformation, rather than being only reactive to instructions received.⁷⁹⁸ She argues that a novel approach is necessary because the regime of guaranteed rights afforded by the *Constitution* is not sufficient.⁷⁹⁹ South African lawyers are “standing on the shoulders of giants”, she

⁷⁹⁵ Brinks and Gauri 2014 *Perspectives on Politics* 390.

⁷⁹⁶ Gloppen *Social Rights Litigation as Transformation: South African Perspectives* 1-23.

⁷⁹⁷ For a more detailed discussion of these doctrines and the potential to move away from them, see chapter 5.

⁷⁹⁸ Mc Dougall 2016 *New York Law School Law Review* 36.

⁷⁹⁹ Mc Dougall 2016 *New York Law School Law Review* 34.

argues, and should follow in the footsteps of the likes of Nelson Mandela, Robert Sobukwe, Steve Biko, Lilian Ngoyi, Oliver Tambo, and others.⁸⁰⁰ Thus she highlights the role that the legal profession played in effecting change in the past and suggests that it should take up a similar role going forward in driving socio-economic change.⁸⁰¹ This is a persuasive invocation of the potential powers of legal professionals in effecting societal change. Initiatives to this effect would need the support of the judiciary, as well as voluntary buy-in by the profession, and could potentially be developed through awareness-raising and activism.

2.4.4.12 Reconciling Competing Interests

Seagle points out that competing interests are at the core of the issue of poverty.⁸⁰² This would seem to be an obvious statement, but it is one that seems to receive scant attention from the judiciary and legal theorists. When considering the phenomenon of poverty from the perspective of competing interests, the question arises of how the law can contribute to the reconciliation of such interests, as Seagle succinctly points out. Novel dispute resolution mechanisms and novel remedies to achieve poverty amelioration are urgently needed.⁸⁰³ These could be driven by judicial initiative, aided and supported by the legal profession and academia.

2.4.4.13 Summary of Observations with Regard to Legal Solutions

In this section various perspectives on how the judiciary and the legal system could serve to ameliorate poverty have been considered. As has been indicated in the course of the discussion, each seems to have its own merit. None on its own is likely to be a panacea for poverty amelioration however, as each has a narrow or

⁸⁰⁰ Mc Dougall 2016 *New York Law School Law Review* 36.

⁸⁰¹ With regard to envisioning an enhanced role for the legal profession in transformatory processes, see also Davis 1991 *Social Justice* 65.

⁸⁰² Seagle 1945 *University of Chicago Law Review* 71.

⁸⁰³ The potential for such innovations is explored in chapter 5.

sectoral practical or theoretical focus. The more tangible of the proposed solutions would be introducing a developmental approach to legal theory on poverty,⁸⁰⁴ and to poverty amelioration interventions by the executive.⁸⁰⁵ Practical deployment of these notions could be underpinned by the remaining proposed solutions, which are of a more theoretical nature. It could be of considerable value if a matrix or spectrum of interventions via the legal system were to be formulated based on a holistic view of all the legal perspectives taken together. This could be a constructive avenue for further research.

2.4.5 An Enhanced Role for the Executive

It is possible to conceptualise a role for the executive in poverty amelioration above and beyond its ordinarily conceived responsibilities. It may be worthwhile for the executive to pursue closer working relationships between functional units of the executive branch of government than the mandatory co-operation required by section 41 of the *Constitution* and the *Intergovernmental Relations Framework Act*.⁸⁰⁶ If actively pursued, such collaboration could serve to coordinate and align various governmental processes towards poverty amelioration.

Pieterse suggests that the executive has a responsibility with regard to budgeting in a purposive manner that is targeted towards poverty amelioration.⁸⁰⁷ This would extend beyond its ordinary budgeting responsibilities and may require new processes and criteria, and judicial intervention, with regard to prioritisation of budgetary resources. It would constitute a departure from the traditional view that

⁸⁰⁴ Mc Evoy 2007 *Journal of Law and Society*, 418. See also Rosa 2011 *Stellenbosch Law Review* 544, 547, Roderer 2015 *Northwestern Journal of International Human Rights* 55, and Liebenberg and Young "Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?"

⁸⁰⁵ Rosa 2011 *Stellenbosch Law Review* 548.

⁸⁰⁶ Rosa 2011 *Stellenbosch Law Review* 548. The Act referred to is Act 13 of 2005.

⁸⁰⁷ Pieterse 2004 *Human Rights Quarterly* 882. In this article he points out that in *In re: Certification of the Constitution of the RSA 1996* 1996 (10) BCLR 1253 CC (hereafter the *Second Certification* case) it was expressly contemplated that courts could give judgment relating to budgetary matters. This has however not been taken forward by judicial practice.

that the separation of powers and judicial deference doctrines preclude the questioning of executive autonomy in budgeting.⁸⁰⁸

It is possible to conceptualise a new role for the executive in the application of judicial pronouncements in the socio-economic realm. Konstant and Vance complain that the executive application of legal pronouncements is weak in South Africa,⁸⁰⁹ and that associated with this phenomenon is a general disconnection for many citizens from the principles enshrined in the *Constitution*.⁸¹⁰ Thus, they highlight deficiencies in enforcement of and understanding of constitutional principles, and accordingly suggest that improvement in these areas may lead to more successful application thereof, which could have positive implications for poverty amelioration.

A further extended role for the executive in poverty amelioration could be a requirement for the pursuit of measurable policies and programmes, which must engage with the lived realities of poverty.⁸¹¹ This could be implemented via targeted government policy, and supported by jurisprudential initiative.⁸¹²

2.4.6 Multi-pronged and Integrated Solutions for Poverty Amelioration

This section contains a discussion of possible multi-pronged (straddling various disciplines) and integrated solutions for poverty amelioration.

2.4.6.1 Understanding the Self-perpetuating Nature of Poverty

The United Nations Commissioner for Human Rights, in a report recommending poverty reduction strategies based on human rights, seeks to create a realisation

⁸⁰⁸ See for example the view expressed in para 37 of the *Treatment Action Campaign* judgment where it was stated that the courts are not institutionally equipped to decide how public revenue should be spent.

⁸⁰⁹ Konstant and Vance 2015 *University of Miami International and Comparative Law Review* 90.

⁸¹⁰ Konstant and Vance 2015 *University of Miami International and Comparative Law Review* 138.

⁸¹¹ Ngang 2014 *African Human Rights Law Journal* 669-671.

⁸¹² Jurisprudence of the courts and academia could contribute towards acknowledging the need for such programmes.

that poverty may cause discrimination, and as such may be self-perpetuating.⁸¹³ It is useful to have awareness of dynamics of this nature in order to understand how to conceptualise a just future, free of poverty. For example, breaking the cycle of discrimination against the poor could be a valuable step in curbing its self-perpetuation. An awareness of the need to do this could be fostered by the executive and supported by judicial pronouncements and the creation of suitable legislative instruments.

2.4.6.2 Understanding Poverty from a Transdisciplinary and Multidisciplinary Perspective

Deneulin writes of the need for a new political, social and economic narrative worldwide in order to overcome the *status quo* where a privileged minority enjoy benefits.⁸¹⁴ Thus she advocates for poverty interventions across various disciplines. As illustrations of how such a narrative might manifest itself, she cites new forms of economic exchange, new narratives to understand the meaning of progress, and wellbeing indices.⁸¹⁵ These considerations are valuable in developing an understanding of ways in which inequality and poverty could be overcome.

It is important that the role of actors other than the courts in pursuing transformative constitutionalism be acknowledged. These include for example the legislature, the country's central law-making institution, as a potential role player, through the development of transformative legislative instruments, the fostering of debate about transformation, and stringent oversight of the transformative role of the executive.⁸¹⁶

It is arguable that a new political approach towards dealing with poverty – recognising that the poor are part of society and part of the same human family as

⁸¹³ United Nations Human Rights Commission *Principles and Guidelines for a Human Rights Approach to Poverty Reduction* 15.

⁸¹⁴ Deneulin "Introduction" 1.

⁸¹⁵ Deneulin "Introduction" 2.

⁸¹⁶ Fowkes "Transformative Constitutionalism and the Global South: The View from South Africa" 15.

everyone else.⁸¹⁷ This provides a new inclusionary vision and ideology to underpin poverty amelioration efforts, based upon dealing with poverty through a multidisciplinary lens.

Sen argues persuasively that socio-economic reform, which by implication would include poverty amelioration, must be based on “three r’s”, being reach, range and reason.⁸¹⁸ Reach relates to ensuring that reform is person-related and even-handed. Range requires that it be broad-based across institutions. Reason refers to its ethical-normative foundations.⁸¹⁹ These are valuable and useful criteria for conceptualising how socio-economic reforms could serve to address the needs of the poor. They represent an understanding of the need for a multidisciplinary approach to addressing poverty-related issues.

2.4.6.3 Poverty Amelioration Solutions in the Realm of Climate Change

Climate change has become widely acknowledged as a phenomenon bearing distinct risks for poor and vulnerable communities, and a number of authors have accordingly proposed ways in which it can be addressed in the context of poverty. The significance of the climate change discourse in the context of poverty is that it entails a broad focus on remedying a range of poverty-related issues.

Climate change needs to be understood, with poverty as one of its ramifications, using insights from social sciences and the humanities.⁸²⁰ This entails commonising and globalising development theory to develop a new “ethics of the Anthropocene”.⁸²¹ This imperative represents a possible new ethics-based foundation for managing the impacts of climate change on the poor.

There is a strong argument to be made that climate migrants have a morally based right to compensation and redress.⁸²² Since deprivation suffered by climate migrants

⁸¹⁷ Muller 2008 *Environment and Urbanisation* 85. He cites a speech by Minister Ronnie Kasrils in the Eastern Cape in 2001.

⁸¹⁸ Sen 2005 *Economic and Political Weekly* 1971.

⁸¹⁹ Sen 2005 *Economic and Political Weekly* 1974.

⁸²⁰ St Clair 2014 *Journal of Global Ethics* 288.

⁸²¹ St Clair 2014 *Journal of Global Ethics* 291.

⁸²² Drydyk 2013 *Ethics Policy and Environment* 45.

is intertwined with their poverty, the notion of moral redress can be applied to poverty in the more general sense, since the poor, like climate migrants, typically end up in their predicament due to no fault of their own.

A new climate ethics with normative foundations is arguably needed to address the impacts of climate change.⁸²³ Given that it is widely acknowledged that the adverse impacts of climate change affect the poor disproportionately, his position is of relevance for poverty amelioration.

A number of other authors bear testimony to the need for shifts in macroeconomic policy to occur in order to address the impacts of climate change on the poor. Prominent amongst these are writers on the subject of the need for macroeconomic shifts to occur to deal with climate change. It is documented that climate change impacts will be disproportionately harsh on the poor.⁸²⁴ Conventional economics lacks the means to deal with climate change issues. In this regard, Barker comments that equilibrium economics, which is posited on market prices reaching an equilibrium, depends on false assumptions and cannot explain observed phenomena associated with climate change.⁸²⁵ Fankhauser and Stern aver that the failure of conventional economics to adopt a development economics approach renders it inadequate to understand and deal with climate change.⁸²⁶ Hallegatte, Fay and Barbier write of the inadequacy of GDP, a notion founded in conventional economics, as a measure to capture the effects of climate change on human well-being.⁸²⁷ It is clear from the writings mentioned in this paragraph that the urgency to address climate change is a strong driver of reassessment of established economic paradigms. If economic reform driven by this impetus is pursued, it will be of benefit to the poor in their situation as the most vulnerable of the citizenry to the impacts of climate change.

⁸²³ Steigleder 2016 *Journal of Human Rights* 270.

⁸²⁴ In this regard see section 2.4.3.1 above.

⁸²⁵ Barker "The Economics of Dangerous Climate Change" 240.

⁸²⁶ Fankhauser and Stern *Climate Change, Development, Poverty and Economics* 22.

⁸²⁷ Hallegatte Fay and Barbier 2018 *Environment and Development Economics* 217.

With regard to the type of macroeconomic shift necessary to deal with climate change, Barker suggests that a “new economics of risk” is necessary which takes insights from other disciplines such as social sciences, meteorology, ethics, history, engineering, and complexity and evolutionary theory.⁸²⁸ Fankhauser and Stern provide a detailed analysis of the type of developments needed in economics for the discipline to be useful in addressing climate change. Following the Paris Accord, they suggest a reshaping of the global economy is necessary to move towards cleaner production and reorientation of investment.⁸²⁹ They go on to say that a new generation of economic models is needed which takes into consideration systemic dynamics and forces of transformative change.⁸³⁰ In addition, they point out that economic policy needs to tackle and address fundamental market failures that frustrate decarbonisation, for example the subsidising of fossil fuels.⁸³¹ Economic analysis needs to be deepened, they argue, to include a component of development economics that understands and incorporates climate change.⁸³²

Addressing climate change, including the impacts on the poor, entails undertaking an inter- and multi-disciplinary risk analysis. This must take into account relevant extraneous issues, especially the energy/economy system, intergenerational equity, addressing issues of path dependence, and the politics of climate change policy.⁸³³ It may also entail a reconceptualisation of the meaning of wealth, and setting limits on consumption.⁸³⁴ In a dissertation written by Gasparic, it is further argued persuasively that for purposes of addressing the impacts of climate change, egalitarian principles are not useful, but specific distributive principles tailored to the situation are necessary.⁸³⁵

From the writings cited above it is apparent that climate change is a major risk and liability for the poor, and that traditional economics is unable to find solutions to

⁸²⁸ Barker “The Economics of Dangerous Climate Change” 342.

⁸²⁹ Fankhauser and Stern *Climate Change, Development, Poverty and Economics* 3.

⁸³⁰ Fankhauser and Stern *Climate Change, Development, Poverty and Economics* 15.

⁸³¹ Fankhauser and Stern *Climate Change, Development, Poverty and Economics* 20.

⁸³² Fankhauser and Stern *Climate Change, Development, Poverty and Economics* 22.

⁸³³ Barker “The Economics of Dangerous Climate Change” 2.

⁸³⁴ St Clair 2014 *Journal of Global Ethics* 289-291.

⁸³⁵ Gasparic *Climate Change and International Distributive Justice* 1-53.

address these challenges. It is no easy task to reconcile climate change science and theory with poverty studies, but it is gaining importance globally as a political imperative. It warrants the specific attention of the executive, supported in the realm of legislative development by the legislature, and in the realm of acknowledging the effects of climate change in judicial jurisprudence.

2.4.6.4 Reforming Urban Geography and Pursuing Environmental Constitutionalism

Poverty amelioration in cities would be well served if city governments were to establish an urban geography which is oriented towards social justice and poverty eradication.⁸³⁶ This entails the undoing of apartheid legacies relating to the layout of cities, in pursuit of greater social justice.⁸³⁷ These ideals were articulated by Visser in 2001 between the advent of the 1996 *Constitution* and the suite of local government legislation which was promulgated in the early 2000's. It is noteworthy that social problems in cities have worsened since the time of his writing. The notion of transformation of urban geography to move the poor to locations with better amenities remains relevant in present times.

Associated with the notion of spatial reform, but with a focus on environmental goods and services, Kotzé writes of a form of emerging environmental constitutionalism which is a socio-legal project and a transformative instrument, which will evolve over time and possibly never reach conclusion.⁸³⁸ He does not write with specific reference to poverty, but his notion of the intertwining of environmentalism and constitutionalism has potential positive ramifications for improving the situation of the poor, given that the poor are commonly exposed and subjected to environmental degradation.

2.4.7 Observations

In this section, an attempt has been made to categorise potential poverty amelioration solutions onto those falling within the realms of political theory,

⁸³⁶ Visser 2001 *Urban Studies* 1673.

⁸³⁷ Visser 2001 *Urban Studies* 1683.

⁸³⁸ Kotze 2015 *Litnet Akademies* 825.

sociology, economics, law, and multi-pronged and integrated solutions. This categorisation will guide and inform the contents of chapters 3, 4 and 5 in which roles for the three branches of government in poverty amelioration will be conceptualised.

2.5 Chapter Summary

This is a multidimensional chapter providing perspectives on poverty in three categories – characteristics of poverty, determinants of poverty, and possible solutions for poverty amelioration. Under each of these categories, a variety of relevant phenomena and ideas has been discerned. This summary will not delineate each individual sub-category, the full list of which can be found in the table of contents. Instead it will focus on general principles that emerge from the analysis.

The purpose of presenting a theoretical overview of perspective of poverty has been primarily to inform the further chapters of this thesis insofar as they will seek to delineate roles and responsibilities residing with the three branches of government with regard to poverty amelioration, and pathways for them to realise these. This main purpose is underpinned by an assumption that poverty is capable of being ameliorated by the three branches. In addition, it is underpinned by an assumption that a full understanding of the three categories of perspectives delineated in the chapter will be of value in informing the delineation of roles and responsibilities.

The analysis in this chapter is by its nature limited in that it is a theoretical, desktop analysis of a phenomenon which has intense and substantive human dimensions, and as such it cannot aspire to reflecting the full lived reality of poverty. Nevertheless it does provide a sufficiently multifaceted analytical picture of poverty amelioration to enable roles and responsibilities on the part of the three branches of government to be identified, as will be more fully outlined in the chapters which follow.

The characteristics of poverty identified in this chapter are many and diverse. The number and diversity of these characteristics is indicative of its pervasive nature, encroaching on many areas of life and human endeavour. It is difficult to single out

one or more characteristics as dominant or more significant, as the phenomenon is best understood in its full diversity. However, the extent of poverty as a major social, economic and political problem of our time is arguably best understood with reference to its embedded and systemic nature, and the fact that it is persistent, prone to inertia, and burgeoning. These descriptors indicate that it is not likely to be capable of easy resolution or remediation.

The analysis of the determinants of poverty in this chapter has been instructive in that it has produced a myriad of such determinants. These include ideological notions, social and economic determinants, determinants linked to the socio-economic rights regime, legal determinants and political determinants. Once again, it is difficult to aver that any particular determinant or category of determinants is of more significance than the others. Of importance is the picture that emerges from considering all the determinants in juxtaposition with each other. This is a further indicator of the pervasiveness of poverty in society, with a huge number of factors contributing to its prevalence. Chapters 3, 4 and 5 will focus on determinants which are relevant to the functionality and the poverty amelioration potential of the three branches of government.

Proposed solutions for poverty amelioration reflected in the theoretical analysis in this chapter are also multifaceted. It has been possible to group these into various categories, being political, social, economic, legal and multi-pronged/integrated solutions. It is important to note that none of the solutions identified constitutes a panacea for poverty relief. With poverty being a pervasive and multi-dimensional phenomenon, and one which requires the urgent attention of the three branches of government, it will be suggested in chapters 3, 4 and 5 that the individual branches should simultaneously deploy all possible solutions at their disposal to seek to overcome the scourge of poverty. These solutions are further discussed in the subsequent three chapters.

CHAPTER 3

THE ROLE OF THE LEGISLATURE IN THE AMELIORATION OF POVERTY

3.1 Introduction

This chapter considers the question as to what the role and responsibilities of the South African legislature may be with regard to the amelioration of poverty. This discussion forms part of the broader context of this thesis, which is a critical evaluation of the individual and relative roles of the three branches of government in poverty amelioration, feeding into the concluding chapter where these relative roles are finally juxtaposed and evaluated.

It is noteworthy that the role of the legislature in poverty amelioration is not a subject which is directly considered in academic literature. This may be because of the legislature's role being commonly understood to constitute primarily law-making and executive oversight. Accordingly, it is necessary to use indirect sources such as legislative material and general material on the role of the legislature (without specific reference to poverty), to inform the discussion. It will be suggested that it is nevertheless possible to conceptualise a potential role for the legislature in poverty amelioration, as will appear from the further discussion in this chapter.

An introduction follows to the nature of the South African legislature within the three spheres of government – national, provincial and local - as delineated in the *Constitution*. This is followed by a brief analysis of the way in which poverty is dealt with in national legislation,⁸³⁹ highlighting some gaps and shortcomings which may be obstacles to the legislature fulfilling a poverty amelioration imperative. Thereafter, features of the legislative system which impact upon its functionality in the context of poverty amelioration are considered, in particular the separation of powers doctrine and the limited nature of legislative oversight. Consideration is then given to possible solutions for poverty amelioration action by the legislature. Concluding remarks follow.

⁸³⁹ Provincial and municipal legislation are not considered because of constraints of length. It is acknowledged that provincial and municipal legislation may have scope for incorporating more detail regarding poverty amelioration measures. National legislation is however of general applicability country-wide.

Throughout the discussion as outlined above, insights drawn from chapter 2 regarding the characteristics of poverty, the determinants of poverty, and solutions for poverty amelioration are deployed.

3.2 The South African Legislative System

Section 43 of the *Constitution* confers legislative authority upon all three spheres of government as follows: legislative authority of the national sphere of government is vested in Parliament,⁸⁴⁰ that of the provincial sphere of government in provincial legislatures,⁸⁴¹ and that of the local sphere of government in municipal councils.⁸⁴²

Section 44 of the *Constitution* delineates the legislative authority of national government. It confers upon the two houses of Parliament distinct roles in the legislative realm. The National Assembly has authority to amend the *Constitution*,⁸⁴³ to pass legislation on any matter within the functional areas set out in Schedule 4,⁸⁴⁴ and to assign any of its legislative powers except that to amend the *Constitution* to a legislative body in another sphere of government.⁸⁴⁵ The National Council of Provinces has authority to participate in the amendment of the *Constitution*,⁸⁴⁶ to pass legislation in terms of section 76⁸⁴⁷ on schedule 4 functional areas,⁸⁴⁸ and to consider in terms of section 75⁸⁴⁹ legislation passed by the National Assembly.⁸⁵⁰

Section 104 of the *Constitution* confers legislative authority on provincial legislatures, confirming that they may pass or amend a provincial constitution,⁸⁵¹

⁸⁴⁰ Section 43(a).

⁸⁴¹ Section 43(b).

⁸⁴² Section 43(c).

⁸⁴³ Section 44(a)(i).

⁸⁴⁴ Section 44(a)(ii).

⁸⁴⁵ Section 44(a)(iii).

⁸⁴⁶ Section 44(b)(i).

⁸⁴⁷ This section relates to ordinary Bills affecting provinces.

⁸⁴⁸ Section 44(b)(ii). The schedule 4 functional areas of concurrent national and provincial legislative competence are provincial public enterprises, public transport, public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the *Constitution* or any other law, regional planning and development, road traffic regulation, soil conservation, tourism, trade, traditional leadership, subject to chapter 12 of the *Constitution*, urban and rural development, vehicle licensing and welfare services.

⁸⁴⁹ This section relates to ordinary Bills not affecting provinces.

⁸⁵⁰ Section 44(b)(iii).

⁸⁵¹ Section 104(1)(a).

pass provincial legislation as mandated by schedules 4 and 5⁸⁵² (or a matter assigned by national legislation, or as specifically provided in terms of the *Constitution*⁸⁵³). In addition, they have authority to assign legislative powers to municipal councils within their province.⁸⁵⁴

Municipal councils are vested with authority in terms of section 156(2) of the *Constitution* to pass by-laws with regard to any matter which they have the right to administer. These include matters listed on parts B of schedules 4 and 5.⁸⁵⁵ Notably, they also have authority to exercise any power reasonably necessary for or incidental to the effective performance of their functions.⁸⁵⁶

Legislative authority is primarily understood to be the power to make laws.⁸⁵⁷ However in the South African constitutional context the authority of the legislature also extends to the power to oversee the executive,⁸⁵⁸ and the provision of *fora* for public consideration of issues.⁸⁵⁹ These ancillary functions are part and parcel of the legislature's functionality in all spheres of government, and are relevant to assessing the role of the legislature in the amelioration of poverty, as further elucidated in this chapter.

3.3 Efficacy of South African National Legislation in Dealing with Poverty: An Overview

This section contains an overview of poverty as reflected in the *Constitution* and national legislation. Its purpose is to highlight how legislation is used as a tool to address poverty-related issues, and to focus on some weaknesses in this regard.

⁸⁵² Section 104(1)(b)(i) and (ii).

⁸⁵³ Section 104(1)(b)(iii) and (iv).

⁸⁵⁴ Section 104(1)(c).

⁸⁵⁵ Section 156(1).

⁸⁵⁶ Section 156(5).

⁸⁵⁷ This is not defined in the Constitution but its ordinarily understood meaning may be gleaned from <https://www.justice.gov.za/legislation/legprocess.html>, where it is described in this manner.

⁸⁵⁸ De Vos and Freedman (eds) *South African Constitutional Law in Context* 144.

⁸⁵⁹ De Vos and Freedman (eds) *South African Constitutional Law in Context* 143.

3.3.1 *The Constitution*

Poverty is a concern reflected directly and indirectly in the *Constitution*. The preamble thereof states that it is adopted as the supreme law of South Africa, so as to serve certain purposes. These include to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”. The “divisions of the past” are not defined, but it would be fair to assume that they include the divisions arising from apartheid, and possibly also colonialism, it being trite that these phenomena were of a divisive nature. Both practices served to impoverish people, especially people of colour,⁸⁶⁰ hence it may be deduced that healing the divisions of the past relates at least partially to poverty amelioration. Social justice and fundamental human rights, also referred to in the preamble, are both relevant to poverty amelioration. In the South African context, the relevance of social justice to poverty amelioration lies in the fact that poverty was foisted upon people under a regime acknowledged as having been unjust. Thus poverty and social justice issues are inextricably linked.⁸⁶¹ Fundamental human rights, also referred to in the preamble to the *Constitution*, include the socio-economic rights in the Bill of Rights, which are purposed largely towards improving the socio-economic well-being of the poor and marginalised. Thus a further link between the preamble and issues pertaining to poverty is established. In the terms outlined in this section, the *Constitution* is clearly a fundamental instrument reflecting concerns about poverty.

The preamble of the *Constitution* further includes an imperative to “improve the quality of life of all citizens and free the potential of each person”. Quality of life and human potential are subjective concepts which are not easily described or quantified. Quality of life relative to poverty in South Africa has been explored in a

⁸⁶⁰ This is trite and is mentioned in many writings relevant to this study. See for example Seekings *Poverty and Inequality After Apartheid* 1-43, in which the content pertaining to poverty and inequality in the period under discussion is prefaced by a reference to poverty and inequality “inherited from the apartheid era”. See also section 2.2.5 of this thesis where the associations between poverty and apartheid are explored.

⁸⁶¹ See section 1.3 where the concept of social justice and its relevance to poverty is discussed.

number of sociological writings, some of which are cited in Chapter 2.⁸⁶² Human potential is a somewhat nebulous concept, because arguably potential cannot be entirely known or verified until tested and fulfilled. In the constitutional preamble, human potential is not referred to in a poverty-specific context. However for purposes of this study it is considered to include the potential to be lifted out of poverty.

Construing the preamble to the *Constitution* in the context of the widespread prevalence of poverty in South Africa, it is justifiable to say that the portions thereof discussed above provide a primary legal basis for the imperative of ameliorating poverty generally.

The discussion in this section must be seen in the context of the fact that there are notable shortcomings in certain governance areas which contribute to poverty, and in respect of which the legislature can play a role in providing legislative solutions. Examples of these areas are education,⁸⁶³ and governance of the minerals-energy sector.⁸⁶⁴ It is further important to note that there are considerations relevant to poverty relating to the functionality of the legislature which should impel the legislature to seek solutions to poverty. These include the fact that the role of the legislature in addressing poverty is currently conceptualised weakly. Furthermore, policy and legislative responses to poverty by government – with the legislature playing a role in the latter – are not prioritised or addressed purposively.

Along with the other branches of government, and in accordance with the aforementioned provisions of the *Constitution*, the legislature has an obligation to consider poverty amelioration as an underlying imperative that must guide its functions. This imperative is borne out in many national legislative instruments, particularly those enacted pursuant to the *Constitution*, as will be explained further.

⁸⁶² See for example Woolard 2002 *Overview of Poverty and Inequality in South Africa* 1-15, discussed in section 2.2.3.

⁸⁶³ Inequalities in education as a determinant of poverty are explored in section 2.2.9.

⁸⁶⁴ The prevalence of poverty in this sector is discussed in section 2.2.12.

A search of legislative instruments containing the word 'poverty'⁸⁶⁵ reveals that it is widely cited as an underpinning imperative in the preambles of many Acts of Parliament, and occasionally within the text thereof. A discussion of those identified as pertinent to this study, and an analysis of the usefulness of their reference to poverty, follows.

3.3.2 Statutes Dealing with Broad Public Law Issues

Many statutes dealing with broad public law issues mention the need to deal with poverty cursorily in their preambles, or within their stated objects and purposes. There is often no further indication within the body of the legislation as to how it relates to amelioration of poverty. This is arguably problematic in that the statutes do not provide a clear conceptualisation of poverty, neither any principles to guide poverty amelioration action and to assist with the transposition of the poverty amelioration imperative into practical realisation. The following examples are cited for illustrative purposes.

The *National Development Agency Act*⁸⁶⁶ is a legislative instrument creating an agency, the purpose of which is to “eradicate poverty”,⁸⁶⁷ and to provide funds for “carrying out projects or programmes aimed at meeting development needs of poor communities”.⁸⁶⁸ It appears that poverty eradication and meeting of development needs are considered to be synonymous.⁸⁶⁹ From these references, it is possible to deduce that generally the purpose of the Act and of the agency established in terms thereof is to promote development and drive poverty amelioration simultaneously. Sections 3 and 4 of the Act indicate that the agency is primarily a conduit for funding of civil society organisations for them to carry out programmes to meet the development needs of poor communities. The Act does not establish criteria for the allocation of funding, neither does it contain a clear conceptualisation of poverty –

⁸⁶⁵ This word search, done on legislation only, was undertaken on the Butterworths Lexis Nexis Database on 11 April 2020. From the search results the statutes cited were selected as being illustrative of the way that poverty is dealt with in national legislation.

⁸⁶⁶ Act 108 of 1998.

⁸⁶⁷ See the preamble to the Act.

⁸⁶⁸ Section 3(a) of the Act.

⁸⁶⁹ ‘Development’ is not defined in the Act.

this is necessary in order to envision solutions for poverty amelioration, for example. The agency's *Strategic Plan 2016-2021* reflects the same deficiencies. By its own admission, the agency has not been fully effective in implementing poverty relief measures.⁸⁷⁰ This could arguably be associated with the failure of the underpinning legislation and the agency itself to clearly conceptualise poverty and how it could possibly be ameliorated. It appears from the plan that implementation of the legislation has been weak, which could be related partly to the failure of the Act as a founding instrument to achieve such conceptualisation. It can be argued that the legislature should have given greater attention to the potential of the Act to meet its stated aims.

The *Public Administration Management Act*⁸⁷¹ is similarly oriented towards "poverty redress".⁸⁷² It is stated explicitly in the preamble that the challenge of redressing poverty, marginalisation of people and communities and other legacies of apartheid and discrimination, is best achieved by "providing for administrations in the three spheres of government to be organised and to function in ways that ensure efficient, quality, collaborative and accountable service delivery to alleviate poverty and promote social and economic development for the people of the Republic".⁸⁷³

The *Intergovernmental Relations Framework Act*⁸⁷⁴ has preamble provisions very similar to those in the Public Administration Management Act.⁸⁷⁵ Again, neither Act contains any principles or methodology to achieve these stated aims. Thus both Acts provide only a perfunctory and cursory reference to poverty.

⁸⁷⁰ National Development Agency *Strategic Plan 2016-2021* 13 (para 5.2).

⁸⁷¹ Act 11 of 2014.

⁸⁷² See the preamble to the Act.

⁸⁷³ See the preamble to the Act.

⁸⁷⁴ Act 13 of 2005.

⁸⁷⁵ The third and fourth paragraphs of the preamble to this Act state: "AND WHEREAS one of the most pervasive challenges facing our country as a developmental state is the need for government to redress poverty, underdevelopment, marginalisation of people and communities and other legacies of apartheid and discrimination; AND WHEREAS this challenge is best addressed through a concerted effort by government in all spheres to work together and to integrate as far as possible their actions in the provision of services, the alleviation of poverty and the development of our people and our country...".

In similar vein, the *Local Government: Municipal Structures Act*⁸⁷⁶ contains in its preamble an eloquent statement of the *status quo* pertaining to poverty:

WHEREAS past policies have bequeathed a legacy of massive poverty, gross inequalities in municipal services, and disrupted spatial, social and economic environments in which our people continue to live and work....

However, the Act does not spell out how the municipal structures it establishes should serve the purpose of remedying the poverty described. Thus, similarly to the other Acts cited in this section, it deals with poverty perfunctorily and cursorily, which is arguably not useful for development of practical poverty amelioration mechanisms.

The above analysis is suggestive of a pattern of legislation governing public law relationships and institutions in South Africa making reference to the imperative to address poverty, without providing substance to this imperative in the form of principles and methodologies for doing so. This is borne out by other examples in addition.⁸⁷⁷ The importance of this observation is that it indicates that the state does not give attention during the legislative process to defining and conceptualising poverty. As is evident from chapter 2, poverty has a wide range of characteristics and is conceptualised differently by different theorists.⁸⁷⁸ Consideration will now be given to more sector-specific legislation reflecting the imperative of poverty amelioration. The focus falls on the following categories of legislation: land rights and land administration, energy and mineral and petroleum resources, health, education, environment and labour. These categories have been chosen due to their

⁸⁷⁶ Act 117 of 1998.

⁸⁷⁷ See also for example section 13 of Schedule A of the *Municipal Budget and Reporting Regulations*, 2009, under the *Local Government: Municipal Finance Management Act* 56 of 2003, which requires that "economic development objectives that facilitate job creation, economic growth, poverty alleviation" be included as in municipal budget documentation as considerations for development of performance objectives. The preamble of the *Statistics Act* 6 of 1999 is another example of a statute making reference in its preamble to the need to ameliorate poverty. The *Use of Official Languages Act* 12 of 2012 also makes reference to poverty in its Annexure A, where it prescribes the identification of "poverty nodal areas". Also, the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 includes poverty within the definition of socio-economic circumstances on the basis of which unfair discrimination is prohibited.

⁸⁷⁸ See section 2.2 above.

explicit linkages to poverty-related matters, and the fact that they accordingly are illustrative of a lack of legislative clarity as to how poverty is conceptualised.

3.3.3 *Legislation Dealing with Land Rights and Land Administration*

Legislation dealing with land rights and land administration serves to restore land rights to those dispossessed of land during times of colonialism and apartheid. Land poverty foisted upon those so dispossessed is an issue with which the political leadership in post-apartheid South Africa continues to grapple.⁸⁷⁹ Interestingly, the *Restitution of Land Rights Act*⁸⁸⁰ does not directly mention poverty amelioration as one of its underpinning objectives.⁸⁸¹ It instead refers to redress of land dispossession undertaken as part of racially discriminatory practices, and to the need to redress inequality.⁸⁸² These imperatives are linked to poverty matters. The Act is an institutional legislative instrument, establishing infrastructure and mechanisms for processing land claims.⁸⁸³ The purpose of its institutions and processes is however fundamentally the redress of land dispossession and land poverty, which was a transformative imperative at the time of the political transition and has remained so. Thus it may be said that the Act is an instrument for the alleviation of land poverty, although it does not clearly articulate this imperative.

Other legislative instruments dealing with land and land rights are explicit in their purpose of addressing poverty. The *Land Reform: Provision of Land Assistance Act*,⁸⁸⁴ a statute which provides for the acquisition by the state and designation of land for land reform purposes, states amongst its purposes the alleviation of poverty.⁸⁸⁵ The *Spatial Planning and Land Use Management Act*,⁸⁸⁶ brought into

⁸⁷⁹ In the 2018 *State of the Nation Address* by President Cyril Ramaphosa, redistribution of land was mentioned as a central priority of national government and expropriation without compensation promised. This is available on <https://www.gov.za/speeches/president-cyril-ramaphosa-2018-state-nation-address-16-feb-2018-0000>.

⁸⁸⁰ Act 22 of 1994.

⁸⁸¹ The word "poverty" does not occur in the Act at all.

⁸⁸² See the preamble to the Act.

⁸⁸³ The Act creates the Land Claims Commission (Chapter II) and the Land Claims Court (Chapter III) and establishes structures, rules and processes within these.

⁸⁸⁴ Act 126 of 1993.

⁸⁸⁵ Section 1A of the Act.

⁸⁸⁶ Act 16 of 2013.

existence approximately twenty years after the political transformation of 1994, sets out developmental principles relating to spatial planning and land use management that favour the redress of past imbalances and address the needs of the poor.⁸⁸⁷

Given that inequitable and skewed distribution of land along race, gender and nationality lines remains prevalent long after the political transformation,⁸⁸⁸ and it has been reported to Parliament that the national land reform programme has been a weak and unsuccessful process,⁸⁸⁹ it may be concluded that land reform legislation oriented towards redress of dispossession and poverty amelioration has not been deployed by the executive as a successful instrument to achieve poverty amelioration. It is arguable that a clearer articulation of poverty amelioration imperatives in the legislation may have rendered it more purposive and effective in this regard. Given that poverty is a multifaceted and complex phenomenon,⁸⁹⁰ it would arguably be appropriate for legislative instruments addressing poverty-related issues to conceptualise the phenomenon more clearly.

3.3.4 Legislation Dealing with Energy and Associated Resources

The main legislative instruments dealing with resources such as energy, minerals and gas all express themselves to be oriented towards poverty amelioration. The *National Energy Act*⁸⁹¹ expressly states in its preamble that energy resources are considered to be an instrument of poverty alleviation. One of the purposes of the Act is stated to be the "improvement of the quality of life of the people of the Republic".⁸⁹² The Act also provides for universal access to energy, including free

⁸⁸⁷ Section 7 of the Act.

⁸⁸⁸ See the statistics presented in the Department of Rural Development and Land Reform *Land Audit Report 2018*.

⁸⁸⁹ See the discussion and conclusions in Parliament of the Republic of South Africa *Diagnostic Report on Land Reform in South Africa 2016*.

⁸⁹⁰ See section 2.2 which illustrates the diverse characteristics of poverty.

⁸⁹¹ Act 34 of 2008.

⁸⁹² Section 2(i) of the Act.

basic electricity to households.⁸⁹³ Despite these clear poverty amelioration imperatives, the Act does not indicate how their achievement is envisaged.⁸⁹⁴

The *Minerals and Petroleum Resources Development Act*⁸⁹⁵ indicates in its preamble that one of its purposes is to redress past racially discriminatory practices in the mining industry. Such practices are widely acknowledged to have been exploitative, and to have left the labour force in circumstances of poverty whilst enriching the shareholders and senior officials of the mining corporations.⁸⁹⁶ However poverty amelioration imperatives in the Act have thus far proved to be of questionable effect, and have even been the subject of litigious contestation between the regulator, communities and industry. The rights of indigenous communities who are at risk of being dispossessed of their land by mining corporations are central to this contestation.⁸⁹⁷ The Act is an example of poverty amelioration imperatives in national legislation having little or no impact upon the conduct of industry and relationships between role players. Again, issues pertaining to poverty are dealt with in a perfunctory and cursory way.

The regulations under the *Gas Act*⁸⁹⁸ contain a provision⁸⁹⁹ requiring that information regarding historically disadvantaged South Africans be included in a licence application, and that the regulator must take such information into account in a

⁸⁹³ Section 5 of the Act. See also Section 6 which sets out the requirements for integrated energy planning. In this section, universal accessibility (Section 6(2)(d)) and social equity (Section 6(2)(e)) are included as mandatory aspects of integrated energy planning.

⁸⁹⁴ In the case of free basic electricity, there is a national Free Basic Energy Policy, promulgated in 2003, which sets out the recommendations of government as to the mechanisms for provision and quantities of free basic electricity to qualifying households. This policy is however not entirely useful as a poverty relief instrument. See Mosdell *The Role of South African Municipalities in Energy Governance* 21.

⁸⁹⁵ Act 28 of 2002.

⁸⁹⁶ The Marikana massacre of August 2012 is widely considered to have epitomised the polarity between mine owners and directors and workers and the hardships of the latter. See also Humby 2016 *Journal of Business Ethics* 653. Department of Mineral Resources *Broad Based Socio-economic Empowerment Charter for the Mining Industry 2018*, acknowledges at page ii thereof that there remains a proliferation of communities living in abject poverty in the surrounds of mining operations.

⁸⁹⁷ See *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP), in which the traditional rights of a community to land in respect of which a mining right was issued, were recognised by the court.

⁸⁹⁸ Act 48 of 2001.

⁸⁹⁹ Regulation 5.

manner that *inter alia* facilitates poverty alleviation. Though not explicitly stated, one can possibly infer that licensing conditions to this effect are intended. There is no literature on the effect of these regulations on poverty.

The above legislative instruments relating to mineral and energy resources reflect a common trend to make reference to poverty alleviation. However the litigious interaction between the mining industry and the government,⁹⁰⁰ with the latter promoting the interests of workers, suggests that the inequities of colonialism and apartheid in resource extraction industries such as mining still remain and may not be remedied easily. Thus these legislative instruments are examples of references to poverty alleviation in legislation having questionable value in practical terms. A possible exception could be the potential to realise poverty alleviation benefits from the mandatory social benefit requirement imposed upon project developers in the Renewable Energy Independent Power Producers Procurement Programme,⁹⁰¹ although this has not been proven in practice and has been questioned by some authors.⁹⁰²

3.3.5 Health Legislation

Consideration will now be given to health legislation, which is relevant to poverty in that it provides the framework within which healthcare is provided to the poor. In this realm, there is a similar disconnect between the orientation of the legislation with regard to matters of poverty, and the reality for the poor, particularly those

⁹⁰⁰ The Chamber of Mines and others have sought to challenge the Department of Minerals' attempts to create a mining charter that is oriented towards bringing about transformation in the industry. This was the underpinning issue under consideration in *Chamber of Mines of South Africa v Minister of Mineral Resources and Others* 2018 (4) SA 581 (GP), in which a divided court gave judgment favouring the position of the chamber to the effect that the empowerment status of mining corporations does not have to be continuously topped up.

⁹⁰¹ In the early stages of the programme, it was a mandatory condition of tender that bidders had to commit a percentage of their profits from their projects to social and community upliftment.

⁹⁰² See Shaw *Assessing the Sustainability of an Independent Power Producers Social Investment in a Community: a Case Study of Scatec Solar* 1-172, in which the view is expressed that the programme lacks a community engagement methodology necessary to satisfy the requirements. See also Wlokas, Westoby and Sole 2017 *Journal of Energy in Southern Africa* 35, in which the view is expressed that the potential of the programme is weakened by a lack of appreciation for existing community development tradition and frameworks.

needing healthcare. The *National Health Act*⁹⁰³ mirrors some of the imperatives towards change recorded in the preamble to the *Constitution*. In its preamble, it gives recognition to socio-economic injustices, imbalances and inequities in health service, to the need to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights, and the need to improve the quality of life of all citizens and free the potential of each person. In addition, the Act creates a system of structured free health care for certain categories of persons.⁹⁰⁴ A reading of the Act gives one the impression of a shift towards equitable healthcare for all, including those living in poverty. However it is documented that gross inequities in the quality of healthcare available and disparities in access to healthcare have continued to prevail many years after the coming into existence of the Act. This is borne out by the initiative to create a new healthcare system as reflected in the *National Health Insurance Bill, 2019*.⁹⁰⁵ It proposes the establishment of a new national health insurance system that is envisaged to reduce poverty and inequalities inherited from the past. The Bill has been criticised in the media on a number of grounds. These include the alleged lack of capacity on the part of the state to implement the proposed scheme⁹⁰⁶ and the possible unaffordability of the scheme.⁹⁰⁷ In addition the scheme is opposed by lobbyists in the private healthcare business.⁹⁰⁸ Transformation in the healthcare sector remains an unrealised aspiration articulated in legislation and policy but not achieved in reality. A full analysis of developments in healthcare provision since the Act of 2003, leading up to the eventual publication of the controversial bill in 2019, is outside of the ambit of this thesis. It is however warranted to observe that the intent of the Act in providing for universal healthcare, including for the poor, has

⁹⁰³ Act 61 of 2003.

⁹⁰⁴ Section 4 of the Act.

⁹⁰⁵ B11/2019 https://www.gov.za/sites/default/files/gcis_document/201908/national-health-insurance-bill-b-11-2019.pdf.

⁹⁰⁶ See <https://www.timeslive.co.za/ideas/2017-07-03-lets-be-honest-state-is-not-capable-of-brimplementing-nhi/>.

⁹⁰⁷ See https://www.iol.co.za/the-star/sa-cant-afford-a-scheme-like-the-nhi-1980009_

⁹⁰⁸ Solanki *et al* 2021 *South African Medical Journal* 812.

not been realised for an extended period of time. This is arguably an indictment on the seriousness of the intent as reflected in the legislation upon its adoption in 2003.

3.3.6 Legislation Dealing with Education

Education is also a sphere in which legislative instruments bear reference to poverty, but the efficacy of poverty relief provisions in the legislation is questionable. Poverty amelioration is frequently indicated as an underpinning objective of the post-apartheid education system. The *National Education Policy Act*⁹⁰⁹ is a brief framework Act requiring that the Minister of Education establish national education policy on a variety of issues.⁹¹⁰ This Act does not however deal specifically with poverty issues affecting education. By contrast, the *South African Schools Act*,⁹¹¹ of similar vintage,⁹¹² expresses imperatives to redress the injustices of the past pertaining to education, and to contribute to the eradication of poverty.⁹¹³ Section 35 of the Act requires that schools be placed into quintiles for purposes of determining funding to be allocated to them. Norms and standards relating to the funding of schools have been set up in terms of this requirement,⁹¹⁴ requiring that provincial education departments categorise schools from most poor to least poor,⁹¹⁵ and prioritise allocation of funding to the most poor. This constitutes an attempt to redistribute resources by way of providing less funding to better-off schools and more to worse-off schools. However, there is a great deal of material testifying to the fact that education remains grossly unequal and profoundly under-resourced in many areas, notwithstanding the legislative provisions quoted.⁹¹⁶ Thus there is a regrettable disconnect between the imperatives reflected in legislation and the

⁹⁰⁹ Act 27 of 1996.

⁹¹⁰ Section 3(4) of the Act provides a list of eighteen operational issues upon which the Minister must formulate national education policy.

⁹¹¹ Act 84 of 1996.

⁹¹² Both Acts were passed in 1996.

⁹¹³ See the preamble to the Act.

⁹¹⁴ Department of Education *National Norms and Standards for School Funding*, GN1282, GG39473, 14 December 2006.

⁹¹⁵ *National Norms and Standards for School Funding*, paras 100-107.

⁹¹⁶ See for example the 2016 assessment of the non-governmental organisation Section 27, entitled *Too Many Children Left Behind* 1-25, which describes ongoing deprivation and disparity in school quality in the public school system <https://section27.org.za/2016/08/too-many-children-left-behind-exclusion-in-the-south-african-inclusive-education-system/>.

reality of the state of education in South Africa. This is suggestive of another illustration of hollowness in legislative references to poverty, in that they have not been transposed into poverty amelioration solutions.

3.3.7 Environmental Legislation

Environmental legislation also has poverty amelioration as one of its underlying imperatives. The *National Environmental Management Act*⁹¹⁷ posits poverty as the result of inequality in the distribution of wealth and resources, and both as the cause and result of environmentally harmful practices.⁹¹⁸ Citing inequality as a cause of poverty may be a valid observation, but how this observation should affect environmental governance is not accounted for in the Act. Similarly, the statement that poverty is the cause and effect of environmentally harmful practices is not easy to understand. The preamble is the only place in the Act where poverty is explicitly mentioned, and this in the somewhat disjointed manner described. Thus the central environmental legislative instrument in South Africa fails to forge a clear connection between poverty and the environment.

The sector-specific environmental management statutes make reference to poverty in a number of places. The *National Environmental Management: Air Quality Act*⁹¹⁹ mentions in its preamble that the burden of health impacts associated with air pollution falls disproportionately on the poor. This may be true, but the content of the Act is not specifically purposed to alleviate air quality issues affecting the poor, but rather to address air quality more generally. Section 83 of the *National Environmental Management: Integrated Coastal Management Act*⁹²⁰ confers the power on the Minister of Environmental Affairs to make regulations regarding the sustainable use of coastal resources in order to address poverty in communities dependent upon coastal resources for their livelihood. The principles according to which he or she should make such regulations are not articulated in the main Act or in subsidiary legislation. Another example is the reference in the *Municipal Waste*

⁹¹⁷ Act 107 of 1998.

⁹¹⁸ See the preamble to the Act.

⁹¹⁹ Act 39 of 2004.

⁹²⁰ Act 24 of 2008.

*Sector Plan*⁹²¹ established in terms of the *National Environmental Management: Waste Act*⁹²² to poverty eradication as an imperative of municipal waste management.⁹²³ Again, how this should be done is not articulated.

All of the environmental legislative instruments cited refer to poverty in a cursory way and do not contain substantive content for addressing poverty-related issues. Thus it may be said that the linkages forged in national legislation between poverty and the environment are weak. This is a possible area for development of the law.

3.3.8 Labour Legislation

Labour law is an area in which the need for socio-economic transformation to create livelihoods for those living in poverty as a consequence of apartheid has long been articulated. The *Labour Relations Act*⁹²⁴ is the primary legislative instrument serving this aim. Subsequent to this Act, the *Employment Equity Act*⁹²⁵ and the *Broad Based Black Economic Empowerment Act*⁹²⁶ came into being. None of these Acts explicitly articulates poverty relief as an underpinning imperative, but all are geared towards remedying the disadvantaged position of people of colour in the labour market prior to the political transformation of 1994, which is associated with their widespread poverty.⁹²⁷ At the time of writing this thesis the role of labour in the social, political and economic milieu is an issue which is in the spotlight – the situation is extremely volatile and its outcome may play a decisive role in the evolution of poverty-related issues in the future.⁹²⁸

⁹²¹ Act 59 of 2008.

⁹²² *Municipal Waste Sector Plan* in terms of the *National Environmental Management: Waste Act*, GN 270 of 30 March 2012, GG 35206.

⁹²³ Clause 3.3.10 of this plan requires municipalities to pursue poverty alleviation in the waste sector via job creation, community waste management schemes, and recycling initiatives.

⁹²⁴ Act 66 of 1995.

⁹²⁵ Act 55 of 1998.

⁹²⁶ Act 53 of 2003.

⁹²⁷ The impoverishing effects of apartheid on its victims are discussed in Borat *Economic Policy in South Africa: Past, Present and Future* 1-25. See also Terreblanche *Lost in Transformation: South Africa's Search for a New Future Since 1986* 1-144.

⁹²⁸ The events referred to include a national strike by bus drivers in April and May 2018 which has severe impacts on public transport, especially in metropolitan areas. In addition a newly established federation of trade unions, the South African Federation of Trade Unions, launched national strike action to protest against proposed minimum wage legislation, on 25 April 2018.

In terms of the *National Minimum Wage Act*⁹²⁹ employers are bound to pay employees a legislated rate which varies annually.⁹³⁰ Although the minimum wage is set at a low level this is nevertheless a valid legislative measure for poverty amelioration. Also, the *Unemployment Insurance Act*⁹³¹ allows for payment of allowances for defined periods for those unable to work because of maternity leave, parental and adoption leave, and illness. Both of these measures are illustrative of a trend towards worker protection and poverty amelioration, albeit that it is arguable that they fix their respective financial provisions at a very low level.

The *Social Assistance Act*⁹³² is the foundational legislative instrument for the rendering of social assistance to the poor, which serves to supplement the income of those outside the labour market.⁹³³ Although it does not mention 'poverty', it makes provision for the rendering of social assistance to those in need, including children,⁹³⁴ those in need of care,⁹³⁵ foster children,⁹³⁶ the disabled,⁹³⁷ older persons⁹³⁸ and war veterans.⁹³⁹ The Act undoubtedly guards against poverty for such beneficiaries, but it does not cater for able-bodied adults suffering the effects of poverty, and thus is limited in its scope.

Its strike memorandum is extremely enlightening regarding the mood of the poor, which comes across in an assertive manner. Interestingly, the union chose to include protest against alleged privatisation of water to be included in its representations in respect of Cape Town and Johannesburg. The memorandum may be found on <http://saftu.org.za/memorandum-handed-over-on-the-25-april-general-strike/>. At the time of final editing of this thesis, a strike by Transnet employees has had devastating impacts on exports and imports at the country's ports.

⁹²⁹ Act 9 of 2018.

⁹³⁰ As at the time of writing the legislated minimum wage is R23.19 per hour. See GN 732 in GG 45882 7 February 2022.

⁹³¹ Act 63 of 2001.

⁹³² Act 13 of 2004.

⁹³³ See section 2.3.3.7 for a discussion on South Africa's social grant system.

⁹³⁴ Section 6.

⁹³⁵ Section 7.

⁹³⁶ Section 8.

⁹³⁷ Section 9.

⁹³⁸ Section 10.

⁹³⁹ Section 11.

3.3.9 Observations

From the above discussion, it appears that addressing poverty emerges in South African legislation as a recurring idea, akin to a motif in an artistic work.⁹⁴⁰ It is weakly framed and conceptualised, and dealt with in an incidental fashion, as is indicated by the above discussion of the ways in which poverty is reflected in the various Acts of Parliament referred to. It is not useful that the issue of poverty appears in legislation as an incidental issue, mentioned briefly in the preambles to statutes or in their stated objectives, but not developed as a major aspect of their functionality. This amounts to a failure by the legislature to embrace a role as lawmaker relative to poverty. The dearth of practical measures in national legislation to combat poverty could be partially due to a general approach by the legislature that the separation of powers doctrine precludes it from dictating operational matters to the executive, although this research has not been able to find an official statement or stance by any legislature to this effect.

3.4 Features of the Legislative System: A Critical Reflection

In this section, two salient features of the legislative system are critically examined, being its adherence to the separation of powers doctrine, and its domination by the political party system. These are highlighted for discussion because they both have major impacts upon the legislature's functionality and scope of its powers with regard to matters pertaining to poverty.

3.4.1 Separation of Powers as an Impediment to Effective Parliamentary Oversight

Separation of powers is a salient feature of South African constitutional democracy. In terms of the separation doctrine, the functions of the three branches of government are held distinct from each other and are protected from mutual influence, with each branch of government being precluded from interfering in the

⁹⁴⁰ A motif is an idea or image that appears repeatedly in the work of an artist or in a piece of writing or music. See <https://dictionary.cambridge.org/dictionary/english/motif> accessed 9 October 2021. It is notable that a motif in literary work does not necessarily include an analysis of the image it conveys. The recurring motif of poverty in the legislative instruments cited is of a symbolic nature similar to a literary motif.

business of the other two.⁹⁴¹ The conferral in the *Constitution* of distinct and separate powers upon the legislature, executive and judiciary serves to entrench the doctrine of separation of powers.⁹⁴² The strength of the doctrine has further been entrenched by the Constitutional Court, for example in the *Glenister* judgment.⁹⁴³ Thus the prevalence of the doctrine in South Africa is undeniable. However, it is problematic that the doctrine seems to discourage the legislature from intervening in the affairs of the executive, despite the fact that executive oversight by the legislature is mandated by the *Constitution*, and is arguably necessary to ensure practical implementation of national law and policy. In the context of poverty amelioration, this may have the effect of thwarting the implementation of poverty amelioration imperatives contained in the *Constitution* and other legislation. Liebenberg⁹⁴⁴ describes how the pursuit of an idealised form of strictly demarcated powers can supplant the finding of a functional and pragmatic way to facilitate responsive and accountable government. She posits a dialogic model of separation of powers which will allow the limits of power to be tested. Although this is suggested in the context of the dynamics between the courts and the other branches of government, the principle of dialogic interaction would be usefully deployed as between the legislature and the executive.

In its judgment in the second *Certification* case, the Constitutional Court endorses the separation doctrine, pointing out that the separation of powers doctrine prevents usurpation of power by any of the branches of government.⁹⁴⁵ However it does not take into account the fact that separation of powers may have undesirable spin-offs. These may include for example a phenomenon described as “executive political steering”, whereby the executive steers the making and review of legislation

⁹⁴¹ De Vos and Freedman (eds) *South African Constitutional Law in Context* 103. Legislative oversight over the executive and other organs of state is mandated by Section 55(2) of the *Constitution*, which provides: “The National Assembly must provide for mechanisms— (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and (b) to maintain oversight of -
(i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state.”

⁹⁴² De Vos and Freedman (eds) *South African Constitutional Law in Context* 103.

⁹⁴³ *Glenister v President of the Republic of South Africa and Others* 2011 3 SA 347 (CC) para 89.

⁹⁴⁴ Liebenberg *Socio-economic Rights Adjudication under a Transformative Constitution* 67.

⁹⁴⁵ Second *Certification* case, para 109.

in Parliament, which may tend to undermine the authority of the legislature as law-maker.⁹⁴⁶ Although the separation of powers is upheld as a cardinal principle of South African democracy, it is beset with anomalies which render it not necessarily a valuable doctrine for the amelioration of poverty. Arguably the separation imperative does not encourage adherence to the requirement for parliamentary oversight of the executive, it thwarts the integration of functionality between branches of government, and it fosters the dominance of legislative processes by the executive. All of these factors would tend to detract from the authority of the legislature as an institution capable of contributing to the fight against poverty.

The prevalence of a neoliberal governance model in South Africa results in weakness of parliamentary oversight of the executive.⁹⁴⁷ The weakness described is manifested within the context of strictly separated branches of government. A feature of weak parliamentary oversight is disinclination on the part of Parliament to interrogate assumptions about macroeconomics, which in turn is not favourable for poverty amelioration.⁹⁴⁸

3.4.2 Dominance of the Political Party System

De Vos and Freedman explain that the South African parliamentary system is founded largely on the British system.⁹⁴⁹ The foundational principles inherited from the British are the requirement that the support of the majority of parliament is required to form government, and the Westminster concept of strict party discipline.

The voting process of legislative bodies in all three spheres of government is characterised by adherence to political party lines agreed in advance in caucus proceedings.⁹⁵⁰ This has the effect that there is no robust debate about new law within the law-making forum, as the outcome is predetermined.⁹⁵¹ This is

⁹⁴⁶ Kock *The Impact of Political Steering on the Legislative Process* 17.

⁹⁴⁷ Segatti and Pons-Vignon 2013 *Review of African Political Economy* 537-555.

⁹⁴⁸ Segatti and Pons-Vignon 2013 *Review of African Political Economy* 546.

⁹⁴⁹ De Vos and Freedman (eds) *South African Constitutional Law in Context* 111.

⁹⁵⁰ See De Vos 2015 *South African Journal on Human Rights* 39, who describes the way in which party discipline influences voting in the legislature.

⁹⁵¹ The lack of robust debate is particularly evident in the national and provincial legislatures, whose members are elected on a proportional representation basis from party lists, and where

problematic in the context of seeking solutions to poverty. Given that poverty is an intractable problem without obvious solutions, legislative debate could contribute to exploring ideas for its resolution.

The exercise of democracy as it relates to the dynamics between voters and their elected representatives is mediated by political parties, and in consequence of this phenomenon, parties have considerable power.⁹⁵² Party authority may subvert the authority of Parliament, indicating that party political forces may dominate constitutional institutions.⁹⁵³ The proportional representation system in Parliament, which entails voters voting for political parties rather than individual and accountable representatives, further contributes to the disconnection between voters and their representatives.⁹⁵⁴

The power of political parties is further entrenched by the phenomenon of democratic centralism, which is a practice within parties whereby debate only ensues until a vote is taken, and once a collective decision is reached, party members are no longer at liberty to vote against it.⁹⁵⁵ Thus the autonomy of parliamentarians and other law makers to pursue personal belief and conscience is fettered. This creates an ethical dilemma for them, in that they are duty-bound to uphold the *Constitution*, but have their ability to do so constrained by having to adhere to the party line. In the context of poverty amelioration, as with many other contexts, these phenomena could thwart innovation and individual and smaller group initiatives to find appropriate solutions.

The oversight authority of Parliament and other legislative bodies is exercised mainly via oversight committees, but in reality it is difficult for these committees to hold members of the executive to account, since the latter are senior political party

adherence to party lines is strongest. However it is also evident in municipal councils – although partly constituted by proportional representation and partly from elected ward councillors, party caucuses are also held in advance of legislative debate.

⁹⁵² De Vos and Freedman (eds) *South African Constitutional Law in Context* 110.

⁹⁵³ Southall 2014 *Journal of Contemporary African Studies* 332.

⁹⁵⁴ De Vos and Freedman (eds) *South African Constitutional Law in Context* 125.

⁹⁵⁵ De Vos and Freedman (eds) *South African Constitutional Law in Context* 112. See also Mattes 2002 *Journal of Democracy* 22-36, who describes democratic centralism stifling innovation and precluding the implementation of checks and balances within political parties.

members who may be of the same party as the committee members.⁹⁵⁶ Esau⁹⁵⁷ emphasises the weakness of the legislative oversight system in South Africa, citing as contributory factors the overlapping roles of the executive and members of legislative bodies, the adherence to strict party loyalty and discipline, and the practice of holding party caucuses.⁹⁵⁸ These phenomena render it difficult to hold the executive to account in any of its practices.

It is noteworthy that the members of the national executive are drawn from the ranks of the National Assembly and that this produces a blurring between the executive and legislative functions.⁹⁵⁹ A significant consequence of this phenomenon is the potential compromising of the obligation of Parliament to oversee the executive function, with cabinet ministers cast in the dual roles of executive overseers and those subject to oversight. It is also problematic that the oversight process is permeated and influenced by party allegiances and thus lacks impartiality.

Another dynamic influencing the functionality of the legislature, and potentially its efficacy in the realm of poverty amelioration, is the fact that the initiation and preparation of national legislation is undertaken by national ministers, who typically ensure that it adheres strictly to party lines. Legislation typically serves to give effect to government policy and programmes as reflected in election manifestoes and as formulated by political parties.⁹⁶⁰ The law-making function of the legislature is furthermore influenced by the prevailing political culture within political parties being one of deference to leadership of the party. This is particularly pronounced in the case of the ANC.⁹⁶¹

⁹⁵⁶ De Vos and Freedman (eds) *South African Constitutional Law in Context* 149.

⁹⁵⁷ Esau *An Exploratory Study into the Views, Understandings and Experiences of Members of the South African Parliament in Comparative Perspective* 1-13.

⁹⁵⁸ Esau *An Exploratory Study into the Views, Understandings and Experiences of Members of the South African Parliament in Comparative Perspective* 5. See also Malapane 2016 *Journal of Public Administration and Development Alternatives* 135-149, who criticises the practice of drawing ministers from the ranks of members of Parliament and the conflict of interest that emerges from their juxtaposed roles of executive performance and executive oversight.

⁹⁵⁹ De Vos and Freedman (eds) *South African Constitutional Law in Context* 108.

⁹⁶⁰ De Vos and Freedman (eds) *South African Constitutional Law in Context* 156.

⁹⁶¹ De Vos and Freedman (eds) *South African Constitutional Law in Context* 155.

The dominance of the party political system in the legislature, as described in this section, is a factor which inhibits debate and deliberation and the forging of creative solutions to governance issues. It also enables the wielding of political power to dictate process and outcomes in the legislature. These dynamics do not necessarily augur well for the amelioration of poverty. (This discussion has focused on the national legislature, and it is considered likely – but has not been researched – that similar dynamics prevail in provincial and local legislatures.)

3.5 Possible Mechanisms for the Legislature to Contribute to Poverty Amelioration

3.5.1 Awareness of the Fundamental Duty to Ameliorate Poverty

Legislatures in all three spheres of government have a duty to uphold the *Constitution* and promote the Bill of Rights.⁹⁶² Attending to matters pertaining to poverty amelioration is a component of these duties. Awareness of this fundamental obligation should permeate the work of legislative bodies.

As makers of law, legislative entities should have a clear vision of the ethos and ideology underpinning the body of legislation they are tasked with creating and maintaining. In the South African context this includes having a clear understanding of the poverty amelioration imperatives reflected in the *Constitution*. Legislation under consideration for passing or repeal must be seen in relation to its broader purpose, the ethos of the *Constitution*, and the impacts of the proposed legislation. An awareness of these dimensions could safeguard against the risk of passing legislation in an abstract manner without due regard for its functionality in the social, political and economic context in which it is intended to operate.

3.5.2 Enhancement of Oversight Functions

Whilst there may be some scope for the legislature to enhance its role as legislator, there is probably much more scope for it to enhance its oversight functions. A part of its oversight role is the overseeing of government programmes and initiatives

⁹⁶² Section 7 of the *Constitution*.

that seek to or have the potential to ameliorate poverty. In reality however the legislative oversight role is compromised in South Africa for a number of reasons.⁹⁶³ In conceptualising ways in which the legislature could play a more effective role in poverty amelioration, it is important to recognise the weakness of the current oversight function and consider how this function could possibly be enhanced. Enhancement of this function could enable legislatures to exert some control over the practical implementation by the executive of the poverty amelioration imperatives articulated in legislation.⁹⁶⁴

There are a number of deficiencies in the functionality of the legislative oversight role in South Africa, described by various authors. The application of the separation of powers doctrine poses a challenge to the exercise of legislative oversight.⁹⁶⁵ Furthermore, the idolising of political leadership, particularly within party ranks, renders parliamentarians less inclined to question the leadership's authority.⁹⁶⁶ This is a feature of political culture within the ruling party and possibly within other parties, which constrains the holding of government to account.⁹⁶⁷ Weaknesses in the oversight process are also attributable to the fact that legislative reform was prioritised in the *Constitution* and in its implementation post the transition to democracy, and oversight therefore took on a secondary role.⁹⁶⁸ There are furthermore inherent weaknesses in the oversight process which must be overcome, being the fact that it is exercised *ex post facto*, with overseers having the benefit of

⁹⁶³ These include the dominant role of party politics – see De Vos 2015 *South African Journal on Human Rights* 30, and Esau *An Exploratory Study into the Views, Understandings and Experiences of Members of the South African Parliament in Comparative Perspective* 1-13. Election by party list and strict adherence to party instructions and hierarchy are factors limiting the effectiveness of Parliament – see Rotberg and Salahub 2013 *African Legislative Effectiveness* 14. The report commissioned by Parliament 2012 *Oversight Model of the South African Legislative Sector* 70 acknowledges that the oversight role of parliament is currently ineffective. The World Bank Institute *Legislative Oversight and Budgeting: A World Perspective* 328 states that the viability of a parliament is vitiated by having command of the executive in the hands of the dominant party.

⁹⁶⁴ For an account of how poverty is dealt with in national legislation, see section 3.2.

⁹⁶⁵ Matebese-Notshulwana and Lebakeng *Constraints and Prospects for Legislative Oversight in Emerging African Democracies: the Case of South Africa* 184.

⁹⁶⁶ Matebese-Notshulwana and Lebakeng *Constraints and Prospects* 187.

⁹⁶⁷ Matebese-Notshulwana and Lebakeng *Constraints and Prospects for Legislative Oversight in Emerging African Democracies: the Case of South Africa* 188.

⁹⁶⁸ Matebese-Notshulwana and Lebakeng *Constraints and Prospects for Legislative Oversight in Emerging African Democracies: the Case of South Africa* 189.

hindsight but not bearing responsibility for the actions being overseen.⁹⁶⁹ Legislative oversight is impeded by the dominance of the party political system stifling discourse and discussion, and the proportional representation system fostering party loyalty.⁹⁷⁰ The roles and fates of the governing party and government are securely intertwined, and this has adverse impacts upon the efficacy of oversight.⁹⁷¹ Members of legislative bodies are reluctant to call members of the executive from their own party to account, as this is seen as non-comradeship and is potentially career-limiting.⁹⁷² The legislature becomes a rubber-stamping institution under these circumstances.⁹⁷³ The majority of members of the legislature seek to maintain and support government rather than question its actions.⁹⁷⁴ Having procedures for oversight is of itself insufficient if these are not supported by a culture of oversight and an appetite for pursuing it.⁹⁷⁵ This will inevitably be an iterative and deliberative process which is only likely to succeed if the majority party takes due cognisance of the need for more effective oversight and ways in which this could be achieved.

Deficits in the effectiveness of legislative oversight must be seen in the context of a wider crisis of governance in South Africa, characterised by ongoing poverty, poor infrastructure, weak institutions and a general lack of accountability.⁹⁷⁶ The problem of ineffective oversight must be understood in the context of these broader dynamics.

⁹⁶⁹ Matebese-Notshulwana and Lebakeng *Constraints and Prospects for Legislative Oversight in Emerging African Democracies: the Case of South Africa* 190.

⁹⁷⁰ Matebese-Notshulwana and Lebakeng *Constraints and Prospects for Legislative Oversight in Emerging African Democracies: the Case of South Africa* 191.

⁹⁷¹ Mbete *An Evaluation of Oversight and Accountability by the Fourth Parliament of the Republic of South Africa* 33.

⁹⁷² Mbete *An Evaluation of Oversight and Accountability by the Fourth Parliament of the Republic of South Africa* 33.

⁹⁷³ Mbete *An Evaluation of Oversight and Accountability by the Fourth Parliament of the Republic of South Africa* 33.

⁹⁷⁴ Mbete *An Evaluation of Oversight and Accountability by the Fourth Parliament of the Republic of South Africa* 34.

⁹⁷⁵ Mbete *An Evaluation of Oversight and Accountability by the Fourth Parliament of the Republic of South Africa* 58.

⁹⁷⁶ Fagbadebo 2019 *Insight on Africa* 44. See also Parliament of the Republic of South Africa *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* 79.

The role of legislatures in the monitoring and evaluation of government may be an underexplored field.⁹⁷⁷ Such evaluation is beset by the inherent difficulty of evaluating the executive against its constitutional obligations, with these obligations delineated as part of a complex web of legal precedent.⁹⁷⁸ The functionality of legislatures in institutionalising monitoring and evaluation processes into their operations typically lags behind that of executive institutions.⁹⁷⁹ Thus there are embedded institutional features which may serve to foster inertia and render change in the realm of pursuing effective oversight difficult. Nevertheless there may be ways in which legislative oversight can be enhanced. Matebese-Notshulwana and Lebakeng suggest that there must be a conscious effort on the part of legislatures to translate the political emancipation which came with the transition to democracy, into economic well-being.⁹⁸⁰ This could conceivably be achieved by way of a concerted effort on the part of those responsible for oversight to ensure that the programmes and projects of the executive are oriented towards realising the poverty amelioration imperatives contained in the *Constitution* and other legislation.⁹⁸¹ Matebese-Notshulwana and Lebakeng do not advocate that reforming the approach of those responsible for legislative oversight will on its own enhance the quality of oversight. They propose in addition the fostering of a responsible citizenry, educated in governance issues, who can interact with the legislature and play a part in fulfilling the oversight function.⁹⁸²

Fagbadebo puts forward the viewpoint that the purpose of oversight must be understood to be answerability and accountability in the exercise of state powers, in order to ensure effective policy outcomes.⁹⁸³ Mbete emphasises that the

⁹⁷⁷ Zantsi 2020 *African Evaluation Journal* 2.

⁹⁷⁸ Zantsi 2020 *African Evaluation Journal* 3.

⁹⁷⁹ Zantsi 2020 *African Evaluation Journal* 5.

⁹⁸⁰ Matebese-Notshulwana and Lebakeng *Constraints and Prospects for Legislative Oversight in Emerging African Democracies: the Case of South Africa* 190.

⁹⁸¹ For an outline of relevant legislation, see section 3.3.

⁹⁸² Matebese-Notshulwana and Lebakeng *Constraints and Prospects for Legislative Oversight in Emerging African Democracies: the Case of South Africa* 196.

⁹⁸³ Fagbadebo 2019 *Insight on Africa* 45.

imperative of exercising financial scrutiny as part of the oversight process must be kept in mind.⁹⁸⁴

Committees of Parliament are the primary vehicle through which oversight is conducted, and they fulfil this function via briefings, visits and consideration of reports.⁹⁸⁵ These committees are at a disadvantage relative to the executive with regard to the availability of resources.⁹⁸⁶ They function in an *ad hoc* manner which manifests in a failure to notice problems in budgetary allocations, being reactive rather than proactive, failure to reconcile expenditure with policy priorities, failure to track performance over time, and failure to follow up on recommendations.⁹⁸⁷

The provision of technical expertise to oversight committees is a *sine qua non* for effective oversight.⁹⁸⁸ This goes hand in hand with the allocation of resources generally and the creation of a framework for oversight.⁹⁸⁹ A further significant element of effective oversight is the recognition of the importance of public participation in the democratic context.⁹⁹⁰

It appears from the study undertaken by Mbete that there are a number of practical dysfunctions in the oversight regime, the correction of which would contribute greatly to better functionality. Training for members of legislatures, especially with regard to their responsibilities being divorced from their party affiliations, is imperative, as they may not always fully appreciate their roles and responsibilities. Legislative and executive programmes need to be aligned in order for the latter to be effectively monitored by the oversight mechanism. Reporting to the legislature

⁹⁸⁴ Mbete *Evaluation of Oversight and Accountability by the Fourth Parliament of the Republic of South Africa* 32.

⁹⁸⁵ Parliament of the Republic of South Africa *Oversight Model of the South African Legislative Sector* 23.

⁹⁸⁶ Parliament of the Republic of South Africa *Oversight Model of the South African Legislative Sector* 36.

⁹⁸⁷ Parliament of the Republic of South Africa *Oversight Model of the South African Legislative Sector* 23.

⁹⁸⁸ Mbete *An Evaluation of Oversight and Accountability by the Fourth Parliament of the Republic of South Africa* 33.

⁹⁸⁹ Mbete *An Evaluation of Oversight and Accountability by the Fourth Parliament of the Republic of South Africa* 34.

⁹⁹⁰ Mbete *An Evaluation of Oversight and Accountability by the Fourth Parliament of the Republic of South Africa* 44.

on executive responses to oversight interventions is imperative, and non-compliant members of the executive need to be sanctioned. As a general principle, power relations between the committee chairs and the executive need to be understood and managed.⁹⁹¹ Oversight must be understood as an evaluative and iterative process, in order for it to be developmental and constructive in nature.⁹⁹² Effective oversight requires that a process of monitoring and evaluation be followed, within an evaluative culture, and including processes of self-assessment.⁹⁹³

The 2017 *Parliamentary Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* puts forward a robust vision of how the legislature can play a role in poverty amelioration. The report states that to address poverty, distribute wealth equitably and spur jobs-rich growth, the legislature must “guide society to focus on fundamental issues that underpin outcomes in the economy and society”. According to the report, this entails the redress of defects created by apartheid, the development of human capabilities, overseeing reform in healthcare and education, and changing the structure of the economy to encourage labour absorptive growth.⁹⁹⁴ In the context of a report prepared for the legislature’s consideration, these observations are significant. However, the report is lacking in practical recommendations for implementation of the imperatives articulated.

The report builds on recommendations made in the 2012 parliamentary document *Oversight Model of the South African Legislative Sector*. This document recommends that transversal issues should be addressed as special parliamentary oversight projects. Conceivably poverty, which is a multi-faceted issue, could be dealt with in this way.⁹⁹⁵ It is suggested that dealing with transversal issues as part of legislative

⁹⁹¹ Mbete *An Evaluation of Oversight and Accountability by the Fourth Parliament of the Republic of South Africa* 139-149.

⁹⁹² Zantsi 2020 *African Evaluation Journal* 1.

⁹⁹³ Zantsi 2020 *African Evaluation Journal* 4.

⁹⁹⁴ Parliament of the Republic of South Africa *High Level Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change* 535.

⁹⁹⁵ Parliament of the Republic of South Africa *Oversight Model of the South African Legislative Sector* 26.

oversight requires the provision of resources, the formulation and pursuit of outputs, outcomes and programmes.⁹⁹⁶

The 2012 *Oversight Model of the South African Legislative Sector* document emphasises that the task of oversight needs to be undertaken in an empirical manner rather than in a spirit of party posturing.⁹⁹⁷ It also recommends that meetings of committees should be structured in such a way as to be conducive to empirical oversight and that the quality of reports to committees should be improved.⁹⁹⁸ As with the 2017 Report, the 2012 document provides valuable insights into ways in which the oversight function of Parliament could be enhanced, but stops short of recommending practical steps to achieve this.

3.6 Chapter Summary

This chapter comprises an analysis targeted towards considering the role of the legislature in poverty amelioration. The legislative function is likely to be commonly understood in the three spheres of government but is explored from the perspective of legislation and literature which pertains mostly to the national legislature.

An analysis of the efficacy of legislation as a vehicle for poverty amelioration is undertaken, based on a range of national legislative instruments that purport to have such amelioration as an underpinning imperative. The analysis commences with the *Constitution*, which is the primary instrument enjoining legislatures to consider poverty amelioration in the course of their work. The relevant constitutional provisions are supplemented by various categories of national legislation which incorporate poverty amelioration into their text. These include broad public law instruments, legislation dealing with land matters, legislation on energy and resources, health legislation, education legislation, environmental legislation, and labour legislation. A pattern is discerned of cursory and anecdotal

⁹⁹⁶ Parliament of the Republic of South Africa *Oversight Model of the South African Legislative Sector* 26.

⁹⁹⁷ Parliament of the Republic of South Africa *Oversight Model of the South African Legislative Sector* 26.

⁹⁹⁸ Parliament of the Republic of South Africa *Oversight Model of the South African Legislative Sector* 36.

mention of poverty in the legislation under consideration, without any inclusion of principles and methodologies for addressing poverty issues. This appears to represent that legislation is not in itself an efficacious instrument for taking forward poverty amelioration imperatives.

There are features of the legislative system that render it less than functional and successful in ameliorating poverty. These include its adherence to the separation of powers doctrine, which is not conducive to effective legislative oversight, neither to the forging of integrated governance between the executive and the legislature. In addition the dominance of the party political system in dictating the functional dynamics of the legislative system serve in a number of respects to impede effective oversight. This is characterised by predetermined voting as dictated by parties, which subverts the authority of the legislature, democratic centralism, the enforcement of strict party discipline, and idolisation of political leadership.

Possible solutions for finding a role for the legislature in poverty amelioration include raising awareness of the fundamental nature of the duty of branches of government to ameliorate poverty, and awareness of the ethical and ideological considerations that arise in their work that are relevant to this imperative. They also include pursuing an enhanced oversight function to enable the legislature to effectively call the executive to account with regard to its poverty amelioration obligations.

In conclusion, it is worth reiterating that although the legislature is not widely understood to be a branch of government responsible for amelioration of poverty, it is indeed capable of exerting positive influence in this regard through two mechanisms. The first of these is via an enhanced legislative process to provide for the interweaving of poverty amelioration considerations into the law-making process. The second is via enhanced legislative oversight as proposed in this chapter.

CHAPTER 4

THE ROLE OF THE EXECUTIVE IN THE AMELIORATION OF POVERTY

4.1 Introduction

In this chapter, consideration is given to the roles and responsibilities of the executive in the amelioration of poverty, and how these may be circumscribed and fulfilled. This discussion forms part of the broader context of this thesis, which is a consideration of the relative roles of the three branches of government in poverty amelioration, and thus it feeds into the concluding chapter where these relative roles are juxtaposed and evaluated.

It seems logical to assume that the executive is the branch of government which is primarily responsible for poverty amelioration, given that it initiates policy and legislation, executes projects and programmes, implements legislation and allocates budget. Thus it is resourced to take decisive action towards poverty relief.

An introduction follows to the nature of the South African executive within the three spheres of government – national, provincial and local - as delineated in the *Constitution* and other legislation. This is followed by a discussion of government policy relevant to poverty, to illustrate how poverty issues are currently framed by the executive and to highlight possible shortcomings in that regard. Thereafter consideration is given to possible courses of action for the executive to address poverty issues more thoroughly and meaningfully.

4.2 The Executive in South Africa

National executive authority is vested in the president,⁹⁹⁹ and provincial executive authority in the provincial premier.¹⁰⁰⁰ In municipalities executive authority is vested either in the executive Mayor or in an executive council.¹⁰⁰¹ Like legislative bodies,

⁹⁹⁹ Section 85 of the *Constitution*.

¹⁰⁰⁰ Section 125 of the *Constitution*.

¹⁰⁰¹ Sections 42 and 54 of the *Local Government: Municipal Structures Act* 117 of 1998.

executive authorities are obliged to uphold the *Constitution* and the Bill of Rights, and by logical deduction, to pursue the imperative of ameliorating poverty.

National executive authority, although vested in the President, is exercised by him or her together with the cabinet, as per section 85(2) of the *Constitution*. This section elaborates on what executive authority comprises, as follows: (a) implementing national legislation except where the *Constitution* or an act of parliament provides otherwise; (b) developing and implementing national policy; (c) co-ordinating the functions of state departments and administrations; (d) preparing and initiating legislation; and (e) performing any other executive function provided for in the *Constitution* or in national legislation.

A similar governance structure prevails in provinces, with executive authority vesting in the premier together with the members of the executive council, as per section 125(2) of the *Constitution*, as follows:

- (a) implementing provincial legislation in the province;
- (b) implementing all national legislation within the functional areas listed in schedules 4 and 5 except where the *Constitution* or an Act of Parliament provides otherwise;
- (c) administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;
- (d) developing and implementing provincial policy;
- (e) co-ordinating the functions of the provincial administration and its departments;
- (f) preparing and initiating provincial legislation; and
- (g) performing any other function assigned to the provincial executive in terms of the *Constitution* or an Act of Parliament.

In the case of local government, section 151(2) of the *Constitution* provides that executive authority vests in the municipal council. The *Constitution* does not

elaborate upon how this authority is exercised. The *Local Government: Municipal Structures Act*¹⁰⁰² provides however for municipalities to establish either an executive committee system or an executive mayoral system.¹⁰⁰³ Whichever of these applies, they are bound to fulfil the objects set out in section 152 of the *Constitution*.¹⁰⁰⁴ These are: (a) to provide democratic and accountable government for local communities; (b) to ensure the provision of services to communities in a sustainable manner; (c) to promote social and economic development; (d) to promote a safe and healthy environment; and (e) to encourage the involvement of communities and community organisations in the matters of local government. These objects are applicable to the general functionality of local government, both legislative and executive.

It is noteworthy that in all three spheres of government, although the executive does not have legislative decision-making powers, it exercises considerable influence over the development of law, as it initiates and develops legislation for presentation to legislative bodies, and develops policy for consideration by them. In addition, it makes secondary legislation such as regulations. The executive in national, provincial and local government also determines mechanisms and budgets for implementation of law enacted by the legislature. Thus, there is an interplay of forces between the legislature and the executive that determines policy direction and outcomes. With regard to policy and legislative content and orientation, there is no legal instrument dictating how this interplay of forces should be managed. This is unfortunate in the context of poverty amelioration, as clear direction in this regard could be geared towards achieving this purpose. This could be achieved via intergovernmental collaboration as mandated in terms of chapter 3 of the *Constitution* and the *Intergovernmental Relations Framework Act*.¹⁰⁰⁵

¹⁰⁰² Act 117 of 1998.

¹⁰⁰³ Chapter 4 of the Act.

¹⁰⁰⁴ Section 19(1) of the Act.

¹⁰⁰⁵ Act 13 of 2005.

4.3 National Government Policy Relevant to Poverty

In this section, a critical view is presented of popular policy positions relevant to poverty and which either have won popular support or were espoused by the national executive prior to the political transition in 1994, at the time of the transition, and subsequently. The purpose is to illustrate that national executive policy has substantial impacts and effects which may influence the trajectory of policy, with a view to developing direction for executive policy going forward.

4.3.1 The Freedom Charter and the RDP

The *Freedom Charter* was the main manifesto document of the ANC whilst it was banned and in exile prior to the political transformation in 1994, and as such it has been a significant informant of public policy. The following content thereof is of relevance to socio-economic rights and poverty.

In article 4, the charter speaks of having the land owned by those who work it, and ending famine and hunger. Article 8 speaks of free education, and article 9 of affordable housing, plentiful food and free healthcare. The charter refers explicitly to the pursuit of democracy, less explicitly to social justice, and not at all to the desired political and economic systems necessary to achieve its objectives. It may with justification be said to have a socialist orientation, in that it clearly envisages a society based upon socio-economic equality, such as is promoted by socialist theory. By the time the political transition was underway in the early 1990's, the *Freedom Charter* as the official manifesto of the ANC was supplanted by the negotiating positions presented by the party's newly released leaders in the transitional deliberations.

The RDP, released in 1994, encapsulated the transitional vision of the ANC. It was prefaced with a message from Nelson Mandela, and included a broad transformative vision of all aspects of social, political and economic life, giving due cognisance to the deprivation and abuse that occurred under apartheid. In Mandela's preface, there is explicit reference to the need to address socio-economic issues as a

component of democracy.¹⁰⁰⁶ This appeared to be intended as an underpinning element of a poverty relief agenda to follow. There are a number of references to redistributive justice in the RDP. For example there are references in clauses 1.4.2 and 2.4.6 relating to the redistribution of land to landless people. There are also broad requirements set out in clause 4.8.3 for affirmative action in the workplace and in education. Both of these imperatives are redistributive in nature, taking away privilege and opportunity from the previously advantaged members of society and conferring these upon previously disadvantaged. The policy orientation of the RDP was similar to that of the *Freedom Charter*.

4.3.2 The GEAR Policy

Approximately two years after the publication of the RDP and the first democratic election, the ANC government saw fit to publish a new national development strategy entitled *Growth, Employment and Redistribution: A Macroeconomic Strategy*, popularly known as GEAR. This encapsulated the macroeconomic policy of the day as decided upon by the incumbent government.

GEAR deals with high-level macro-economic objectives. It does not consider lower level socio-economic issues that directly affect the rights of people.¹⁰⁰⁷ Furthermore, it is founded upon the principles of neoliberalism¹⁰⁰⁸ and capitalism,¹⁰⁰⁹ and as such favours business rather than the poor.¹⁰¹⁰ GEAR served to replace local-level discourses about economic models with the widely accepted global discourse favouring neoliberalism.¹⁰¹¹ It has been much criticised for its neoliberal orientation

¹⁰⁰⁶ Government of the Republic of South Africa *Reconstruction and Development Programme*, 4th page (pages are unnumbered).

¹⁰⁰⁷ Moyo and Mamabolo 2014 *Journal of Public Administration* 946.

¹⁰⁰⁸ Neoliberalism is a policy in terms of which control of economic factors is shifted from the public sector to the private sector, as per Investopedia 2017 <http://www.investopedia.com/terms/n/neoliberalism.asp>.

¹⁰⁰⁹ Capitalism is an economic system in which capital goods are owned by private individuals or businesses, and the production of goods and services is regulated by supply and demand in the market, per Investopedia 2017 <http://www.investopedia.com/terms/c/capitalism.asp> (accessed 16 January 2019).

¹⁰¹⁰ See section 2.3.1 for a more detailed discussion of neoliberalism and capitalism (amongst other ideologies) as determinants of poverty.

¹⁰¹¹ Peet 2002 *Antipode* 74.

by a number of authors.¹⁰¹² Their criticism has included the assertion that it serves to stifle rather than advance transformation.¹⁰¹³ It has furthermore been asserted that it exacerbates inequality and unemployment.¹⁰¹⁴ It is a hegemonic approach, it is argued, with power vested in business and negligible, if any, trickle-down benefits reaching the poor.¹⁰¹⁵ Neoliberalism does not assist the cause of development in South Africa.¹⁰¹⁶ The practices of neoliberalism, together with corruption and the prevalence of transnational corporations, have caused a destructive version of capitalism to be practised in Sub-Saharan Africa.¹⁰¹⁷ Neoliberalism has further been resilient in South Africa since the time of GEAR.¹⁰¹⁸ It has even served as an instrument of oppression of contradictory views.¹⁰¹⁹ The transition from the RDP to GEAR represented an ideological about-turn in the orientation of the work of the executive.¹⁰²⁰

4.3.3 *The Social Welfare White Paper 1997*

This paper,¹⁰²¹ published in 1997, articulates a vision of a welfare state in which those in need of social assistance are taken care of, in terms of a broad plan to tackle poverty and other social ills. It is undoubtedly pro-poor and socialist in its orientation, and in this respect it is not aligned to GEAR.¹⁰²² The paper underpins the *Social Assistance Act*, but the Act is much less liberal than the paper in its delineation of beneficiaries who qualify for social assistance. In particular, the Act does not provide for assistance for able-bodied adults living in poverty.

¹⁰¹² See section 2.3.1.1 for a discussion of neoliberalism as a determinant of poverty.

¹⁰¹³ Adelzadeh 1996 *Transformation* 66. See also Schneider 2003 *Review of Social Economy* 25.

¹⁰¹⁴ Alexander 2013 *Review of African Political Economy* 605.

¹⁰¹⁵ MacDonald and Smith 2004 *Urban Studies* 1461.

¹⁰¹⁶ Sai-wing Ho and Schneider 2002 *Journal of Economic Issues* 507.

¹⁰¹⁷ Schneider 2008 *Forum for Social Economics* 115.

¹⁰¹⁸ Segatti and Pons Vignon 2013 *Review of African Political Economy* 507.

¹⁰¹⁹ Vally in "The Political Economy of State Repression in South Africa" argues that the neoliberal model has the effect of constraining contrary views and may lead to repression, as occurred at the time of the protests relating to the World Summit on Sustainable Development in Johannesburg in 2002.

¹⁰²⁰ See section 2.3.1.1 in which neoliberalism as a determinant of poverty is discussed.

¹⁰²¹ Department of Welfare *Social Welfare White Paper 1997*.

¹⁰²² See the discussion of the orientation of GEAR in the previous section.

4.3.4 The NDP

The NDP is an aspirational document which expresses the intent that it will "eliminate poverty", "reduce inequality", "change lives" and create a "new story" with regard to developmental issues in South Africa.¹⁰²³ Notwithstanding its promotion of the notion of social protection,¹⁰²⁴ it places a strong emphasis on development of capabilities rather than pure redistribution and restorative justice.¹⁰²⁵ In terms of this approach, the state is portrayed as a liberal developmental state, focused upon economic growth, state-led industrialisation, a growth focus in labour markets, and authoritarian in its approach. It is questionable whether this model is a good fit with conditions in contemporary South Africa.¹⁰²⁶ In the NDP, an attempt is made to account for the purported failure of the RDP.¹⁰²⁷ This failure is blamed on a lack of co-ordination in government and external economic shocks. There is no reference to the fact that since the espousal of GEAR, government policy has moved away from the principles of social justice and away from the ideological orientation of the RDP.

Although Chapter 11 of the NDP favours the notion of social protection, which is pro-poor, it must be questioned whether the measures envisaged to provide social assistance are sufficient in their reach and in their quantum to meaningfully address poverty. This is evident from the *Medium Term Strategic Framework* (MTSF) discussed below.

¹⁰²³ Preamble to *National Development Plan 2030* 3. The author of the preamble, Minister Trevor Manuel, describes the orientation of the plan as one which revolves around citizens being active in development, and a capable and developmental state.

¹⁰²⁴ *National Development Plan 2030*, Chapter 11. In terms of this chapter social protection is planned for the most vulnerable members of society such as the aged, children and the disabled.

¹⁰²⁵ Moyo and Mamabolo 2014 *Journal of Public Administration* 946. A capabilities approach is one which was advocated by Amartya Sen in the 1980's and which focuses on the ability of people to do and be. In the social justice context proponents of this approach would argue that it is up to government to provide opportunity, and up to individuals to embrace opportunity to the extent that they are able.

¹⁰²⁶ Burger in *How Suitable is a Developmental State to Tackle Unemployment, Inequality and Poverty in South Africa?* 1 argues that the developmental state model is not able to tackle unemployment, inequality and poverty in South Africa.

¹⁰²⁷ NDP 16.

The MTSF is a document produced every five years to report on the progress made with the implementation of the NDP and to set out further intended actions by government for such implementation. The most recent of these frameworks, released in 2019, is prefaced by a statement by President Cyril Ramaphosa in which he makes the somewhat contradictory statement that government has made significant strides in meeting basic human needs, but has not managed to overcome inequality and poverty. He does however reiterate the imperative in the NDP of eliminating poverty and reducing inequality by 2030.¹⁰²⁸ His words are echoed by the late Minister Jackson Mthembu in his introductory overview, in which he states that government has made some progress towards achieving the objectives of the NDP but that fundamental transformation is still lacking.¹⁰²⁹ In the introduction to the framework, it is stated that the human rights and dignity of historically oppressed people have been partially regained.¹⁰³⁰ Thus it is acknowledged, albeit rather obliquely, that there was little progress between 2012 and 2019 with the realisation of the objectives of the NDP.

The framework contains a number of anecdotal accounts of improvements to service delivery. For example, it accounts for a substantial increase in the number of South Africans receiving anti-retroviral treatment for AIDS.¹⁰³¹ It is stated that multidimensional poverty, measured in terms of indicators for health, education, standard of living and economic activity has declined from 17.9 percent of the population in 2001 to 7 percent in 2016.¹⁰³² However this information is followed by the telling statement that “true transformation of our economy, our environment and our society elude us (sic). South Africa still confronts the challenges of poverty, inequality and unemployment.” It is further stated that the country remains the most unequal in the world in terms of its Gini coefficient score.¹⁰³³

¹⁰²⁸ Presidency of the Republic of South Africa *Medium Term Strategic Framework 2019-2024* 4. This is the most recent framework issued under the NDP.

¹⁰²⁹ MTSF 6.

¹⁰³⁰ MTSF 10.

¹⁰³¹ MTSF 11.

¹⁰³² MTSF 12.

¹⁰³³ MTSF 12. See section 1.3 for a discussion of the Gini coefficient as a measure of inequality, with specific reference to South Africa.

It is acknowledged in the framework that since the inception of the NDP the percentage of people living below the National Planning Commission's "lower-bound poverty line"¹⁰³⁴ has increased by 0.8 percent. However it is alleged that multidimensional poverty decreased by 12.9 percent between 2001 and 2016.¹⁰³⁵ This is confusing and indicative of a measure of arbitrariness in the deployment of poverty measurement criteria.

A full analysis of the intended actions reflected in the framework is outside of the scope of this thesis. However it can be said that it is questionable whether the framework has the potential to reduce poverty and inequality. This is largely because, like the NDP itself, it adopts a neoliberal approach to governance, and this is not favourable for poverty relief.¹⁰³⁶

4.3.5 Observations on National Government Policy Relevant to Poverty

The purpose of this discussion on national government policy relevant to poverty has been to illustrate how executive policy on fundamental planning and macroeconomic issues relevant to poverty has evolved since before the political transition, to date. The *Freedom Charter* and the RDP were fundamentally socialistic in their orientation, with strong redistributive imperatives. These policy documents dealt *inter alia* with issues of redistribution of land, affirmative action in labour, and reform in education. Shortly after the political transition however, they were supplanted by GEAR, which has a neoliberal and capitalist orientation, and promotes adherence to international macroeconomic models. This has been adverse for poverty amelioration. The NDP of 2012 pursues a similar orientation, and the MTSF which serves as a review and assessment of the plan indicates that the plan has not made meaningful progress with regard to poverty amelioration.

¹⁰³⁴ The "lower bound poverty line" is an estimate of the monthly monetary need per person of basic food for survival plus a limited range of non-food items. See Statistics SA *National Poverty Line* 2019 3.

¹⁰³⁵ MTSF 16.

¹⁰³⁶ See the discussion in section 2.3.1.1 regarding neoliberalism as a cause or determinant of poverty.

The discussion of the trends in executive policy relevant to poverty serves to emphasise how executive policy, particularly with regard to macroeconomic and broad governance issues, has major impacts upon the trajectory of poverty and poverty amelioration. It is incumbent upon the executive to consider these seen against the backdrop of time, to inform policy planning into the future with a view to effectively addressing poverty.

4.4 Possible Mechanisms for the Executive to Pursue Poverty Amelioration

In this section possible mechanisms for action by the executive in addressing poverty amelioration are explored. These are based on material from the literature study in chapter 2, transposed into practical solutions for addressing the issue at hand.

4.4.1 Gaining and Promoting Awareness of the Nature and Dimensions of Poverty

Awareness of the nature and dimensions of any phenomenon, including poverty, is a prerequisite for finding solutions to address what is required for making changes to the phenomenon in question. There are two respects in which the executive should play a role with regard to such awareness. Firstly, it should initiate programmes to foster the necessary awareness in government officials and entities, particularly policy makers and decision makers. Secondly, and in order to obtain buy-in from the citizenry for poverty amelioration initiatives it should implement programmes to raise public awareness of the nature and dimensions of poverty. Awareness thereof on the part of government and the public could serve to create a synergistic society-wide awareness of the seriousness of the phenomenon, and contribute towards its resolution.

The entrenched nature of poverty in South Africa is something of which the entire population spectrum should be aware.¹⁰³⁷ Such an awareness would form a foundational basis for action on the part of government, and potential support from business and the citizenry, all working together. It could furthermore act in synergy

¹⁰³⁷ Sibanda 2011 *Stellenbosch Law Review* 482. See also the discussion in section 2.2.1.

with awareness of other features and dimensions thereof to create a matrix of considerations surrounding poverty of which society as a whole is aware. This point will not be restated in the further discussion of issues of which awareness is needed, but it should be assumed that it applies generally throughout this section.

The executive and the citizenry should be aware of the persistence of historical disadvantage and deprivation in segments of society.¹⁰³⁸ A corollary of such an awareness would be an acknowledgement that the manifestations of apartheid, which was officially abolished in the early to mid-1990s, still persist in contemporary times. It is widely acknowledged that apartheid was an undesirable and socially unjust system, but it is possible that complacency and lack of awareness result in a lack of perception of the persistence of negative manifestations thereof into the present time.¹⁰³⁹

A full understanding of the nature and dimensions of poverty requires that its multidimensionality be recognised. The dimensions straddle various areas of human life such as kinship (from which the poor may be alienated), food insecurity, crowded living conditions, energy poverty, unemployment and social dysfunctionality.¹⁰⁴⁰

The executive and the citizenry need to understand that poverty is a sociological phenomenon which is broader than money-metric deprivation.¹⁰⁴¹ The additional dimensions include social power relations which are adverse for the poor, and socio-historical influences which have rendered the poor vulnerable to capitalism,

¹⁰³⁸ This phenomenon is ably described in Cole, Bailey and New 2017 *Sustainability Science* 829.

¹⁰³⁹ Pieterse describes poverty as a consequence of the deprivations of apartheid – see Pieterse 2004 *Human Rights Quarterly* 887 and Pieterse 2005 *SA Public Law* 158. In similar vein, Dugard explains that poverty has remained racialised after the demise of apartheid – see Dugard 2013 *The Activist* 3. See also Rapatsa 2015 *Judicial Tribune* 218 who writes of the perpetuation of the “documented cruelty” of apartheid. See also Gradin 2012 *Journal of African Economies* 187, who avers that the ongoing prevalence of racial inequality after the demise of apartheid is attributable to forces of inertia. See also the discussion in section 2.2.5.

¹⁰⁴⁰ Woolard 2002 *Overview of Poverty and Inequality in South Africa* 1-15.

¹⁰⁴¹ Du Toit 2005 *PLAAS Chronic and Development Studies* 2. The phenomenon of poverty being characterised by sociological phenomena is illustrated in section 2.2.5 (dealing with its association with apartheid) and section 2.2.120 (linking poverty issues with urbanisation).

authoritarianism and modernisation over the course of history.¹⁰⁴² An understanding of the depth of these dimensions could be advantageous for a process of understanding what is required in order to forge poverty amelioration solutions.

In the process of seeking a deeper understanding of poverty-related issues, the executive and the citizenry should understand its temporal and cyclical dimensions. These relate to its persistence over time¹⁰⁴³ and the fact that it is a burgeoning and worsening problem.¹⁰⁴⁴ An awareness of these dimensions leads inevitably to the conclusion that it is necessary for government and the citizenry to take action to turn around the trajectory of persistent and worsening poverty.¹⁰⁴⁵

The executive and the citizenry need to have an awareness of poverty being linked to class, and class in turn being linked to race.¹⁰⁴⁶ Such an awareness would enable government, with the support and endorsement of the citizenry, to devise programmes to break down the barriers that inevitably form part of a stratified class structure.¹⁰⁴⁷

Government needs to foster within its ranks and amongst the citizenry an awareness of the fact that economic power structures formed prior to the political transition remained intact, which is a substantial contributor to the persistence of post-transition poverty.¹⁰⁴⁸ Awareness of this phenomenon could serve to underpin a shift towards new economic models, which could bode better for poverty amelioration.

¹⁰⁴² Du Toit 2005 *PLAAS Chronic and Development Studies 2*. See also Klasen 2000 *Review of Income and Wealth* 33 where it is suggested that a deprivation index should be devised in order to properly understand poverty.

¹⁰⁴³ Dugard 2013 *The Activist* 3 – here it is averred that the persistence of poverty over a period of almost 20 years since the political transition is an indictment upon the constitutional transformative project.

¹⁰⁴⁴ Mc Lean *Constitutional Courts, Deference and Socio-economic Rights in South Africa* 220.

¹⁰⁴⁵ The theoretical foundation of these dimensions of poverty appears in section 2.2.4.

¹⁰⁴⁶ Burger *et al The Middle Class in Contemporary South Africa: Comparing Rival Approaches* 1-20.

¹⁰⁴⁷ The links between class issues and poverty are discussed in section 1.2.

¹⁰⁴⁸ Swilling, Musango and Wakeford 2015 *Journal of Environmental Policy and Planning* 9. See further the discussion in section 2.3.2.4.

It is important for government to understand that policy is never value-neutral.¹⁰⁴⁹ Ideas and notions linked to values always underpin policy development. Giving due recognition to the importance of ideas in driving policy innovation could assist with the fostering of new solutions for poverty amelioration.¹⁰⁵⁰

Government and the citizenry need to understand that poverty is associated with failure of distributive justice.¹⁰⁵¹ Distributive justice is not formally recognised in South African law, but it is a foundational notion in poverty studies.¹⁰⁵² Awareness-raising with regard to distributive justice could give impetus to poverty amelioration initiatives by government and private sector role players.¹⁰⁵³

It is arguable that it is incumbent upon the executive to ensure within its own ranks, and also within the citizenry, that a general understanding is fostered of the potential value of the doctrine of egalitarianism for poverty amelioration.¹⁰⁵⁴ This doctrine promotes equality, including equality of income and resources, and it accordingly favours the poor.¹⁰⁵⁵

The executive, and to an extent also the citizenry, need to be aware of the linkages and possible synergies between poverty amelioration and environmental protection.¹⁰⁵⁶ These arise typically in situations where service delivery projects are

¹⁰⁴⁹ Movik 2014 *Geoforum* 187 makes this point with reference to the assumptions and understandings underpinning water policy in South Africa.

¹⁰⁵⁰ Rodrik 2014 *Journal of Economic Perspectives* 189 argues that it is possible to effect policy innovation through giving due recognition to ideas as a force for the manifestation thereof. See also Schotte, Zizzamia and Leibbrandt *Social Stratification, Life Chances and Vulnerability to Poverty in South Africa* 39 who reinforce the arguments of both Movik and Rodrik.

¹⁰⁵¹ Distributive justice relates to the social, economic and legal processes that dictate how benefits and burdens are distributed across society, as dictated by social, economic and political frameworks. See Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/entries/justice-distributive/>. Palat 2008 *Futures* 721 argues that distributive justice has failed across the global South due to the failure of political leaders across the world failing to challenge economic world order.

¹⁰⁵² Waldorf 2012 *Social and Legal Studies* 180-181 argues that distributive justice is an essential consideration in addressing matters of inequality.

¹⁰⁵³ The links between poverty and failure of distributive justice appear are discussed in section 2.4.3.5.

¹⁰⁵⁴ Putterman, Roemer and Silvestre 1998 *Journal of Economic Literature* 861.

¹⁰⁵⁵ Egalitarianism as a basis for poverty amelioration is a feature of social justice – see section 2.4.1.2.

¹⁰⁵⁶ Du Plessis 2011 *South African Journal on Human Rights* 285. See also Jayathilaka 2015 *International Journal of Conceptions on Management and Social Sciences* 3, where linkages are suggested between poverty, environment and development and a new mode of thinking

designed and executed with the incorporation of environmentally favourable design and benefits that serve the interests of poor communities, and that are sustainable in the longer term.

An understanding of poverty as a human rights issue, particularly in circumstances where fundamental socio-economic rights are not realised,¹⁰⁵⁷ is of value to serve as a foundation for action by government, enabled and assisted by the private sector, towards poverty amelioration.¹⁰⁵⁸ This approach has constitutional credibility, given that human rights are entrenched in the *Constitution*.

The executive and the citizenry (as guided by the executive) need to be aware of the unavoidable connections between ethics and economics.¹⁰⁵⁹ An awareness of this connection enables a view to be taken with regard to moral and ethical considerations relevant to allowing the phenomenon of poverty to persist. It also enables the introduction of ethical considerations into economic policy, which could form a basis for an ethically and morally based redistribution of wealth, which would benefit the poor.

For the executive to be able to create a framework for poverty amelioration, and for the citizenry to buy in to it, the lived experience of poverty and its qualitative aspects need to be considered.¹⁰⁶⁰ In the writings of Deutch, it is suggested that a new social psychology be developed to address human needs, including poverty.¹⁰⁶¹ A new, more in depth view of the psycho-social elements and hardships of poverty, fostered

advocated in which human development and environmental issues are acknowledged to be intertwined.

¹⁰⁵⁷ Section 2.3.3 deals with dysfunctionalities in the human rights regime as a determinant of poverty.

¹⁰⁵⁸ Jansen van Rensburg and Naude 2007 *Public Administration and Development* 396 argue that poverty constitutes a violation of human rights and a social injustice, since the *Constitution* recognises the right to fulfilment of basic needs.

¹⁰⁵⁹ Huda 2015 *Journal of Arts and Humanities* 42 argues for the forging of linkages between ethics and economics, which, it is argued, would instil an understanding of the immorality of inequality. These linkages are discussed in section 2.4.2.3.

¹⁰⁶⁰ Wilson and Dugard 2011 *Stellenbosch Law Review* 667. See also Liebenberg 2001 *South African Journal on Human Rights* 239.

¹⁰⁶¹ Deutch 1975 *Journal of Social Issues* 137. See also Metz 2016 *Res Publica* 333 who describes poverty as an inhuman condition and suggests that an understanding of its psycho-social dimensions could be a path towards its amelioration.

by the executive and communicated to the citizenry, could serve to provide an impetus for the forging of solutions to poverty.¹⁰⁶²

4.4.2 Rethinking the Neoliberal Governance Model

Neoliberalism is frequently portrayed as a cause or determinant of poverty in South Africa.¹⁰⁶³ The discussion here seeks to suggest ways in which the executive can move towards a rethinking of neoliberalism as a poverty alleviation strategy.¹⁰⁶⁴ Since the executive is the primary initiator and driver nationally of legislative and policy reform,¹⁰⁶⁵ it is incumbent upon it to take action towards the reconsideration of neoliberalism as a dominant governance model in South Africa.

In light of the criticism of the adverse effects of the switch in prevailing executive policy in the 1990's from socialism to neoliberalism, the executive needs to consider whether it should contemplate taking steps to reverse this process. There are many writers who take the view that this would have advantageous effects for promoting the struggle for equality and social justice.¹⁰⁶⁶ Although it is theoretically possible for the executive to drive policy reform of its own volition, in reality it would only do so in line with the position of the dominant party to which most of its members belong.

Government should be encouraged to question whether neoliberalism is consistent with the *Constitution*, given that neoliberalism promotes inequality.¹⁰⁶⁷ This should lead government to ask intense questions about its suitability as a governance

¹⁰⁶² See section 2.4.2.4 for a discussion of the psycho-social aspects of poverty.

¹⁰⁶³ See section 2.3.1.1.

¹⁰⁶⁴ See section 4.3 above in which the predominance of a neoliberal governance model in executive policy over time is discussed.

¹⁰⁶⁵ Although policy and legislation are decided upon at political level, the executive plays a substantial role in their initiation and formulation.

¹⁰⁶⁶ See Emery 2006 *Social Justice* 11, where it is argued that the switch to neoliberalism in the 1990's had the effect of impeding the struggle for equality and social justice. This view is reinforced in Mtshiselwa 2016 *Theological Studies* 4. It is further reinforced by Adelzadeh 1996 *Transformation* 66 and Hanson and Hentz 1999 *Political Science Quarterly* 491, who emphasise that in the process of the shift from the RDP to GEAR, the redistributive imperatives of the *Constitution* have been weakened.

¹⁰⁶⁷ Lemanski 2017 *International Development Planning Review* 20 presents a strong argument that neoliberalism is at odds with the *Constitution* by reason of the fact that neoliberalism promotes inequality.

model, and to consider policy shifts which weaken the adverse impact of neoliberalism on the poor.

Neoliberal economists tend to marginalise poverty by omitting it as a factor in their economic analysis.¹⁰⁶⁸ This leads to a disregard of possible initiatives towards redistribution of wealth, which is a necessary component of poverty amelioration. Government should consider how to remedy this deficit and mainstream poverty into economic assessment.

An incisive analysis by Segatti and Pons Vignon of six attributes of neoliberalism may be interpreted to provide potential guidance to the executive as to how it could reverse some of its negative outcomes.¹⁰⁶⁹ They highlight that government does not follow a deliberative process in the formulation of economic policy.¹⁰⁷⁰ This counterproductive trend in policy formulation could be countered by government purposefully engaging with regard to economic policy rather than the apparent present trend of taking the desirability of globally dominant economic models as a given. This could lead to economic policy reforms which could be of benefit to the poor. Secondly, they highlight certain deficits in democratic oversight by the legislature relevant to the persistence of neoliberalism.¹⁰⁷¹ Improving parliamentary oversight, which can be an initiative of the executive as well as or in conjunction with the legislature, could lead to the development of a more stringent culture of scrutiny of government policy. This may include its neoliberal orientation. Development of such a culture could lead to conceptualisation of alternatives favourable for poverty amelioration. Thirdly, they describe the phenomenon of autonomism in government, associated with a disinclination on the part of the executive and parliamentarians to interrogate proposed policy for decision.¹⁰⁷² It is incumbent upon the executive to ensure that government officials and external parties are aware of the need for full and sufficient policy interrogation, including

¹⁰⁶⁸ Schneider 2003 *Review of Social Economy* 26, 48.

¹⁰⁶⁹ Segatti and Pons Vignon 2013 *Review of African Political Economy* 537.

¹⁰⁷⁰ Segatti and Pons Vignon 2013 *Review of African Political Economy* 547.

¹⁰⁷¹ Segatti and Pons Vignon 2013 *Review of African Political Economy* 548. Issues pertaining to democratic oversight are discussed in section 3.4.1 of this thesis.

¹⁰⁷² Segatti and Pons Vignon 2013 *Review of African Political Economy* 549.

with regard to matters related to poverty. This is imperative to ensure that policy is appropriately focused to achieve socio-economic goals, including making poverty amelioration possible. Fourthly, they describe the phenomenon of macroeconomics being free from scrutiny, even though microeconomics is tightly regulated.¹⁰⁷³ This is manifested by the unquestioning application of fundamental macroeconomic precepts such as neoliberalism and capitalism, with only microeconomic issues being canvassed and debated by way of public participation. For poverty amelioration to become a reality it is imperative that fundamental governance models underpinning macroeconomic approaches be interrogated, especially by the executive in its role as crafter of policy and law. Fifthly, they argue that there is a failure by macroeconomics to address redistribution and inequality, with these not being factored into economic planning.¹⁰⁷⁴ This obviously does not augur well for poverty amelioration. Sixthly, there is a failure by government to interrogate neoliberal deepening.¹⁰⁷⁵ Neoliberalism has failed to combat corruption or to create an efficient state, they aver.¹⁰⁷⁶ Furthermore, they state, macro-economic policies, which are oriented towards the deepening of neoliberalism, have not been able to address issues of redistribution and inequality.¹⁰⁷⁷ These deficits render poverty amelioration more difficult. The writings of these authors provide a valuable framework for conceptualising how a rethinking by the executive of strict adherence to neoliberalism could make a contribution towards poverty amelioration.

Under neoliberalism, market forces are seen as an ethic in themselves, and ethical dimensions in economics are not acknowledged.¹⁰⁷⁸ Neoliberalism has failed to effect social and economic development, rather entrenching the *status quo*.¹⁰⁷⁹ Development ethics may be a viable alternative to neoliberalism, since it factors socio-economic considerations and dignity and equality into its reasoning, and these

¹⁰⁷³ Segatti and Pons Vignon 2013 *Review of African Political Economy* 550.

¹⁰⁷⁴ Segatti and Pons Vignon 2013 *Review of African Political Economy* 538.

¹⁰⁷⁵ Segatti and Pons Vignon 2013 *Review of African Political Economy* 538.

¹⁰⁷⁶ Segatti and Pons Vignon 2013 *Review of African Political Economy* 541.

¹⁰⁷⁷ Segatti and Pons Vignon 2013 *Review of African Political Economy* 553.

¹⁰⁷⁸ Astroulakis 2014 *Ethics and Economics* 96.

¹⁰⁷⁹ Astroulakis 2014 *Ethics and Economics* 99.

considerations are of value in ameliorating poverty.¹⁰⁸⁰ The executive should be aware of the need for policy reform in this direction and move towards its implementation.

Acquiescence in a neoliberal order is associated with a legalistic view of socio-economic issues,¹⁰⁸¹ associated with their being ascribed the status of legal rights. A focus on civil and political rights leads to a diminished focus on poverty issues.¹⁰⁸² The executive needs to be aware of this dynamic, which is indicative of a need for mainstreaming of the imperative to work towards realisation of socio-economic rights outside of the courts, that is by way of forging government legislation and policy to achieve these aims.

The executive needs to play a role in promoting an understanding of development theory. This must of necessity include a questioning of neoliberalism.¹⁰⁸³ It is arguable that as part of this analysis neoliberalism should be repurposed to take into account the specific circumstances that prevail in the South African context.¹⁰⁸⁴

The executive needs to take to heart some of the criticisms that have been proffered by analysts of the NDP, in particular those that have highlighted its neoliberal stance.¹⁰⁸⁵ Proceeding from the position that neoliberalism is not beneficial to the poor, it must be questioned whether the poverty relief imperatives articulated in the plan are capable of realisation. There is a cogent argument to be made that government should reconsider the orientation of this core national planning instrument.

A cumulative reading of the sources cited in this section leads to the conclusion that there is a cogent argument to be made that the executive should consider and

¹⁰⁸⁰ Astroulakis 2014 *Ethics and Economics* 104.

¹⁰⁸¹ Mc Evoy 2007 *Journal of Law and Society* 411. He conceptualises legalism as an inability to view social issues free from the "lens of the law".

¹⁰⁸² Mc Evoy 2007 *Journal of Law and Society* 418.

¹⁰⁸³ Samson 2007 *Africa Development* 27.

¹⁰⁸⁴ Ferguson 2009 *Antipode* 178. He argues that, where being able-bodied is not a guarantee of finding work, it would be appropriate to introduce a basic income grant as a means to alleviate poverty in the neoliberal context

¹⁰⁸⁵ In this regard see Allogio and Thomas 2013 *Social Dynamics* 110 and Moyo and Mmamabolo 2014 *Journal of Public Administration* 946.

question whether the prevalent neoliberal governance model serves the interests of the population generally, and those of the poor in particular. The writers cited present a clear position that a rethinking of neoliberalism is a *sine qua non* of socio-economic reform, and accordingly of poverty amelioration.

4.4.3 Rethinking the Value of the Capitalist Governance Model in South Africa

There is wide consensus that capitalism does not assist the poor and may even serve to exacerbate poverty.¹⁰⁸⁶ Since the executive is the primary entity initiating and driving the creation of policy and legislation, it is incumbent upon it to consider whether capitalism as the dominant economic paradigm and governance model should be retained.

The Marikana massacre of 2012 is considered by many to be symbolic of the conflict between capitalism and the poor in the South African context.¹⁰⁸⁷ Given that the massacre was characterised by violent conflict between poor workers seeking better wages, and a capitalist-oriented mining corporation backed by the South African Police Service, this position would seem to be justified. The Marikana incident and the capitalist-poor conflict it symbolised, with the police supporting the capitalist mining corporation, could have served as an impetus to persuade government that there is cause to question the desirability of the prevalence of capitalism in the country.

It is incumbent upon the executive to consider whether a shift away from capitalism should be contemplated in order to create a more equal society. This is ably explored by Hickey and Du Toit,¹⁰⁸⁸ who account for a number of ways in which the workings of the mainstream economy perpetuate poverty. One of these is the functioning of the labour market, which is allied to the orientation of the economy

¹⁰⁸⁶ See Le Roux 1991 *Social Justice* 234. and Gelb 1991 *Social Justice* 247, writing at approximately the same time, who argued that the capitalist governance model would be unable to address inequality in South Africa. For a discussion of capitalism as a determinant of poverty, see section 2.3.1.3.

¹⁰⁸⁷ Alexander 2013 *Review of African Political Economy* 615 and Schierup 2016 *Critical Sociology* 1062 express this view strongly.

¹⁰⁸⁸ Hickey and Du Toit *Adverse Incorporation, Social Exclusion and Chronic Poverty* 81.

as a whole, and which locks out the poor.¹⁰⁸⁹ They furthermore explain that the capitalist trading market has spin-offs which exacerbate poverty and increase a number of undesirable phenomena associated with it, being pollution, corruption, crime and inequality.¹⁰⁹⁰ In addition they describe how trade liberalisation, which is associated with capitalism and was introduced in South Africa shortly after the political transition, has the effect of inducing poverty-related phenomena.¹⁰⁹¹ Their writings serve as a valuable illustration of how market and trade forces contribute to poverty, and they could be taken as a guideline for the executive regarding changes that need to be made to weaken the stronghold of capitalism in furtherance of poverty amelioration.

The apartheid economy was capitalism-based, and there has been only a refurbishment and not a shift away from this model subsequent to the political transition.¹⁰⁹² The executive should be cognisant of this fact and consider whether a policy shift away from capitalism should occur, in the interests of benefitting the poor. Critics of the prevalence of capitalism typically posit a shift towards a socialist-oriented governance model, which the executive should research and investigate.

A very practical point regarding the alienation of the poor from participation in the capitalist economy is the fact that, without assets and resources, participation in the economy is not possible.¹⁰⁹³ For the prevalence of capitalism to be beneficial to the poor, a mechanism needs to be found by the executive for unlocking the potential for the poor to acquire assets and resources. This could be done by way of policy and legislation giving the poor access to resources on the strength of which they can participate in the capitalist market, if the capitalist paradigm is to be retained. Measures of this nature could include for example incentives and mechanisms to

¹⁰⁸⁹ At the time of writing this thesis unemployment was recorded as having peaked at 46.6% nationally – see Statistics South Africa *Quarterly Labour Force Survey Quarter 1 2021* 12. See also Ferguson 2013 *Journal of the Royal Anthropological Institute* 232-233, where it is stated that the effect of lock out from the market is worse than subjection, and that those who are excluded from the markets would wish to gain access thereto even under circumstances of subjection.

¹⁰⁹⁰ Hickey and Du Toit *Adverse Incorporation, Social Exclusion and Chronic Poverty* 18.

¹⁰⁹¹ Hickey and Du Toit *Adverse Incorporation, Social Exclusion and Chronic Poverty* 19.

¹⁰⁹² Southall 2014 *Annals of the American Academy of Political and Social Science* 48.

¹⁰⁹³ Lephakga 2016 *Studia Historiae Ecclesiasticae* 3

enable the poor to participate in the share market, or to acquire property. Alternatively, the position that government should veer away from unquestioning support of the capitalist paradigm, should be explored.

The discourse around the need to achieve social justice in order to ameliorate poverty typically does not deal with property and capitalist relations.¹⁰⁹⁴ This is a lacuna which the executive must address – it must pursue a discourse incorporating these elements. Up to the present time government has been intent on the preservation of capital,¹⁰⁹⁵ which obviously favours the interests of the ‘haves’ over the ‘have nots’ and frustrates poverty amelioration. This orientation must be questioned by government if it has serious intent to overcome poverty.

The right to own private property is a core component of capitalism.¹⁰⁹⁶ The right to property which is enshrined in section 25 of the *Constitution* conflicts with the socio-economic rights in circumstances where ownership of assets needed for socio-economic rights fulfilment is in issue.¹⁰⁹⁷ The executive is aware of this anomaly, as is evidenced by its unsuccessful effort to amend section 25 to allow explicitly for expropriation without compensation, and its subsequent statements that it will proceed anyway with such expropriation as the constitutional amendment was not necessary.¹⁰⁹⁸ At the time of writing this thesis, it remains to be seen if and how the executive will follow through with this stated intent. The reconciliation of the property right with the transformative imperatives of the Constitution, which may involve a shift away from capitalist property relations, must remain an ongoing urgent priority of government if progress is to be made towards poverty amelioration.

¹⁰⁹⁴ Chipkin and Meny-Gilbert *Understanding the Social Justice Sector in South Africa* 10.

¹⁰⁹⁵ Hurt 2017 *Capital and Class* 306.

¹⁰⁹⁶ Jahan and Mahmud 2017 *Finance and Development* 2.

¹⁰⁹⁷ Ginsburg & Gibson 2013 *The South African Constitutional Court and Socio-economic Rights as Insurance Swaps* 3.

¹⁰⁹⁸ On 7 December 2021 the National Assembly failed to pass a resolution to amend Section 25 to this effect. Subsequently the President has announced that government will go ahead with expropriation without compensation, on the basis that this is already allowed under Section 25 – see <https://businesstech.co.za/news/government/549578/two-big-changes-planned-for-south-africa-in-2022-ramaphosa/>.

There is a growing trend in developing countries to challenge the capitalist governance model in light of its failure to address issues of inequality.¹⁰⁹⁹ The executive needs to be aware of this phenomenon and should deliberate on possible alternative governance models which enable poverty amelioration.

4.4.4 Rethinking the Dominance of Constitutionalism

Adherence to constitutionalism is highly prevalent in South Africa,¹¹⁰⁰ with the *Constitution* regarded as the source of all governmental authority, and its authority being entrenched by way of onerous requirements for its amendment.¹¹⁰¹ However, the *Constitution* is not an end in itself but merely a mechanism whereby space is created for political action, and it is political action that serves to address social ills such as poverty.¹¹⁰² Thus any complacency or acquiescence in the sufficiency of the *Constitution* on the part of the executive needs to be countered.

Critics of the *Constitution*¹¹⁰³ claim that its transformative potential is limited, and even that it masks or glosses over racial hegemony and historical injustice. The executive should be alerted to the notion that reliance on the *Constitution*, or acquiescence in its existence, as a cure for social ills, may be misplaced in the context of efforts to ameliorate poverty. Having a constitution providing for equality as a fundamental human right may have the effect of de-historicising inequality and creating the illusion of a fresh start with equal opportunity for all.¹¹⁰⁴ The executive needs to bear in mind in formulating its policies and programmes that the notion of the poor experiencing a fresh start on a footing of equal opportunity is a myth, given

¹⁰⁹⁹ Mc Chesney and Foster 2010 *Monthly Review Magazine* 9. The authors refer to capitalism as “an irrational system which survives on bubbles, bloated debt, suicidal military spending and hypercommercialisation” and posit a shift towards macroeconomic trends in the realm of socialism.

¹¹⁰⁰ See the discussion of constitutionalism as a determinant of poverty in section 2.3.1.4.

¹¹⁰¹ Section 74 of the *Constitution* requires a two-thirds majority vote for its amendment.

¹¹⁰² Woolman 2016 *New York Law School Law Review* 295 describes the *Constitution* as “scaffolding” which must be supplemented by political action in order to achieve societal transformation.

¹¹⁰³ The latter argument is made strongly in Madlingozi 2017 *Stellenbosch Law Review* 124.

¹¹⁰⁴ Lephakga 2016 *Studia Historiae Ecclesiasticae* 2.

the entrenched patterns of disadvantage that have spilled over from apartheid into contemporary times.¹¹⁰⁵

It is incumbent upon the executive to realise and acknowledge that the *Constitution* is not purely an instrument of transformation, but that its content was negotiated and represents a political compromise.¹¹⁰⁶ As such, its potential as a transformative instrument must be considered realistically, and executive projects and programmes conceptualised which focus on supporting the transformative imperative.

Faith in constitutionalism may have the effect of disincentivising social activism,¹¹⁰⁷ which may dilute initiatives towards poverty amelioration. Thus a type of complacency may exist within society, based on an assumption that the *Constitution* is there to resolve social and economic issues and that therefore no activism is needed. To counter this trend the executive must ensure that there are mechanisms in place to allow for the role of social activism in executive action.

The *Constitution* fails to attribute normative content to transformational imperatives, and tends to promote attenuated remedies, deference with regard to political decisions, and inattention to economic issues.¹¹⁰⁸ The executive must be aware that action on its part is necessary to overcome these shortcomings, for example through the development of concrete economic interventions to improve the lot of the poor.

¹¹⁰⁵ See section 2.2.5 in which the relationship between poverty and apartheid is discussed.

¹¹⁰⁶ Bond 2014 *Politikon* 461. The author posits the view that adherence to the *Constitution* may thwart transformation, and, by implication, poverty amelioration.

¹¹⁰⁷ Bond 2014 *Politikon* 465.

¹¹⁰⁸ Mc Dougall 2016 *New York Law School Law Review* 33-34. See also Hodgson "Bridging the Gap between People and the Law: Transformative Constitutionalism and the Right to Constitutional Literacy" 189, who posits the view that the *Constitution* entrenched inequality due to it not incorporating sufficiently radical instruments for transformation. See also Moyo 2014 "Transformative Constitutionalism, Substantive Equality and the Role of the Courts: Lessons from South African and Zimbabwe" 3, who argues that the formal equality conferred by the *Constitution* masks underlying inequality and institutionalised privilege. See also Rapatsa 2015 *Judicial Tribune* 217 who states that the rights framework in the *Constitution* entrenches the social and economic *status quo*. In addition, Moyn 2014 *Law and Contemporary Problems* 151 criticises the human rights regime for being ineffective and rhetorical and a distraction from the necessary diagnosis and remedy of the world's ills.

It is particularly apposite that the executive should acknowledge that the legalistic formulation of human rights in the *Constitution* serves to truncate and frustrate the potential for their realisation.¹¹⁰⁹ Also, it is conceivable that aspects of the constitutional rights regime may frustrate transformation. Possibly the most cogent illustration of this is the trumping of land restitution processes by the constitutional property right, which although this trumping is not sanctioned in section 25, has bedevilled land restitution.¹¹¹⁰ The executive needs to conceptualise measures to ensure realisation of the spirit and purport of the rights in a manner that promotes poverty amelioration, notwithstanding their legalistic formulation.

There are a number of areas of human need in relation to which the existence of a constitutional right to a socio-economic resource has had no impact on delivery of the resource to the public. An illustration of this is the right to health care, where the existence of the right has made limited difference to the fact that those with assets and resources are able to access high level care, and the poor are afflicted by a lack of such access.¹¹¹¹ A further illustration is the right to social security, which, it has been argued, does not assist the poor but widens inequality.¹¹¹² Yet another example is the failure of the right to education to make inroads into backlogs and inequalities in the provision of education.¹¹¹³ With regard to the right to food, availability of food is dictated by power and commercial relationships within the food industry, with the existence of the right playing little or no role in assisting the

¹¹⁰⁹ Bond "Capitalism, the Privatisation of Basic Social Services and the Implementation of Socio-Economic Rights: Challenges and Advocacy Strategies for Human Rights and Social Justice Actors, Learning from the Johannesburg Water Defeat" 1-8. See also Pieterse 2007 *Human Rights Quarterly* 796 and Brand 2005 "The Politics of Need Interpretation and the Adjudication of Socio-Economic Rights Claims in South Africa" iii, both cited in Bond.

¹¹¹⁰ Hendricks and Ntsebeza "Black Poverty and White Property in South Africa" 227.

¹¹¹¹ Mayosi and Benatar 2014 *New England Journal of Medicine* 1345.

¹¹¹² Leibbrandt, Finn and Woolard 2012 *Development Southern Africa* 19. See also Vaaltein and Schiller 2017 *Children and Youth Services Review* 235, who highlight the inadequacy of the child support grant.

¹¹¹³ Christie 2010 *International Journal of Educational Development* 9. See also Kang'ethe and Chivanga 2016 *International Journal of Science Education* 255 who outline various failures in the education system notwithstanding the constitutionally entrenched right to education. Further, see Motala Vally and Spreen "Transforming Education and Training, or Reconstituting Power and Privilege?" 241-260 who write of the retention of apartheid power relations in education after the political transition, and who suggest that the right to education is preservative of the *status quo*.

poor.¹¹¹⁴ By the admission of the national Department of Human Settlements in 2015, realisation of the right to housing was not close to fruition and was beset by a number of problems¹¹¹⁵ - this is a possible indictment of the usefulness of the constitutional right for socio-economic transformation. The executive needs to urgently interrogate the reasons for failure of the socio-economic rights to ameliorate poverty, and to put programmes in place to remedy this.

The executive should understand that the Bill of Rights may not necessarily be framed with an understanding of the dynamics of its application. The legislature's indeterminacy in this regard may be compounded by unawareness or inertia on the part of the executive, who may not realise their responsibility or a methodology to discharge the onus of ensuring application of the law.¹¹¹⁶ Given that it is the branch of government tasked with implementation of the law, the executive should institute and pursue a programme of analysing and envisioning how it can drive rights towards fulfilment.

The most cogent point to be taken from the discussion in this section is that, with regard to socio-economic transformation, of which poverty amelioration is a component, the executive needs to be aware that the *Constitution* is not a panacea for all ills, but only a framework for political and executive action.

4.4.5 Economic Power and Policy Issues

The executive needs to take cognisance of the fact that the sequence of events in the realm of economic policy at the time of and shortly after the political transition, resulted in preservation of pre-existing economic power structures.¹¹¹⁷ Thus, the apartheid economic disparity between the privileged minority and the deprived majority was largely left intact, and has persisted into contemporary times. The

¹¹¹⁴ Patel 2012 *Plos Medicine* 3.

¹¹¹⁵ Department of Human Settlements *Towards a Policy Foundation for the Development of Human Settlements* 20 where problems in housing delivery related to spatial planning issues are noted.

¹¹¹⁶ Dixon 2007 *International Journal of Constitutional Law* 400.

¹¹¹⁷ Swilling, Musango and Wakeford 2015 *Journal of Environmental Policy and Planning* 9. The theoretical foundation for taking cognisance of economic power and policy issues in poverty studies is outlined in section 2.3.2.4.

phenomenon of concentration of wealth in the top deciles in South Africa is ongoing.¹¹¹⁸ In the interests of distributive justice and poverty amelioration, this trend needs to be reversed or at least curbed. The executive must undertake programmes which address this situation. There are a number of ways in which a more equitable distribution of wealth can be effected – these would include an increase in taxation of the wealthy and distribution of the gains thereof to the poor,¹¹¹⁹ or by bolstering the income potential of the poor through pro-poor legislation, for example by better regulation of minimum wages.¹¹²⁰

The disparity between the wealthy and the poor in South Africa is associated with the persistence of private economic power.¹¹²¹ This persistence under constitutional democracy has the effect of maintaining the status quo and keeping the poor in poverty.¹¹²² It is incumbent upon the executive to consider how to effect redress of this phenomenon through initiation of appropriate policy and legislative interventions. This would require innovative development of law and policy targeted at curbing corporate power and private wealth, for example. Institutionalised privilege confers power upon those with assets and resources. This power is wielded in the economic and social realms. This phenomenon may be masked by the presence of formal equality as mandated by the *Constitution*.¹¹²³ Where economic power prevails in a society, the imperative towards equitable distribution of resources may be disregarded.¹¹²⁴ The existence of economic power dynamics and the attendant lack of a voice for the poor and disadvantaged are issues that warrant the attention and consideration of the executive, if poverty amelioration is to be pursued.

¹¹¹⁸ Leibbrandt *Unemployment and Inequality Outcomes in South Africa* 20.

¹¹¹⁹ This is strongly advocated in Terreblanche *A Wealth Tax for South Africa* 1-20.

¹¹²⁰ See section 3.3.8 in which minimum wage legislation is discussed.

¹¹²¹ Davis 2015/2016 *New York Law School Law Review* 302. See also Crocker 2014 *Journal of Global Ethics* 245 who argues that poverty persists because of ongoing power imbalances in the social, political and economic realms.

¹¹²² Fowkes "Transformative Constitutionalism and the Global South: The View from South Africa" 4.

¹¹²³ Moyo "Transformative Constitutionalism, Substantive Equality and the Role of the Courts: Lessons from South African and Zimbabwe" 3.

¹¹²⁴ Mc Donald 1998 *Review of African Political Economy* 88.

Transformation of society and poverty amelioration may be enabled through understanding and redressing economic power imbalances between the wealthy and the poor.¹¹²⁵ This entails ensuring that the poor have not only political power, but economic power as well. The executive needs to find ways to ensure that this is achieved through projects and programmes to achieve economic empowerment. An example of this would be to develop policy which entitles workers to benefit from economic growth in proportion to their contribution thereto. The power wielded by political elites, which enables economic self-enrichment and the diversion of resources to the wealthy at the expense of the poor,¹¹²⁶ is a phenomenon which the executive must take steps to curb, given that it is a perpetuator of poverty as argued earlier.

The executive needs to acknowledge and seek to rectify the anomalies and contradictions embedded in national economic policy. The ongoing prevalence of GEAR as the macroeconomic policy in South Africa is the most fundamental of these anomalies. This has continued from the 1990s into contemporary times.¹¹²⁷ The espousal of GEAR is at odds with the imperatives of reducing inequality and pursuing social justice.¹¹²⁸ The features of GEAR and its impacts on poverty are discussed elsewhere in this thesis.¹¹²⁹ Given the ongoing prevalence of poverty and inequality in contemporary times, it is urgently necessary that the executive should consider whether the macroeconomic model provided by GEAR, and perpetuated in the NDP, should be pursued further.¹¹³⁰

Arguably the most important potential economic reform for the amelioration of poverty is simply the mainstreaming of poverty discourse into economics – a

¹¹²⁵ Watson 2003 *Planning Theory and Practice* 403. See also Lephakga 2016 *Studia Historiae Ecclesiasticae* 11.

¹¹²⁶ This is described in Rosa 2011 *Stellenbosch Law Review* 554.

¹¹²⁷ Karriem and Hoskins 2016 *Politikon* 15.

¹¹²⁸ Karriem and Hoskins 2016 *Politikon* 15.

¹¹²⁹ See section 4.3.2 in which the neoliberal orientation of GEAR is explored and critiqued. See also section 2.4.1.8 in which the possibility is mooted of a reversion to the ideological stance of the RDP.

¹¹³⁰ Freund 2013 *Review of African Political Economy* 534-535 describes vividly how the espousal of orthodox Western economics under GEAR has led to modest growth, mass unemployment, unprecedented levels of inequality and the ongoing absence of the tools needed to build a skills-based economy.

phenomenon which is currently lacking.¹¹³¹ The lack of explicit inclusion of poverty considerations in economics has the effect of depoliticising poverty and dampening discourse on the subject. The executive could remedy this deficit by actively pursuing research and policy development to incorporate poverty discourse into economics. For example, a yardstick for poverty amelioration by means other than financial assessments such as GDP, could be developed.

The executive needs to give due consideration to finding an economic policy orientation that will serve to reduce poverty, and not blindly follow the economic growth model espoused in conventional Western economic theory.¹¹³² This entails pursuing economic transformation rather than conventional economic growth models.¹¹³³ It also entails ensuring that developmental projects benefit all social groups and social welfare cuts across all strata of society. The executive needs to consider moving away from utilising conventional economic analyses and yardsticks as a measure of well-being of the citizenry, for example GDP, which has limited relevance to the poor who are not active participants in the mainstream economy.¹¹³⁴ An example of a holistic assessment tool which looks beyond monetary issues to other human needs is the *Gross National Happiness Index of the Kingdom of Bhutan*.¹¹³⁵

Macroeconomic reform to benefit the poor may entail the rethinking of a number of hallowed concepts and institutions currently dominating the economic policy landscape. This may include the introduction of trade protection rather than free trade, development banks rather than commercial banks, and more expansionary monetary policies.¹¹³⁶

¹¹³¹ Gentle "Poverty and Social Movements" 360.

¹¹³² Zhanje and Tala 2016 *Journal of Public Administration* 284.

¹¹³³ Ulriksen 2012 *Development Southern Africa* 13.

¹¹³⁴ Hallegatte Fay and Barber 2018 *Environment and Development Economics* 217.

¹¹³⁵ See an explanation of how this index works at GNH Centre Bhutan <https://www.gnccentrebhutan.org/gnh-happiness-index>.

¹¹³⁶ Motala 2016 *American University Business Law Review* 49. Trade protection is the deliberate attempt to protect the local economy by limiting imports or promoting exports. See https://www.economicsonline.co.uk/global_economics/trade_protectionism.html/. National and international development banks are specialised banks or subsidiaries set up to support private sector development in developing countries. See

A move away from applying conventional economic paradigms towards an ethos of redistributive justice is an imperative which the executive could seek to incentivise.¹¹³⁷ Such an initiative would have to start with an awareness in government and the citizenry of the outcomes of applying conventional economic paradigms, and would have to proceed towards initiation and implementation of overt policies directed towards redistributive justice. New economic paradigms which the executive could pursue in the interests of poverty amelioration could include an equity-based regime which limits economic growth in the interests of environmental protection, and at the same time pursues mechanisms for redistribution of wealth.¹¹³⁸

It is possible to conceptualise new economic models which, if espoused and pursued by the executive, could serve as the foundation for an egalitarian society and be of benefit to the poor. An example is the “human economy” proposed by Oxfam.¹¹³⁹ This requires putting workers first, and limiting corporate profit-making by executives and shareholders.¹¹⁴⁰ It also entails a number of social justice interventions such as universal free services, a social protection floor, regulation of wages, gender equality and addressing income inequality.¹¹⁴¹ It is incumbent upon the executive to give due consideration to theoretical models of this nature with a view to assessing their poverty amelioration potential.

The executive may further need to consider whether it should approach economic policy issues on the basis of a need to forge connections between economics and ethics. This would involve an interrogation of the morality of inequality.¹¹⁴² An

<https://www.oecd.org/development/development-finance-institutions-private-sector-development.htm>. An expansionary monetary policy is a type of macroeconomic monetary policy that aims to increase the rate of monetary expansion to stimulate the growth of a domestic economy. The economic growth must be supported by additional money supply. The money injection boosts consumer spending, as well as increases capital. See <https://corporatefinanceinstitute.com/resources/knowledge/economics/expansionary-monetary-policy/>.

¹¹³⁷ Cohen 1997 *Philosophy and Public Affairs* 7, 12.

¹¹³⁸ Rosales 2008 *Conservation Biology* 1415, 1416.

¹¹³⁹ Oxfam International *Reward Work, Not Wealth* 1-18. Oxfam is a confederation of charitable organisations founded in the United Kingdom in 1942.

¹¹⁴⁰ Oxfam International *Reward Work, not Wealth* 18.

¹¹⁴¹ Oxfam International *Reward Work, not Wealth* 17.

¹¹⁴² Huda 2015 *Journal of Arts and Humanities* 42.

analysis of this nature could provide an ideological foundation for finding long-term solutions to poverty amelioration. This is necessary because the neoliberal capitalist model underpinning the economy lacks ethical dimensions and does not consider the qualitative aspects of citizens' lives, as discussed earlier.¹¹⁴³

Reconceptualisation of the role and function of economics by the executive could serve to deepen its value as a resource for purposes of poverty amelioration. The inherent political dimensions in economic theory and policy require acknowledgement, so as to foster an understanding of how changes thereto can be made.¹¹⁴⁴ Associated with this is the notion that economic theory should be deepened by an acknowledgement of, or an addition of, ethical dimensions.¹¹⁴⁵ The focus on conventional economic goals by the executive and by society as a whole tends to undermine the pursuit of societal goals,¹¹⁴⁶ and tends to erode values and personal responsibility.¹¹⁴⁷ As part of these processes, the imperative to ameliorate poverty may be disregarded. A possible way for the executive to reverse trends of this nature is to foster and incentivise a collective consciousness which encourages pursuit of social good and discourages self-interested behaviour.¹¹⁴⁸

The executive needs to address the conceptual rift between business and development, which are regarded by role players in business as separate endeavours.¹¹⁴⁹ This conceptual rift leads to corporations taking the view, either consciously or by inaction, that their business activities are divorced from their developmental and corporate social responsibilities. As a result there is a lack of integration of developmental imperatives, including poverty amelioration, into

¹¹⁴³ Astroulakis 2014 *Ethics and Economics* 94-95. See also Greyling and Rossouw 2017 *Social Indicators Research* 1053 who bemoan the fact that the study of economics does not deal with quality of life. See also section 2.4.3.1 above.

¹¹⁴⁴ Buchanan 1959 *Journal of Law and Economics* 136.

¹¹⁴⁵ Alvey 2015 *Journal of Social Science* 137. See also Wight *Ethics in Economics: A Critical Thinking Approach* 1-20, where it is indicated that economists fail to understand the moral context in which they operate, and the fact that moral capabilities are important for human cooperation. Wight goes on to say that ethics is an essential component of positive economics, and that there are moral flaws in defining economic efficiency as net value created.¹¹⁴⁵

¹¹⁴⁶ Poruthiyil 2013 *Journal of Business Ethics* 735.

¹¹⁴⁷ Irlenbusch and Villeval 2015 *Current Opinion in Psychology* 91.

¹¹⁴⁸ Laffont 1975 *Economica* 433.

¹¹⁴⁹ Fig 2005 *International Affairs* 603.

mainstream corporate affairs. This is not a uniquely South African phenomenon,¹¹⁵⁰ but given the fact that poverty is a burgeoning and worsening problem in the country, the need to integrate poverty amelioration into corporate activities in South Africa is particularly acute.

The executive further needs to consider the development of economic paradigms which will serve to address the needs of all people, especially the poor.¹¹⁵¹ This should entail the development of an allocative budgeting system in terms of which public resources are allocated coherently and transparently.¹¹⁵² Since the improvement of the circumstances of the poor requires allocation of budgetary resources to improve their lives, such allocation would need to be done with due prioritisation of their needs.

In pursuing macroeconomic reform in order to benefit the poor, the executive should seek to maximise the fiscal pool of resources for realisation of the socio-economic rights.¹¹⁵³ This entails introducing measures to remedy economic inequality, which would give socio-economic rights the necessary backing to enable their realisation, which would be of benefit to the poor.¹¹⁵⁴ Deployment of fiscal

¹¹⁵⁰ See Taysir and Pazarck 2013 *Procedia – Social and Behavioural Sciences* 302 who have researched corporate social responsibility in the international context and have concluded that there is a global trend of strategic management units of corporations not caring about social responsibility issues. See also Bond 2013 *Third World Quarterly* 266 who is vociferous in his criticism of the lack of corporate accountability in BRICS countries. He points to abuses by corporations in the spheres of ecological destruction, consumer centricity and over-financialisation.

¹¹⁵¹ Baxi "Preliminary Notes on Transformative Constitutionalism" 48 argues for the creation of a "constitutional economics" which serves the needs of the people.

¹¹⁵² Baxi Preliminary Notes on Transformative Constitutionalism" 49-50. She advocates for resource allocation to be done by way of "demosprudence" which takes into account demographics and needs, rather than jurisprudence.

¹¹⁵³ Jagwanth and Soltau "Socio-economic Rights and Implications for Intergovernmental Fiscal Relations in South Africa" 2.

¹¹⁵⁴ Bilchitz 2002 *South African Law Journal* 490. See also Tregenna and Tsela 2012 *Development Southern Africa* 35, who echo the need for reducing economic inequality. In addition, see Matthews and Mc Laren 2016 *Budget Analysis for Advancing Socio-economic Rights* 6 who advocate for the introduction of a system whereby the state acknowledges and fulfils its obligation to make maximum budgetary resources available for realisation of socio-economic rights. Furthermore, Baxi 2013 "Preliminary Notes on Transformative Constitutionalism" 48, argues for a system of resource allocation and budgeting which takes into account the demographics and needs of all citizens including the poor.

resources needs to be targeted to the most needy in society in order to maximise the impact of poverty amelioration efforts and move towards greater equality.¹¹⁵⁵

The executive must be made aware, to the extent that it is not currently, of macroeconomic shifts that may be needed to deal with the impacts of climate change upon society generally, and upon the poor in particular. This entails appreciation of the risks in various realms that are associated with climate change, informed by various realms of understanding including social sciences, ethics and history.¹¹⁵⁶ Economic reshaping may be necessary in order to move towards cleaner production and reorientation of investment.¹¹⁵⁷ The process of such reshaping would serve to decarbonise the economy, whilst at the same time creating a more sustainable economic framework for the benefit of the poor.

The executive could draw on the concept of sustainable development to underpin economic policy, and this would be of benefit to the poor. This is because the traditional three 'pillars' of sustainable development, namely environmental, social and economic development, represent a broad spread of policy considerations and encourage a holistic view of issues under consideration.¹¹⁵⁸ A holistic view of the interplay between environmental, social and economic issues could be of value in seeking solutions to poverty amelioration, given that it would have a thorough and multidimensional orientation.

It is important for the executive, and indeed for all branches of government, to understand that in South Africa a unique set of circumstances prevails which entrenches and perpetuates poverty. It is incumbent upon the executive to be aware of these and seek means to remediate them, in the course of carrying out its governmental and policy initiation functions. Perhaps the most important realisation that is needed, is that the workings of the mainstream economy exacerbate

¹¹⁵⁵ Motsoeneng *Monitoring and Evaluating the Progressive Realisation of the Right to Water and Sanitation in South Africa* 1-120.

¹¹⁵⁶ Barker "The Economics of Dangerous Climate Change" 240.

¹¹⁵⁷ Fankhauser and Stern *Climate Change, Development, Poverty and Economics* 22.

¹¹⁵⁸ Dokurno and Fiedor 2016 *Gospodarka Narodowa* 22.

poverty.¹¹⁵⁹ Capitalist investors are speculative and are not incentivised to invest in productive areas of the economy such as manufacturing and agriculture.¹¹⁶⁰ Government could give impetus to and incentivise such investment.

4.4.6 Addressing Issues of Social Policy, Social Power and Adverse Incorporation

The executive needs to address the problem of persistent societal power imbalances. These cause poverty and deprivation to be entrenched and ongoing.¹¹⁶¹ Social power relationships and the hierarchical social order of society underpin poverty dynamics in South Africa.¹¹⁶² These phenomena may result in adverse incorporation of the poor into society.¹¹⁶³ The executive should seek to gain an understanding of how to overcome this phenomenon, through targeted sociological research and interventions.

The role of social institutions in developing countries such as South Africa should be focused on the targeting of poverty, rather than the pursuit of economic growth.¹¹⁶⁴ The executive must foster such an approach in institutions over which it has influence or control. This may involve the formulation of policy imperatives and programmes, and possibly the initiation of legislation in order to effect such targeting.

It is important for the executive to understand, and to foster an understanding, that poverty is not only an economic but a sociological phenomenon. The need to acknowledge it as such is eloquently described by Du Toit, and he argues that it is unfortunate that poverty research does not have a sufficiently sociological focus.¹¹⁶⁵ He argues for a new “metanarrative” founded on a sociological footing, which will foster a deeper understanding of poverty. This would involve a society wide

¹¹⁵⁹ Hickey and Du Toit *Adverse Incorporation, Social Exclusion and Chronic Poverty* 1-34.

¹¹⁶⁰ Hickey and Du Toit *Adverse Incorporation, Social Exclusion and Chronic Poverty* 19-20.

¹¹⁶¹ Crocker 2014 *Journal of Global Ethics* 245-246.

¹¹⁶² Du Toit “The Proper Subject for Poverty Research is Inequality” 133-140.

¹¹⁶³ Du Toit “The Proper Subject for Poverty Research is Inequality” 140. For a discussion of the interplay of social and economic factors which lead to adverse incorporation, see section 2.3.2.5.

¹¹⁶⁴ Zhanje and Tala 2016 *Journal of Public Administration* 284. Examples of social institutions are government, the economy, educational institutions, families and healthcare institutions.

¹¹⁶⁵ Du Toit 2005 *PLAAS Chronic and Development Studies* 2.

discussion about the nature of society, and the identity of its members and the claims and counterclaims such membership entails. Such a discussion could be facilitated and enabled by the executive, and it would have the effect of opening up discourse about poverty issues, with the ultimate goal of finding solutions.

The investigation of sociological aspects of poverty, and the seeking of poverty amelioration solutions with a sociological basis, are under-researched and under-developed domains. The executive should give attention to research and development in these areas, with a view to finding ways to ameliorate poverty. These are also suitable subjects for further academic research.

4.4.7 Achieving Redress for the Poor

It is important for the executive to understand that measures to redress poverty are a necessary part of poverty amelioration, and to find means to provide such redress.¹¹⁶⁶ The need for redress is premised on the notion that poverty is a fundamentally unjust situation which is an outcome of historical processes of colonialism, neo-liberalism, capitalism and apartheid, and that overt action is needed in order to redress the injustices associated with these.¹¹⁶⁷

Under apartheid, resources were stripped from the South African economy. It is warranted to adopt measures to recover these resources, in the interests of redress for the poor.¹¹⁶⁸ Unfortunately there has been a considerable lapse of time since the end of apartheid which renders the possibility of recovering resources more remote. Also, wealth gained under apartheid is protected by the constitutional property right, and this is a major obstacle to redress. Despite these limitations, it is of value for the executive, and indeed for society as a whole, to be mindful of the underlying justification for measures to redress poverty.

¹¹⁶⁶ "Redress" means the putting right of a wrong. It is synonymous with compensation and correction. See <https://dictionary.cambridge.org/dictionary/english/redress>.

¹¹⁶⁷ Opotow 2001 *Social Justice Research* 165 provides an insightful view of how justice may be achieved after periods of human rights abuses, which, he argues, must be via distributive, inclusionary and procedural interventions.

¹¹⁶⁸ Mani 2008 *International Journal of Transitional Justice* 253.

Redressing poverty may entail seeking to remedy what is lacking in the lives of the poor.¹¹⁶⁹ Once these deficiencies are understood, they may be remedied by fostering a society-wide commitment to prioritising the needs of the poor, coupled with an ethic of care.¹¹⁷⁰ The executive can play a role in driving these imperatives and values. Adherence thereto is associated with the position that role players in society have a positive duty to help those in need.¹¹⁷¹

Redress for the poor may involve a critical appraisal of the *Constitution* as a socially transformative instrument, and the consideration of amending or augmenting it to include express elements of restorative and reparative justice.¹¹⁷² For example, a clause requiring government to enact legislation making express provision for return of assets unlawfully gained during apartheid, or as a result of corruption, could be considered. As the initiator of policy and legislative interventions, the executive has an important role in this regard.

Redress for poor must of necessity entail the undertaking of social and institutional reforms, and the repurposing of the economy to create circumstances for making redress possible. An example of such a reform could be the subsidisation of industries which employ large numbers of poor people. This must be the primary initiative of the executive in its role as initiator of policy. Reconciliation should be secondary to this process.¹¹⁷³

It is conceivable that poverty amelioration could be effected by the introduction of a universal basic income grant to all citizens, which could ensure that everyone has at least the most basic means of subsistence.¹¹⁷⁴ Arguably the executive should consider an income grant model which focuses on assisting the destitute and

¹¹⁶⁹ Smith 1997 *Environment and Planning* 20. See also Watson 2003 *Planning Theory and Practice* 407, who argues for the fostering of an understanding of social dynamics from the perspective of those who are subjugated, with a view to finding redress mechanisms. See also Savransky 2017 *Sociology* 24-25 who advocates for recognition of a "sociology of absences".

¹¹⁷⁰ Smith 1997 *Environment and Planning* 33.

¹¹⁷¹ Gilabert 2006 *Southern Journal of Philosophy* 210.

¹¹⁷² Madlingozi 2017 *Stellenbosch Law Review* 142.

¹¹⁷³ Sarkin and Daly 2004 *Columbia Human Rights Review* 661.

¹¹⁷⁴ De Wispelaere and Noguera 2012 "On the Political Feasibility of Universal Basic Income – An Analytic Framework" 17 provide a general theoretical analysis of the concept of universal basic income, which, they say, must fit with social needs on various levels.

unemployed, and which would be an augmentation of the current social grant system, rather than a universal grant, as the latter would not serve to narrow the gap between rich and poor. It is incumbent on the executive to consider these alternatives, since it is the primary organ of state exercising fiscal control.

It is arguable that redress for the poor is more effectively pursued through governmental action rather than reliance on markets to effect change. Executive action by the state has the potential to open up equality of opportunity, which does not naturally occur in a market-dominated society.¹¹⁷⁵ It is incumbent upon the executive to ensure that the governance of the country, for which it bears the primary responsibility, is not undertaken in a manner that is preservative of the status quo, and in particular that it does not perpetuate features of colonialism and eurocentrism.¹¹⁷⁶

Redress for the poor may only be possible if positive discrimination is applied in order to equalise society, over and above measures already introduced into labour and procurement law.¹¹⁷⁷ This is so because of denial of resources to the poor in the past, particularly under apartheid, and the attendant need to prioritise allocation of resources to them to create a more egalitarian society.¹¹⁷⁸ Resource allocation is uniquely within the preserve of the executive, especially since it is primarily responsible for fiscal budgeting.

Mainstreaming poverty considerations into developmental processes is within the power of the executive. For example, poverty amelioration can be mainstreamed into land use and environmental authorisation processes.¹¹⁷⁹ This may be done by

¹¹⁷⁵ Vallentyne 2007 *Social Philosophy and Policy* 21-22.

¹¹⁷⁶ Ndlovu-Gatsheni 2013 *Journal of Developing Societies* 336-337.

¹¹⁷⁷ For example, the percentage allocation of points for broad-based black economic empowerment as reflected in the *Preferential Procurement Policy Framework Act* could be adjusted to further benefit those previously suffering discrimination.

¹¹⁷⁸ Badat and Sayed 2014 *Annals of the American Academy* 129 argue for positive discrimination in the realm of education in order to rectify past inequities.

¹¹⁷⁹ Mc Evoy 2007 *Journal of Law and Society* 411.

way of legislative or policy instruments requiring or incentivising poverty redress as part of development.¹¹⁸⁰

The executive needs to understand the potential of pursuing a developmental state in the broader sense, in the interests of poverty relief. This involves active intervention by the state including regulatory and guidance measures, with empowerment of the poor being an essential component.¹¹⁸¹ The executive, in its core role in government, has an obligation to ensure that institutional and policy weaknesses associated with the perpetuation of poverty are addressed, and that this occurs prior to development planning, especially for large service delivery projects.¹¹⁸²

Some theorists argue that poverty relief would be best served via a social compact between government and the private sector to drive investment, innovation and enterprise development, and to empower the poor.¹¹⁸³ This is distinguishable from the perspective of theorists who favour a state interventionist approach to tackle poverty. A social compact would possibly have potential to create society-wide benefits if it is underpinned by truly transformational imperatives which serve to effectively redistribute power and wealth.

A social democratic governance model is one which the executive should contemplate in the South African context, in the interests of poverty amelioration. This entails democratic decision making with regard to economic matters, and substantial investment in socio-economic goods such as education, health and housing.¹¹⁸⁴ The executive must interrogate whether the transition from the RDP to

¹¹⁸⁰ Rosa 2011 *Stellenbosch Law Review* 545 *et seq* argues for the introduction of material and resource distribution issues into developmental processes. See also Liebenberg and Young "Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?" who argue for "democratic experimentalism" in developmental processes, to drive poverty relief along with developmental imperatives.

¹¹⁸¹ Karriem and Hoskins 2016 *Politikon* 4.

¹¹⁸² Turok 2016 *Local Economy* 19. The pros and cons for poverty amelioration of pursuing developmentalism are discussed in section 2.3.1.6.

¹¹⁸³ Bhorat et al *Economic Policy in South Africa: Past, Present and Future*.

¹¹⁸⁴ Le Roux 1991 *Social Justice* 230. The writings of Le Roux accord with the RDP of the ANC which was being posited as the future governance model for South Africa prior to the political transition.

GEAR, which entailed a shift to market-based service provision rather than a social democracy, should be reconsidered given that poverty has been exacerbated under the market-based system.¹¹⁸⁵

In the context of a highly unequal society, distributive justice should be a concern of the executive, as this is an important requirement for the achievement of social justice and poverty amelioration.¹¹⁸⁶ Distributive justice considerations must be woven into policy and project initiation and development, which the executive is best placed to guide.¹¹⁸⁷ It is significant to note that distributive justice as a vehicle for ameliorating poverty may be less effective than redistributive justice. The former is forward-looking – a means to ensure that socio-economic resources are distributed fairly going forward. The latter addresses the redistribution of ill-gotten gains acquired during times of injustice.¹¹⁸⁸ This is arguably a necessary consideration in the South African context, with apartheid having effected an unjust distribution of resources along racial lines.¹¹⁸⁹

Redress for purposes of poverty amelioration may entail the introduction of macroeconomic reforms directing the economy away from capitalism. Aspects of capitalism that warrant being challenged or questioned include wealth bubbles, bloated debt, and hyper-commercialisation.¹¹⁹⁰ The executive must interrogate phenomena of this nature, which are adverse for poverty amelioration, with a view to assessing whether they should continue to be pursued or allowed by government.

The executive can pursue actions towards poverty amelioration by empowering, encouraging and incentivising the non-governmental sector. This sector can serve

¹¹⁸⁵ Luiz 1996 *International Journal of Social Economics* 148.

¹¹⁸⁶ Vieira 2012 *Global Society* 313.

¹¹⁸⁷ See Palat 2008 *Futures* 721 where it is argued that distributive justice is associated with changes to the prevailing economic order, and is an essential mechanism for overcoming poverty and inequality in developing countries.

¹¹⁸⁸ Pierce and Martin 2017 *Urban Studies* 259 are advocates for the notion of applying redistributive justice in the process of societal reform. See also Waldorf 2012 *Social and Legal Studies* 180-181 who similarly advocates for redistribution of resources to serve the needs of the poor.

¹¹⁸⁹ Waldorf 2012 *Social and Legal Studies* 180-181. The author argues strongly that distributive justice is an appropriate mechanism for redressing inequalities.

¹¹⁹⁰ Mc Chesney and Foster 2010 *Monthly Review Magazine* 9.

as a force for effecting redress for the poor and marginalised. It can do so via watchdog, advocacy and campaigning activities which promote social development and community engagement, and assisting communities to be agents to bring about their own poverty amelioration measures.¹¹⁹¹

Redress for the poor can be promoted through encouragement and empowerment of people, which the executive can drive. This could take place in a variety of forms, for example via enhancing human capability and making people aware of their capabilities and potential to take their own action to alleviate their circumstances of poverty.¹¹⁹² Another possible way is via incentivising, with financial or reputational rewards, of citizen action towards poverty amelioration. It is possible that empowerment of people with a view to alleviating poverty could be not only on individual level, but also at community level through the improvement of social cohesion, which is associated with voluntary co-operation between citizens.¹¹⁹³ Akin to the notion of social cohesion as a force for transformation is the idea of active citizenry, which entails people using their agency to facilitate realisation of aspirations and amelioration of poverty.¹¹⁹⁴ Associated with the notion of using human agency to effect transformation is the idea of developing an ethic of care

¹¹⁹¹ Lombard and Du Preez 2004 *Social Work* 231. See also Roth 2004 *Human Rights Quarterly* 63, who emphasises the role of NGOs in upholding rights.

¹¹⁹² This is suggested in Clark *The Capability Approach: Its Development, Critiques and Recent Advances* 1-18. Other writers have stressed the role of people in constitutional transformation. In this regard see Brand 2011 *Stellenbosch Law Review* 614, and Sibanda 2011 *Stellenbosch Law Review* 486. The latter argues persuasively that the *Constitution* embodies choices which humans can choose to make to uphold rights and fulfil its purpose.

¹¹⁹³ Burns, Lefko-Everett and Njizela *From Definition to Measurement: Constructing a Social Cohesion Index for South Africa* 1-28. See also Seekings 2016 *European Journal of Social Theory* 207 who links social cohesion and solidarity with redistribution of resources. See also Rapatsa 2014 *Mediterranean Journal of Social Sciences* 966-969 where it is argued that the *Constitution* supports the notion of a society based on social solidarity, caring and interdependence. In addition see Laffont 1975 *Economica* 433 who advocates for the development of a collective consciousness against self-interest. See further Blake 2001 *Philosophy and Public Affairs* 7, 12, who writes in favour of the fostering of concern amongst citizens for relative deprivation, with legislative provisions being introduced to effect distributive justice.

¹¹⁹⁴ Enslin 2003 *Cambridge Journal of Education* 80. See also Harloe 2001 *International Journal of Urban and Regional Research* 894 who argues that poverty is a creation of society, and it is thus capable of being ameliorated through human effort. See also Sanders and Chopra 2006 *American Journal of Public Health* 76 who highlight the valuable role of human initiative and involvement in resolving public health issues.

and human empathy as a basis for poverty amelioration action.¹¹⁹⁵ This may entail development of the lateral or horizontal applicability of human rights, and the imposition of positive encouragement laterally as between citizens to ensure the fulfilment of rights.¹¹⁹⁶ It also may entail the recognition of a positive impetus on the part of the executive, but also on society as a whole, to help those in need rather than only pursuing the libertarian notion of a duty only to do no harm.¹¹⁹⁷ An ethic of care and human empathy may be more evident in rural communities in South Africa than in towns and cities, with citizens in the former actively maintaining a safety net against poverty through mutually supporting each other.¹¹⁹⁸ The executive should motivate and encourage such arrangements. The concept of human agency for poverty relief may be extended to understanding how social outcomes such as poverty are developed and driven fundamentally via human choices, for example in voting for political parties or representatives. Thus human agency may be mobilised to effect change in such outcomes.¹¹⁹⁹ This is a dynamic which the executive should be aware of and should seek to develop as a force for change.

The executive must foster an environment where community mobilisation is encouraged and where community demands and needs are heard and meaningfully responded to. This may be a force for driving poverty amelioration. This is illustrated in litigious matters in which communities come together to demand fulfilment of their rights, as was the case in *Mazibuko*, which saw a group of litigants pursue their right to water.¹²⁰⁰ It is arguable that community mobilisation in the political rather than the litigious context is more effective in achieving social change.¹²⁰¹

¹¹⁹⁵ Smith 1997 *Environment and Planning* 33-34. See also Olsaretti 2013 *Economics and Philosophy* 461 who argues that equality is associated with mutual caring between people and exchange of reciprocal care, which has the potential to drive a positive impetus towards poverty amelioration.

¹¹⁹⁶ Block 2015 *American Journal of Economics and Sociology* 46.

¹¹⁹⁷ Gilibert 2006 *Southern Journal of Philosophy* 193.

¹¹⁹⁸ Neves and Du Toit 2013 *Journal of Agrarian Change* 103.

¹¹⁹⁹ Oxfam International *Reward Work, not Wealth* 28.

¹²⁰⁰ See the discussion of this case in Dugard 2008 *South African Journal on Human Rights* 588. The author highlights the effectiveness of the community-based approach to addressing their circumstances of poverty. At the time the article was written the successful appeal of the City of Johannesburg to the Constitutional Court had not yet been heard.

¹²⁰¹ Ndlovu 2014 *Transformative Constitutionalism: The Best Tactic to Achieve It* 64.

The concept of utopian thinking is one which the executive, supported by society, can espouse with a view to ameliorating poverty. This would entail the envisaging and working towards an ideal egalitarian state in which the inequities associated with poverty are absent, and in which new social relationships are imagined and developed.¹²⁰² Furthermore it may be possible for the executive to envisage and create new transdisciplinary modes of thinking such as reforming economics and ensuring that it is better aligned to sociology.¹²⁰³

Redress for the poor may be achieved by creating a framework for human empowerment. This may be done in a step by step manner, as advocated by Crocker.¹²⁰⁴ The steps envisaged are the recognition of power imbalances, creating processes of self-determination and empowerment, fostering a developmental agenda without elite capture, safeguarding against corruption, and driving transitional justice. Empowerment can be a valuable and legitimate focus of executive action towards poverty amelioration.

The executive should move towards the fostering of an awareness of the need for an applied ethical framework oriented towards redressing injustices suffered by the poor.¹²⁰⁵ An approach of this type may also involve the normative ranking of social outcomes according to their ethical and moral foundation.¹²⁰⁶

4.4.8 Miscellaneous Socio-economic Phenomena to be Addressed by the Executive

This section deals with a number of other socio-economic phenomena which are potentially under the control of or can be influenced by the executive, and which

¹²⁰² Mullins 1972 *The American Political Science Review* 498.

¹²⁰³ This is suggested in Van Parijs 2013 *Politics and Society* 171, where a cogent argument is made for utopian thinking in sociology and the integration of economics into the social sciences.

¹²⁰⁴ Crocker 2014 *Journal of Global Ethics* 245.

¹²⁰⁵ Becker and Brown 2013 *Ethics, Policy and Environment* 37. They advocate for the introduction of an applied ethical framework in the context of dealing with inequities arising from climate change, but their approach holds equally well in the context of poverty amelioration.

¹²⁰⁶ Silva-Leander and Seth 2017 *Social Choice and Welfare* 2. See also Agbude, Adoba and Etefe 2013 *Research on Humanities and Social Sciences* 1 who argue for the introduction of moral and ethical dimensions into developmental policy.

exacerbate poverty. They are mentioned here in the context of the executive potentially finding solutions to overcome their role as such.

The executive needs to be aware that the commodification of goods and resources which are the subject of fundamental human rights or public service delivery obligations, is at odds with the imperatives of equalising society and ameliorating poverty. Commodification entails provision of such goods and services on a profit-driven basis. Ways to overcome the negative features and outcomes of commodification need to be found and deployed.¹²⁰⁷ Associated with commodification of goods and services is the outsourcing by government of service provision to the private sector. This results in the pursuit of cost recovery and profits, in priority to human rights realisation and poverty amelioration.¹²⁰⁸ The executive should become aware of these problematic dynamics and pursue policy and legislative initiatives to combat their negative impacts.

The executive could give consideration to the possibility of finding ways to control urbanisation, as a poverty amelioration measure. This is due to increasing evidence that urban poverty is rapidly expanding¹²⁰⁹ and is associated with worse food insecurity than that prevailing in rural areas.¹²¹⁰ How to control urbanisation is a vexed question in the South African context, with its history of oppressive influx control measures during apartheid. It is suggested that the optimal way to achieve this would be to pursue developmental programmes in the rural areas, including improve infrastructure, access to health and education, and reliable services, to incentivise people to live there.

Free and open trade by South Africa with foreign countries, as espoused by government shortly after the political transition in 1994, had adverse effects on the

¹²⁰⁷ In this regard see Movik 2014 *Geoforum* 187-195, who writes of the adverse consequences of commodification of water in South Africa, Bond 1999 *Geoforum* 55 who criticises the principle of cost recovery contained in the *Local Government: Municipal Systems Act*, and Chirwa 2004 *African Human Rights Law Journal* 292 who posits that cost recovery on water conflicts with the human right to water.

¹²⁰⁸ Chirwa 2004 *African Human Rights Law Journal* 292 and Mc Graw 2011 *Loyola University Chicago International Law Review* 167.

¹²⁰⁹ Leibbrandt *et al* 2009 *Unemployment and Inequality Outcomes in South Africa* 1-54.

¹²¹⁰ Battersby 2011 *Development Southern Africa* 546.

economy, decimating economic sectors such as textiles, due to the influx of cheap imports.¹²¹¹ Global free trade, which has persisted into contemporary times, is inimical to human rights and the interests of the poor – a trend which has been documented in the international context as well.¹²¹² It is incumbent upon the executive to give attention to the issue of the exacerbation of poverty by liberal and free trade, and to consider what measures can be taken to offset negative impacts thereof, for instance to boost the manufacturing sector in South Africa.

Labour market conditions, associated with the supply and demand for categories of labour, have a determinative effect on poverty, since they are inextricably linked to employment rates and the well-being of those in employment. These conditions may determine the ease of finding employment, and also the remuneration levels of specific jobs.¹²¹³ Policy and legislation in the labour sphere which protects employees to the detriment of employers may serve to disincentivise the latter from employing staff.¹²¹⁴ The executive is in a position to undertake policy and initiate legislative reforms which have the effect of minimising the potential negative effects of labour market conditions on poverty. An example would be the undertaking of incentivisation measures, and possible educational reforms, to boost labour market sectors which fail to attract candidates.

In contemporary South Africa, there is a strong awareness of corruption as a phenomenon which benefits the corrupt to the detriment of the poor.¹²¹⁵ There are positive indicators that government is addressing the issue of corruption, especially

¹²¹¹ Motala 2016 *American University Business Law Review* 36.

¹²¹² Schneider 2003 *Journal of Economic Issues* 391, 394. See also Oppong 2006 *African Human Rights Law Journal* 124. For a South-Africa-specific perspective, see Hickey and Du Toit 2007 *Adverse Incorporation, Social Exclusion and Chronic Poverty* 18.

¹²¹³ Bhorat *et al Economic Policy in South Africa: Past, Present and Future* 17.

¹²¹⁴ Leibbrandt *Unemployment and Inequality Outcomes in South Africa* 32.

¹²¹⁵ An example of this awareness is the strong publicity around the investigations and reporting of the Zondo Commission enquiry into the phenomenon of state capture. It is reported that at least R50 billion can be traced as having flowed from state coffers to Gupta-linked companies – see <https://www.dailymaverick.co.za/article/2021-05-24-the-totalish-cost-of-the-guptas-state-capture-r49157323233-68/>. See also Rosa 2011 *Stellenbosch Law Review* 554 where the phenomenon of diversion of resources from the poor through corruption is cogently described.

via the Zondo Commission¹²¹⁶ findings,¹²¹⁷ although at the time of writing it still remains to be seen whether effective remedial action will be taken against identified perpetrators. Associated with corruption is the phenomenon of patrimonialism, which entails the diversion of public resources to select groups in exchange for political support.¹²¹⁸ The executive has a cardinal role to play in governmental management of corruption and redress for its outcomes.

4.5 Chapter Summary

It has been a focus of this chapter to emphasise that the executive has a cardinal role to play in taking a range of actions which individually and cumulatively could serve to ameliorate poverty. The first reason for its cardinal role is that it is the branch of government that initiates policy and legislation. As such, it plays a vital role in ensuring that necessary policy and legislative instruments, including those that may ameliorate poverty, are initiated and pursued. The second reason is that it is the branch of government responsible for management of the *fiscus*, with regard to which it fulfils a planning and budgeting role, and an implementation and expenditure role. Thus it is essentially responsible for ensuring that government resources are deployed purposively, including towards the amelioration of poverty.

An essential component of the executive's responsibility to consider using its powers and resources to ameliorate poverty must of necessity lie in the interrogation of the primary policy instruments which government has adopted from time to time. The GEAR and NDP policies do not favour or promote poverty amelioration. With poverty being as endemic and pervasive as it is in South African society, it is urgently necessary that a policy foundation be developed that can develop, encourage and incentivise potential pathways to achieve poverty amelioration. Analysts of the current national economic and developmental policy regime strongly present the

¹²¹⁶ The Zondo Commission is a judicial commission of enquiry appointed by the president in 2018 to investigate allegations of state capture, corruption and fraud in the public sector in South Africa.

¹²¹⁷ The full reports of the commission in six volumes may be found on www.statecapture.org.za/site/information/reports.

¹²¹⁸ Lodge 2014 *African Affairs* 1.

position that a policy shift away from neoliberalism is necessary if issues pertaining to poverty are to be addressed.

Besides interrogation of policy and possible policy shifts, there are a number of courses of action which the executive can take to work towards poverty amelioration. The value of these courses of action lies in their individual potential, but even more so in their cumulative potential to achieve substantial transformative outcomes. Gaining and promoting an awareness of the nature and dimensions of poverty is an obvious first step for the executive to follow in finding poverty amelioration solutions. With poverty-related issues being weakly and erratically reflected in legislation, and with significant anomalies in national economic and development policy, it is reasonable to assume that the necessary awareness in government and the citizenry is lacking. An understanding of the problem to be addressed is an essential first step in finding solutions.¹²¹⁹

The reconsideration of neoliberalism as a dominant paradigm in the governance of South Africa is a task which the executive must undertake if it is to address poverty amelioration. This is borne out by a number of authors.¹²²⁰ The role of the executive in such an initiative is clear if seen in the context of the fact that the executive is the primary driver of legislative and policy change.

The prevalence of capitalism as an underlying and unquestioned economic framework or model, is a millstone in the way of socio-economic transformation for the poor. The main feature of capitalism serving as an obstruction to change is the fact that it is preservative of the status quo and even promotes the widening of the rift between rich and poor.¹²²¹ Again, the executive as the initiator of legislative and policy change is best placed to initiate changes in the prevailing economic paradigm.

¹²¹⁹ For a full discussion of the need to gain and promote the necessary awareness, see section 4.4.1 hereof.

¹²²⁰ The views of various writers who posit the rethinking of neoliberalism as a governance paradigm, along with suggestions as to how the executive might tackle this task, are featured in section 4.4.2.

¹²²¹ Various perspectives on capitalism as an inhibitor of socio-economic transformation are featured in section 4.3.3.

The executive has a significant obligation to ensure that the *Constitution* is not deified but rather used meaningfully as a tool for poverty amelioration. This entails planning and implementing programmes that support the transformational imperatives of the constitution, but at the same time acknowledge its limitations and the risks and pitfalls of constitutional complacency and acquiescence. In particular, ways must be found to utilise the socio-economic rights as a purposive and meaningful way to achieve poverty amelioration.¹²²² The executive as the primary branch of government responsible for implementation of the law is uniquely placed to undertake these functions.

It is necessary that the executive be aware of and seek to remedy economic power and policy issues that stand in the way of poverty amelioration. It can use its position as the initiator of legislation and policy to create measures to address wealth disparity and empower the poor. In addition, the executive must make a conscious effort to mainstream poverty discourse into economic theory. It can do so by initiating debate and research in this regard. As part of this discourse, new economic models can be conceptualised and explored, such as the “human economy” posited by Oxfam, bringing ethical dimensions into economics, closing the gap between business and corporate social initiatives, purposive allocative budgeting and pursuing macroeconomic shifts necessary to manage climate change.

As part of this process, the prevailing economic model espoused in GEAR and perpetuated in the NDP, needs to be re-evaluated and reconsidered. The executive needs to orient itself towards pursuit of economic transformation rather than economic growth as conventionally understood.

Poverty amelioration may be able to be effected via fostering an understanding of poverty through a sociological lens, rather than viewing it as a purely economic phenomenon. This would foster an understanding of how the poor are marginalised

¹²²² See the discussion of the role of the executive in poverty amelioration in the context of a constitutional state, in section 4.3.4.

and deprived through entrenched societal power imbalances, which could in turn lead to initiatives to overcome such imbalances.

In summary, this chapter has illustrated that the executive has a key role to play in the management and amelioration of poverty issues. This is mainly because it is the initiator of policy and legislation, and is the branch of government tasked with implementing and applying the law. Thus it has practical status and powers which enable it to wield influence and authority over issues relating to poverty amelioration.

CHAPTER 5

THE ROLE OF THE JUDICIARY IN THE AMELIORATION OF POVERTY

5.1 Introduction

In this chapter, the judiciary as the third role-player amongst the three branches of government is highlighted insofar as it has a role to play in poverty amelioration. The chapter begins with a setting out of the configuration and functions of the judicial system in South Africa. After this, one should be able to draw from the *Constitution* and constitutional theory to argue that the judiciary has a role to play in poverty alleviation. It proceeds to deal with an analysis of the two most cogent influences over judicial efficacy in ameliorating poverty – the separation of powers and judicial deference doctrines. It moves on to consider judicial approaches to poverty and contributions towards poverty amelioration after the political transition of 1994. In particular, aspects of judicial functioning that may thwart or limit poverty amelioration are considered, followed by judicial approaches to poverty reflected in case law. Thereafter, courses of action for the judiciary to pursue in addressing poverty amelioration are outlined. Firstly in this category, circumstances of which the judiciary should be aware which are relevant to its role in poverty amelioration are outlined. Secondly, actions which the judiciary can pursue proactively and urgently towards this goal are considered.

5.2 The Judiciary in South Africa

The judiciary is an evolving institution which has been in place since the inception of South Africa as a sovereign state and a republic, and earlier. In terms of the 1909 and 1961 Constitutions, which respectively marked the coming into being of a sovereign state and a republic, the administration of justice was placed under the control of a Minister of Justice.¹²²³ In terms of the present *Constitution*, the judicial authority of the Republic is vested in the courts.¹²²⁴ The Chief Justice is designated as the head of the judiciary, and exercises responsibility over the establishment and

¹²²³ See <https://www.judiciary.org.za/index.php/ocj/about-the-ocj/historical-background> date unknown, where these historical developments are succinctly sketched.

¹²²⁴ Section 165(1) of the *Constitution*.

monitoring of norms and standards for the exercise of the judicial functions of all courts.¹²²⁵

Section 166 of the *Constitution* establishes the hierarchy of South African courts – the Constitutional Court, the Supreme Court of Appeal, the High Courts, the Magistrates’ Courts and any other court established or recognised in terms of an Act of Parliament. The Constitutional Court is the highest court. In terms of section 167(3) of the *Constitution*, it may decide constitutional matters and any other matter upon which it grants leave to appeal. It functions primarily as a court of appeal and does not hear evidence. The Supreme Court of Appeal is the next highest court and functions on a similar basis, with jurisdiction to hear any matter except certain labour and competition matters. The High Courts have jurisdiction over persons present in their areas and matters which arise in their areas, and which do not clearly fall within the jurisdiction of Magistrates’ Courts. Magistrates’ Courts deal with less serious criminal and civil cases.

Arising from the broad powers conferred upon the courts in terms of the *Constitution*,¹²²⁶ it is possible to conceptualise a substantial role for the judiciary in poverty amelioration. The duties conferred upon the judiciary to pursue transformative constitutionalism¹²²⁷ and enforce compliance with socio-economic rights¹²²⁸ render it in a position to contribute towards such amelioration through jurisprudence aligned with the values and vision of the *Constitution*.

The functioning of the judiciary in South Africa is influenced by rules of practice or doctrines which influence its role in the constitutional democracy. The most significant of these for purposes of the present discussion are the separation of powers doctrine¹²²⁹ and the doctrine of judicial deference, as these have substantial

¹²²⁵ Section 165(6) of the *Constitution*.

¹²²⁶ See section 172, which confers broad powers in constitutional matters on the courts, and section 173 which confers inherent power.

¹²²⁷ In this regard see section 1.3.

¹²²⁸ In terms of section 8(1) of the *Constitution*, the Bill of Rights binds the judiciary.

¹²²⁹ For an outline of the meaning of the separation of powers doctrine, see De Vos and Freedman (eds) *South African Constitutional Law in Context* 202.

influence over decision-making in socio-economic rights cases which are relevant to poverty amelioration.

5.3 Separation of Powers and Judicial Deference as Inhibitor

Separation of powers is a doctrine which is a hallmark of the Westminster governmental system. It dictates that the three branches of government should as far as possible avoid encroachment into each others' functional areas.¹²³⁰ In the context of judicial functionality this presents an anomaly, since the judiciary wields judicial authority which entitles it to enforce the *Constitution* and the law generally, even against other branches of government, although the separation doctrine dictates that it must exercise restraint in making orders against them.

In socio-economic rights cases, in which the issue of poverty is raised or is an underpinning consideration, it may sometimes be a vexed question as to how far the judiciary can go in directing the actions of the other branches of government.

Strict application of the separation of powers doctrine may serve to mask unease on the part of conservative judges with the concept of transformative constitutionalism and may indicate a reluctance to seek remedies for escalating socio-economic inequality.¹²³¹ A significant illustration of the application of the doctrine is the reasonableness review posited in *Grootboom*.¹²³² This standard of review is abstract and potentially subjective, and it avoids the vexed dilemma of how to ensure that the socio-economic rights are applied in a manner that serves the needs of the poor. The matter of *Soobramoney* saw the court expressing compassion with a socio-economic rights claimant, but despite this obviously sympathetic position it nevertheless found that it was bound to take an inflexible

¹²³⁰ For a discussion of the separation of powers in the context of legislative functionality, see section 3.4.1 above.

¹²³¹ Dugard 2007 *Leiden Journal of International Law* 969. At 979 the author also refers to strict adherence to separation of powers as being reflective of an "angst" or a timidity. See also Ebadolahi 2008 *New York University Law Review* 1583, who argues that having to deal with socio-economic rights issues induces anxiety in the judiciary.

¹²³² For a discussion of the association between separation of powers and the reasonableness review in *Grootboom* see Dugard 2007 *Leiden Journal of International Law* 975. See also Liebenberg *Socio-economic Rights Adjudication Under a Transformative Constitution* 151-157.

view of its duty of non-interference with the decisions of government.¹²³³ This represents an anomaly whereby a court wishes to help a claimant but is influenced by the separation doctrine to not interfere with decisions of other branches of government. The ramifications of this position for poverty amelioration are decidedly negative, in that it supports a reluctance to grant substantive relief. Also, it belies the humanitarian imperatives underpinning the *Constitution* and the Bill of Rights.

The separation of powers doctrine is premised on the notion that judicial adjudication is non-political. In the context of socio-economic rights adjudication this is a fallacy, as the adjudicative process of necessity involves judges positioning themselves along ideologically and politically based lines. For example, a judge favours non-interference in the decisions of the executive will typically be one who favours liberal democratic tradition – his or her political and ideological position is reflected in the choice made regarding adherence to the separation doctrine.¹²³⁴ It is arguable that, rather than shy away from acknowledging the political dimensions of socio-economic rights adjudication, the judiciary should respond to failures of service delivery and other intransigence by the executive.¹²³⁵

Adherence to separation of powers tends to result in courts failing to address tangible socio-economic needs, and basing judgments on adherence to the doctrine rather than on people-centred considerations.¹²³⁶ This does not augur well for the fulfilment of the fundamental socio-economic rights of the citizenry.

Since the judiciary is the branch of government which is tasked with adjudication of socio-economic rights claims, it may be said that it has an active duty to advance socio-economic equality.¹²³⁷ This should be a foremost consideration in it weighing up where to position itself with regard to the separation of powers doctrine. The advancement of socio-economic equality may require the courts to make orders

¹²³³ *Soobramoney* para 29.

¹²³⁴ See Pieterse 2004 *Human Rights Quarterly* 904 and Pieterse 2004 *South African Journal on Human Rights* 399 where it is argued that the adjudicative process is inherently political.

¹²³⁵ Ngang 2014 *African Human Rights Law Journal* 663.

¹²³⁶ Pieterse 2004 *South African Journal on Human Rights* 404. The judgment in *Soobramoney* is a clear illustration of this.

¹²³⁷ Dugard 2007 *Leiden Journal of International Law* 970.

giving directions with regard to budgetary allocation.¹²³⁸ This possibility is one which the courts should explore and embrace in the interests of poverty amelioration.

The judiciary should take cognisance, to the extent that it has not already, that the separation doctrine is one which is somewhat blurred and fluid in the international realm, and that it may well be appropriate for a specific country such as South Africa to adopt a customised interpretation thereof. Given the doctrine's potential to thwart realisation of rights, it is arguable that it should be reconceptualised in the South African context.¹²³⁹ This reconceptualisation could entail the judiciary acknowledging that with the *Constitution* incorporating justiciable socio-economic rights, it is legitimate for orders to be made which have impacts upon government's budgetary allocations.¹²⁴⁰

An exception to the conservative approach of the judiciary with regard to the separation of powers doctrine in the early 2000s may be found in the *Treatment Action Campaign* judgment, in which the court granted declaratory and mandatory relief for the rollout of antiretroviral medication, to prevent mother to child transmission of the HIV virus. In more recent times, there has been a positive indication that the courts are willing to move into the terrain of granting relief against provincial and local government in socio-economic rights cases.¹²⁴¹ This may be indicative of a developing trend to move away from strict separation of powers and deference.

¹²³⁸ In this regard see section 2.4.3.2, in particular the discussion around the *Second Certification Judgment* explicitly providing for such a possibility, articulating in para 77 thereof that it would not constitute a breach of the separation of powers doctrine for courts to make orders with budgetary implications. See also Dugard 2007 *Leiden Journal of International Law* 971.

¹²³⁹ Dugard 2007 *Leiden Journal of International Law* 978.

¹²⁴⁰ See also Dugard 2007 *Leiden Journal of International Law* 979, where, citing Haysom, she articulates that the *Constitution* must provide "bread and freedom". See also Pieterse 2004 *South African Journal on Human Rights* 417 where the point is made that the orientation of the South African *Constitution* departs significantly from Anglo-Saxon legal culture in which the separation and deference doctrines are grounded.

¹²⁴¹ See *Pheko and others v Ekurhuleni Metropolitan Municipality and others* 2012 (2) SA 598 (CC) (hereafter "*Pheko*"), *Adonisi and others v MEC Transport and Public Works and others* 2021 4 All SA 69 (WCHC) (hereafter "*Adonisi*"), *Unemployed Peoples Movement v Premier Eastern Cape* 2020 ZAECHC 47 (hereafter "*Unemployed Peoples Movement*"), and *South African Human Rights Commission v Msundizi Local Municipality and others* 2021 (6) SA 500 (KZP) (hereafter "*SAHRC v Msundizi*").

Rooted in the concept of the separation of powers, the doctrine of judicial deference is characterised by judges deferring to other branches of government when dealing with litigious matters which relate to the powers and decisions of such branches. It represents a form of judicial reticence to interfere or intrude into the domain of the legislature and the executive, largely by reason of the fact that the other branches of government (or their leadership in the case of the executive) are democratically elected, and the judiciary is not. Application of the doctrine is sometimes accompanied by the judiciary explicitly stating that the executive has better ability to determine the issue at hand.¹²⁴²

The higher courts of South African have 'inherent jurisdiction' in terms of section 173 of the *Constitution*.¹²⁴³ Thus in terms of their constitutive legislation there are no categories of decisions that are excluded from their jurisdiction. Furthermore, section 165(2) of the *Constitution* provides that "(t)he courts are independent and subject only to the *Constitution* and the law, which they must apply impartially and without fear, favour or prejudice." In the absence of a legislative prescript requiring judicial deference, and given the explicit statement of independence of the courts in the *Constitution*, the application of judicial deference by the judiciary is a matter not of legislative compliance but of voluntary adherence to tradition.¹²⁴⁴

There is a tension between judicial deference and judicial independence, these being opposing imperatives. Judgments of the Constitutional Court in socio-economic rights cases indicate that the judiciary is inclined to favour a deferential approach in this realm. One of the most pertinent illustrations of judicial deference in socio-economic rights cases is the *Mazibuko* case. The judgment of O'Regan J in this case is a cardinal illustration of the application of strong judicial deference by

¹²⁴² This was stated by the court in *Mazibuko*.

¹²⁴³ Section 173 states: "Inherent power.—The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice".

¹²⁴⁴ See Ngang 2014 *African Human Rights Law Journal* 666, where it is argued that the judiciary is the architect of its own limitations. This argument is part of a broader discussion around the obligation of the judiciary to hold the state to account with regard to poverty amelioration.

the Constitutional Court. Paragraph 61 of the judgment encapsulates the approach of the court:

Secondly, ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.

Close scrutiny of the words used by court in this paragraph of the judgment reveals the strength of its adherence to deference. “Inappropriate” suggests an unquestioning adherence to tradition. The court’s assertion above suggests that it regards budgetary allocation as a sacrosanct area of governance with which it will not interfere. The last sentence of the paragraph explicitly articulates the counter majoritarian argument which supports the doctrine of judicial deference, neglecting to consider what should be done when the accountable organ of state should be held to account.

Brand¹²⁴⁵ points out that a strong deferential approach is premised upon a binary perception of the institutional relations at hand, in that it is based on a consideration of the positions of the executive and the judiciary relative to each other.¹²⁴⁶ He suggests that a three-pronged analysis, taking into account the position of the litigants, would be more useful. Given that they are often non-suited when deference is applied, this would seem to be a valid argument. Brand further points out that judicial deference is inclined to lead to attenuated relief being granted.¹²⁴⁷ An illustration of the granting of attenuated relief pursuant to judicial deference is the judgment in *Grootboom*, in which the court ordered government to revise its emergency housing plans, but was loath to give specific direction with regard

¹²⁴⁵ Brand 2011 *Stellenbosch Law Review* 614.

¹²⁴⁶ Brand 2011 *Stellenbosch Law Review* 617-620.

¹²⁴⁷ Brand 2011 *Stellenbosch Law Review* 615.

thereto or to a make a supervisory order. As mentioned above, there is an emergent trend in recent times, evident in the *Pheko, Adonisi, Unemployed Peoples Movement* and *SAHRC v Msunidizi* cases, for courts to grant relief to remedy the service delivery deficiencies and rights violations of provincial and local government. Judicial deference is not specifically ruled upon in these cases, but the granting of relief to the claimants in all of them is indicative of a downplaying of the deference doctrine. A clear judicial *ratio decidendi* or *obiter dictum* in this regard would be most helpful.

Brand highlights that in observing the deference doctrine, courts are steered away from their fundamental duty to effect transformation under the *Constitution*.¹²⁴⁸ It is a logical corollary of application of the doctrine that the executive is relieved from being called to account by any mechanism other than the ballot box. The effect of this is that the executive wields the authority with regard to fulfilment of the socio-economic rights – an unsatisfactory position given that the *Constitution* provides that everyone, including government, is equal before the law, and given that the judiciary could contribute meaningfully in this realm.

Brand states furthermore that strong deference in socio-economic rights cases serves to “technicise” poverty, and thus to limit the capacity for political action by impoverished people. This would seem to be borne out in the judgments in both *Mazibuko* and *Grootboom*, which leave the reader with the impression that it is the plans, programmes and budgets of government that are primarily under consideration, rather than the suffering of the poor and disadvantaged. Again, the recent cases of *Pheko, Adonisi, Unemployed Peoples Movement* and *SAHRC v Msundizi* show a softening of the courts’ approach when dealing with peoples’ hardships associated with socio-economic rights failures.

Liebenberg offers further persuasive criticism of strong deference in socio-economics rights cases. Its application is not conducive to participatory democracy, she states.¹²⁴⁹ She argues further that the unquestioning application

¹²⁴⁸ Brand 2011 *Stellenbosch Law Review* 624.

¹²⁴⁹ Liebenberg 2012 *Socio-Economic Rights Under a Transformative Constitution* 31.

of the doctrine detracts from the nature of law as “dialogic politics”.¹²⁵⁰ This point is similar to the point made by Brand that in the application of the deference doctrine, the voice of the claimants is not heard. Another point raised by Liebenberg is that deference diminishes the potential for legal adjudication to influence social policy.¹²⁵¹ Justiciability of the socio-economic rights, she further argues, points towards an intention on the part of the drafters of the *Constitution* that the courts should embrace an interpretive role, which is less likely to happen when deference is strictly applied.¹²⁵² With the application of deference, judicial interpretation is insulated from transformative critique.¹²⁵³ The gist of these points raised by Liebenberg is that the application of the doctrine belies the transformation imperative which underpins the *Constitution*. Appraising the Constitutional Court judgment in *Mazibuko*, she expresses the view that the Court took refuge in the perceived lack of institutional competence and legitimacy in the courts. In so doing, it avoids its responsibility to interpret the normative standards underpinning the socio-economic rights.¹²⁵⁴ This is clear particularly from paragraph 61 of the judgment quoted above, where O’Regan J explicitly states that it is “institutionally inappropriate” for a court to determine what government should do towards realisation of the rights. The court does not give consideration to a possible duty on its part to give normative content to the rights, or to hold government to account.

With regard to both the separation of powers and judicial deference doctrines, it would be apposite for the judiciary to actively pursue a shared premise of its roles and responsibilities, in the context of a transformative constitution.¹²⁵⁵ This is needed notwithstanding the fact that government has on occasion overtly articulated its belief that the judiciary is bound to abide by the two doctrines.¹²⁵⁶

¹²⁵⁰ Liebenberg 2012 *Socio-Economic Rights Under a Transformative Constitution* 34.

¹²⁵¹ Liebenberg 2012 *Socio-Economic Rights Under a Transformative Constitution* 36.

¹²⁵² Liebenberg 2012 *Socio-Economic Rights Under a Transformative Constitution* 37.

¹²⁵³ Liebenberg 2012 *Socio-Economic Rights Under a Transformative Constitution* 39.

¹²⁵⁴ Liebenberg 2012 *Socio-Economic Rights Under a Transformative Constitution* 468.

¹²⁵⁵ Pieterse 2004 *South African Journal on Human Rights* 417.

¹²⁵⁶ Siyo and Mubangizi 2015 *Potchefstroom Electronic Law Journal* 42 provide an account of instances in which the national government has taken a stance against judicial independence

5.4 Judicial Approaches to Poverty after the Political Transition

This section has two parts. Firstly, it considers features of judicial approaches which are problematic in the context of the obligation of the judiciary to pursue the constitutional imperative of poverty relief, other than judicial adherence to separation of powers doctrine and the deference principle. Thereafter it provides a summary and critique of existing jurisprudence dealing with poverty issues.

5.4.1 Approaches to Poverty Reflected in Case Law

There is no case in the case law history of South Africa in which poverty is the main subject of the case. Poverty is dealt with by the courts only as a circumstance taken into account in deciding matters before them. This is notwithstanding that poverty amelioration is a constitutional imperative, as discussed above. It will be shown in subsequent discussion in this section that poverty is neither presented in court nor understood by the courts as a phenomenon that has economic, sociological and political dimensions. It would be better understood in context if all its various dimensions were taken into consideration.¹²⁵⁷

In litigation pertaining to social grants, the courts have expressed their views regarding the phenomenon of social assistance provided by the state in terms of section 27 of the *Constitution*, and the legislation pertaining to payment of social grants,¹²⁵⁸ being instruments for the amelioration of poverty.

In the matter of *Black Sash Trust*,¹²⁵⁹ the court was concerned primarily with the operational functionality of the payment system for the disbursement of social

and has favoured the strict observance of separation of powers. They refer *inter alia* to government's initiative to review the judgments of the Constitutional Court, and to the government's disregard in 2015 of a court order regarding the arrest of Sudanese leader Omar Al Bashir whilst he was in South Africa.

¹²⁵⁷ This point is more fully discussed in section 2.4.6.

¹²⁵⁸ The *South African Social Security Agency Act* 9 of 2004 and the *Social Assistance Act* 13 of 2004 are the framework legislative instruments in terms of which social grants are paid to beneficiaries.

¹²⁵⁹ *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* 2017 (3) SA 335 (CC).

grants to beneficiaries. The judgment of Froneman J is introduced with a comment indicating the court's perception of the role of social grants relative to poverty:

[1] One of the signature achievements of our constitutional democracy is the establishment of an inclusive and effective programme of social assistance. It has had a material impact in reducing poverty and inequality and in mitigating the consequences of high levels of unemployment. In so doing it has given some content to the core constitutional values of dignity, equality and freedom.

The first footnote in this extract from the judgment refers to a sociological study dealing with the needs of children.¹²⁶⁰ Since it focuses only on children, it is not a valid source of information regarding poverty generally. The second is a link to a newspaper article suggesting that the crisis before the court relating to payment of social grants has ironically put the need for social grants in the spotlight.¹²⁶¹ Neither of the sources cited by the court is clear authority for the point that the court seems to be trying to make, namely that the social grants system is a remedy for poverty. The approach taken by the court in describing and commenting on the phenomenon of poverty is thus disappointingly shallow.

Although not as recent, the matter of *Khosa*¹²⁶² also saw the court dealing with issues pertaining to the dispensing of social grants, in the context of the rights of permanent residents to social assistance. In this judgment too, poverty is seen as a circumstance which is ameliorated by the provision of social grants. In the main judgment of Mokgoro J., there is extensive deliberation on the reasonableness of

¹²⁶⁰ This footnote refers to the publication entitled "South Africa Child Gauge 2016" by the Children's Institute of the University of Cape Town. The page referenced represents the commencement of a chapter dealing with the child support grant, describing its value for children in need, but also its deficiencies, including difficulties with barriers to entry which result in many children not being allowed into the social security net. Thus the source cited is not good authority for the proposition stated by the court, namely that the social assistance programme has had a material impact in reducing poverty and inequality and mitigating the effect of high levels of unemployment.

¹²⁶¹ This footnote creates a link to a press article in the Daily Despatch about the issue before the court, namely the inability of SASSA to ensure payment of social grants to beneficiaries. In the article the writer, Steven Friedman, expresses the view that the crisis has a positive spin off in that it has served to engender positive attitudes towards the social grant system, which, he says, fulfils an important role in the campaign against poverty.

¹²⁶² *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC).

excluding non-citizens from social assistance, in the context of the links between poverty and the fundamental rights to equality and dignity.¹²⁶³ Only in one part of the judgment does the court make reference to poverty as a relevant circumstance for its consideration, which it does in the following manner:

[74] Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society.

The two sources referenced in the footnotes of the above extract, bizarrely, deal with issues of marginalisation of aliens, and racial segregation laws, in the United States of America, and both relate to times long past.¹²⁶⁴ It is extremely strange that the court chose outdated American sources to substantiate its comments with regard to poverty. This is suggestive of the court not being engaged with the issue of poverty as manifested currently in South Africa, and of needing to consider more relevant sources on the phenomenon.

Outside of the realm of social assistance there is a broad range of cases in which the courts have considered poverty as a relevant circumstance informing their findings. Consideration will first be given to cases where principles associated with poverty were enunciated as general principles guiding the decision of the court.

¹²⁶³ In this regard see paras 52 and 76 of the judgment. At paragraph 52 the need for social assistance is described on the basis of unequal access to basic necessities of life – ie as being founded on inequality – and at paragraph 76 social exclusion suffered by those who lack such necessities as being associated with a lack of dignity.

¹²⁶⁴ The first is Chang “Immigrants Under the New Welfare Law: A Call for Uniformity, A Call for Justice” in 1997 *University of California Los Angeles Law Review* 205. The judgment wrongly references the date of this article as 1977. In this article the author argues that a welfare law in the United States that excludes benefits to aliens should be declared unconstitutional in terms of the US Constitution. The applicability to South Africa is questionable given the different constitutional contexts. The second is the two American cases of *Plessy v Ferguson* 163 US 537, 551 (1896) and *Brown v Board of Education* 347 US 483, 494 (1954). The former case, over a century old, with the constitutionality of Louisiana laws requiring separate rail facilities for whites and people of colour. The latter, emanating from the 1950’s, similarly deals with constitutionality of a racial segregation law pertaining to schools in the United States.

In the matter of *Daniels v Scribante and another*,¹²⁶⁵ the Constitutional Court dealt with issues pertaining to security of tenure in terms of the *Extension of Security of Tenure Act*.¹²⁶⁶ The situation of the applicant, who had tenancy of the respondent's property by virtue of this legislation, was considered by the court to be illustrative of the plight of those historically disadvantaged and rendered poverty-stricken by apartheid, especially those living on farms. The situation at hand and its ramifications and implications inspired much judicial contemplation, reflected in three assenting judgments in addition to the main judgment. All of the judges were *ad idem* that the applicant was entitled to make improvements to the dwelling inhabited by her on the respondent's property, and all wrote strong expositions of their views with regard to the obligation of private individuals and entities to uphold the Bill of Rights, and, more importantly for purposes of this thesis, of their positions with regard to poverty and disadvantage. In the main judgment Madlanga J discusses the legal issues at hand in the context of historical land dispossession and the hardships and indignities associated therewith.¹²⁶⁷ In addition, the court explains very clearly and explicitly that these hardships and indignities have persisted into contemporary times.¹²⁶⁸ Interestingly, the assenting judgments of the two caucasian judges on the bench, Froneman J and Cameron J, contain detailed and vociferous statements regarding the persistence of hardship and poverty into modern times. Froneman J expresses a "sense of shame" in this regard.¹²⁶⁹ He goes on to say that in order to make the ideals of the *Constitution* a reality, three changes are necessary, namely an honest and deep recognition of past injustices, a reappraisal of the conception of the nature of ownership and property, and an acceptance rather than an obfuscation of the consequences of constitutional change.¹²⁷⁰ He stresses that inhuman and undignified living conditions on farms can no longer be countenanced, in light of the constitutional mandate to heal the divisions of the past.¹²⁷¹ He focuses closely on the role of notions of property ownership in a

¹²⁶⁵ *Daniels v Scribante and Another* 2017 (4) SA 341 (CC).

¹²⁶⁶ Act 62 of 1997.

¹²⁶⁷ Paras 1, 2, 14 and 16.

¹²⁶⁸ Para 22.

¹²⁶⁹ Para 109.

¹²⁷⁰ Para 115.

¹²⁷¹ Para 132.

transformational context – an issue highly relevant to persistence of poverty.¹²⁷² In addition, he considers whether the notion of economic efficiency is an adequate justification for pursuing an economic system of personal competition for wealth and retention of property rights in the South African context, with its colonial and apartheid history. He expresses the view that the basic assumptions to justify the economic efficiency argument in this context are lacking.¹²⁷³

The assenting judgement of Cameron J concurs that “the past is not done with us” and that its claims to justice still need to be reckoned with.¹²⁷⁴ This statement is made notwithstanding his expressed reservation about courts writing about historical matters, which, he argues, they should do with great caution.¹²⁷⁵ Despite this caveat, this judgment reinforces and amplifies the effect of Froneman J’s position.

The aforementioned discussion by Froneman J is the only instance to date of a South African court considering issues of hardship and poverty as being clearly linked to the prevailing social, economic and political milieu. The approach by the court underpins the approach of this thesis in considering poverty as a phenomenon that must be understood across these various contexts.

It is arguable that the court’s views of poverty in the wider context in *Daniels* are so central to its findings that they carry more weight than that of an *obiter dictum*. This is the case because of their interwovenness with the rationale of the judgments of Madlanga J, Froneman J and Cameron J, and because of the court interrelating poverty with the fundamental right to dignity.

In a number of other judgments the courts have expressed *obiter dicta* views on poverty in a general sense. In *V & A Waterfront*¹²⁷⁶ the court had to consider an application to permanently exclude certain individuals from the Cape Town

¹²⁷² Para 136.

¹²⁷³ Paras 141 and 142.

¹²⁷⁴ Para 153.

¹²⁷⁵ Para 152.

¹²⁷⁶ *V & A Waterfront (Pty) Ltd v Police Commissioner of the Western Cape and others* 2004 (5)BCLR 538 (C).

Waterfront because of their begging activities. Two important points for purposes of the present discussion on poverty were made by the court. The first is that the right to life is not purely a right to remain alive, but includes the right to livelihood. For this proposition the court cites Indian case law as authority.¹²⁷⁷ The second is that discrimination against a person on grounds of poverty would indirectly constitute discrimination on grounds of race, in the context of South African history.¹²⁷⁸ These two comments by the court indicate a sensitivity to the plight of victims of poverty. However, the judgment is not strongly protective of the poor, and judgment was granted in favour of the Waterfront corporation.

The matter of *Glenister* did not relate primarily to plight of the poor,¹²⁷⁹ but a strong statement was made by Moseneke DCJ and Cameron J on the negative effects of corruption on the efforts of the state to fight poverty and deliver on the socio-economic rights guaranteed in the *Constitution*.¹²⁸⁰ The link between corruption and poverty relief was *mero motu* raised by the court, which suggests that issues pertaining to poverty are a slight undercurrent in the thinking of the judges.

In the realm of criminal law, courts occasionally make reference to poverty as a mitigating factor to be taken into account in sentencing, and their reflections in this regard are illustrative of the prevailing judicial mindset with regard to poverty. Thus for example in *S v Qamata*,¹²⁸¹ in which the two accused were convicted of murdering an aged and vulnerable farming couple, the court took into account that the accused came from a rural, poverty stricken background and were “doomed to a life of poverty”.¹²⁸² The court considered this to be a factor mitigating against the death sentence, which was still competent at the time. Similarly in the matter of *S*

¹²⁷⁷ The authority cited is *Olga Tellis v Bombay Municipal Authority* AIR 1986 S C 180 at para 32.

¹²⁷⁸ Both of the issues cited are raised on page 5 of the judgment. The paragraphs of the judgment are not numbered.

¹²⁷⁹ The main issue under consideration was the constitutionality and lawfulness of government interventions for crime fighting and corruption-busting.

¹²⁸⁰ Para 57.

¹²⁸¹ *S v Qamata* 1997 1 All SA 657 (E).

¹²⁸² Page 660 (paragraphs unnumbered).

*v Sithole*¹²⁸³ the court took into account as a mitigating factor the fact that the accused was the victim of poverty and hunger, in the context of a theft charge.

Interestingly, there are reported cases in the realm of media law in which the adjudicating tribunals were called upon to comment upon the portrayal of the phenomenon of poverty in media and the arts. These are similarly indicative of judicial thinking on poverty matters. The matter of *Walkers Fruit Farms Associations and Watch v e.tv*¹²⁸⁴ saw the Broadcasting Complaints Tribunal considering whether a television feature portraying the area in which the farms were situated as being an area where poverty and crime was rife, warranted the censure of the tribunal. The tribunal found that the portrayal was substantially accurate, and dismissed the complaint. Thus the poor and crime-ridden nature of the area was taken to be a circumstance not to be shied away from. In the matter of *Human Rights Commission of South Africa v South African Broadcasting Corporation*¹²⁸⁵ the same tribunal found that a song alleging that Indians in KwaZulu Natal caused the poverty of the Zulu people constituted hate speech. Poverty was again portrayed in this matter as a social circumstance to be acknowledged as such, albeit one of a number of circumstances referred to in the song in question. These cases convey the message that poverty is a social circumstance in South African society that warrants comment in the media and the arts.

Poverty has furthermore drawn the attention of the courts in litigious proceedings about differential municipal property rates. In the matter of *City Council of Pretoria v Walker*,¹²⁸⁶ poverty was acknowledged by the Constitutional Court as a lawful basis for the local authority charging differential rates to owners of property in poor areas, and it was found that this did not constitute unfair discrimination. This finding was supported some years later by the Supreme Court of Appeal in *Rates Action Group v City of Cape Town*,¹²⁸⁷ in which it was found that the linking of sewerage availability

¹²⁸³ *S v Sithole* 2004 JOL 12410 (T).

¹²⁸⁴ *Walkers Fruit Farms Association and Watch v etv* 2004 JOL 13235 (BCCSA).

¹²⁸⁵ *Human Rights Commission of South Africa v South African Broadcasting Corporation* 2003 (1) BCLR 92 (BCCSA).

¹²⁸⁶ *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC).

¹²⁸⁷ *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (CC).

charges to property values did not amount to unfair discrimination against the non-poor. The charging of differential property rates and service availability charges, adjusted to take poverty of some groups into account, represents another acknowledgment of poverty as a social reality.

Interestingly, poverty has been cited as a relevant circumstance by the Constitutional Court with regard to legal costs, specifically taxation of counsel's fees, in the matter of *Camps Bay Ratepayers and Residents' Association and another v Harrison and another*.¹²⁸⁸ In a scathing comment, the court stated that it is unjustified for counsel to charge hundreds of thousands of rands to argue an appeal "in a country where disparities are gross and poverty is rife".¹²⁸⁹

In the context of land restitution, the Land Claims Court in framing its relief acknowledged in *The Dhlomo Dhlomo Community v The Minister of Agriculture and Land Affairs and others*¹²⁹⁰ that restitution of the relevant land to the claimants rather than financial compensation was desirable, in that it would have the consequence of relieving their poverty. This is illustrative of an inclination on the part of the courts to acknowledge poverty as a factor in land restitution matters.

Within the body of litigation considering evictions in the context of the right of access to housing, courts have repeatedly made reference to the poverty of those who stand to be evicted. In the *Grootboom* matter, the court vividly described the desperate circumstances of the claimant and her fellow community members.¹²⁹¹ It is noteworthy however that the *ratio decidendi* in the judgment is centred around the right of access to housing, and that poverty seems to be considered an anecdotal circumstance. Thus it cannot be said that the courts afford any differential consideration to victims of poverty in the context of housing jurisprudence. This is a phenomenon evident in other areas of case law. The cardinal judgments on the

¹²⁸⁸ *Camps Bay Ratepayers and Residents' Association and another v Harrison and another* 2012 (11) BCLR 1143 (CC).

¹²⁸⁹ Para 10.

¹²⁹⁰ *The Dhlomo Dhlomo Community v The Minister of Agriculture and Land Affairs and others* 2016 JOL 35741 (LCC).

¹²⁹¹ See in particular para 24 of the judgment in which Yacoob J refers to the "extreme conditions of poverty, homelessness and intolerable housing" suffered by the appellants.

right to education exhibit the same phenomenon – the jurisprudence is centred around the right and not on the role of education in poverty amelioration.¹²⁹² The case law on water is of similar ilk.¹²⁹³

Labour law judgments occasionally make reference to issues pertaining to poverty. An example of this is the matter of *Transman (Pty) Ltd v COSATU*,¹²⁹⁴ in which the court gave consideration to allegations by a trade union that labour brokers had the effect of exacerbating poverty amongst workers. Again, the reference to poverty is incidental to the main legal question.

Although poverty is more commonly at issue in public than in private law, there are instances in which it is raised as a relevant circumstance in civil litigation. For example, in *Road Accident Fund and another v Mdeyide*¹²⁹⁵ the Constitutional Court grappled with the issue of how poverty and illiteracy impacted on the issue of access to justice in motor vehicle accident claims.¹²⁹⁶ Some years earlier a similar issue had been before the court in the context of the Defence Act in the matter of *Mohlomi v Minister of Defence*.¹²⁹⁷

The contents of this section indicate that, notwithstanding the fact that poverty is clearly a constitutional law issue, it is dealt with by the courts as an anecdotal circumstance, or even a cameo¹²⁹⁸ of society. The prevalence of poverty is cited in a limited way by the courts, often as part of an *obiter dictum*, but is not seen as a sufficiently strong consideration to amount to a *ratio decidendi* or overriding circumstance guiding judicial decision-making. A notable exception is the *Daniels*

¹²⁹² The *Juma Masjid* and the *Welkom High School* cases make oblique references to poverty, the former in citing a provision in the ICESCR stating that education is important for poverty alleviation, and the latter citing the preamble to the Schools Act to similar effect.

¹²⁹³ This is strongly evident in *Mazibuko*.

¹²⁹⁴ *Transman (Pty) Ltd v Cosatu* 2017 JOL 37191 (GSJ).

¹²⁹⁵ *Road Accident Fund and another v Mdeyide* 2011 1 BCLR 1 (CC).

¹²⁹⁶ In this matter, poverty and illiteracy was not found to be a sufficient basis for a declaration of unconstitutionality of the time prescripts contained in the relevant legislation.

¹²⁹⁷ *Mohlomi v Minister of Defence* 1996 (12) BCLR 1559 (CC). In this matter the court took a different approach, declaring that provisions of the Defence Act were unconstitutional in that they limited the right of access to justice.

¹²⁹⁸ As per the Oxford Online Dictionary (<https://en.oxforddictionaries.com/definition/cameo>), a cameo is "a short descriptive literary sketch which neatly encapsulates someone or something".

case described above, in which poverty was an important rationale in the court's reasoning.

5.4.2 Aspects of the Judicial Process which Thwart or Frustrate Poverty Amelioration

Aside from judicial adherence to separation of powers and deference, which are the cardinal obstacles to the judiciary taking a role in ameliorating poverty, there are a number of other aspects of judicial adjudication that are either not conducive to poverty amelioration or actively stand in its way.

5.4.2.1 Judicial Conservatism and Legal Culture

Legal culture has a profound constraining effect on socio-economic transformation.¹²⁹⁹ New legal methodologies are needed in order to effect such transformation, but their development is thwarted by the fact that there is no coherent effort to develop such methodologies.¹³⁰⁰

Legal scholars, including the judiciary, are prone to indulging in "jurisprudential conservatism".¹³⁰¹ This trend is manifested in adherence to prior authority, and in acquiescence in the prevailing social and legal order.

The conservative nature of the adjudicative culture prevailing in the South African legal system,¹³⁰² is not conducive to realising the transformative imperatives in the constitution, including the amelioration of poverty. There is a need to transform legal culture and recognise the stultifying consequences of failure to do so.¹³⁰³ Reform of the judicial mindset is a responsibility which the judiciary must embrace.

¹²⁹⁹ Davis and Klare 2010 *South African Journal on Human Rights* 411.

¹³⁰⁰ Davis and Klare 2010 *South African Journal on Human Rights* 509.

¹³⁰¹ Dugard 2013 *The Activist* 1.

¹³⁰² Klare 1998 *South African Journal on Human Rights* 146. This line of argument is pursued throughout the article – a good example of which is at 156 at which the author emphasises the need for examining judicial mindset and methodology to assess whether societal transformation can be achieved.

¹³⁰³ Langa 2006 *Stellenbosch Law Review* 7. The late former Chief Justice posits that judges must accept that they are prone to preconditioning, which they should avoid, and they must actively engage with the *Constitution*. He further states that formalism in legal reasoning constitutes an avoidance of responsibility.

The judiciary does not itself seem to have embraced the problem of conservative judicial culture and judicial deference working together to preserve the economic *status quo*. This is indicative of an attitude of complacency, and a disinclination to acknowledge the political nature of adjudication and the role of the judiciary in effecting transformation.¹³⁰⁴ In addition, the judiciary is at times guilty of arrogance and elitism,¹³⁰⁵ which is not conducive to the granting of relief to socio-economic rights claimants.

5.4.2.2 Formality and Procedural Strictness

Courts are focused upon adherence to legal process rather than taking on a broader role to effect socio-economic transformation. This limits their ability to contribute towards poverty amelioration.¹³⁰⁶ Inherent features of the litigious process as practiced by the judiciary can inhibit the realisation of socio-economic rights.¹³⁰⁷ The process is formally structured and procedurally strict, and this renders it difficult for the lived reality of socio-economic deprivation and marginalisation to be captured and presented.¹³⁰⁸

5.4.2.3 The Adversarial Nature of Judicial Adjudication

A further constraint of the litigious process, inhibiting its potential towards poverty amelioration, is its adversarial nature.¹³⁰⁹ The court process is focused on the push and pull of justificatory statements by opposing parties, and this does not lend itself

¹³⁰⁴ Pieterse 2004 *South African Journal on Human Rights* 383. He proposes at 409 that the judiciary should take on a more activist role with regard to socio-economic rights adjudication, including the scrutiny of budgets and government policy. He further indicates at 418 that the judiciary should acknowledge the unashamedly political nature of the *Constitution*. The arguments made in this article are no less relevant in the present time than they were at the time of writing.

¹³⁰⁵ Mc Evoy 2007 *Journal of Law and Society* 411.

¹³⁰⁶ Fowkes "Transformative Constitutionalism and the Global South: The View from South Africa" 7.

¹³⁰⁷ Section 2.3.4 highlights dysfunctionality of the legal system, of which the judiciary is part, which serve as determinants of poverty.

¹³⁰⁸ Brinks and Gauri 2014 *Perspectives on Politics* 378 argue that formalism and proceduralism inherent in the litigious process detract from its potential to deal with real world issues.

¹³⁰⁹ Pieterse 2004 *South African Journal on Human Rights* 393. See also Brand 2011 *Stellenbosch Law Review* 634.

to good polycentric decision-making.¹³¹⁰ In socio-economic rights cases relevant to poverty, it can arguably be beneficial to have a less confrontational and adversarial decision-making process, so that time and energy is not spent on argument but rather on finding solutions.

5.4.2.4 Failure of the Judiciary to Embrace Transformation

The judiciary has historically been inclined to take an activist view with regard to civil and political rights, but to display a timidity with regard to promoting socio-economic rights.¹³¹¹ This is indicative of a shying away from judicial activism in the realm of socio-economic rights. The agency of the judiciary as an upholder of constitutional values is thus exercised in a somewhat unbalanced way.

The legal adjudicative process is in itself inclined to be anti-transformational. This tendency is associated with the courts viewing poverty as a non-political issue, and their legitimising liberalist-capitalist views of poverty, including regulation by the market.¹³¹²

The ability of courts to craft meaningful solutions in poverty-related cases is adversely impacted upon by their taking a classical liberal rather than a transformative approach to poverty.¹³¹³ This is largely attributable to the fact that liberalism downplays the role of the state as a party responsible for poverty relief.

The judicial adjudicative process has been unable to make a difference to the fact that social and political power relations may thwart poverty amelioration. This is evidenced by the fact that the poor experience economic, social and procedural barriers to accessing the law and judicial recourse, whilst the powerful have experience in navigating the system, and take advantage of the tendency of the

¹³¹⁰ Pieterse 2004 *South African Journal on Human Rights* 393.

¹³¹¹ Dugard 2007 *Leiden Journal of International Law* 977. See also Pieterse 2004 *South African Journal on Human Rights* 417.

¹³¹² Brand *Courts, Socio-economic Rights and Transformative Politics* 5.

¹³¹³ Dugard and Langford 2011 *South African Journal on Human Rights* 56. The *Mazibuko* matter is cited as an example of the classical liberal approach to adjudication. By contrast the judgment in *Joseph* is cited as an example of a more transformative mode of adjudication. For a detailed exposition of how neoliberalism and liberalism impact negatively upon poverty amelioration, see sections 2.3.1.1 and 2.3.1.2.

judiciary to uphold the *status quo*. These dynamics lead one to the conclusion that judicial recourse is not an effective instrument to uphold the interests of the poor against those who enjoy socio-economic privilege.¹³¹⁴

The judiciary has demonstrated a disinclination to give a voice to the poor, based on the counter majoritarian argument. Thus the potential for the judiciary to play an active role in socio-economic transformation is wasted.¹³¹⁵ Symptomatic of this disinclination is the scarcity of remedies requiring political engagement.¹³¹⁶

The judiciary does not overtly acknowledge that within a system of social rights constitutionalism, it has a high degree of responsibility to address social rights issues.¹³¹⁷ It also does not address the need for its legitimacy to be linked to a consequentialist standard which assessed outcomes and efficacy.¹³¹⁸ It is also disinclined to acknowledge the linkages between law and politics, and the potential for them to work together synergistically.¹³¹⁹ Further, the judiciary does not typically indulge in deconstructing and analysing its own functionality within society, and therefore may not have an understanding of its role in society.¹³²⁰

Legal advocacy towards transformation is a function which the judiciary, along with other role players in the legal system, should pursue, given that they have an obligation to uphold the *Constitution*. The judiciary and the legal profession are instead reactive to instructions they receive and matters they process, and typically do not pursue general advocacy on matters of public interest.¹³²¹

The application by the courts of an abstract standard of reasonableness in socio-economic rights cases is prejudicial to the poor, in that this requires of them that they analyse and understand the policies and programmes and budgetary practices

¹³¹⁴ Brinks and Gauri 2014 *Perspectives on Politics* 379.

¹³¹⁵ Bilchitz 2015 *South African Journal on Human Rights* 110.

¹³¹⁶ Brand *Courts, Socio-Economic Rights and Transformative Politics* 5.

¹³¹⁷ Brinks and Gauri 2014 *Perspectives on Politics* 380.

¹³¹⁸ Brinks and Gauri 2014 *Perspectives on Politics* 385.

¹³¹⁹ Brinks and Gauri 2014 *Perspectives on Politics* 385.

¹³²⁰ See Gross 2004 *Stanford Journal of International Law* 99, where it is cogently argued that the law must be deconstructed to assess whether it is able to move towards justice.

¹³²¹ Mc Dougall 2016 *New York Law School Law Review* 34.

of government in order to justify their claims for fulfilment of rights.¹³²² This is illustrative of the legal system serving as an obstacle to transformative change which would benefit the poor.

Courts are loath to adopt more ambitious judicial methodologies that identify underlying disputes and forge new tools to bring about justice and equity.¹³²³ If such an approach were to be taken, it could assist in dismantling power relations that contribute to or entrench socio-economic marginalisation or deprivation.¹³²⁴

5.4.2.5 Limiting Adjudication to Issues in the Papers

Jurisprudential outcomes of litigious process are limited to issues raised in the papers, and do not necessarily focus on the right/s in issue, and this can be counter-productive for addressing issues pertaining to poverty. Rules and conventions pertaining to civil litigious process dictate that the judiciary must pronounce on the claim or claims before it, which are personal claims by a claimant or group of claimants. This leads to the granting of attenuated relief with no pronouncements being made on the interpretation of rights in the general context.¹³²⁵ This trend limits possible outcomes in the realm of socio-economic rights jurisprudence.

The judicial system, with its practice of dealing only with disputes as pleaded before the courts, is accustomed to granting only reparative rather than distributional relief. This is problematic for the pursuit of socio-economic equality.¹³²⁶ This is highly evident in the context of land reform matters, where the efficacy of the judicial process leaves much to be desired.

Legal minimalism practised by the judiciary, which is the habit of addressing only one or more points which are dispositive of a matter and disregarding others, may

¹³²² Dugard 2007 *Leiden Journal of International Law* 975.

¹³²³ Clark and Esterhuizen "Remembering the Transformative Mandate: An Analysis of Twenty Years of Housing and Eviction Jurisprudence in South Africa" 14.

¹³²⁴ Clark and Esterhuizen "Remembering the Transformative Mandate: An Analysis of Twenty Years of Housing and Eviction Jurisprudence in South Africa" 14-15.

¹³²⁵ Rapatsa 2015 *Acta Universitatis Danubius Juridica* 32, and Liebenberg 2012 *African Human Rights Law Journal* 29.

¹³²⁶ Du Toit 2013 *Journal of Agrarian Change* 22.

leave fundamental questions regarding socio-economic rights unanswered.¹³²⁷ This is evidenced in the lack of norm-setting by the judiciary in socio-economic rights matters.¹³²⁸ The Constitutional Court does not typically, in the socio-economic rights realm, make use of its powers to make any just and equitable order it deems fit, but rather adopts a minimalistic approach towards the framing of its orders.¹³²⁹ Thus opportunities are missed to frame relief in more general terms in a manner that promotes socio-economic transformation.

5.4.2.6 Disjuncture between Judicial Process and Constitutional Values

There is a disjuncture between legal process on the one hand and the values outlined in the *Constitution* on the other hand, and this arguably renders legal process an unsuitable vehicle for achieving fulfilment of constitutional rights.¹³³⁰ Practices espoused in the courts are arguably not geared towards the purpose of fulfilment of socio-economic rights. Rather, in the context of socio-economic rights litigation, they are focused upon adhering to the separation of powers doctrine and assessing the reasonableness of government programmes.

The early housing jurisprudence after the political transition is an illustration of the disjuncture described above.¹³³¹ The judiciary was prone to making decisions on the basis of administrative law concepts of rationality, reasonableness and procedural fairness, without due consideration of social realities and without addressing the psycho-social aspects of homelessness. This was evident in the approach of the court in the *Grootboom* judgment. A court-centric analysis of socio-economic rights issues, if done without due regard for social and economic circumstances that contribute to poverty and underdevelopment, is inherently myopic and limited.¹³³²

¹³²⁷ Brickhill "Public Interest Alchemy: Combining Art and Science to Litigate for Social Change" 1-24.

¹³²⁸ A cogent example of this is the *Grootboom* judgment, which saw the court directing government to develop programmes for emergency housing but failing to set any norms and standards for such programmes.

¹³²⁹ Christiansen 2010 *Journal of Gender, Race and Justice* 589.

¹³³⁰ Rapatsa 2015 *Acta Universitatis Danubius Juridica* 19.

¹³³¹ Wilson and Dugard 2011 *Stellenbosch Law Review* 665.

¹³³² Jagwanth and Soltau "Socio-Economic Rights and Implications for Intergovernmental Fiscal Relations in South Africa" 2.

In more recent times, the courts have shown a greater receptiveness to considering issues relating to poverty as part of their fundamental reasoning. An example is the case of *Daniels v Scribante*¹³³³ discussed earlier, where the court made explicit reference to poverty as an underpinning consideration in deciding the issues at stake.

5.4.2.7 Legalism

A phenomenon described as legalism may be an impediment to the realisation of socio-economic rights.¹³³⁴ Legalism is conceptualised as an inability to view social issues free from the “lens of the law”.¹³³⁵ Features of legalism include a focus on civil and political rights, an acquiescence in a neo-liberal economic order, and diminished focus on social issues such as poverty.¹³³⁶ A focus of this nature does not bode well for poverty amelioration.

5.4.2.8 Access to Justice

Aside from issues of process, it is trite that access to justice for the poor is problematic. Those living in poverty do not have the means to afford the services of attorneys and advocates, and are dependent for legal services upon non-governmental organisations who operate with donor funding, and who often in turn depend on the philanthropic willingness of activist practitioners to work for modest earnings compared to what they could earn outside of the non-governmental sector. Such organisations can only deal with a limited number of cases. Thus the anomalous situation prevails that those most in need of legal assistance to enforce their socio-economic rights are least able to obtain such assistance.¹³³⁷ Access to

¹³³³ See a discussion of this case in section 5.4.1.

¹³³⁴ Mc Evoy 2007 *Journal of Law and Society* 411.

¹³³⁵ Mc Evoy 2007 *Journal of Law and Society* 415.

¹³³⁶ Mc Evoy 2007 *Journal of Law and Society* 418. For a discussion of legalism as a determinant of poverty, see section 2.3.5.1.

¹³³⁷ Rapatsa 2015 *Acta Universitatis Danubius Juridica* 33. See also Nyenti 2014 “The Role of Access to Justice in the Development of Socio-Economic Rights in South Africa” 1-19. In addition see section 5.4.2.8 where access to justice is mentioned as an issue which could be addressed by judicial activism.

justice is a cogent factor in limiting the potential of the judiciary to ameliorate poverty.

5.4.2.9 Embeddedness and Situatedness of the Judiciary

The legal system, of which the judiciary is an important part, is embedded within society, and this affects its functionality. In a fascinating article entitled "Sociology of Law for a Postliberal Society", Munger explains the sociological embeddedness of law as the milieu in which the judiciary works. He states that legal process and adjudication is so thoroughly embedded in social organisation that every aspect thereof is captured by the social organisation in which litigants are enmeshed. These effects are cumulative, and lead to the collective advantage of the "haves" over the "have nots".¹³³⁸ This has obvious adverse consequences for poverty amelioration. Also, the personal make-up and ideological stance of judges, referred to as their "situatedness", may influence the outcomes of socio-economic rights cases. This is an unfortunate but inevitable feature of a socially embedded and people-centred process and institution.¹³³⁹

5.4.2.10 Intransigence on the Part of the Judiciary

The judiciary has to date not achieved substantial success in fulfilling the purpose of judicial review of government action, which is to overcome "blind spots and burdens of inertia" in public processes.¹³⁴⁰ This was evidenced by the granting of truncated or weak relief in the early socio-economic rights cases of the post-transformation period, for example in the *Grootboom* and *Treatment Action Campaign* cases. In more recent times, there are indications that the judiciary may be willing to move towards granting specific relief incorporating structural interdicts in socio-economic rights cases. An example of this is the structural relief granted in the *SAHRC v Msundizi* case.

¹³³⁸ Munger 1993 *Loyola of Los Angeles Law Review* 97.

¹³³⁹ Daniel 2013 *De Jure* 25. "Situatedness" is described as a person's highly developed, highly-contextualised, environmentally-produced personal *Constitution* as it exists in relation to the situations of others.

¹³⁴⁰ Dixon 2007 *International Journal of Constitutional Law* 395.

There has to date been little or no acknowledgement on the part of the judiciary of the political and ideological nature of its work.¹³⁴¹ Such an acknowledgement would enable a process of driving forward pro-active judicial support of socio-economic transformation. An appreciation of the role of judicial decision making in upholding socio-economic rights and thus contributing to poverty amelioration could be fostered via the judiciary acknowledging its ideological role in this regard.

Intransigence on the part of the courts with regard to socio-economic rights may serve as a factor which prevents the amelioration of poverty.¹³⁴² The purpose of the inclusion of the socio-economic rights in the *Constitution* must be understood with reference to the transformative imperatives articulated in its preamble.¹³⁴³ Courts dealing with socio-economic rights issues display a lack of understanding that they have a distinctive role in effecting transformation, especially in the scrutiny of government processes.¹³⁴⁴ The judiciary clings to the notion that pro-active pursuit of socio-economic rights may breach the separation of powers doctrine, which is misguided.¹³⁴⁵ The Constitutional Court has abdicated its authority in this regard to the executive, and that the judiciary generally has adopted a subservient stance in socio-economic matters.¹³⁴⁶ The judiciary may lack sufficient awareness of the weight of the onus it carries to enable fulfilment of the socio-economic rights and to find innovative ways to do so, and this is evidenced by truncated remedies such as that in *Grootboom*.¹³⁴⁷ Lack of awareness in this regard may result in a lack of focus on the task at hand.

Judicial responsiveness is an important catalyst for the realisation of socio-economic rights.¹³⁴⁸ In the early years of the post-transition period, it appeared that the courts

¹³⁴¹ Fowkes "Transformative Constitutionalism and the Global South: The View from South Africa" 7. He cites an article written in 2010 by Justices Langa and Cameron in which they bemoan the failure of the judiciary to acknowledge the problematic nature of its role in apartheid times.

¹³⁴² Ngang 2014 *African Human Rights Law Journal* 655.

¹³⁴³ Ngang 2014 *African Human Rights Law Journal* 661.

¹³⁴⁴ Ngang 2014 *African Human Rights Law Journal* 662-3.

¹³⁴⁵ Ngang 2014 *African Human Rights Law Journal* 664.

¹³⁴⁶ Ngang 2014 *African Human Rights Law Journal* 665.

¹³⁴⁷ Kabange "The South African Constitution and Socio-economic Rights: Has Justiciability Made any Difference?" 1-31.

¹³⁴⁸ Dixon 2007 *International Journal of Constitutional Law* 409. For a more detailed discussion of Dixon's position, see section 2.3.5.2.

were reticent and unresponsive when called upon to give judgments that could contribute towards effecting poverty relief. Some writers argued that courts were inclined towards a particular line of adjudication in socio-economic rights matters. For example Dixon argued, with specific reference to the *Grootboom* and *Treatment Action Campaign* matters, that they were “prone to failures of responsiveness”.¹³⁴⁹ She advocates the adoption of a dialogic approach which would empower courts to intervene not only when government is guilty of patent unreasonableness or irrationality, but also when there are failures of foresight, perspective, accommodation or responsiveness. This would help to overcome the tendency of the judicial system to be a disabling factor in the struggle to ameliorate poverty. Judicial reticence serves to inhibit the potential of jurisprudence to alleviate the plight of the poor.¹³⁵⁰

With the courts to date not having played a significant role in socio-economic transformation, their potential to do so is flagging.¹³⁵¹ This is attributable to the fact that a system of adherence to judicial precedent is followed, together with the pursuit of an embedded legal culture. Through these practices, non-intervention is perpetuated and strengthened.

It appears from poverty-related jurisprudence that the judiciary does not consider that its role encompasses a positive duty to move into the realm of distributive decision-making. This is generally notable by its absence. This may be because they consider distributive justice to be the concern of the executive, and possibly the legislature, or it may be because they shy away from distributive justice issues because they are perceived as too contentious.¹³⁵² Courts can contribute to democracy by giving a voice to the poor, and that this is a stronger argument than

¹³⁴⁹ Dixon 2007 *International Journal of Constitutional Law* 407.

¹³⁵⁰ Clark and Esterhuizen “Remembering the Transformative Mandate: An Analysis of Twenty Years of Housing and Eviction Jurisprudence in South Africa”, third page (pages unnumbered).

¹³⁵¹ Cohen 2014 *Northwestern Journal of Human Rights* 132. This conclusion is based on the outcome of a discussion between the author and Chief Justice Mogoeng.

¹³⁵² Fredman 2005 *South African Journal on Human Rights* 190. See also Pieterse 2004 *South African Journal on Human Rights* 383 who posits the view that the courts have not only authority but also a responsibility to give meaning to socio-economic rights.

the prevailing one that their powers should be fettered because of countermajoritarianism.¹³⁵³

The failure of the judiciary to deal meaningfully with socio-economic rights issues is reflected in its disinclination to attribute normative content to the rights. Poscher, writing about the relationship between hermeneutics,¹³⁵⁴ jurisprudence and law, emphasises that interpreting law involves attributing normative content, and that it requires skill and wisdom.¹³⁵⁵ Thus, by extrapolation, it is incumbent upon those applying the law in any context, including in the socio-economic rights realm in South Africa, to ensure that the spirit and import of the socio-economic rights regime and of the Constitution, is promoted. Failure to do so undermines the potential of human rights adjudication to pose an ethical challenge to systemic forms of social injustice.¹³⁵⁶

5.5 Possible Courses of Action for the Judiciary in Pursuing Poverty Amelioration

In this section, possible avenues for action by the judiciary in addressing poverty amelioration are suggested. These are based on material from the literature study in Chapter 2, transposed into practical solutions for addressing the issue at hand. It is acknowledged that, unlike in the case of the executive, suggesting ways in which the judiciary can contribute to poverty amelioration is somewhat controversial, given that it has traditionally, up to contemporary times, functioned in a way that does not recognise any obligation to do so. The following section outlines circumstances of which the judiciary should be aware, but which are not necessarily under its direct control, which play a role in it potentially becoming an agent for poverty amelioration. It is posited that the realisation of these circumstances could be a factor contributing towards the judiciary assisting with poverty amelioration. The subsequent section proposes a number of areas under

¹³⁵³ Bilchitz 2015 *South African Journal on Human Rights* 99.

¹³⁵⁴ Hermeneutics is the study of interpretation and interpretive approaches – see the Stanford Encyclopaedia of Philosophy at <https://plato.stanford.edu/entries/hermeneutics/>.

¹³⁵⁵ Poscher R "Hermeneutics, Jurisprudence and Law" 451.

¹³⁵⁶ Liebenberg 2012 *African Human Rights Law Journal* 1 at 29.

the control of the judiciary where a firm judicial stance could make a contribution to poverty amelioration.

5.5.1 *Fostering Awareness*

A first step towards an enhanced role for the judiciary in poverty amelioration must of necessity be the raising of awareness of circumstances which affect its performance in this regard.

A legalistic view of socio-economic rights, which is associated with their justiciability and their framing as legal entitlements, leads to acquiescence in the prevailing governance order, which in turn is not conducive to poverty amelioration.¹³⁵⁷ In addition, it detracts from legal humility and the pursuit of development, both of which, if suitably applied, can be conducive to poverty amelioration.¹³⁵⁸ Legalism is a prevailing feature of the social and economic order which the judiciary should be cognisant of, with a view to taking counterbalancing action where appropriate in the interests of poverty amelioration.

There is an acquiescence across the world in socio-economic rights being perceived as aspirational rather than fully realisable.¹³⁵⁹ Accepting this as a given may lead the judiciary to grant attenuated or minimalistic relief in socio-economic rights cases – a phenomenon of which the judiciary should be aware and should guard against if it is to address poverty amelioration. Also, rights tend to be framed in a rhetorical manner and are minimalistic, which are factors limiting their usefulness.¹³⁶⁰ This is also a consideration of which the judiciary should be aware, and against which it should take counterbalancing measures.

¹³⁵⁷ Mc Evoy 2007 *Journal of Law and Society* 418. See also Pieterse 2007 *Human Rights Quarterly* 796, where it is argued that the transformative potential of rights is limited by their formulation and embeddedness in the status quo. In addition, see Brand "The Politics of Need Interpretation and the Adjudication of Socio-economic Rights Claims in South Africa", cited in Bond "Capitalism, the Privatisation of Basic Social Services and the Implementation of Socio-economic Rights: Challenges and Advocacy Strategies for Human Rights and Social Justice Actors, Learning from the Johannesburg Water Defeat" 2.

¹³⁵⁸ Mc Evoy 2007 *Journal of Law and Society* 425, 428.

¹³⁵⁹ Trispiotis 2010 *Opticon* 8.

¹³⁶⁰ Moyn 2014 *Law and Contemporary Problems* 168.

The existence of a socio-economic rights framework is not in itself sufficient to address poverty.¹³⁶¹ The rights must be deployed together with supplementary processes to enable their fulfilment, such as needs analysis, community engagement and allocation of financial resources. This is an important issue of which the judiciary needs to be aware, especially to guard against making orders which fail to address implementation measures.

The broad spectrum rights such as the right to dignity and the right to equality need to be given meaning in the context of socio-economic rights adjudication if they are to serve as a useful adjunct in socio-economic rights deployment.¹³⁶² The judiciary needs to be cognisant of the fact that the meaning and application of these rights is currently blurred and uncertain. A further dynamic in relation to these rights is that they may be seen to de-historicise inequality and indignity.¹³⁶³ Judicial initiative in circumscribing their meaning could be of value towards poverty amelioration.

The judiciary should be made aware that the fact that the human rights discourse does not challenge the prevailing class structure, which is reminiscent of apartheid times, and does not address redistribution and reparation.¹³⁶⁴ Complacency about the efficacy and purpose of socio-economic rights on the part of the judiciary may actually serve to preserve inequality and entrench poverty, because it negates any recognition of the need for such redistribution and reparation.

The *Constitution* is a less than ideal vehicle for the realisation of socio-economic rights, in that it does not clearly delineate the relative enforcement and interpretation roles of the three branches of government. This leaves a *lacuna* or

¹³⁶¹ Anand 2007 *Journal of International Development* 523. See also Ataguba, Day and McIntyre 2014 *Plos Medicine* 2, who write of the need to ensure financial resource allocation if the right to healthcare is to be realised.

¹³⁶² O'Connell 2008 *International Journal of Constitutional Law* 267. See also Seekings 2005 *The Colour of Desert: Class and Distributive Justice in Post-apartheid South Africa* 1-43.

¹³⁶³ Lephakga 2016 *Studia Historiae Ecclesiasticae* 2. See also Liebenberg 2005 *South African Journal on Human Rights* 22, where it is argued that societal failure to respond to poverty equates to impairment of the dignity of victims.

¹³⁶⁴ Bond "Capitalism, the Privatisation of Basic Social Services and the Implementation of Socio-Economic Rights: Challenges and Advocacy Strategies for Human Rights and Social Justice Actors, Learning from the Johannesburg Water Defeat" 2. See also Davis 2006 *South African Journal on Human Rights* 304, who writes eloquently of the need to deal with the distributional outcomes of constitutional rights.

impasse which may result in all three branches failing to pursue poverty amelioration optimally.¹³⁶⁵

The adjudication of socio-economic rights and reliance on the *Constitution* to resolve socio-economic issues, are both political in nature.¹³⁶⁶ It is misguided and potentially misleading for the judiciary to seek to place an apolitical veneer over these activities, and it may detract from the potential to find meaningful solutions to problems associated with poverty. Where a constitutional scheme is liberal-democratic in nature, it may be inherently difficult to achieve the degree of transformation needed to ameliorate poverty.¹³⁶⁷ It is furthermore noteworthy that legal action pertaining to poverty-related issues encroaches on the realms of sociology, economics and political theory.¹³⁶⁸ Jurisprudence relating to socio-economic matters would be more robust and credible if these considerations were to be recognised by the judiciary. The judiciary thus needs to be cognisant of the fact that legal practices and discourses may construct or influence social realities.¹³⁶⁹ This entails an awareness of the potential for the judiciary to wield substantial influence pertaining to socio-economic matters, and an appropriate assumption of responsibility in this regard.

It is potentially useful for the judiciary to have an understanding of the historical context from which present-day constitutionalism evolved, and of how the current socio-economic milieu was formed largely by forces of colonialism and apartheid.¹³⁷⁰ It is also potentially useful for it to have an understanding of the concept of social justice, and how poverty and inequality are linked to injustice.¹³⁷¹ Such understandings could lend depth and credibility to judicial positions in poverty-related matters.

¹³⁶⁵ Dixon 2007 *International Journal of Constitutional Law* 400.

¹³⁶⁶ Pieterse 2004 *South African Journal on Human Rights* 404. See also Davis 2015/2016 *New York Law School Law Review* 47, who writes of the effect of inequality on democracy, highlighting the interwovenness of socio-economic and political issues. His views are echoed in Mc Lean 2009 *Constitutional Deference, Courts and Socio-economic Rights in South Africa* 1-254.

¹³⁶⁷ Sibanda 2011 *Stellenbosch Law Review* 496.

¹³⁶⁸ Bilchitz 2015 *South African Journal on Human Rights* 118.

¹³⁶⁹ Davis and Klare 2012 *South African Journal on Human Rights* 448-449.

¹³⁷⁰ Du Plessis 2015 *Potchefstroom Electronic Law Journal* 1346.

¹³⁷¹ Rapatsa 2015 *Judicial Tribune* 218.

The judiciary needs to be acutely aware that there is a difficulty with the poor obtaining access to justice, even though they are the segment of society most in need of assistance.¹³⁷² Thus the paradoxical situation prevails whereby the branch of government which has authority to make reparative orders to assist the poor is unavailable to them. An awareness of this needs to be a cardinal focus of the judiciary's functioning - resolving access issues is an urgent priority if social justice and poverty amelioration are to be achieved.

The judiciary needs to acknowledge and be aware that the pursuit of extra-legal solutions may in some instances constitute the best remedy in socio-economic rights cases.¹³⁷³ Whilst it may not have the authority to directly impose such solutions, it does have the authority to order parties to explore them and report back to the court. An example of such a situation could be a court ordering an organ of state to engage with a claimant group or community claiming fulfilment of socio-economic rights to explore options for such fulfilment, and to report back to the court. The judiciary furthermore has the power to guide the evolution of poverty amelioration efforts and popular thinking with regard thereto through the framing of *obiter dicta* in circumstances where the making of binding orders is neither possible, nor feasible.

5.5.2 Actions to Optimise Potential

This section is premised on the notion that the judiciary should seek to play an active role in poverty amelioration, in fulfilment of its duty to uphold the *Constitution*, which is a Constitution geared towards this goal.

5.5.2.1 Rethinking Adherence to Separation of Powers and Judicial Deference

The adherence by the judiciary to the doctrines of separation of powers and judicial deference was critically analysed above.¹³⁷⁴ For reasons outlined in that section, the judiciary can and should critically consider whether ongoing adherence to these two

¹³⁷² Rapatsa 2015 *Acta Universitatis Danubius Juridica* 33

¹³⁷³ Mc Granahan 2015 *World Development* 243.

¹³⁷⁴ See section 5.3.

doctrines is desirable, given its duty to uphold the *Constitution* and the Bill of Rights. It is strongly arguable that such adherence is an obstacle in the way of socio-economic rights fulfilment, and therefore poverty amelioration, and should be reconsidered urgently.

5.5.2.2 Pursuing Stronger Relief and Remedies

Constitutional Court judgments have been rightly criticised for being incremental and reticent and offering weak remedies generally,¹³⁷⁵ and the courts have been accused of offering weak responses in the realm of poverty amelioration.¹³⁷⁶ The weak responses of courts generally include a failure to appreciate the need to uphold the transformative imperatives of the constitutional preamble,¹³⁷⁷ a failure to respond to deficits on the part of government,¹³⁷⁸ and a lack of appreciation that holding government to account does not violate the separation of powers rule.¹³⁷⁹ These deficiencies in the performance of the judiciary in the realm of poverty amelioration are all capable of being addressed institutionally should the judiciary have the will to do so.

5.5.2.3 Departure from Judicial Minimalism

Judicial adjudicative processes are inclined to be minimalistic in their approach, addressing only issues raised in court papers and not broader principles.¹³⁸⁰ It is within the powers of judges to wield influence over the fulfilment of socio-economic rights by casting aside minimalism and using mechanisms at their disposal. Such mechanisms include making orders for mandatory engagement between the parties and reporting back to the court, the enunciation of legal interpretive principles as *obiter dicta*, and supervisory orders. *Obiter dicta* do not have binding effect as

¹³⁷⁵ Mc Dougall 2016 *New York Law School Law Review* 34. See also Ngang 2014 *African Human Rights Law Journal* 661-665.

¹³⁷⁶ Ngang 2014 *African Human Rights Law Journal* 661-665.

¹³⁷⁷ Ngang 2014 *African Human Rights Law Journal* 661.

¹³⁷⁸ Ngang 2014 *African Human Rights Law Journal* 662-663.

¹³⁷⁹ Ngang 2014 *African Human Rights Law Journal* 664.

¹³⁸⁰ Brickhill "Public Interest Alchemy: Combining Art and Science to Litigate for Social Change" 1-24.

judicial precedent, but they are certainly capable of influencing the trajectory of judicial thought on pertinent socio-economic rights issues.¹³⁸¹

5.5.2.4 Attribution of Meaning and Normative Content

The vague framing of the socio-economic rights, for example by using the words “adequate”, “sufficient” and “basic”, may render judicial interpretation of the rights somewhat difficult.¹³⁸² This however does not excuse the judiciary for vague interpretations of the rights, as it has a duty as part of the adjudicative process to attribute meaning and to ascribe normative content to the rights. Institutional directions by the judiciary to encourage purposive and normative interpretations of rights is needed, as well as constructive case law precedents. The attribution of normative content to the prescripts of the *Constitution* is an essential part of judicial adjudication towards socio-economic transformation,¹³⁸³ and has regrettably been lacking in South African socio-economic rights jurisprudence, leaving the meaning of the rights hollow.¹³⁸⁴ Where rights do not have normative content set by judicial precedent or by state regulation, it is incumbent upon the judiciary to take on the task of norm setting.¹³⁸⁵ This should include attributing meaning and content to the rights to equality and dignity.¹³⁸⁶ As already mentioned,¹³⁸⁷ the interpretation of these two rights is a vexed issue. It is strongly arguable that the judiciary should develop the content thereof in parallel with giving meaning to the socio-economic rights.¹³⁸⁸

¹³⁸¹ See Du Toit 2013 *Journal of Agrarian Change* 22 who bemoans the making of *ad hoc* decisions in adjudication relating to land reform.

¹³⁸² Ebadolahi 2008 *New York University Law Review* 1587.

¹³⁸³ Poscher “Hermeneutics, Jurisprudence and Law”.

¹³⁸⁴ For example, in *Grootboom* the court failed to attribute normative content to the right to housing.

¹³⁸⁵ Rapatsa 2015 *Acta Universitatis Danubius Juridica* 32. See also Liebenberg 2012 *African Human Rights Law Journal* 29.

¹³⁸⁶ Glensy 2011 *Columbia Human Rights Law Review* 65. See also O’Connell 2008 *International Journal of Constitutional Law* 274, who bemoans the fact that dignity is dealt with in an oblique manner by the courts.

¹³⁸⁷ See section 2.3.3.3.

¹³⁸⁸ Liebenberg 2005 *South African Journal on Human Rights* 13-15.

5.5.2.5 Departure from Legalism

The adjudicative process may at times be dominated by legal technicalities rather than consideration of social realities.¹³⁸⁹ An overly legalistic approach by the courts may result in inappropriate and truncated relief.¹³⁹⁰ It may also have negative impacts upon access, and has been criticised for being amoral.¹³⁹¹ The application of an abstract standard of reasonableness in socio-economic rights cases against the state is associated with legalism which has negative impacts upon the poor.¹³⁹² The disinclination of the courts to develop normative standards for deliberative engagement in socio-economic rights cases is also symptomatic of an overly legalistic approach which undermines the potential of human rights adjudication to find meaningful solutions to poverty amelioration.¹³⁹³ The management and control of legalism in the adjudicative process is well within the control of the judiciary, and should be addressed by way of an institutional effort to provide training and support to the judiciary.¹³⁹⁴

5.5.2.6 Rethinking Adherence to the Prevailing Legal Culture

Allowing the prevalence and persistence of a conservative legal culture and the practices associated with it, is an indictment on the performance of the judiciary. This is connected to but is a separate issue from legalism *per se* as discussed above. Remedying this would require an examination of judicial mindset and methodologies, with a view to revising them to achieve societal transformation, and to enable better alignment of judicial practices with the transformative imperatives in the *Constitution*.¹³⁹⁵ Judicial culture is a strong influence on the functionality of the judiciary in all spheres of adjudication and in particular in socio-economic rights

¹³⁸⁹ Wilson and Dugard 2011 *Stellenbosch Law Review* 665.

¹³⁹⁰ See also Mc Granahan 2015 *World Development* 250, who outlines the limited outcomes of an overly legalistic approach in water and sanitation cases.

¹³⁹¹ Dugard 2008 *South African Journal on Human Rights* 214.

¹³⁹² Dugard 2007 *Leiden Journal of International Law* 975.

¹³⁹³ Liebenberg 2012 *African Human Rights Law Journal* 29.

¹³⁹⁴ See also Jagwanth and Soltau "Socio-economic Rights and Implications for Intergovernmental Fiscal Relations in South Africa" 2, where the authors describe the limitations of a court-centric analysis which disregards economic and other external circumstances.

¹³⁹⁵ Klare 1998 *South African Journal on Human Rights* 156.

adjudication, where untransformed legal culture results in failure to uphold the spirit and purport of the *Constitution*.¹³⁹⁶ Transformation of legal culture may entail the development of new judicial methodologies, and the judiciary should be open to this.¹³⁹⁷ Reticence on the part of the judiciary to espouse such transformation inhibits the potential of the adjudicative process to alleviate the plight of the poor.¹³⁹⁸ Judicial culture and practice is a realm over which the judiciary itself has control, and has a responsibility to address, particularly when its dynamics have been ably and cogently analysed by the authors cited in this section. Addressing the issue, which would require a concerted effort on the part of the judiciary, would of necessity have to be preceded by an effort to raise awareness of the dynamics to be remedied.

5.5.2.7 Espousing Judicial Activism

The judiciary in South Africa appears to be non-activist in its stance. It seldom seeks to utilise its status and its influence to effect transformation. The *Constitution* articulates transformative imperatives without clearly designating which branches of government are responsible to pursue them, and by default this may be interpreted to mean that all branches of government, including the judiciary, are accountable for doing so.¹³⁹⁹ In the realm of socio-economic rights adjudication, there is scope for the judiciary to take an activist position, including the scrutiny of government policy and budgets.¹⁴⁰⁰ Part of judicial activism is an acceptance and an embracing of the unashamedly political nature of the *Constitution*. The judiciary is prone to the depoliticisation of socio-economic issues, coupled with acquiescence in liberalist-capitalist views of poverty.¹⁴⁰¹ This makes judges less inclined to pursue socio-economic transformation, which is counter-productive for poverty amelioration. As an overarching principle guiding socio-economic rights

¹³⁹⁶ Langa 2006 *Stellenbosch Law Review* 7. The late Chief Justice highlights the need for judges to avoid legal formalism and to engage with the *Constitution*.

¹³⁹⁷ Davis and Klare 2010 *South African Journal on Human Rights* 509.

¹³⁹⁸ Clark and Esterhuizen "Remembering the Transformative Mandate: an Analysis of Twenty Years of Housing and Eviction Jurisprudence in South Africa" third page (pages are unnumbered).

¹³⁹⁹ Pieterse 2004 *South African Journal on Human Rights* 383.

¹⁴⁰⁰ Pieterse 2004 *South African Journal on Human Rights* 409.

¹⁴⁰¹ Brand *Courts, Socio-economic Rights and Transformative Politics* 5.

adjudication, a shift towards a transformative rather than a palliative approach by the judiciary is essential.¹⁴⁰² An essential goal of the judiciary in pursuing judicial activism in socio-economic rights matters must be to give a voice to the poor, who currently struggle to overcome many impeding factors towards realisation of their rights. This will of necessity entail moving away from the countermajoritarian position which currently dominates judicial thinking.¹⁴⁰³ It may also involve moving away from judicial resistance to the notion of encroaching into the territory of distributive justice.¹⁴⁰⁴ The Constitutional Court has powers to make any just and equitable order it deems fit, and this is enabling in the realm of judicial innovation.¹⁴⁰⁵ Fostering activism and a transformative imperative on the part of the judiciary may require institutional intervention in the form of training or directives. As leader of the judiciary, the Chief Justice has an important role to play in this regard.

5.5.2.8 Adoption a Conscious Transformative Approach

Transformation in the approach of the judiciary to the fulfilment of socio-economic rights is rendered difficult by the fact that legal rules and processes are embedded within the society and culture of which they are part.¹⁴⁰⁶ The effect of such embeddedness is that changes in judicial practice are difficult to achieve, especially since they may have ripple effects and ramifications outside of the judicial process and would accordingly require wide consultation. Rights are formulated, interpreted and enforced by institutions that are embedded in the political, social and economic milieu of the day, and formulation, interpretation and enforcement is geared towards maintaining the status quo.¹⁴⁰⁷ Although embeddedness poses a challenge to legal reform, it is imperative that these challenges be embraced and tackled head-on by the judiciary, if socio-economic transformation is to occur.

¹⁴⁰² Wilson and Dugard 2011 *Stellenbosch Law Review* 665.

¹⁴⁰³ Bilchitz 2015 *South African Journal on Human Rights* 110. See also Brand 2009 *Courts, Socio-economic Rights and Transformative Politics* 5.

¹⁴⁰⁴ Fredman 2005 *South African Journal on Human Rights* 190.

¹⁴⁰⁵ Christiansen 2010 *Journal of Gender, Race and Justice* 589.

¹⁴⁰⁶ Munger 1993 *Loyola of Los Angeles Law Review* 97.

¹⁴⁰⁷ Bond "Capitalism, the Privatisation of Basic Social Services and the Implementation of Socio-economic Rights: Challenges and Advocacy Strategies for Human Rights and Social Justice Actor, Learning from the Johannesburg Water Defeat" 2.

5.5.2.9 Overcoming the Constraints of Situatedness

Adjudication is influenced by the situatedness of individual judges, and in socio-economic rights cases this may be by their personal positions with regard to socio-economic transformation.¹⁴⁰⁸ Judicial training and effort **is** needed to ensure that judges are able to identify and move beyond any such personal positions.

5.5.2.10 Overcoming Elitism and Arrogance

The judiciary is partly responsible, together with the legal profession, for the public and especially the poorer classes perceiving judicial and professional legal officers as elitist.¹⁴⁰⁹ It is incumbent upon the judiciary to foster an approach of judicial humility amongst its members, in order to make the realisation of socio-economic and other rights an easier journey for litigants.

5.5.2.11 Addressing Unequal Power Relations

The orientation of socio-economic rights jurisprudence is typically neutral with regard to power dynamics between the parties – judges do not consider that they may have a responsibility to protect the weak against the powerful.¹⁴¹⁰ The powerful may be the privileged sectors of society, or may be the state. Enabling the weak and powerful to compete on equal terms in the litigation arena may require that special attention is given to assisting the weaker party. Judges need to receive training and support to enable them to level the playing fields in this way.

5.5.2.12 Innovation in Court Orders

There is a notable absence in South African jurisprudence of judicial orders directing the state to make budgetary allocation for socio-economic rights fulfilment. This has the effect that government effectively enjoys unfettered autonomy with regard to such allocation.¹⁴¹¹ If judges are to pursue socio-economic transformation, as they

¹⁴⁰⁸ Daniel 2013 *De Jure* 25.

¹⁴⁰⁹ Mc Evoy 2007 *Journal of Law and Society* 411.

¹⁴¹⁰ Brinks and Gauri 2014 *Perspectives on Politics* 379.

¹⁴¹¹ Liebenberg 2001 *South African Journal on Human Rights* 257.

are obliged to do, they need to exercise their judicial authority to scrutinise executive budgeting and make orders with regard thereto.

The crafting of suitable remedies is a *sine qua non* for the fulfilment of socio-economic rights.¹⁴¹² In socio-economic rights matters, the judiciary must strive to craft remedies which serve to fulfil the rights and the constitutional imperatives underpinning them. It also needs to ensure that political will to enforce court-ordered remedies is fostered.¹⁴¹³ This may entail active engagement by the court with the parties prior to crafting a remedy. It may also entail a measure of innovation on the part of the judiciary.¹⁴¹⁴ Supervisory jurisdiction is also a mechanism whereby courts may craft appropriate and innovative orders in socio-economic rights matters.¹⁴¹⁵ Judges should be encouraged and trained, arguably as early as during basic university law training, to foster such approaches.

5.5.2.13 Judicial Consequentialism

The judiciary must embrace a consequentialist approach towards socio-economic rights adjudication. This entails judges enquiring into the consequences of the adjudication and orders potentially to be made, and of necessity entails judges being aware of and looking into considerations in the realms of sociology and economics.¹⁴¹⁶ The broad investigation required may be best performed in a “bottom up” fashion, first considering the law in its societal context and then moving towards the crafting of a legal remedy.¹⁴¹⁷

5.5.2.14 Adopting a People-centric Approach

There is an urgent need in socio-economic rights cases for the judiciary to foster an awareness of the psycho-social elements of poverty and deprivation, and to

¹⁴¹² Holness 2013 *Speculum Iuris* 6.

¹⁴¹³ Wilson 2011 *South African Journal on Human Rights* 131.

¹⁴¹⁴ Kruger *Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts* 1-420.

¹⁴¹⁵ Wesson 2004 *South African Journal on Human Rights* 297.

¹⁴¹⁶ Gould 2016 *Ancilla Iuris* 83-84.

¹⁴¹⁷ Kruger *Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts* 12.

safeguard claimants against psycho-social hardships.¹⁴¹⁸ This is aligned to the people-centric orientation of the constitutional preamble and the Bill of Rights.

5.5.2.15 Pursuing Synergies with the Legal Profession

In pursuing socio-economic transformation, the judiciary could be ably assisted by the legal profession, and synergies between the bench and the profession pursued in this regard. The legal profession in South Africa has a long tradition of successful activism towards the achievement of fundamental rights and freedoms, for example via Nelson Mandela and Oliver Tambo, and this tradition should be fruitfully taken forward in the interest of poverty amelioration.¹⁴¹⁹ Transformation of legal education is a further initiative which can be undertaken by the judiciary in collaboration with academia, to inculcate transformative imperatives in future jurists.¹⁴²⁰ Judicial effort to achieve these aims is necessary.

The purpose of this section has been to suggest ways in which the judiciary can take immediate and purposive actions to serve the interests of poverty amelioration.

5.6 Chapter Summary

This chapter analyses and considers the role of the judiciary in poverty amelioration. Two dominant doctrines influence the way in which the judiciary approaches socio-economic rights adjudication – the separation of powers doctrine and the judicial deference doctrine.¹⁴²¹ Adherence to the separation doctrine is anomalous in the context of a constitutional system where socio-economic rights are justiciable and the courts are mandated to hold the state to account for their fulfilment. It is irrefutable that strict adherence to the doctrine by the judiciary is highly disadvantageous for poverty amelioration. The separation doctrine appears to be deployed by judges to mask or assuage their discomfort with making transformative

¹⁴¹⁸ Metz 2016 *Res Publica* 327 argues that it is incumbent upon the legal system to recognise the psycho-social effects of poverty, which amount to degradation of one's personal sense of humanity.

¹⁴¹⁹ Mc Dougall 2016 *New York Law School Law Review* 34.

¹⁴²⁰ Quinot 2012 *South African Law Journal* 417.

¹⁴²¹ For a detailed discussion of these two doctrines in the context of the role of the judiciary in the amelioration of poverty, see section 5.3. The text that follows constitutes a summary of this section.

orders in the face of state ineptitude or intransigence. Strict adherence to the doctrine may cause the judiciary to fail to fulfil its duty to promote constitutional transformation and to uphold the socio-economic rights. Adherence is not formally regulated in South Africa but is a rule of practice voluntarily espoused by the judiciary and entrenched in adjudicative practice. In the international context, separation is a blurred and fluid concept. Taking a cue from this fact, it is warranted for the judiciary to move towards a reconceptualised model of separation of powers to align with the constitutional imperatives of the South African *Constitution*. Such a model should actively promote the pursuit of socio-economic transformation by the judiciary. The doctrine of judicial deference is manifested in judicial practice as a reticence on the part of the judiciary to intervene in the affairs of other branches of government. This is anomalous in the context of the judiciary having powers to hold the other branches to account. Again, deference is a rule of judicial practice voluntarily espoused by the judiciary. Application of the doctrine leads to attenuation of relief granted to socio-economic rights claimants against the state. As such, it does not support a potential role for the judiciary in poverty amelioration.

There are a number of features and practices endemic in legal and judicial practice which are not conducive to poverty amelioration but which are not necessarily under the direct control of the judiciary. These include legal formalism, the adversarial nature of the litigious process, the reparative rather than distributive orientation of litigation, problems of access to justice for the poor, judicial reticence and conservatism, legal minimalism, the embeddedness of the legal system in society and the economy, judicial culture, complacency in the existence of the rights, situatedness of judges, a lack of self-reflection and a general lack of judicial activism and advocacy.¹⁴²²

In the realm of jurisprudence on issues of poverty, there is something of a vacuum, except for the noteworthy judgment in *Daniels v Scribante*. This case contains the only detailed exposition of the social, economic and political dimensions of poverty

¹⁴²² For a full discussion of the limiting features of legal and judicial practice in the context of poverty amelioration, see section 5.2.1.

and its ramifications for its victims by the courts, albeit in an *obiter* fashion. As indicated, it is arguable that the statements on the dimensions of poverty in the four assenting judgments are sufficiently interwoven with the rationale for the judgments as to render them of more significance than typical *obiter* pronouncements. The courts have made reference to poverty in a number of contexts in other cases, in which poverty is presented as an anecdotal circumstance under consideration by the court, incidental to the relief or lack thereof under consideration. Poverty has never overtly been part of the *ratio decidendi* in a reported litigious matter. This research has not found any evidence of a litigious matter in which an order is sought against the state for poverty amelioration, which no doubt accounts for this lacuna. The possibility of litigation of this nature in the future cannot be discounted.

There are a number of circumstances which are not directly under the control of the judiciary, but of which it must take cognisance if it is to embrace its role in poverty amelioration. The judiciary must understand the interwovenness of poverty with the prevailing socio-economic governance system, which is essentially neoliberal and capitalist. It does not have power to control this directly but an awareness of its impacts could greatly enhance judicial insight into poverty-related matters. The judiciary also needs to understand the context of socio-economic rights as aspirational rather than capable of immediate full application. This should not lead to acquiescence in non-fulfilment of the rights, but should serve as an impetus to develop methodologies for fulfilment. The legal framework for rights fulfilment is not a panacea for poverty amelioration in itself but it can be deployed with support and supplementary measures to move towards this goal. The judiciary must ensure that such measures are utilised to maximise the impact of the orders it makes. The socio-economic rights are framed in a less than completely clear manner, for example the right to "sufficient" food and water. The judiciary should not use this lack of clarity to avoid holding government to account, but should embrace the opportunity to give content and meaning to the rights through judicial advocacy and precedent. The persistence of a class structure in the democratic South Africa is closely associated with socio-economic inequality – a fact of which the judiciary

should be aware. It must consider ways in which socio-economic deprivation linked to class can be overcome. The *Constitution* fails to address intergovernmental roles and responsibilities with regard to poverty amelioration. Again, this should not be seen as a rationale for inaction, but rather an opportunity to deliberate on and to craft solutions involving all branches and spheres of government. The historical context which led to the inequalities in South African society is unique and poses its own challenges, even several decades after the political transformation. The judiciary needs to seek ways in which reparative and redistributive measures can overcome such inequalities. One of the most significant tasks faced by the judiciary is to address the issue of access to justice for the poor. This is a vexed issue which may involve the judiciary taking the lead in conceptualising and driving reform of the legal system to alleviate lack of access.

Besides the issues just mentioned, there are other possible actions to ameliorate poverty which fall within the ambit of the powers of the judiciary, and to which immediate attention is warranted. The first of these is a reconsideration of the desirability of adherence to the separation of powers and deference doctrines. It is urgently necessary that the judiciary should overcome its reticence to make meaningful orders in socio-economic rights cases, and that it should seek to forge strong remedies rather than to avoid doing so. In such cases, the judiciary needs to focus squarely on the transformative imperatives of the *Constitution* to guide its thinking. It needs to cast aside judicial minimalism and replace it with a robust reparative approach. It must also move into the realm of attribution of content to the rights and formulation of norms where these are lacking. Transformation of legal culture is an urgent imperative which the judiciary must pursue, taking heed of the writings of Klare and others in this regard. Most importantly, the judiciary must not gloss over socio-economic rights issues as if they were apolitical, but must rather take an activist position with regard to fulfilment of the rights, holding government and other actors fully to account for such fulfilment. The judiciary needs to realistically assess its own performance as an agent for poverty amelioration and to find ways to improve on such performance. As part of this, it must acknowledge its own embeddedness and that of the legal system generally in social and economic

structures, and assess how it could become liberated from such embeddedness. The situatedness of members of the judiciary also needs to be addressed via awareness and training. An approach of judicial humility is an essential component of action by the judiciary towards poverty amelioration, which must include an acknowledgement that existing judicial mindsets and habits may have to be relinquished in favour of a fresh approach. The incursion of the judiciary into making pronouncements about executive budgeting and expenditure is long overdue. As long as this continues to be seen as a judicial taboo, the power of the judiciary to work towards poverty amelioration will remain constrained. A spirit of innovation should become the new functional motto of judicial authority, given that the courts have to date been less than active and purposeful in making findings relating to poverty amelioration. Consequentialism should become a standard by which the judiciary assesses its own performance in socio-economic rights matters – this entails a realistic assessment of the impact of orders under consideration and a maximising of such impact. The judiciary needs to factor in psycho-social hardships relating to poverty as a consideration in its jurisprudence. Training in this regard would be helpful. Lastly, but by no means least importantly, the judiciary must embrace its leadership role in the legal system and utilise this *inter alia* to enlist the involvement of the legal profession and other actors within the legal system to drive the cause of poverty amelioration.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 Study Background

The rationale for this study was to develop and present an understanding of the phenomenon of structural poverty in South Africa, and why and how it has persisted in the modern constitutional era.¹⁴²³ This investigation was contextualised within the framework of a consideration of the roles and responsibilities of the three branches of government,¹⁴²⁴ and through a consideration of the characteristics¹⁴²⁵ and determinants¹⁴²⁶ of poverty and possible solutions for its amelioration.¹⁴²⁷ The investigation was done through a multidisciplinary lens, as further explained below. Poverty in South Africa was shown to be: a) a constitutional issue, and one associated with social justice and transformative constitutionalism,¹⁴²⁸ as well as b) an issue which is interwoven specifically with socio-economic rights realisation, or lack thereof.¹⁴²⁹

The main objective of the study was to consider how the three branches of government could more effectively contribute to the amelioration of poverty.¹⁴³⁰ Subsidiary objectives serving the main objective included the identification of the various dimensions of poverty through a multidisciplinary lens, the consideration of the functionality and responsibilities of the three branches of government in the context of poverty studies, and the seeking of enablers and suggestions for the overcoming of impediments towards poverty amelioration by the three branches.

¹⁴²³ See sections 1.1 and 1.6.

¹⁴²⁴ These are summarised in sections 3.6, 4.5 and 5.6.

¹⁴²⁵ See section 2.2.

¹⁴²⁶ See section 2.3.

¹⁴²⁷ See section 2.4.

¹⁴²⁸ See section 1.3.

¹⁴²⁹ See section 1.4.

¹⁴³⁰ See section 1.6.

6.2 Method and Limitations of the Study

This is a desktop study, based on academic and other literature resources, as well as legal instruments and case law. It involves observational, causal and deductive reasoning and analysis, which lends depth to the study, but it nevertheless leans towards being theoretical and conceptual. The value of the study lies in its introduction of theory on the subject it addresses, and would best be proven through the practical implementation of its findings and recommendations.

The study is limited in its scope by the fact that it is focused on an investigation of the functionality of the national sphere of government in its legislative and executive branches, relevant to poverty amelioration, and to judicial functionality as evidenced in the reported judgments of the superior courts. An investigation of the functionality of all spheres of government relative to poverty, and of the lower courts, would be a foundation for multiple theses or research papers on the subject.

In some areas of investigation mentioned in the study there is a dearth of information and analysis, which places a limitation on the study.¹⁴³¹

A further limitation of the study is that it does not include engagement with actors in the three branches of government to gauge their responses to its findings and recommendations. Thus the practical feasibility of implementing the study outcomes is as yet untested, and it is hoped that the study will be a basis for investigating these in the future.

6.3 Research Findings

6.3.1 Findings Emerging from the Theoretical Perspectives on Poverty

The research reflected in chapter 2 constitutes an attempt to understand poverty with reference to its characteristics, its determinants, and possible solutions for its amelioration. This has produced a web of findings which are reflective of the complex nature of poverty, and which adds to and consolidates existing research in the field of poverty studies. The research done to produce these findings straddled

¹⁴³¹ See for example paragraph 1.4.3 and relevant footnotes, dealing with the right to food.

a variety of fields such as law, sociology, economics and political theory and was done on the basis of researching concepts broadly rather than researching within specific academic disciplines. The rationale for this was to ensure that as many aspects of poverty as possible were considered. The sub-headings below recapture key findings worth noting for purposes of the thesis.

6.3.1.1 Characteristics of Poverty

Poverty has money-metric and non-money-metric characteristics.¹⁴³² It is an embedded and systemic problem in South Africa,¹⁴³³ which is persistent over time, subject to inertia, and burgeoning.¹⁴³⁴ In addition, it has links and associations with apartheid.¹⁴³⁵ It is associated with economic exclusion,¹⁴³⁶ and is under-represented as a consideration in economic theory.¹⁴³⁷ It is characterised by non-realisation of the rights to equality and dignity,¹⁴³⁸ and by non-realisation of the socio-economic rights, for example the right to education.¹⁴³⁹ It is furthermore associated with urbanisation¹⁴⁴⁰ and developmental legalism,¹⁴⁴¹ and is frequently manifested in the minerals-energy sector.¹⁴⁴² These findings are all considered important in building an understanding of poverty which forms a basis for answering the research question of this thesis, namely what enablers and impediments exist for the amelioration of poverty by the three branches of government in the South African context.

6.3.1.2 Determinants of Poverty

It has been found that poverty is attributable to a wide range of determinants, which have been grouped into six categories.

¹⁴³² See sections 2.2.2 and 2.2.3.

¹⁴³³ See section 2.2.1.

¹⁴³⁴ See section 2.2.4.

¹⁴³⁵ See section 2.2.5.

¹⁴³⁶ See section 2.2.7.

¹⁴³⁷ See section 2.2.7.

¹⁴³⁸ See section 2.2.6.

¹⁴³⁹ See section 2.2.9.

¹⁴⁴⁰ See section 2.2.10.

¹⁴⁴¹ See section 2.2.11.

¹⁴⁴² See section 2.2.12.

In the first category, ideological notions have been identified as determinants of poverty. These are neoliberalism,¹⁴⁴³ libertarianism,¹⁴⁴⁴ capitalism,¹⁴⁴⁵ constitutionalism,¹⁴⁴⁶ post-colonialism and neo-colonialism,¹⁴⁴⁷ developmentalism¹⁴⁴⁸ and utilitarianism.¹⁴⁴⁹ Adherence to these ideological notions has been found to be a determinant of poverty. In the second category, social and economic phenomena and dysfunctionalities have been shown to determine poverty. These are failure to achieve social justice,¹⁴⁵⁰ inequality and indignity,¹⁴⁵¹ identity politics,¹⁴⁵² social and economic power structures,¹⁴⁵³ adverse incorporation of the poor into the economy,¹⁴⁵⁴ weak policy responses and ineffective bureaucracy,¹⁴⁵⁵ routine functioning of market institutions,¹⁴⁵⁶ weak responses by the courts,¹⁴⁵⁷ anomalies in government policy,¹⁴⁵⁸ lack of capabilities,¹⁴⁵⁹ pursuit of economic growth,¹⁴⁶⁰ lack of social cohesion,¹⁴⁶¹ social exclusion,¹⁴⁶² affirmation of global power structures and institutional hegemony,¹⁴⁶³ resource extraction,¹⁴⁶⁴ household features and phenomena,¹⁴⁶⁵ overdensification¹⁴⁶⁶ and patrimonialism and clientilism.¹⁴⁶⁷ These are all distinct phenomena with a causal and determinative role relative to poverty. The third category relates to dysfunctionalities in the human rights regime, being that

1443 See section 2.3.1.1.
1444 See section 2.3.1.2.
1445 See section 2.3.1.3.
1446 See section 2.3.1.4.
1447 See section 2.3.1.5.
1448 See section 2.3.1.6.
1449 See section 2.3.1.7.
1450 See section 2.3.2.1.
1451 See section 2.3.2.2.
1452 See section 2.3.2.3.
1453 See section 2.3.2.4.
1454 See section 2.3.2.5.
1455 See section 2.3.2.6.
1456 See section 2.3.2.7.
1457 See section 2.3.2.8.
1458 See section 2.3.2.9.
1459 See section 2.3.2.10.
1460 See section 2.3.2.11.
1461 See section 2.3.2.12.
1462 See section 2.3.2.13.
1463 See section 2.3.2.15.
1464 See section 2.3.2.16.
1465 See section 2.3.2.17.
1466 See section 2.3.2.18.
1467 See section 2.3.2.19.

rights are prone to legalism and entrenchment of the *status quo*,¹⁴⁶⁸ shortcomings in the potential for realising rights,¹⁴⁶⁹ the vexed nature of the equality and dignity rights,¹⁴⁷⁰ general shortcomings of reliance on rights for poverty amelioration,¹⁴⁷¹ conflict between rights,¹⁴⁷² deficiencies in the implementation of the right to healthcare,¹⁴⁷³ anomalies relating to the social security right,¹⁴⁷⁴ weak implementation of the right to education,¹⁴⁷⁵ the right to food as requiring more attention and research¹⁴⁷⁶ and obstacles to realising the right to housing.¹⁴⁷⁷ All of these represent distinct features of the human rights regime which are of concern as determinants of poverty. A fourth category of determinants is constituted by dysfunctions in the legal system. These are the prevalence of legalism in the system,¹⁴⁷⁸ and conservative legal culture and entrenched legal practices.¹⁴⁷⁹ These represent obstacles to poverty amelioration and as such are determinants of poverty. A fifth category consists of political dynamics which serve as determinants of poverty. These are general political dynamics,¹⁴⁸⁰ a weak role played by the legislature,¹⁴⁸¹ weak representivity of the poor,¹⁴⁸² corruption and clientilism,¹⁴⁸³ elite capture of land reform,¹⁴⁸⁴ and weaknesses in the NDP.¹⁴⁸⁵ Sixthly and lastly, some miscellaneous determinants of poverty can be identified, being lack of corporate

¹⁴⁶⁸ See section 2.3.3.1.
¹⁴⁶⁹ See section 2.3.3.2.
¹⁴⁷⁰ See section 2.3.3.3.
¹⁴⁷¹ See section 2.3.3.4.
¹⁴⁷² See section 2.3.3.5.
¹⁴⁷³ See section 2.3.3.6.
¹⁴⁷⁴ See section 2.3.3.7.
¹⁴⁷⁵ See section 2.3.3.8.
¹⁴⁷⁶ See section 2.3.3.9.
¹⁴⁷⁷ See section 2.3.3.10.
¹⁴⁷⁸ See section 2.3.4.1.
¹⁴⁷⁹ See section 2.3.4.2.
¹⁴⁸⁰ See section 2.3.5.1.
¹⁴⁸¹ See section 2.3.5.2.
¹⁴⁸² See section 2.3.5.3.
¹⁴⁸³ See section 2.3.5.4.
¹⁴⁸⁴ See section 2.3.5.5.
¹⁴⁸⁵ See section 2.3.5.6.

accountability,¹⁴⁸⁶ globalisation, urbanisation and trade,¹⁴⁸⁷ climate change¹⁴⁸⁸ and labour-related issues.¹⁴⁸⁹ These phenomena are also determinative of poverty.

6.3.1.3 Solutions for Amelioration of Poverty

In the process of researching possible solutions for poverty amelioration it was possible to identify six categories of possible interventions.

In the first category proposed poverty amelioration solutions were identified which are associated with political and ideological considerations. These are understanding the ideological foundations and dimensions of poverty studies,¹⁴⁹⁰ understanding poverty in the context of social justice,¹⁴⁹¹ acknowledging the primacy of constitutional values,¹⁴⁹² revisiting traditional ideologies and considering new ideologies in the context of poverty studies,¹⁴⁹³ pursuing social democracy and socialism,¹⁴⁹⁴ pursuing partnerships between government and non-governmental organisations,¹⁴⁹⁵ and reverting to the macroeconomic orientation of the RDP.¹⁴⁹⁶

As explained in chapter 2, each of these, if pursued, could serve as solutions for poverty amelioration. Secondly, possible social solutions for the amelioration of poverty were identified. These are acknowledging the potential of human agency to overcome poverty,¹⁴⁹⁷ using utopian thought as a vision underpinning poverty amelioration,¹⁴⁹⁸ invoking morality and ethics and establishing norms and values,¹⁴⁹⁹ addressing the psycho-social aspects of poverty,¹⁵⁰⁰ *Ubuntu*,¹⁵⁰¹ acknowledging the

¹⁴⁸⁶ See section 2.3.6.1.
¹⁴⁸⁷ See section 2.3.6.2.
¹⁴⁸⁸ See section 2.3.6.3.
¹⁴⁸⁹ See section 2.3.6.4.
¹⁴⁹⁰ See section 2.4.1.1.
¹⁴⁹¹ See section 2.4.1.2.
¹⁴⁹² See section 2.4.1.3.
¹⁴⁹³ See section 2.4.1.4.
¹⁴⁹⁴ See section 2.4.1.6.
¹⁴⁹⁵ See section 2.4.1.7.
¹⁴⁹⁶ See section 2.4.1.8.
¹⁴⁹⁷ See section 2.4.2.1.
¹⁴⁹⁸ See section 2.4.2.2.
¹⁴⁹⁹ See section 2.4.2.3.
¹⁵⁰⁰ See section 2.4.2.4.
¹⁵⁰¹ See section 2.4.2.5.

limits of socio-economic rights,¹⁵⁰² acknowledging the potential of the right to dignity as a vehicle for poverty amelioration,¹⁵⁰³ and conceptualising a role for business in ameliorating poverty.¹⁵⁰⁴ These represent a collection of interventions which could contribute positively to poverty amelioration. In the third category, it is possible to conceptualise poverty amelioration solutions in the realm of economics. These are questioning the world economic order,¹⁵⁰⁵ addressing executive budgeting,¹⁵⁰⁶ linking economics and ethics,¹⁵⁰⁷ linking economics and development theory,¹⁵⁰⁸ and linking economics and distributive justice.¹⁵⁰⁹ Fourthly, there are a number of possible poverty amelioration solutions relating to legal matters. These are judicial innovation,¹⁵¹⁰ making orders of wider application,¹⁵¹¹ having law guided by the social sciences,¹⁵¹² having law cognisant of economic and monetary issues,¹⁵¹³ having law cognisant of political issues,¹⁵¹⁴ fostering collaboration between courts and state,¹⁵¹⁵ courts taking on a role as an agency for transformation,¹⁵¹⁶ finding targeted judicial remedies for the realisation of socio-economic rights,¹⁵¹⁷ having the judiciary pursue a consequentialist standard,¹⁵¹⁸ acknowledging the limits of the law and seeking extra-judicial solutions,¹⁵¹⁹ exploring the role of the legal profession in poverty amelioration,¹⁵²⁰ and reconciling competing interests.¹⁵²¹ Each of these holds positive potential for poverty amelioration. A fifth category of solutions towards poverty amelioration consists of envisaging and implementing an enhanced role for the

¹⁵⁰² See section 2.4.2.6.
¹⁵⁰³ See section 2.4.2.7.
¹⁵⁰⁴ See section 2.4.2.8.
¹⁵⁰⁵ See section 2.4.3.1.
¹⁵⁰⁶ See section 2.4.3.2.
¹⁵⁰⁷ See section 2.4.3.3.
¹⁵⁰⁸ See section 2.4.3.4.
¹⁵⁰⁹ See section 2.4.3.5.
¹⁵¹⁰ See section 2.4.4.1.
¹⁵¹¹ See section 2.4.4.2.
¹⁵¹² See section 2.4.4.3.
¹⁵¹³ See section 2.4.4.4.
¹⁵¹⁴ See section 2.4.4.5.
¹⁵¹⁵ See section 2.4.4.6.
¹⁵¹⁶ See section 2.4.4.7.
¹⁵¹⁷ See section 2.4.4.8.
¹⁵¹⁸ See section 2.4.4.9.
¹⁵¹⁹ See section 2.4.4.10.
¹⁵²⁰ See section 2.4.4.11.
¹⁵²¹ See section 2.4.4.12.

executive.¹⁵²² Sixthly, there are a number of multi-pronged and integrated solutions for poverty amelioration, which also have potential for poverty amelioration. These are understanding the self-perpetuating nature of poverty,¹⁵²³ understanding poverty from a transdisciplinary and multi-disciplinary perspective,¹⁵²⁴ seeking poverty amelioration solutions in the realm of climate change,¹⁵²⁵ and reforming urban geography and pursuing environmental constitutionalism.¹⁵²⁶

6.3.2 Findings: Role of the Legislature

The legislature is not commonly thought of as a branch of government responsible for poverty amelioration, but it is possible to discern two distinct areas in which it could make a contribution to poverty amelioration. These are a) the fostering and promotion of awareness, via its legislative and deliberative functions, of the fundamental imperative to ameliorate poverty,¹⁵²⁷ and b) the enhancement of the legislative oversight function insofar as it is exercised in areas relevant to poverty amelioration.¹⁵²⁸

6.3.2.1 Fostering and Promotion of Awareness of the Imperative to Ameliorate Poverty

Legislative process does not lend itself to fostering an awareness of ethical and ideological issues underpinning legislative development, neither of the importance and centrality of focusing on the constitutional imperative to ameliorate poverty.¹⁵²⁹ Thus it is imperative that the legislature should ensure that such an awareness amongst its ranks is fostered.

¹⁵²² See section 2.4.5.

¹⁵²³ See section 2.4.6.1.

¹⁵²⁴ See section 2.4.6.2.

¹⁵²⁵ See section 2.4.6.3.

¹⁵²⁶ See section 2.4.6.4.

¹⁵²⁷ See section 3.5.1.

¹⁵²⁸ See section 3.5.2.

¹⁵²⁹ See section 3.5.1.

6.3.2.2 Enhancement of the Legislative Oversight Function

Research into the functionality of legislative oversight has revealed a number of weaknesses, the remediation and rectification of which could be a positive force towards poverty amelioration. This is premised on the assumption that effective legislative oversight of poverty-related work by the executive could serve to exercise better control and ensure the effectiveness of such work. Two weaknesses play a significant role in rendering legislative oversight less than effective – strict adherence to the separation of powers doctrine, and the workings of the political party system.¹⁵³⁰ Other weaknesses and dysfunctionalities which also detract from the efficacy of legislative oversight include the *ex-post-facto* nature of oversight (rather than it being proactive), leading to the legislature taking on a rubber-stamping rather than a meaningful oversight role, prevalence of a weak oversight culture, institutional inertia, an unengaged citizenry, lack of alignment with executive programmes, and failure to consider poverty as an oversight project.¹⁵³¹

6.3.3 Findings: Role of the Executive

In this section the major findings of the study regarding the roles of the executive in poverty amelioration will be highlighted. These will be transposed in a succeeding section¹⁵³² into recommendations as to what the executive could do towards poverty amelioration. The findings are grouped into eight categories.

6.3.3.1 Awareness of Poverty-related Issues

The executive needs to foster within its own ranks and within society an awareness of the multidimensional nature of poverty, and of certain of its cardinal characteristics.¹⁵³³ This is a necessary precursor to taking action towards poverty amelioration. Such an awareness must include a focus on the failure of distributive and redistributive justice which characterises poverty.¹⁵³⁴ It must also include a focus

¹⁵³⁰ See section 3.5.2.

¹⁵³¹ See section 3.5.2.

¹⁵³² See section 6.4.2.

¹⁵³³ See section 4.4.1.

¹⁵³⁴ See section 4.4.1.

on understanding poverty as a phenomenon associated with historical disadvantage, for example apartheid dynamics.¹⁵³⁵ In addition the association of poverty with dysfunctional social power relations needs to be highlighted and understood.¹⁵³⁶ Furthermore, linkages between poverty and human rights issues need to be articulated and understood.¹⁵³⁷ Articulation and understanding of these various dynamics is important as a foundation for executive action to ameliorate poverty.

6.3.3.2 Prevailing Neoliberal Governance Model

It has been shown in this thesis that neoliberalism is a strong determinant of poverty.¹⁵³⁸ It is a feature of the neoliberal governance model that poverty issues are sidelined, relative to other issues.¹⁵³⁹ In addition, adherence to the model is characterised by a lack of engagement on economic policy issues.¹⁵⁴⁰ Also, it is characterised by a lack of development ethics as part of governance.¹⁵⁴¹ Acquiescence in the socio-economic rights regime is a further feature of the neoliberal model.¹⁵⁴² There is furthermore a disinclination to re-purpose neoliberalism to make governance more favourable for the poor.¹⁵⁴³ These findings are reflected in the current main national planning instrument, the neoliberal-oriented NDP, for example.¹⁵⁴⁴

6.3.3.3 Prevalence of Capitalism

It has been shown¹⁵⁴⁵ that the capitalist model currently prevalent in South Africa has negative ramifications for the poor. In addition, constitutional protection of the

¹⁵³⁵ See section 4.4.1.
¹⁵³⁶ See section 4.4.1.
¹⁵³⁷ See section 4.4.1.
¹⁵³⁸ See section 2.3.1.1.
¹⁵³⁹ See section 4.4.2.
¹⁵⁴⁰ See section 4.4.2.
¹⁵⁴¹ See section 4.4.2.
¹⁵⁴² See section 4.4.2.
¹⁵⁴³ See section 4.4.2.
¹⁵⁴⁴ See section 4.4.2.
¹⁵⁴⁵ See section 2.3.1.3.

right to property is preservative of the rich-poor divide and thus also not favourable for poverty amelioration.¹⁵⁴⁶

6.3.3.4 Prevalence of Constitutionalism

Constitutionalism has been shown to be a dominant thought paradigm in South Africa.¹⁵⁴⁷ Another important finding of the study is that the socio-economic rights regime has limited efficacy in poverty amelioration.¹⁵⁴⁸ These findings are associated primarily with acquiescence in the *Constitution* and the socio-economic rights as being in themselves solutions for such amelioration, whereas they provide only a high level framework for achieving this.¹⁵⁴⁹

6.3.3.5 Economic Issues

It has been shown that the prevailing locus of economic power at the time of the political transition of 1994, has remained unchanged.¹⁵⁵⁰ It has also been shown that poverty is notably absent as a factor in the prevailing economic discourse.¹⁵⁵¹ In addition, the prevailing economic growth model is narrowly focused on GDP.¹⁵⁵² Also, economic theory is focused on conventional economic paradigms, with a lack of consideration of possible new paradigms.¹⁵⁵³ It has been shown that there is a lack of connection of economics and ethics.¹⁵⁵⁴ Also, in the realm of executive budgeting, purposive allocative budgeting practices are not followed.¹⁵⁵⁵ In addition, there is no initiative to maximise the fiscal pool for socio-economic rights realisation.¹⁵⁵⁶ Furthermore, macroeconomic shifts necessary to deal with impacts of climate

¹⁵⁴⁶ See section 4.4.3.

¹⁵⁴⁷ See section 4.4.4.

¹⁵⁴⁸ See section 4.4.4.

¹⁵⁴⁹ See the discussion of the *Constitution* as "scaffolding", as per Woolman, in section 2.3.1.4.

¹⁵⁵⁰ See section 4.4.5.

¹⁵⁵¹ See section 4.4.5.

¹⁵⁵² See section 4.4.5.

¹⁵⁵³ See section 4.4.5.

¹⁵⁵⁴ See section 4.4.5.

¹⁵⁵⁵ See section 4.4.5.

¹⁵⁵⁶ See section 4.4.5.

change are not part of economic planning.¹⁵⁵⁷ Also, economic policy pays scant regard to the principles of sustainable development.¹⁵⁵⁸

6.3.3.6 Poverty and Sociological Issues

This study has not been able to find any evidence of the executive examining poverty-related issues from a sociological perspective. However certain findings have been made with regard to possible courses of action for the executive to follow in order to ensure that poverty is appropriately understood from a sociological perspective. These include a consideration of social power dynamics and the taking of remedial action where the poor are disadvantaged by these, and prioritising poverty amelioration efforts of a sociological nature rather than only pursuing economic growth.¹⁵⁵⁹

6.3.3.7 Policy Issues which Thwart Redress for the Poor

It has been found that there are no policy instruments at present for redistribution of wealth¹⁵⁶⁰. Also, there is no formal initiative to introduce a universal basic income grant.¹⁵⁶¹ Also there is a notable lack of policy to drive a move away from colonialism and eurocentrism.¹⁵⁶² In addition, positive discrimination to achieve redress is very narrow in focus, being limited to labour law and procurement law.¹⁵⁶³ There is in addition a notable lack of poverty considerations in certain public law decision-making *fora*, for example land use and environmental decision-making processes. There is a notable lack of developmentalism in public policy.¹⁵⁶⁴ Also, a broad-based social compact for addressing poverty is lacking.¹⁵⁶⁵ Public policy also is not oriented towards promoting social democracy.¹⁵⁶⁶ Importantly, policy promoting

¹⁵⁵⁷ See section 4.4.5.

¹⁵⁵⁸ See section 4.4.5.

¹⁵⁵⁹ See section 4.4.6.

¹⁵⁶⁰ See section 4.4.7.

¹⁵⁶¹ See section 4.4.7.

¹⁵⁶² See section 4.4.7.

¹⁵⁶³ See section 4.4.7.

¹⁵⁶⁴ See section 4.4.7.

¹⁵⁶⁵ See section 4.4.7.

¹⁵⁶⁶ See section 4.4.7.

macroeconomic reform is lacking.¹⁵⁶⁷ Also, there is a dearth of policy material promoting citizen empowerment and human agency.¹⁵⁶⁸ In addition, there is a dearth of policy material serving to assist future planning, or 'futurecasting'.¹⁵⁶⁹ There are also deficits in public policy in the realms of dealing with commodification,¹⁵⁷⁰ problems pertaining to urbanisation,¹⁵⁷¹ and free trade¹⁵⁷² and labour market issues.¹⁵⁷³

All of the areas mentioned require clear policy approaches to deal with poverty. In a subsequent section¹⁵⁷⁴ recommendations will be made as to how the executive could remedy the policy deficits identified.

6.3.4 Findings: Role of the Judiciary

It has been possible in the course of this research to identify two categories of judicial functionality which are relevant to its potential to pursue poverty amelioration. The first is the category of aspects of the judicial function which require longer term change and reform.¹⁵⁷⁵ The judiciary is prone to acquiescing in the socio-economic rights as aspirational ideals, and to not drive initiatives towards finding mechanisms to render them realisable. It is furthermore inclined to use legal rhetoric, which may not be useful in the poverty amelioration context, and to be minimalistic in formulating judicial solutions.

There is a *lacuna* in judicial jurisprudence with regard to the attribution of meaning to the equality and dignity rights, which are intertwined with the socio-economic rights. There is similarly a deficit in dealing with the delineation of the roles of the three branches of government with regard to poverty matters, which is currently not prescribed in the *Constitution*.

¹⁵⁶⁷ See section 4.4.7.

¹⁵⁶⁸ See section 4.4.7.

¹⁵⁶⁹ See section 4.4.7.

¹⁵⁷⁰ See section 4.4.7.

¹⁵⁷¹ See section 4.4.7.

¹⁵⁷² See section 4.4.7.

¹⁵⁷³ See section 4.4.7.

¹⁵⁷⁴ See section 6.4.2.

¹⁵⁷⁵ These are discussed more fully in section 5.5.1.

The judiciary is inclined to take a legalistic view in socio-economic rights litigation, which detracts from its potential to recognise the political, social and economic aspects of the adjudication process. Thus it typically does not embrace appropriate interventions in these realms.¹⁵⁷⁶ The judiciary is not always cognisant of the historical context of poverty,¹⁵⁷⁷ the need for social justice¹⁵⁷⁸ and better access to justice,¹⁵⁷⁹ and the occasional need for extra-judicial solutions rather than judicial pronouncements.¹⁵⁸⁰

A second category of judicial functionality has been identified in respect of which the judiciary can take urgent action in pursuit of poverty amelioration solutions.¹⁵⁸¹ Firstly, addressing strict adherence to the doctrines of separation of powers and judicial deference, in so far as they guide the judiciary in poverty-related matters, is within the ambit of the judiciary's powers.¹⁵⁸² This is necessary because these doctrines stand in the way of the holding of the other branches of government to account, and are accordingly counterproductive in poverty amelioration matters.

As outlined above,¹⁵⁸³ the judiciary functions within an established milieu of legal culture, in which legalism prevails, and poverty amelioration is not a priority. This is counterproductive for the judicial innovation needed to work towards this goal. Thus there is a lack of conscious effort towards transformation. There is similarly a lack of initiative towards development of a culture of judicial activism in addressing poverty.

Much of socio-economic rights legislation is framed in a general and abstract way,¹⁵⁸⁴ and this requires supplementation by judicial attribution of norms and meaning to rights, in cases in this sphere.

¹⁵⁷⁶ See section 5.5.1.

¹⁵⁷⁷ See section 5.5.1.

¹⁵⁷⁸ See section 5.5.1.

¹⁵⁷⁹ See section 5.5.1.

¹⁵⁸⁰ See section 5.5.1.

¹⁵⁸¹ These are discussed more fully in section 5.5.2.

¹⁵⁸² See sections 5.5.2.1 and 3.4.

¹⁵⁸³ See section 2.3.4.2 where the prevailing legal culture as a determinant of poverty is discussed.

¹⁵⁸⁴ See section 5.5.2.4.

Judicial humility is a necessary orientation for the judiciary to adopt in assisting the cause of poverty amelioration.¹⁵⁸⁵ This entails a recognition of the judicial function being one which must serve the needs of the people, especially those experiencing disadvantage and deprivation. In addition, situatedness of judges¹⁵⁸⁶ is a phenomenon which may influence the adjudicative process and the addressing of poverty-related issues. A lack of a consequential approach on the part of judges is also problematic, as this impedes the forging of targeted and purposive solutions to poverty-related issues.¹⁵⁸⁷ This may be associated with a lack of people-centrism.¹⁵⁸⁸ Innovation in the framing of court orders may also be lacking.¹⁵⁸⁹

6.4 Recommendations

6.4.1 Role of the Legislature

This section reflects recommendations based on research of the legislative function of the national legislature. Although the recommendations are potentially of broad applicability, they have not been researched in the context of the legislatures of the other spheres of government.

6.4.1.1 Awareness of Ethos and Ideology

Legislatures must foster and promote an awareness within their own ranks, and more broadly, of the ethos and ideology underpinning legislative development. In particular, they must develop an awareness of the poverty amelioration imperative supported by the Constitution, and the need to take this into account in debating and approving legislation, especially legislation dealing with socio-economic matters such as housing, education and water. This will enable them to build poverty amelioration imperatives into the exercise of their legislative function.¹⁵⁹⁰

¹⁵⁸⁵ See section 2.3.4.1.

¹⁵⁸⁶ See section 5.4.2.9.

¹⁵⁸⁷ See section 5.5.2.13.

¹⁵⁸⁸ See section 5.5.2.14.

¹⁵⁸⁹ See section 5.5.2.12.

¹⁵⁹⁰ See section 6.3.2.1.

Ethical and ideological awareness can be fostered and promoted via thorough and robust debate amongst legislators on legislative matters, especially those which involve ethical and normative issues, such as poverty and issues associated therewith.¹⁵⁹¹ Legislatures should formulate and apply guidelines for such debate which serve to encourage their members to engage with the issues at hand and their underpinning imperatives. In particular, a formal guideline should be introduced by legislative administrators for legislative scrutiny and debate which encourages consideration of poverty-related issues, especially when the material before the legislature in question is socio-economic in nature. Such an imperative would have to be associated with a loosening up of the trend towards rigid party allegiances, given that this trend stifles robust debate.¹⁵⁹² There is a possibility that the Electoral Amendment Bill¹⁵⁹³ serving before Parliament at the time of writing, which will allow for the election of non-party-affiliated members to Parliament, will encourage independent action and debate in Parliament favourable for poverty amelioration, because a lack of party allegiances would leave legislators free to pursue their own thoughts and conscience.¹⁵⁹⁴

6.4.1.2 The Legislative Oversight Function

There are a number of measures which could be introduced by legislatures in all spheres of government with the support of the executive, towards enhancing the oversight function, with possible positive spin-offs for poverty amelioration.¹⁵⁹⁵ First and foremost, an educational programme, driven collaboratively by the legislature and the executive, and initiated by either of them, to highlight and foster recognition of oversight weaknesses is to be recommended. As part of this, the inhibitory role of the separation of powers doctrine should be highlighted and means found to overcome this role. Also, a component should be introduced to discourage slavish

¹⁵⁹¹ See section 2.4.2.3 and section 5.5.2.4 with regard to the normative and ethical basis of poverty-related issues.

¹⁵⁹² See section 3.4.2.

¹⁵⁹³ B1/2022.

¹⁵⁹⁴ This proposed legal reform applies also to provincial elections. Independent candidates in municipal elections are currently allowed, in terms of the *Local Government: Municipal Structures Act* 117 of 1998.

¹⁵⁹⁵ See section 3.5.2 and section 6.3.2.2.

party loyalty to the extent that it inhibits the oversight function. A new dynamic culture of oversight could be fostered through such a programme. This would include the imperative for oversight to take on a transformative function aligned to the imperatives in the *Constitution* and constitutional legislation.¹⁵⁹⁶ The type of educational programme envisaged would need to be part of a broad educational imperative for members of legislatures.

Reform of legislative oversight should furthermore entail a process to ensure that oversight is proactive rather than *ex post facto*.¹⁵⁹⁷ Thus inputs from the oversight process must be timed to feed into the work of the executive prior to the approval of policy and the making of executive decisions. If this is not achieved, oversight becomes only a critique of action already taken, and it is thus rendered much less effective.

Legislative committees need to be resourced and trained by administrators of legislatures to play an active role in the oversight process, so as to contribute towards its optimisation.¹⁵⁹⁸ In addition, the citizenry, including organisations and corporations, must be encouraged via public participation processes initiated by the legislature to engage actively in legislative deliberations.¹⁵⁹⁹ These suggested developments could serve to enhance the oversight process and contribute positively to poverty amelioration.

6.4.2 Role of the Executive

The recommendations contained in this section are of broad application but in this study have only been researched in the context of the national executive.

6.4.2.1 Awareness of Poverty-related Issues

¹⁵⁹⁶ Constitutional legislation is understood to be legislation which emanates from the provisions of the *Constitution*, for example legislation flowing from the Bill of Rights, and legislation elaborating upon the functions of the three spheres of government established in terms of the *Constitution*.

¹⁵⁹⁷ See section 6.3.2.2.

¹⁵⁹⁸ See section 3.5.2.

¹⁵⁹⁹ See section 3.5.2.

In an earlier section,¹⁶⁰⁰ areas were identified in which the executive could raise awareness in its own ranks and in society of poverty-related issues. This is a necessary foundation for executive efforts towards poverty amelioration. Here methodologies will be suggested for the executive to achieve the necessary awareness-raising, which applies to all the issues raised.

In the context of awareness-raising within the ranks of government, the executive could initiate and drive an informational programme focused on the dimensions of poverty and possible solutions for its amelioration, to be rolled out across government departments. This could be done via various types of learning materials utilised in workshops or via electronic dissemination to government officials. The rollout within government departments could be extended to legislative and judicial role-players. It is suggested that the materials should be open-access and free to any interested parties. In terms of content, they should highlight the characteristics and determinants of poverty, and solutions for its amelioration, as reflected in chapter 2.

6.4.2.2 The Prevailing Neoliberal Governance Model

With neoliberalism being a strong determinant of poverty, it is incumbent upon the executive to assess it critically and consider whether it should remain a dominant governance paradigm.¹⁶⁰¹ Poverty issues need to be mainstreamed into public policy – a phenomenon which does not fit well with a neoliberal approach. The executive must formulate and pursue engagement with society, via effective public participation processes, on economic policy issues – something which is lacking under current neoliberal governance. In addition, development ethics must be mainstreamed into the governance process. Further, means need to be found to ensure that there is not acquiescence in the socio-economic rights regime, but instead it should be interrogated with a view to rendering it useful for poverty amelioration. The NDP needs to be interrogated, particularly with regard to its neoliberal orientation, and revised or repurposed to render it more useful for poverty

¹⁶⁰⁰ See section 4.4.1 and section 6.3.2.1.

¹⁶⁰¹ See section 2.3.1.1 and section 4.4.2.

amelioration. This is important, as the NDP has been hailed as a cross-cutting policy instrument guiding law and policy across all branches of the executive.¹⁶⁰²

The proposed interventions noted above lie squarely within the sphere of responsibility of the executive as the main initiator and driver of strategic policy. They should be tackled at the most senior level of executive government due to their strategic nature.

6.4.2.3 Prevalence of Capitalism

As was the case with recommendations relating to the prevalence of neoliberalism, it is recommended here that the executive interrogate the prevalence of capitalist governance model in the context of the vast rich-poor divide in South Africa, which tends to keep the poor in a state of poverty.¹⁶⁰³ This interrogation should likewise take place at the most senior executive level, including the presidency and cabinet levels, as it will be of a significant strategic nature. An important aspect of the interrogation is the right to property, which is currently in the spotlight with the passing by the National Assembly of the Expropriation Bill in 2022.¹⁶⁰⁴

6.4.2.4 Prevalence of Constitutionalism

Without undermining the importance and value of the *Constitution*, the executive should ensure that it is supplemented by programmes and policies to ensure that its promises of enhanced quality of life for all, including the poor, are fulfilled.¹⁶⁰⁵ This could be achieved by way of pursuing some or all of the solutions for poverty amelioration identified in chapter 2. In the context of poverty amelioration, this entails a critical evaluation of and formulation of norms and standards relating to the socio-economic rights.

¹⁶⁰² This is evident from the broad-based vision statement in pages 11 to 22 of the NDP.

¹⁶⁰³ See section 2.3.1.3 and section 4.4.3.

¹⁶⁰⁴ It appears that the passing of the Bill will face a constitutional challenge. See <https://www.moneyweb.co.za/news/south-africa/expropriation-bill-set-to-face-constitutional-challenge>.

¹⁶⁰⁵ See section 2.3.1.3 and section 4.4.4.

6.4.2.5 Economic Issues

It is incumbent upon the executive to reconsider where the locus of economic power should vest in contemporary times, especially given the lengthy time lapse since the political transition of 1994, and the preservation of economic power in the hands of the privileged and wealthy.¹⁶⁰⁶ Also, the executive needs to ensure that economic discourse going forward incorporates poverty-related issues.¹⁶⁰⁷ Economic growth should be assessed using new paradigms, including moving away from or broadening the main yardstick, which is currently focused on GDP.¹⁶⁰⁸ Furthermore, ethical considerations need to be built into economic practice, which will enhance the well-being of the poor.¹⁶⁰⁹ This would include driving and fostering corporate accountability in order to have corporations play an active role in addressing poverty.¹⁶¹⁰ In the realm of executive budgeting, clear allocative budgeting methodologies purposed towards poverty relief are needed.¹⁶¹¹ Economic policy and planning must cater for macroeconomic shifts necessary to deal with the impacts of climate change.¹⁶¹² In addition, means need to be found to incorporate the principles of sustainable development into economic planning.¹⁶¹³ This would entail the cross-pollination of interventions relating to society and the environment with economic intervention. Revisions and reconsideration of economic policy as proposed in this paragraph would be the prerogative of the executive in its role as initiator and driver of policy reform.

Adoption of the economic reforms recommended above would require policy intervention by the national executive, under guidance of the most senior level of executive authority.

¹⁶⁰⁶ See section 2.3.2.4 and section 4.4.5.

¹⁶⁰⁷ See section 4.4.5.

¹⁶⁰⁸ See section 4.4.5.

¹⁶⁰⁹ See section 4.4.5.

¹⁶¹⁰ See section 2.3.6.1.

¹⁶¹¹ See section 4.4.5.

¹⁶¹² See section 4.4.5.

¹⁶¹³ See section 4.4.5.

6.4.2.6 Sociological Issues

The lack of material identifying poverty as a sociological issue needs to be overcome and initiative instituted to fill this theoretical gap.¹⁶¹⁴ This can be done by the executive in collaboration with academia and research institutions. The importance of such an initiative is to drive a more holistic and people-oriented understanding of poverty.¹⁶¹⁵

6.4.2.7 Policy Issues which Thwart Redress for the Poor

Based on the findings above related to policy issues which thwart redress for the poor, it is possible to recommend a number of policy reforms which the executive can implement to ensure that such redress is possible. Firstly, the executive needs to consider initiating and pursuing policy instruments for the redistribution of wealth.¹⁶¹⁶ Due consideration must be given, or pursued to the extent that it has already been considered, to the implementation of a universal basic income grant.¹⁶¹⁷ Initiatives need to be considered to drive policy away from colonialism and eurocentrism.¹⁶¹⁸ Positive discrimination needs to be pursued beyond the current labour and procurement law instruments.¹⁶¹⁹ Developmentalism in public policy needs to be pursued.¹⁶²⁰ A social compact for addressing poverty needs to be developed.¹⁶²¹ A social-democratic policy orientation should dominate executive policy efforts.¹⁶²² Importantly, macroeconomic reform must be placed on the government policy agenda.¹⁶²³ Citizen empowerment and human agency need to become a policy focus. Policy initiatives to guide future planning are necessary.¹⁶²⁴

¹⁶¹⁴ See section 2.4.2 and section 4.4.6.

¹⁶¹⁵ This may include addressing issues of spatial planning such as overdensification – see section 2.3.2.18.

¹⁶¹⁶ See section 4.4.7.

¹⁶¹⁷ See section 4.4.7.

¹⁶¹⁸ See section 4.4.7.

¹⁶¹⁹ See section 4.4.7.

¹⁶²⁰ See section 4.4.7.

¹⁶²¹ See section 4.4.7.

¹⁶²² See section 4.4.7.

¹⁶²³ See section 4.4.7.

¹⁶²⁴ See section 4.4.7.

The executive needs to find means to deal with commodification, urbanisation, free trade and labour market issues.¹⁶²⁵

Given the diversity of the policy interventions for redress for the poor highlighted above, it is suggested that a broad-based policy reform initiative to address redress for the poor should be initiated by the executive, to address policy reform in all the areas mentioned. Since the reform would cut across many areas of governance, the National Planning Commission would be the ideal forum for the initiative to be developed.

6.4.3 Role of the Judiciary

The recommendations in this section are based upon research into the functionality of the judiciary in the superior courts (High Court, Supreme Court of Appeal and Constitutional Court) in socio-economic rights and related cases. The principles distilled could serve to guide judicial reform in the lower courts as well, but this is conjectural in the context of this study.

6.4.3.1 Longer Term Functionality of the Judiciary

The judiciary must address aspects of its longer-term functionality which are relevant to its potential to pursue poverty amelioration. It should guard against acquiescing in the socio-economic rights as aspirational ideals, and should drive initiatives towards finding mechanisms to render them realisable.¹⁶²⁶ It should also move away from unnecessary use of legal rhetoric, which is generally not useful in the poverty amelioration context.¹⁶²⁷ It should also move away from minimalism in the crafting of judicial solutions.¹⁶²⁸

It is incumbent on the judiciary to seek to attribute meaning to the equality and dignity rights, which are intertwined with the socio-economic rights.¹⁶²⁹ It should

¹⁶²⁵ See section 4.4.7.

¹⁶²⁶ See section 5.5.1.

¹⁶²⁷ See section 5.5.1. 12.

¹⁶²⁸ See section 5.5.2.3.

¹⁶²⁹ See section 5.5.2.4.

also address the delineation of the roles of the three branches of government with regard to poverty matters.

The judiciary must guard against taking a legalistic view in socio-economic rights litigation, and rather focus on its potential to address political, social and economic issues which are inherent in the adjudication process, and to embrace appropriate interventions in these realms.¹⁶³⁰ The judiciary must furthermore be cognisant of the historical context of poverty,¹⁶³¹ the need for social justice and better access to justice,¹⁶³² and the occasional need for extra-judicial solutions rather than judicial pronouncements.¹⁶³³

Pursuit of the interventions suggested in this section would produce a more substantive pro-poor orientation on the part of the judiciary than is currently the case.

6.4.3.2 Urgent Action by the Judiciary

The judiciary needs to give due consideration to poverty-related interventions in respect of which it can effectively take urgent action in pursuit of poverty amelioration solutions.¹⁶³⁴ This must include addressing strict adherence to the doctrines of separation of powers and judicial deference, in so far as they guide the judiciary in poverty-related matters.¹⁶³⁵ This is within the ambit of the judiciary's powers. This would free up the judiciary to use judicial creativity and discretion in forging meaningful poverty amelioration solutions.

The judiciary needs to seek to detach itself from the established milieu of legal culture, in which legalism prevails, and poverty amelioration is not a priority.¹⁶³⁶ This is necessary to enable it to adopt an innovative and transformative approach. Judicial activism is necessary for the judiciary to be able to pursue these

¹⁶³⁰ See section 5.5.2.5.

¹⁶³¹ See section 5.5.1.

¹⁶³² See section 5.5.1.

¹⁶³³ See section 5.5.1.

¹⁶³⁴ These are discussed more fully in section 5.5.2.

¹⁶³⁵ See section 5.5.2.1.

¹⁶³⁶ See section 5.5.2.6.

imperatives.¹⁶³⁷ The judiciary needs to seek to attribute norms and meaning to rights, which will help to overcome the problem of rights being framed in a general and abstract way.¹⁶³⁸

The judiciary must actively pursue judicial humility in order to enhance its ability to assist the cause of poverty amelioration. In so doing, it must strive to serve the needs of the people, especially those who are poor and disadvantaged.¹⁶³⁹ In addition it must seek to overcome the situatedness of judges which influences the adjudicative process, including socio-economic rights adjudication.¹⁶⁴⁰ It must furthermore adopt a consequential approach to adjudication to enable it to forge targeted and purposive solutions to poverty-related issues.¹⁶⁴¹ People-centrism should furthermore be a focus of the judiciary.¹⁶⁴² The judiciary should strive to be innovative in the framing of court orders.¹⁶⁴³ Generally, the orientation of judicial adjudication should be pro-poor if the judiciary is to make a meaningful contribution to poverty amelioration.

6.5 Future Research Agenda

The multidisciplinary nature of the research done for this thesis needs to be embraced and the findings and recommendations taken forward by way of introduction the three branches of government, initially in the national sphere and later in the other spheres, for their consideration. Ways to do this need to be investigated, ideally in dialogue with actors in the branches, and could constitute a future research exercise. This would enable a testing of receptiveness to the recommendations of the study and a concomitant mapping of implementation thereof.

Another avenue for possible future research could be collaboration between academia and research institutions on the one hand, and government on the other

¹⁶³⁷ See section 5.5.2.7.

¹⁶³⁸ See section 5.6.

¹⁶³⁹ See section 5.5.2.10.

¹⁶⁴⁰ See section 5.5.2.9.

¹⁶⁴¹ See section 5.5.2.13.

¹⁶⁴² See section 5.5.2.14.

¹⁶⁴³ See section 5.5.2.12.

hand, to develop and pursue a research agenda into poverty amelioration by government (in the three branches). A valuable aspect of this could be developing additional research into poverty measurement and statistics on a more broad-based footing, acknowledging both the monetary and non-monetary aspects thereof.

A further avenue for possible future research could be the seeking of ways in which the branches of government could collaborate together with a view to seeking poverty amelioration solutions. This could help overcome the current *lacuna* in the co-operative governance regime established in terms of chapter 3 of the *Constitution*, which applies only to the legislature and the executive.

Other potential avenues for future research have been identified in the course of this study. These include the following:

- Research into the nature of psycho-social hardships associated with poverty and seeking remedies to address this phenomenon.¹⁶⁴⁴
- The development of matrices or spectra of interventions possible in the respective realms of functionality of each of the branches of government.¹⁶⁴⁵
- Seeking a deeper understanding of the *nexus* between law and sociology in the context of poverty studies, and fostering a mechanism for law to be guided by sociology in this regard.¹⁶⁴⁶

The suggestions for future research in this section are not exhaustive. As is apparent from the complexity of poverty in the constitutional context evidenced in this thesis, there is vast potential for the identification and pursuit of new areas of research.

6.6 Conclusion

As outlined in chapter 1 and alluded to throughout this thesis, poverty in South Africa is a matter which must be addressed urgently, if there is to be any hope of a

¹⁶⁴⁴ See section 2.4.2.4. See also section 2.4.4.3 where the need for understanding of psycho-social aspects of poverty is further discussed.

¹⁶⁴⁵ See section 2.4.4.13 where this is proposed in the context of the judiciary.

¹⁶⁴⁶ See section 4.4.6.

shift towards a more equal and egalitarian society. Given its burgeoning, immutable and entrenched nature, it is not a matter for easy resolution. An attempt has been made to suggest ways in which the three branches of government could achieve or contribute towards poverty amelioration, taking into account the features and characteristics of poverty, its causes and determinants, and possible solutions for such amelioration.¹⁶⁴⁷ It is however necessary to look at the respective roles of the three branches relative to each other so as to attempt to pinpoint where the primary responsibility for poverty amelioration lies.

There are a number of features of the executive and the authority it wields which place it in a stronger position relative to the other branches of government with regard to the taking of action towards poverty amelioration. The leader of the executive, the State President, is regarded as the overall leader of government, even though he as an individual does not have any authority over the legislature or the judiciary. He is expressed in section 83 of the *Constitution* to be the head of state, whilst section 85 assigns to him powers and the responsibility to exercise executive authority by fulfilling certain functions. These are

- (a) implementing national legislation except where the *Constitution* or an Act of Parliament provides otherwise;
- (b) developing and implementing national policy;
- (c) co-ordinating the functions of state departments and administrations;
- (d) preparing and initiating legislation; and
- (e) performing any other executive function provided for in the Constitution or in national legislation.

¹⁶⁴⁷ See the concluding sections of chapters 3, 4 and 5.

Thus the functioning of the President and executive is the central co-ordination point around which government as a whole is positioned, or is at least nominally and indicatively so by virtue of the President being named the head of state.

With the President and the executive being the main face of government, the executive is vested with credibility in the eyes of the citizenry to undertake actions involving cardinal policy and practical approaches to resolution of problems such as poverty. As such, it is also best placed to pursue innovation in the realms of policy and project implementation, in line with the *Constitution* and other legislation. The concluding section of chapter 4 ventures to suggest ways in which the executive can contribute to poverty amelioration.

The centrality of the executive with regard to governance and innovation does not in any way diminish the roles of the legislature and the judiciary. The legislature remains the central law-making authority of the Republic, and it has authority to oversee the work of the executive. As explained in chapter 3, these roles confer upon it distinctive authority and responsibility with regard to matters of poverty amelioration. Similar principles apply with regard to the judiciary, which is vested with judicial authority and the power to hold government and other actors to account, including with regard to adherence to the *Constitution* and the fulfilment of the fundamental rights in the Bill of Rights. In chapter 5 suggestions are made regarding the contribution the judiciary could make in this regard. This research would be incomplete if it were not to suggest ways in which the three branches of government can pursue interactive means to achieve poverty amelioration. The principles of co-operation between spheres of government, enunciated in section 41 of the *Constitution*, can serve in addition to guide co-operative relationships between the branches.

It is imperative that the branches of government, in liaison with each other, explore possible synergies which could drive poverty amelioration action. Thus for example, a policy initiative of the executive could be workshopped with the legislature and

with the judiciary, with the latter two institutions lending their insights into the process.¹⁶⁴⁸

Possible actions of the three branches of government towards poverty amelioration need to be premised on a shared and mutual understanding of the severity of poverty nationally and the urgent necessity to move towards its amelioration. It is incumbent upon all three branches to take cognisance of the problem of poverty and the need for them to embrace a role in its resolution. When doing so each branch should deliberate with the others, share insights and ideas, and ensure co-ordinated action and mutual support. The underpinning imperative of such action by the three branches must of necessity be to effect transformation in a variety of social, economic and political institutions, doctrines and processes, in order to make poverty amelioration possible. Along with the imperative to transform, a spirit of innovation, based on the recognition of a deep-rooted need for social, economic and political change, should be a fundamental ethos guiding the three branches towards poverty amelioration.

¹⁶⁴⁸ See section 6.5 where collaboration between the three branches with regard to poverty is posited as a possible future research topic.

BIBLIOGRAPHY

Literature

- Adato, Carter and May 2006 *Journal of Development Studies*
Adato M, Carter MR and May J "Exploring Poverty Traps and Social Exclusion in South Africa Using Qualitative and Quantitative Data" 2006 *Journal of Development Studies* 226-247
- Adelzadeh 1996 *Transformation*
Adelzadeh A "From the RDP to GEAR: the Gradual Embracing of Neo-liberalism in Economic Policy" 1996 *Transformation* 66-95
- African National Congress *The Freedom Charter*
African National Congress *The Freedom Charter* (1955)
http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AD1137/AD1137-Ea6-1-001-jpeg.pdf accessed 29 December 2021
- Agbude, Adoba and Etete 2013 *Research on Humanities and Social Sciences*
Agbude G, Adoba IO and Etete PI "Ethics of development: Kant and Cabral's Pragmatic Contributions" 2013 *Research on Humanities and Social Sciences* 1-9
- Alexander 2013 *Review of African Political Economy*
Alexander P "Marikana, Turning Point in South African History" 2013 *Review of African Political Economy* 605-619
- Alkire 2005 *Journal of Human Development*
Alkire S "Why the Capability Approach?" 2005 *Journal of Human Development* 115-133
- Allogio and Thomas 2013 *Social Dynamics*
Allogio S and Thomas K "Resisting the Lure of Deferral: Realising the South African National Development Plan" 2013 *Social Dynamics* 108-110
- Alvey 2015 *Journal of Social Science*
Alvey JE "A New Framework for Ethics and Economics" 2015 *Journal of Social Science* 123-142
- Anand 2007 *Journal of International Development*
Anand PB "Right to Water and Access to Water: an Assessment" 2007 *Journal of International Development* 511-526

- Arbour 2007 *New York University Journal of International Law and Policy*
 Arbour L "Economic and Social Justice for Societies in Transition" 2007 *New York University Journal of International Law and Policy* 1-27
- Astroulakis 2014 *Ethics and Economics*
 Astroulakis N "An Ethical Analysis of Neo-liberal Capitalism: Alternative Perspectives from Development Ethics" 2014 *Ethics and Economics* 94-108
- Ataguba, Day and Mc Intyre 2014 *Plos Medicine*
 Ataguba JE, Day C and Mc Intyre D "Monitoring and Evaluating Progress towards Universal Health Coverage in South Africa" 2014 *Plos Medicine* 1-3
- Badat and Sayed 2014 *Annals of the American Academy*
 Badat S and Sayed Y "Post 1994 South African Education: The Challenge of Social Justice" 2014 *Annals of the American Academy* 127-148
- Bagaric and Allan 2006 *Journal of Human Rights*
 Bagaric M and Allan J "The Vacuous Concept of Dignity" 2006 *Journal of Human Rights* 7-270
- Ballard 2005 *African Affairs*
 Ballard R "The Ant and the Grasshopper: Rationalising Exclusion and Inequality in the Post-Apartheid City" 2005 *African Affairs* 64-88
- Barchiesi "Wage Labour, Citizenship and Social Discipline"
 Barchiesi F "Wage Labour, Citizenship and Social Discipline" in Maharaj B, Desai A and Bond P (eds) *Zuma's Own Goal: Losing South Africa's War on Poverty* (Africa World Press Asmara Eritrea 2011)
- Barchiesi 2016 *Journal of Contemporary African Studies*
 Barchiesi F "Schooling Bodies to Hard Work: The South African State's Policy Discourse and its Moral Constructions of Welfare" 2016 *Journal of Contemporary African Studies* 221-235
- Barkan and Pulido 2017 *Annals of the American Association of Geographers*
 Barkan J and Pulido L "Justice: An Epistolary Essay" 2017 *Annals of the American Association of Geographers* 33-40
- Barkemeyer et al 2014 *Sustainable Development*
 Barkemeyer R et al "What Happened to the "Development" in "Sustainable Development?" 2014 *Sustainable Development* 15-32
- Barker "The Economics of Dangerous Climate Change"
 Barker T "The Economics of Dangerous Climate Change" in Shmelev, SE (ed) *Green Economy Reader: Lectures in Ecological Economics and Sustainability* (Springer New York 2017)

- Battersby 2011 *Development Southern Africa*
 Battersby J "Urban Food Insecurity in Cape Town, South Africa: an Alternative Approach to Food Access" 2011 *Development Southern Africa* 545-561
- Baxi "Preliminary Notes on Transformative Constitutionalism"
 Baxi L 2008 "Preliminary Notes on Transformative Constitutionalism"
 Unpublished contribution delivered at *Courting Justice II Conference* (2008 Delhi)
- Becker and Brown 2103 *Ethics, Policy and Environment*
 Becker C and Brown D "Integrating Development Ethics and Climate Change Ethics" 2013 *Ethics, Policy and Environment* 37-42
- Beresford 2015 *African Affairs*
 Beresford AR "Power, Patronage and Gatekeeper Politics in South Africa" 2015 *African Affairs* 226-248
- Bernheim 2009 *Journal of the European Economic Association*
 Bernheim BD "Behavioural Welfare Economics" 2008 *Journal of the European Economic Association* 267-319
- Bhorat, Oosthuizen and Van der Westhuizen 2012 *Development Southern Africa*
 Bhorat H, Oosthuizen M and Van der Westhuizen C "Estimating a Poverty Line: An Application to Free Basic Municipal Services in South Africa" 2012 *Development Southern Africa* 77-96
- Bhorat *et al Economic Policy in South Africa: Past, Present and Future*
 Bhorat H *et al Economic Policy in South Africa: Past, Present and Future* (2014)
http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/DPRU%20WP201401.pdf accessed 14 May 2022
- Bilchitz 2002 *South African Law Journal*
 Bilchitz D "Giving Socio-economic Rights Teeth: The Minimum Core and Its Importance" 2002 *South African Law Journal* 484-501
- Bilchitz 2015 *South African Journal on Human Rights*
 Bilchitz D "Are Socio-Economic Rights a Form of Political Rights?" 2015 *South African Journal on Human Rights* 86-111
- Blake 2001 *Philosophy and Public Affairs*
 Blake M "Distributive Justice, State Coercion and Autonomy" 2001 *Philosophy and Public Affairs* 257-296
- Block 2015 *American Journal of Economics and Sociology*
 Block WE "Natural Rights, Human Rights and Libertarianism" 2015 *American Journal of Economics and Sociology* 29-62

- Bohler-Muller 2012 *Human Sciences Research Council Review*
 Bohler-Muller N "Access to Justice Fundamental to Social Change" 2012 *Human Sciences Research Council Review* 20-22
- Bond 1999 *Geoforum*
 Bond P "Basic Infrastructure for Socio-Economic Development, Environmental Protection and Geographical Desegregation: South Africa's Unmet Challenge" 1999 *Geoforum* 43-59
- Bond 2004 *Review of African Political Economy*
 Bond P "The ANC's 'Left Turn' and South African Sub-imperialism" 2004 *Review of African Political Economy* 599-616
- Bond 2010 "Capitalism, the Privatisation of Basic Social Services and the Implementation of Socio-Economic Rights: Challenges and Advocacy Strategies for Human Rights and Social Justice Actors, Learning from the Johannesburg Water Defeat"
 Bond P "Capitalism, the Privatisation of Basic Social Services and the Implementation of Socio-Economic Rights: Challenges and Advocacy Strategies for Human Rights and Social Justice Actors, Learning from the Johannesburg Water Defeat" Unpublished contribution delivered at the *International Commission of Jurists Southern Africa Socio-Economic Rights Camp: Economic, Social and Cultural Rights Advocacy and Litigation Conference* (2010 Johannesburg)
- Bond 2014 *Politikon*
 Bond P "Constitutionalism as a Barrier to the Resolution of Widespread Community Rebellions in South Africa" 2014 *Politikon* 461-482
- Bond 2013 *Revista Theomai*
 Bond P "The Right to the City: The Limits to Rights Talk and the Need for Rights to the Commons" 2013 *Revista Theomai* 42-63
- Bond 2013 *Third World Quarterly*
 Bond P "Sub-imperialism as Lubricant of Neoliberalism: South African 'Deputy Sheriff' within BRICS" 2013 *Third World Quarterly* 251-270
- Bond 2014 *Transformation: Critical Perspectives on Southern Africa*
 Bond P "Tokenism in South African Social Policy" 2014 *Transformation: Critical Perspectives on Southern Africa* 48-77
- Bond and Mottiar 2013 *Journal of Contemporary African Studies*
 Bond P and Mottiar S "Movements, Protests and a Massacre in South Africa" 2013 *Journal of Contemporary African Studies* 283-302
- Brand *Courts, Socio-Economic Rights and Transformative Politics*
 Brand JFD *Courts, Socio-Economic Rights and Transformative Politics* (LLD Thesis Stellenbosch University 2009)

- Brand 2011 *Stellenbosch Law Review*
 Brand JFD "Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa" 2011 *Stellenbosch Law Review* 614-639
- Brickhill 2014 "Public Interest Alchemy: Combining Art and Science to Litigate for Social Change"
 Brickhill J "Public Interest Alchemy: Combining Art and Science to Litigate for Social Change" Unpublished Contribution delivered at *Twenty Years of South African Constitutionalism Conference* (2014 New York)
- Brinks and Gauri 2014 *Perspectives on Politics*
 Brinks DM and Gauri V "The Law's Majestic Equality? The Distributive Impact of Judicialising Social and Economic Rights" 2014 *Perspectives on Politics* 375-393
- Brockhoff *A Review of the Development of Social Security Policy in South Africa*
 Brockhoff S *A Review of the Development of Social Security Policy in South Africa* (2013)
<http://spii.org.za/wp-content/uploads/2018/02/2013-07-SPII-Working-Paper-6-Review-of-Social-Security-Policy.pdf> accessed 14 May 2022
- Buchanan 1959 *Journal of Law and Economics*
 Buchanan JM "Positive Economics, Welfare Economics, and Political Economy" 1959 *Journal of Law and Economics* 124-138
- Burger *How Suitable is a Developmental State to Tackle Unemployment, Inequality and Poverty in South Africa?*
 Burger P *How Suitable is a Developmental State to Tackle Unemployment, Inequality and Poverty in South Africa?* (2014)
<https://www.econ3x3.org/article/how-suitable-%E2%80%98developmental-state%E2%80%99-tackle-unemployment-inequality-and-poverty-south-africa> accessed 10 May 2022
- Burger *et al* 2014 *The Middle Class in Contemporary South Africa: Comparing Rival Approaches*
 Burger R *et al* *The Middle Class in Contemporary South Africa: Comparing Rival Approaches* (2014)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2973727 accessed 8 May 2022
- Burns, Lefko-Everett and Njozela *From Definition to Measurement: Constructing a Social Cohesion Index for South Africa*
 Burns J, Lefko-Everett J and Njozela L *From Definition to Measurement: Constructing a Social Cohesion Index for South Africa* (2018)
https://www.opensaldru.uct.ac.za/bitstream/handle/11090/904/2018_217_Saldruwp.pdf?sequence=1 accessed 10 May 2022

Calland "Chimera or Real: How Robust is South Africa's Post-1994 Constitutional Order?"

Calland R "Chimera or Real: How Robust is South Africa's Post-1994 Constitutional Order?" Unpublished contribution delivered at *Twenty Years of South African Constitutionalism Conference* (2014 New York)

Catala 2017 *Philosophical Studies*

Catala A "Secession and Distributive Justice" 2017 *Philosophical Studies* 529-552

Charlton and Rose 2002 *Public Health Nutrition*

Charlton KE and Rose D "Prevalence of Household Food Poverty in South Africa: Results from a Large Nationally Representative Survey" 2002 *Public Health Nutrition* 383-389

Chaskalson 2000 *South African Journal on Human Rights*

Chaskalson A "Human Dignity as a Foundational Value of our Constitutional Order" 2000 *South African Journal on Human Rights* 193-205

Chipkin and Meny-Gilbert *Understanding the Social Justice Sector in South Africa*

Chipkin I and Meny-Gilbert S *Understanding the Social Justice Sector in South Africa* (2013) <http://www.raith.org.za/index.php/files/59/RAITH-Commissioned---Funded-Research/311/Understanding-the-Social-Justice-Sector-in-South-Africa--A-Report-to-the-RAITH-Foundation-and-Atlantic-Philanthropies---by-Ivor-Chipkin-and-Sarah-Meny-Gilbert.pdf> accessed 12 May 2022

Chirwa 2004 *African Human Rights Law Journal*

Chirwa DM "Privatisation of Water in South Africa: A Human Rights Perspective" 2004 *African Human Rights Law Journal* 218-241

Christiansen 2007 *Columbia Human Rights Law Review*

Christiansen EC "Adjudicating Non-justiciable Rights: Socio-Economic Rights and the South African Constitutional Court" 2007 *Columbia Human Rights Law Review* 321-386

Christiansen 2010 *Journal of Gender Race and Justice*

Christiansen EC "Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice" 2010 *Journal of Gender Race and Justice* 576-614

Christie 2010 *International Journal of Educational Development*

Christie P "The Complexity of Human Rights in Global Times: the Case of the Right to Education in South Africa" 2010 *International Journal of Educational Development* 3-11

- City of Cape Town *City of Cape Town Densification Policy*
 City of Cape Town *City of Cape Town Densification Policy* (2012)
http://www.westerncape.gov.za/assets/departments/transport-public-works/Documents/densification_policy accessed 18 September 2022
- Clark *The Capability Approach: Its Development, Critiques and Recent Advances*
 Clark DA *The Capability Approach: Its Development, Critiques and Recent Advances* (2006)
<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.371.4189&rep=rep1&type=pdf> accessed 14 May 2022
- Clark and Esterhuizen 2014 "Remembering the Transformative Mandate: an Analysis of Twenty Years of Housing and Eviction Jurisprudence in South Africa"
 Clark M and Esterhuizen T "Remembering the Transformative Mandate: An Analysis of Twenty Years of Housing and Eviction Jurisprudence in South Africa" Unpublished contribution delivered at *Twenty Years of South African Constitutionalism Conference* (2014 New York)
- Claassens and Matala 2014 *New South Africa Review*
 Claassens A and Matala B "Platinum, Poverty and Prices in Post-apartheid South Africa: New Laws, Old Repertoires" 2014 *New South Africa Review* 117-139
- Cleary *et al* 2013 *Social Science and Medicine*
 Cleary S *et al* "Investigating the Affordability of Key Health Services in South Africa" 2013 *Social Science and Medicine* 37-46
- Cohen 2014 *Northwestern Journal of Human Rights*
 Cohen DF "A Conversation with the Chief Justice" 2014 *Northwestern Journal of Human Rights* 132-151
- Cohen 1997 *Philosophy and Public Affairs* 6
 Cohen GA "Where the Action is: On the Site of Distributive Justice" 1997 *Philosophy and Public Affairs* 3-30
- Cole, Bailey and New 2017 *Sustainability Science*
 Cole MJ, Bailey RM and New MG "Spatial Variability in Sustainable Development Trajectories in South Africa: Provincial Level Safe and Just Operating Spaces" 2017 *Sustainability Science* 829-848
- Comaroff 1998 *Social Identities*
 Comaroff JL "Reflections on the Colonial State in South Africa and Elsewhere: Factions, Fragments, Facts and Fictions" 1998 *Social Identities* 321-361

- Coomans 2005 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*
 Coomans F "Reviewing Implementation of Social and Economic Rights: An Assessment of the 'Reasonableness' Test as Developed by the South African Constitutional Court" 2005 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 167-196
- Cousins and Hall *Rights Without Illusions: the Potential and Limits of Rights Based Approaches to Securing Land Tenure in Rural South Africa*
 Cousins B and Hall R "Rights without Illusions: the Potential and Limits of Rights Based Approaches to Securing Land Tenure in Rural South Africa (2011) <http://repository.uwc.ac.za/xmlui/handle/10566/4476> accessed 13 May 2022
- Couzens 2015 *Potchefstroom Electronic Law Journal*
 Couzens E "Avoiding Mazibuko: Water Security and Constitutional Rights in South African Case Law" 2015 *Potchefstroom Electronic Law Journal* 1162-1188
- Crocker 2014 *Journal of Global Ethics*
 Crocker DA "Development and Global Ethics: Five Foci for the Future" 2014 *Journal of Global Ethics* 245-253
- Daniel 2013 *De Jure*
 Daniel PTK "Recognising Situatedness and Resolving Conflict: Analysing US and South African Education Law Cases" 2013 *De Jure* 24-44
- Das 2009 *Bangladesh E-journal of Sociology*
 Das N K "Identity Politics and Social Exclusion in India's North-East: The Case for Redistributive Justice" 2009 *Bangladesh E-journal of Sociology* 67-82
- Davis 2006 *SAJHR*
 Davis DM "Adjudicating the Socio-Economic Rights in the South African Constitution: Towards Deference Lite?" 2006 *South African Journal on Human Rights* 301-327
- Davis 2015/16 *New York Law School Law Review*
 Davis DM "Twenty Years of Constitutional Democracy: A Preliminary Reflection" 2015/2016 *New York Law School Law Review* 39-54
- Davis and Klare 2012 *South African Journal on Human Rights*
 Davis DM and Klare K "Transformative Constitutionalism and the Common and Customary Law" 2012 *South African Journal on Human Rights* 404-509
- Deneulin "Introduction"
 Deneulin S "Introduction" in Deneulin S *Wellbeing, Justice and Development Ethics* (Routledge London 2014)

Department of Agriculture *Integrated Food Security Strategy*
Department of Agriculture *Integrated Food Security Strategy* (2002)
<https://www.gov.za/documents/integrated-food-security-strategy-south-africa> accessed 7 May 2022

Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework*
Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016)
https://www.africancentreforcities.net/wp-content/uploads/2017/05/IUDF-2016_WEB-min.pdf accessed 19 September 2021

Department of Environmental Affairs *2nd South Africa Environment Outlook*
Department of Environmental Affairs *2nd South Africa Environment Outlook* (2016)
<https://www.dffe.gov.za/sites/default/files/reports/environmentoutlook.pdf> accessed 8 May 2022

Department of Health *National Health Insurance Bill 2019*
Department of Health *National Health Insurance Bill 2019* (2019)
https://www.gov.za/sites/default/files/gcis_document/201908/national-health-insurance-bill-b-11-2019.pdf accessed 9 October 2021

Department of Human Settlements *Towards a Policy Foundation for the Establishment of Human Settlements Legislation*
Department of Human Settlements undated *Towards a Policy Foundation for the Establishment of Human Settlements Legislation* undated
<http://www.dhs.gov.za/sites/default/files/documents/TOWARDS%20POLICY%20FOUNDATION%20FOR%20THEHUMAN%20SETTLEMENTS%20LEGILATION%20-%2001%20NOVEMBER%202015%283%29%20%281%29.pdf> accessed 24 September 2021

Department of Planning, Monitoring and Evaluation *Medium Term Strategic Framework*
Department of Planning, Monitoring and Evaluation *Medium Term Strategic Framework* (2014)
https://www.gov.za/sites/default/files/gcis_document/201409/MTSF/2014-2019.pdf accessed 29 December 2021

Department of Rural Development and Land Reform *Land Audit Report 2018*
Department of Rural Development and Land Reform *Land Audit Report 2018* (2018)
https://www.gov.za/sites/default/files/gcis_document/201802/landauditreport13feb2018.pdf accessed 9 October 2021

Department of Social Development *National Development Agency Strategic Plan 2016-2021*

Department of Social Development *National Development Agency 2016 Strategic Plan 2016-2021* (2016)

<https://www.nda.org.za/assets/resources/3BE50F99-C163-494E-B564-2E16BA55A0C7/NDAStrategicPlan2016-2021PR6.pdf> accessed 9 October 2021

Desai and Maharaj 2011 "Debating the First and Second Economy"

Desai A and Maharaj B 2011 "Debating the First and Second Economy" in Maharaj B, Desai A and Bond P (eds) *Zuma's Own Goal: Losing South Africa's War on Poverty* (Africa World Press Asmara Eritrea 2011)

Deutch 1975 *Journal of Social Issues*

Deutch M "Equity, Equality and Need: What Determines which Value will be used as the Basis of Distributive Justice?" 1975 *Journal of Social Issues* 137-149

De Vos 2015 *South African Journal on Human Rights*

De Vos P "It's my Party (and I'll do what I want to?)" 2015 *South African Journal on Human Rights* 30-56

De Vos and Freedman (eds) *South African Constitutional Law in Context*

De Vos P and Freedman W (eds) *South African Constitutional Law in Context* (Oxford University Press Cape Town 2014)

De Wispelaere and Noguera "On the Political Feasibility of Universal Basic Income – An Analytic Framework"

De Wispelaere J and Noguera JA "On the Political Feasibility of Universal Basic Income – An Analytic Framework" in Caputo RK (ed) *Political Feasibility of Basic Income* (Palgrave Macmillan London 2012)

Dixon 2007 *International Journal of Constitutional Law*

Dixon R "Creating Dialogue about Socio-Economic Rights: Strong-form versus Weak-form Judicial Review Revisited" 2007 *International Journal of Constitutional Law* 391-418

Dokurno and Fiedor 2016 *Gospodarka Narodwa*

Dokurno Z and Fiedor B "Sustainable Development as the Concept of World Economy Development from Contemporary Macroeconomics Perspective" 2016 *Gospodarka Narodwa* 5-24

Drimie and Ruysenaar 2010 *Agrekon*

Drimie S and Ruysenaar S "The Integrated Food Security Strategy of South Africa: an Institutional Analysis" 2010 *Agrekon* 316-337

Drydyk 2013 *Ethics Policy and Environment*

Drydyk J "Development Ethics and the Climate Migrants" 2013 *Ethics, Policy and Environment* 43-55

- Dugard 2007 *Leiden Journal of International Law*
 Dugard J "Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa's Transformation" 2007 *Leiden Journal of International Law* 965-981
- Dugard 2008 *South African Journal on Human Rights*
 Dugard J "Rights, Regulation and Resistance: the Phiri Water Campaign" 2008 *South African Journal on Human Rights* 588-606
- Dugard 2013 *The Activist*
 Dugard J "Courts and Structural Poverty in Africa" 2013 *The Activist* 1-18
- Dugard "Urban Basic Services: Rights, Realities and Resistances"
 Dugard J "Urban Basic Services: Rights, Realities and Resistances" in Langford *et al Socio-Economic Rights in South Africa: Symbols or Substance?* (Cambridge University Press London 2015)
- Dugard and Langford 2011 *South African Journal on Human Rights*
 Dugard J and Langford M "Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism" 2011 *South African Journal on Human Rights* 39-64
- Du Plessis 2011 *South African Journal on Human Rights*
 Du Plessis AA "South Africa's Constitutional Environmental Right (Generously) Interpreted: What is in it for Poverty?" 2011 *South African Journal on Human Rights* 270 -307
- Du Plessis 2015 *Potchefstroom Electronic Law Journal*
 Du Plessis L "Theoretical (Dis)position and Strategic Leitmotifs in Constitutional Interpretation in South Africa" 2015 *Potchefstroom Electronic Law Journal* 1332-1366
- Du Toit *Chronic and Structural Poverty in South Africa: Challenges for Action and Research*
 Du Toit A *Chronic and Structural Poverty in South Africa: Challenges for Action and Research* (2005)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753656 accessed 10 May 2022
- Du Toit 2005 *PLAAS Chronic and Development Studies*
 Du Toit A "Poverty Measurement Blues: Some Reflections on the Space for Understanding Chronic and Structural Poverty in South Africa" 2005 *PLAAS Chronic and Development Studies* 1-18

- Du Toit "The Proper Subject for Poverty Research is Inequality"
 Du Toit A "The Proper Subject for Poverty Research is Inequality" in Maharaj B Desai A and Bond P (eds) *Zuma's Own Goal: Losing South Africa's War on Poverty* (Africa World Press Asmara Eritrea 2011)
- Du Toit 2013 *Journal of Agrarian Change*
 Du Toit A "Real Acts, Imagined Landscapes: Reflections on the Discourses of Land Reform in South Africa after 1994" 2013 *Journal of Agrarian Change* 16-22
- Du Toit and Neves 2014 *Journal of Peasant Studies*
 Du Toit A and Neves D "The Government of Poverty and the Arts of Survival: Mobile and Recombinant Strategies at the Margins of the South African Economy" 2014 *Journal of Peasant Studies* 833-853
- Ebadolahi 2008 *New York University Law Review*
 Ebadolahi M "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Social and Economic Rights in South Africa" 2008 *New York University Law Review* 1565-1606
- Eglash 2016 *Revista Teknokultura*
 Eglash R "An introduction to Generative Justice" 2016 *Revista Teknokultura* 369-404
- Emery 2006 *Social Justice*
 Emery A "Privatization, Neoliberal Development, and the Struggle for Workers' Rights in Post-Apartheid South Africa" 2006 *Social Justice* 6-19
- Enslin 2003 *Cambridge Journal of Education*
 Enslin P "Citizenship Education in Post-apartheid South Africa" 2003 *Cambridge Journal of Education* 73-83
- Esau *An Exploratory Study into the Views, Understandings and Experiences of Members of the South African Parliament in Comparative Perspective*
 Esau MV *An Exploratory Study into the Views, Understandings and Experiences of Members of the South African Parliament in Comparative Perspective* (2014)
<https://www.researchgate.net/profile/Michelle-Esau-2> accessed 14 May 2022
- Evans "Land, Socio-economic Rights and Transformative Justice"
 Evans M "Land, Socio-economic Rights and Transformative Justice" Unpublished contribution delivered at *Land Divided: Land and South African Society in 2013, in Comparative Perspective Conference* (Cape Town 2013)
- Fagan 1998 *South African Journal on Human Rights*
 Fagan A "Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood" 1998 *South African Journal on Human Rights* 220-247

- Fagbadebo 2019 *Insight on Africa*
 Fagbadebo O "Interrogating the Constitutional Requisites for Legislative Oversight in the Promotion of Accountability and Good Governance in South Africa and Nigeria" 2019 *Insight on Africa* 38-59
- Fankhauser and Stern *Climate Change, Development, Poverty and Economics*
 Fankhauser S and Stern N *Climate Change, Development, Poverty and Economics* (2016) <https://econpapers.repec.org/paper/lsglsgwps/wp253.htm> accessed 26 September 2021
- Farrar *The Free Basic Water Policy of South Africa – An Evaluation of its Implementation*
 Farrar L *The Free Basic Water Policy of South Africa – An Evaluation of its Implementation* (Master of Engineering Dissertation University of Cape Town 2014)
- Ferguson 2007 *African Studies Review*
 Ferguson J "Formalities of Poverty: Thinking about Social Assistance in Neoliberal South Africa" 2007 *African Studies Review* 71-86
- Ferguson 2009 *Antipode*
 Ferguson J "The Uses of Neoliberalism" 2009 *Antipode* 166-184
- Ferguson 2013 *Journal of the Royal Anthropological Institute*
 Ferguson J "Declarations of Dependence: Labour, Personhood and Welfare in Southern Africa" 2013 *Journal of the Royal Anthropological Institute* 223-242
- Fig 2005 *International Affairs*
 Fig D "Manufacturing Amnesia: Corporate Social Responsibility in South Africa" 2005 *International Affairs* 599-617
- Finchilescu and Tredoux 2010 *Journal of Social Issues*
 Finchilescu G and Tredoux C "The Changing Landscape of Intergroup Relations in South Africa" 2010 *Journal of Social Issues* 223-236
- Finn, Leibbrandt and Oosthuizen *Poverty Inequality and Prices in Post-apartheid South Africa*
 Finn A, Leibbrandt M and Oosthuizen M *Poverty Inequality and Prices in Post-apartheid South Africa* (2014) <https://econpapers.repec.org/paper/unuwpaper/wp-2014-127.htm> accessed 7 May 2022
- Fourie *How Inclusive is Economic Growth in South Africa?*
 Fourie CvN 2014 "How Inclusive is Economic Growth in South Africa?" <https://www.econ3x3.org/article/how-inclusive-economic-growth-south-africa> accessed 10 September 2021

Fourie "Tales from the Trenches: The Unfulfilled Promise of the Constitutional Environmental Right in South Africa"

Fourie M "Tales from the Trenches: The Unfulfilled Promise of the Constitutional Environmental Right in South Africa" Unpublished contribution delivered at *Twenty Years of South African Constitutionalism Conference* (2014 New York)

Fowkes "Transformative Constitutionalism and the Global South: The View from South Africa"

Fowkes J "Transformative Constitutionalism and the Global South: The View from South Africa" in Von Bogdandy A *et al* (eds) *Transformative Constitutionalism in Latin America: A New Latin American Ius Commune* (Oxford University Press London 2015)

Fredman 2005 *South African Journal on Human Rights*

Fredman S "Providing Equality: Substantive Equality and the Positive Duty to Provide" 2005 *South African Journal on Human Rights* 163-190

Friedman 1986 *Stanford Law Review*

Friedman LM "The Law and Society Movement" 1986 *Stanford Law Review* 763-780

Freund 2013 *Review of African Political Economy*

Freund W "Swimming against the Tide: The Macro-economic Research Group in the South African Transition" 2013 *Review of African Political Economy* 519-553

Gasparic *Climate Change and International Distributive Justice*

Gasparic P *Climate Change and International Distributive Justice* (Master of Arts Thesis University of Rijeka 2016)

Gasper "The Ethics of Economic Development and Human Displacement"

Gasper D "The Ethics of Economic Development and Human Displacement" in De Martino GE and Mc Closkey DN (eds) *The Oxford Handbook of Professional Economic Ethics* (Oxford University Press London 2014)

Gelb 1991 *Social Justice*

Gelb S "Democratising Economic Growth: Crisis and Growth Models for the Future" 1991 *Social Justice* 243-258

Gentle "Poverty and Social Movements"

Gentle L "Poverty and Social Movements" in Maharaj B, Desai A and Bond P (eds) *Zuma's Own Goal: Losing South Africa's War on Poverty* (Africa World Press Asmara Eritrea 2011)

Gilbert 2006 *Southern Journal of Philosophy*

Gilbert P "Basic Positive Duties of Justice and Narveson's Libertarian Challenge" 2006 *Southern Journal of Philosophy* 193-216

Ginsburg and Gibson *The South African Constitutional Court and Socio-Economic Rights as 'Insurance Swaps'*

Ginsburg T and Gibson R *The South African Constitutional Court and Socio-Economic Rights as 'Insurance Swaps'* (2013)
https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1644&context=law_and_economics accessed 14 May 2022

Glensy 2011 *Columbia Human Rights Law Review*

Glensy R D "The Right to Dignity" 2011 *Columbia Human Rights Law Review* 65-142

Gloppen *Social Rights Litigation as Transformation: South African Perspectives*

Gloppen S *Social Rights Litigation as Transformation: South African Perspectives* (2005)
https://www.researchgate.net/publication/37166451_Social_Rights_Litigation_as_Transformation_South_African_Perspectives accessed 15 May 2022

Gould 2016 *Ancilla Iuris*

Gould M "Equity or Dworkin's Egalitarianism: Principles that Incorporate Policies versus Principles that Stand on Their Own" 2016 *Ancilla Iuris* 61-85

Government of the Republic of South Africa *Reconstruction and Development Programme*

Government of the Republic of South Africa *Reconstruction and Development Programme* (1994)
https://www.sahistory.org.za/sites/default/files/the_reconstruction_and_development_programm_1994.pdf accessed 29 December 2021

Government of the Republic of South Africa *Growth, Employment and Redistribution: A Macroeconomic Strategy*

Government of the Republic of South Africa *Growth, Employment and Redistribution: A Macroeconomic Strategy* (1996)
<http://www.treasury.gov.za/publications/other/GEAR/chapters.pdf> accessed 25 September 2017

Government of the Republic of South Africa *Medium Term Strategic Framework 2019-2024*

Government of the Republic of South Africa *Medium Term Strategic Framework 2019-2024*
https://www.dpme.gov.za/keyfocusareas/outcomesSite/MTSF_2019_2024/ accessed 15 May 2022

Gradin 2012 *Journal of African Economies*

Gradin C "Race, Poverty and Deprivation in South Africa" 2012 *Journal of African Economies* 187-238

Greyling and Rossouw *Non-Economic Quality of Life and Population Density in South Africa*

Greyling T and Rossouw S *Non-Economic Quality of Life and Population Density in South Africa* (2016)
<https://econpapers.repec.org/paper/rzawpaper/640.htm> accessed 8 May 2022

Gross 2004 *Stanford Journal of International Law*

Gross AM "The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel" 2004 *Stanford Journal of International Law* 47-104

Hall and Kepe 2017 *Review of African Political Economy*

Hall R and Kepe T "Elite Capture and State Neglect: New Evidence of South Africa's Land Reform" 2017 *Review of African Political Economy* 1-10

Hallegatte, Fay and Barbier 2018 *Environment and Development Economics*

Hallegatte S, Fay M and Barbier ER "Poverty and Climate Change: Introduction" 2018 *Environment and Development Economics* 217-233

Hallowes *Planning Poverty: The NDP and the Infrastructure of Destruction*

Hallowes D *Planning Poverty: The NDP and the Infrastructure of Destruction* (2014)

https://www.researchgate.net/publication/339077460_Planning_Poverty_The_NDP_and_the_infrastructure_of_destruction accessed 12 May 2022

Hallowes and Butler 2004 *The Balance of Rights*

Hallowes D and Butler M *The Balance of Rights* (2004)
<https://www.groundwork.org.za/reports/gWReport2004.pdf> accessed 12 May 2022

Hanson and Hentz 1999 *Political Science Quarterly*

Hanson M and Hentz JJ "Neocolonialism and Neoliberalism in South Africa and Zambia" 1999 *Political Science Quarterly* 479-502

Harloe 2001 *International Journal of Urban and Regional Research*

Harloe M "Social Justice and the City: The New 'Liberal Formulation'" 2001 *International Journal of Urban and Regional Research* 889-897

Hart 2008 *Antipode*

Hart G 2008 "The Provocations of Neoliberalism: Contesting the Nation and Liberation after Apartheid" 2008 *Antipode* 678-705

Harvey 2006 *Geografiska Annaler*

Harvey D "Neo-liberalism as Creative Destruction" 2006 *Geografiska Annaler* 145-158

Hendricks and Ntsebeza "Black Poverty and White Property in South Africa"
Hendricks F and Ntsebeza L "Black Poverty and White Property in South Africa"
in Maharaj B, Desai A and Bond P (eds) *Zuma's Own Goal: Losing South Africa's War on Poverty* (Africa World Press Asmara Eritrea 2011)

Hettne 1983 *Acta Sociologica*

Hettne B "The Development of Development Theory" 1983 *Acta Sociologica* 247

Heywood "Justice and the Treatment Action Campaign"

Heywood M "Justice and the Treatment Action Campaign" in in Maharaj B, Desai A and Bond P (eds) 2011 *Zuma's Own Goal: Losing South Africa's War on Poverty* (Africa World Press Asmara Eritrea 2011)

Hickey and Du Toit *Adverse Incorporation, Social Exclusion and Chronic Poverty*

Hickey S and Du Toit A *Adverse Incorporation, Social Exclusion and Chronic Poverty* (2007) Chronic Poverty Research Centre Working Paper 81
https://www.chronicpoverty.org/uploads/publication_files/WP81_Hickey_duToit.pdf accessed 10 May 2022

Hodgson 2016 *Competition and Change*

Hodgson GM "Conceptualising Capitalism: A Summary" 2016 *Competition and Change* 37-52

Hodgson "Bridging the Gap between People and the Law: Transformative Constitutionalism and the Right to Constitutional Literacy"

Hodgson TF "Bridging the Gap between People and the Law: Transformative Constitutionalism and the Right to Constitutional Literacy" in Bishop M and Price A (eds) *A Transformative Justice: Essays in Honour of Pius Langa* (Juta Cape Town 2015)

Holness *The Constitutional Justification for Free Legal Services in Civil Matters in South Africa*

Holness D *The Constitutional Justification for Free Legal Services in Civil Matters in South Africa* (2013)
http://specjuris.ufh.ac.za/sites/default/files/Holness_SJ20132.pdf
accessed 18 September 2018

Hoppe *A Theory of Socialism and Capitalism*

Hoppe HH *A Theory of Socialism and Capitalism* (Kluwer Academic Publishers Norwell Massachusetts 1989)

Huda 2015 *Journal of Arts and Humanities*

Huda KASMN "Ethics of Reducing Inequality: Some Points" 2015 *Journal of Arts and Humanities* 34-42

- Hull and James 2012 *Africa*
 Hull E and James D "Introduction: Popular Economies in South Africa" 2012 *Africa* 1-19
- Human Rights Watch *2019 World Report*
 Human Rights Watch *2019 World Report* <https://www.hrw.org/world-report/> (2019) accessed 20 June 2020
- Humby 2016 *Journal of Business Ethics*
 Humby T "Addressing Mining Legacies: The Case of the South African Mining Industry 2016 *Journal of Business Ethics* 653-664
- Hurt 2017 *Capital and Class*
 Hurt SR "What's Left of 'the Left' in Post-apartheid South Africa?" 2017 *Capital and Class* 291-313
- Ikegami M *et al* "Poverty Traps and the Social Protection Paradox"
 Ikegami *et al* "Poverty Traps and the Social Protection Paradox" in Barrett CB Carter MR and Chavas J (eds) *The Economics of Poverty Traps* (University of Chicago Press Chicago 2018)
- Inchauste et al *The Distributional Impact of Fiscal Policy in South Africa*
 Inchauste G *et al* *The Distributional Impact of Fiscal Policy in South Africa* (2017) <https://openknowledge.worldbank.org/handle/10986/27980> accessed 20 May 2022
- Irlenbusch and Villeval 2015 *Current Opinion in Psychology*
 Irlenbusch B and Villeval MC "Behavioral Ethics: How Psychology Influenced Economics and How Economics Might Inform Psychology?" 2015 *Current Opinion in Psychology* 87-92
- Jagwanth and Soltau "Socio-economic Rights and Implications for Intergovernmental Fiscal Relations in South Africa"
 Jagwanth S and Soltau F "Socio-economic Rights and Implications for Intergovernmental Fiscal Relations in South Africa" Unpublished contribution delivered at *Twenty Years of South African Constitutionalism Conference* (2014 New York)
- Jacobs 2009 *Agrekon*
 Jacobs FT "The Status of Household Food Security Targets in South Africa" 2009 *Agrekon* 410-433'
- Jahan and Mahmud 2017 *Finance and Development*
 Jahan S and Mahmud AS "What is Capitalism?" 2017 *Finance and Development* 1-81

- Jansen van Rensburg and Naude 2007 *Public Administration and Development*
 Jansen van Rensburg L and Naude W "Human Rights and Development: The Case of Local Government Transformation in South Africa" 2007 *Public Administration and Development* 393-412
- Jayathilaka 2015 *International Journal of Conceptions on Management and Social Sciences*
 Jayathilaka A "Development Ethics and Political Ecology" 2015 *International Journal of Conceptions on Management and Social Sciences* 1-3
- Kabange "The South African Constitution and Socio-Economic Rights: Has Justiciability Made Any Difference?"
 Kabange C "The South African Constitution and Socio-Economic Rights: Has Justiciability Made Any Difference?" Unpublished contribution delivered at *Twenty Years of South African Constitutionalism Conference* (2014 New York)
- Kabudala *et al* 2017 *Social Indicators Research*
 Kabudala *et al* "Assessing Changes in Household Socio-economic Status in Rural South Africa: A Distributional Analysis Using Household Asset Indicators" 2017 *Social Indicators Research* 1047-1073
- Kane 2009 *Philosophical Studies*
 Kane R "Libertarianism" 2009 *Philosophical Studies* 35-44
- Kang'ethe and Chivanga 2016 *International Journal of Science Education*
 Kang'ethe SM and Chivanga SY "Exploring the Gaps Inherent in the Current University Education in South Africa: A Literature Review" 2016 *International Journal of Science Education* 255-264
- Karriem and Hoskins 2016 *Politikon*
 Karriem A and Hoskins M "From the RDP to the NDP: A Critical Appraisal of the Developmental State, Land Reform and Rural Development in South Africa" 2016 *Politikon* 1-20
- Kehler 2001 *Journal of International Women's Studies*
 Kehler H "Women and Poverty: The South African Experience" 2001 *Journal of International Women's Studies* 41-53
- Keller 2009 *Philosophy Compass*
 Keller S "Welfarism" 2009 *Philosophy Compass* 82-95
- Khan 2013 *Review of African Political Economy*
 Khan F "Poverty, Grants, Revolution and 'Real Utopias'" 2013 *Review of African Political Economy* 572-588

- Khoza 2004 *South African Journal on Human Rights*
 Khoza S "Realising the Right to Food in South Africa: Not by Policy Alone – a Need for Framework Legislation" 2004 *South African Journal on Human Rights* 664-683
- Klare 1998 *South African Journal on Human Rights*
 Klare KE "Legal Culture and Transformative Constitutionalism" 1998 *South African Journal on Human Rights* 146-188
- Klasen 2000 *Review of Income and Wealth*
 Klasen S "Measuring Poverty and Deprivation in South Africa" 2000 *Review of Income and Wealth* 33-59
- Koch *The Food Security Policy Context in South Africa*
 Koch J *The Food Security Policy Context in South Africa* (2011) <http://ipcig.org/sites/default/files/pub/en/IPCCountryStudy21.pdf> accessed 8 May 2022
- Kock *The Impact of Political Steering on the Legislative Process*
 Kock M J *The Impact of Political Steering on the Legislative Process* (LLM Research Dissertation University of Pretoria 2014)
- Konstant and Vance "Executive Acquiescence and the Judiciary's Authoritative Legitimacy"
 Konstant A and Vance S "Executive Acquiescence and the Judiciary's Authoritative Legitimacy" Unpublished contribution delivered at *Twenty Years of South African Constitutionalism Conference* (2014 New York)
- Kota *Realising the Right to a Healthy Environment: An Analysis of the Policy Efforts, Budgeting and Enjoyment of the Right to a Healthy Environment in South Africa*
 Kota Z *Realising the Right to a Healthy Environment: An Analysis of the Policy Efforts, Budgeting and Enjoyment of the Right to a Healthy Environment in South Africa* (2016) <http://spii.org.za/wp-content/uploads/2018/08/Working-Paper-19-Realising-the-right-to-a-healthy-environment.pdf> accessed 8 May 2022
- Kotze 2010 *Journal of Human Rights and the Environment*
 Kotze LJ "Phiri, the Plight of the Poor and the Perils of Climate Change: Time to Rethink Environmental and Socio-Economic Rights in South Africa" 2010 *Journal of Human Rights and Environment* 135-160
- Kotze 2015 *Litnet Akademies*
 Kotze LJ "Menseregte, die Omgewing, en Omgewingskonstitutionalisme" 2015 *Litnet Akademies* 823-856

Kruger *Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts*

Kruger R *Racism and Law: Implementing the Right to Equality in Selected South African Equality Courts* (PhD thesis Rhodes University 2008)

Laffont 1975 *Economica*

Laffont JJ "Macroeconomic Constraints, Economic Efficiency and Ethics: An Introduction to Kantian Economics" 1975 *Economica* 430-437

Langa 2011 *Stellenbosch Law Review*

Langa PN "The Role of the Constitution in the Struggle against Poverty" 2011 *Stellenbosch Law Review* 446-451

Langford 2005 *International Journal of Water Resources Development*

Langford M "The United Nations Concept of Water as a Human Right: a New Paradigm for Old Problems?" 2005 *International Journal of Water Resources Development* 273-282

Le Roux 1991 *Social Justice*

Le Roux P "The South African Economy and the Democratic Imperative" 1991 *Social Justice* 230-242

Leibbrandt *et al Unemployment and Inequality Outcomes in South Africa*

Leibbrandt M *et al Unemployment and Inequality Outcomes in South Africa* (2009) <https://www.oecd.org/employment/emp/45282868.pdf> accessed 12 May 2022

Leibbrandt, Finn and Woolard 2012 *Development Southern Africa*

Leibbrandt L, Finn A and Woolard I "Describing and Decomposing Post-apartheid Income Inequality in South Africa" 2012 *Development Southern Africa* 19-34

Lemanski 2017 *International Development Planning Review*

Lemanski C "Unequal Citizenship in Unequal Cities: Participatory Urban Governance in Contemporary South Africa" 2017 *International Development Planning Review* 15-35

Lephakga 2016 *Studia Historiae Ecclesiasticae*

Lephakga T "Colonial Institutionalisation of Poverty among Blacks in South Africa" 2016 *Studia Historiae Ecclesiasticae* 1-15

Liebenberg 2001 *South African Journal on Human Rights*

Liebenberg S "The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa" 2001 *South African Journal on Human Rights* 232-257

- Liebenberg 2005 *South African Journal on Human Rights*
 Liebenberg S "The Value of Human Dignity in Interpreting Socio-Economic Rights" 2005 *South African Journal on Human Rights* 1-30
- Liebenberg *Socio-economic Rights Adjudication Under a Transformative Constitution*
 Liebenberg S *Socio-economic Rights Adjudication Under a Transformative Constitution* (Juta Cape Town 2010)
- Liebenberg 2012 *African Human Rights Law Review*
 Liebenberg S "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of 'Meaningful Engagement'" 2012 *African Human Rights Law Journal* 1-29
- Liebenberg and Young "Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?"
 Liebenberg S and Young KG "Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?" Unpublished contribution delivered at *Twenty Years of South African Constitutionalism Conference* (2014 New York)
- Lodge 2014 *African Affairs*
 Lodge T "Neo-patrimonial Policies in the ANC" 2014 *African Affairs* 1-23
- Lombard and Du Preez 2004 *Social Work*
 Lombard A and Du Preez J "Challenges for Building Partnerships in Social Development" 2004 *Social Work* 231-244
- Luiz 1996 *International Journal of Social Economics*
 Luiz J M "The Socio-economic Restructuring of a Post-apartheid South Africa" 1996 *International Journal of Social Economics* 137-149
- Mabin "Dispossession, Exploitation and Struggle: An Historical Overview of South African Urbanisation"
 Mabin "Dispossession, Exploitation and Struggle: An Historical Overview of South African Urbanisation" in Smith DM (ed) *The Apartheid City and Beyond* (Routledge London 2003)
- Madlingozi 2017 *Stellenbosch Law Review*
 Madlingozi T "Social Justice in a Time of Neo-apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution" 2017 *Stellenbosch Law Review* 123-147
- Magombeyi and Odhiambo 2015 *Socioeconomica*
 Magombeyi MT and Odhiambo NM "Poverty Dynamics in South Africa: Trends, Policies and Challenges" 2015 *Socioeconomica* 333-348

- Malapane 2016 *Journal of Public Administration and Development Alternatives*
 Malapane A "Holding the Executive Accountable: Parliament as the Beacon of Hope to the People" 2016 *Journal of Public Administration and Development Alternatives* 135-149
- Maloberti 2015 *The Independent Review*
 Maloberti N "Rawls and Bleeding-heart Libertarianism – How Well Do They Mix?" 2015 *The Independent Review* 563-582
- Mangu "Nelson Mandela's Contribution to Constitutionalism and the Rule of Law in South Africa"
 Mangu AM "Nelson Mandela's Contribution to Constitutionalism and the Rule of Law in South Africa" Unpublished contribution delivered at *Twenty Years of South African Constitutionalism Conference* (New York 2014)
- Mani 2008 *International Journal of Transitional Justice*
 Mani R "Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development" 2008 *International Journal of Transitional Justice* 253-265
- Marten et al 2014 *Health Policy*
 Marten R et al "An Assessment of Progress towards Universal Health Coverage in Brazil, Russia, India, China, and South Africa (BRICS)" 2014 *Health Policy* 2164-2173
- Matebese-Notshulwana and Lebakeng *Constraints and Prospects for Legislative Oversight in Emerging African Democracies: the Case of South Africa*
 Matebese-Notshulwana K and Lebakeng TJ *Constraints and Prospects for Legislative Oversight in Emerging African Democracies: the Case of South Africa* (2019) https://www.researchgate.net/profile/Koliswa-Matebese-Notshulwana/publication/326831151_Constraints_and_Prospects_for_Legislative_Oversight_in_Emerging_African_Democracies_The_Case_of_South_Africa/links/5ed809ab299bf1c67d37cb12/Constraints-and-Prospects-for-Legislative-Oversight-in-Emerging-African-Democracies-The-Case-of-South-Africa.pdf accessed 20 May 2022
- Mattes 2002 *Journal of Democracy*
 Mattes RB "South Africa: Democracy without the People?" 2002 *Journal of Democracy* 22-36
- Matthews and McLaren *Budget Analysis for Advancing Socio-Economic Rights*
 Matthews T and McLaren D *Budget Analysis for Advancing Socio-Economic Rights* (2016) <http://spii.org.za/wp-content/uploads/2018/05/2016-SPII-SAHRC-Guide-to-Budget-Analysis-for-Socio-Economic-Rights.pdf> accessed 15 May 2022

- May 2102 *Development Southern Africa*
 May J "Smoke and Mirrors? The Science of Poverty Measurement and its Application" 2012 *Development Southern Africa* 63-75
- Mayosi and Benatar 2014 *New England Journal of Medicine*
 Mayosi BM and Benatar SR "Health and Healthcare in South Africa, 20 Years after Mandela" 2014 *New England Journal of Medicine* 1344-1353
- Mbete *An Evaluation of Oversight and Accountability by the Fourth Parliament of the Republic of South Africa*
 Mbete L *An Evaluation of Oversight and Accountability by the Fourth Parliament of the Republic of South Africa* (Masters in Public Administration Dissertation University of Stellenbosch 2016)
- McCarthy and Prudham 2004 *Geoforum*
 McCarthy J and Prudham S "Neoliberal Nature and the Nature of Neoliberalism" 2004 *Geoforum* 275-283
- Mc Chesney and Foster 2010 *Monthly Review Magazine*
 Mc Chesney R W and Foster J B "Capitalism: the Absurd System: a View from the United States" 2010 *Monthly Review Magazine* 1-16
- Mc Crudden 2008 *European Journal of International Law*
 Mc Crudden C "Human Dignity and Judicial Interpretation of Human Rights" 2008 *European Journal of International Law* 655-72
- Mc Donald 1998 *Review of African Political Economy*
 Mc Donald DA "Three Steps Forward, Two Steps Back: Ideology & Urban Ecology in South Africa" 1998 *Review of African Political Economy* 73-88
- Mc Donald and Smith 2004 *Urban Studies*
 Mc Donald D and Smith L "Privatising Cape Town: From Apartheid to Neoliberalism in the Mother City" 2004 *Urban Studies* 1461-1484
- Mc Dougall 2015-2016 *New York Law School Law Review*
 Mc Dougall GJ "Twenty Years of South African Constitutionalism" 2015-2016 *New York Law School Law Review* 26-36
- Mc Evoy 2007 *Journal of Law and Society*
 McEvoy K "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice" 2007 *Journal of Law and Society* 411-440
- Mc Granahan 2015 *World Development*
 Mc Granahan G "Realising the Right to Sanitation in Deprived Urban Communities: Meeting the Challenges of Collective Action, Co-production, Affordability and Housing Tenure" 2015 *World Development* 242-253

- Mc Graw 2011 *Loyola University Chicago International Law Review*
 Mc Graw GS "Defining and Defending the Right to Water and Its Minimum Core: Legal Construction and the Role of National Jurisprudence" 2011 *Loyola University Chicago International Law Review* 127-204
- Mc Laren, Ardlington and Leibbrandt 2014 *BMC Health Services Research*
 McLaren SM Ardlington C and Leibbrandt M "Distance, Decay and Persistent Healthcare Disparities in South Africa" 2014 *BMC Health Services Research* 1-9
- Mc Lean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa*
 Mc Lean K *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (Pretoria University Law Press Pretoria 2009)
- Mechlem 2004 *European Law Journal*
 Mechlem K "Food Security and the Right to Food in the Discourse of the United Nations" 2004 *European Law Journal* 631-648
- Metz 2016 *Res Publica*
 Metz T "The Nature of Poverty as an Inhuman Condition" 2016 *Res Publica* 327-342
- Miller 2008 *Critical Review of International Social and Political Philosophy*
 Miller D "National Responsibility and Global Justice" 2008 *Critical Review of International Social and Political Philosophy* 383-399
- Moav and Neeman 2010 *Journal of the European Economic Association*
 Moav O and Neeman Z "Status and Poverty" 2010 *Journal of the European Economic Association* 413-420
- Mokomane *et al* 2017 *Children and Youth Services Review*
 Mokomane Z *et al* "Availability and Accessibility of Public Health Services for Adolescents and Young People in South Africa" 2017 *Children and Youth Services Review* 125-132
- Motala 2016 *American University Business Law Review*
 Motala Z "Free Trade, the Washington Consensus and Bilateral Investment Treaties: The South African Journey: A Rethink on Rules of Foreign Investment" 2016 *American University Business Law Review* 31-56
- Motala, Vally and Spreen "Transforming Education and Training, or Reconstituting Power and Privilege?"
 Motala E, Vally S and Spreen CA "Transforming Education and Training, or Reconstituting Power and Privilege?" in Maharaj B, Desai A and Bond P (eds) *Zuma's Own Goal: Losing South Africa's War on Poverty* (Africa World Press Asmara Eritrea 2011)

- Motsoeneng *Monitoring and Evaluating the Progressive Realisation of the Right to Water and Sanitation in South Africa*
 Motsoeneng M *Monitoring and Evaluating the Progressive Realisation of the Right to Water and Sanitation in South Africa* (2016) <http://spii.org.za/wp-content/uploads/2018/09/2016-SPII-Monitoring-the-Right-to-Water-and-Sanitation.pdf> accessed 15 May 2022
- Movik 2014 *Geoforum*
 Movik S "A fair share? Perceptions of Justice in South Africa's Water Allocation Reform Policy" 2014 *Geoforum* 187-195
- Moyn 2014 *Law and Contemporary Problems*
 Moyn S "A Powerless Companion: Human Rights in the Age of Neoliberalism" 2014 *Law and Contemporary Problems* 147-169
- Moyo and Mamabolo 2014 *Journal of Public Administration*
 Moyo T and Mamabolo M "The National Development Plan: A Comparative Analysis with the Reconstruction and Development Programme, the Growth, Employment and Redistribution Programme, and the Accelerated and Shared Growth Initiative" 2014 *Journal of Public Administration* 946-959
- Moyo "Transformative Constitutionalism, Substantive Equality and the Role of the Courts: Lessons from South Africa and Zimbabwe"
 Moyo A "Transformative Constitutionalism, Substantive Equality and the Role of the Courts: Lessons from South Africa and Zimbabwe" Unpublished contribution delivered at *Twenty Years of South African Constitutionalism Conference* (2014 New York)
- Mtshiselwa 2016 *Theological Studies*
 Mtshiselwa N "Reconsidering the Freedom Charter, the Black Theology of Liberation and the African Proverb about the Locust's Head in the Context of Poverty in South Africa" 2016 *Theological Studies* 1-7
- Mubangizi 2005 *South African Journal on Human Rights*
 Mubangizi JC "Know your Rights: Exploring the Connections between Human Rights and Poverty Reduction with Specific Reference to South Africa" 2005 *South African Journal on Human Rights* 32-46
- Mukonoweshuro 1991 *Social Justice*
 Mukonoweshuro EG "Between Verwoerd and the ANC: Profiles of Contemporary Repression, Deprivation and Poverty in South Africa's "Bantustans"" 1991 *Social Justice* 170-185
- Muller 2008 *Environment and Urbanisation*
 Muller M "Free Basic Water – a Sustainable Instrument for a Sustainable Future in South Africa" 2008 *Environment and Urbanisation* 67-87

- Mulligan "What's Wrong with Libertarianism?"
Mulligan T "What's Wrong with Libertarianism?" in Brennan J, Schmitz D and Van der Vossen B (eds) *Routledge Handbook of Libertarianism* (Routledge London 2017)
- Munger 1993 *Loyola of Los Angeles Law Review*
Munger F "Sociology of Law for a Postliberal Society" 1993 *Loyola of Los Angeles Law Review* 89-125
- Mushongera Zikhali and Ngwenya 2017 *Social Indicators Research*
Mushongera D Zikhali P and Ngwenya P "A Multidimensional Poverty Index for Gauteng Province, South Africa: Evidence from Quality of Life Survey Data" 2017 *Social Indicators Research* 277-303
- National Development Agency *Strategic Plan 2016-2021*
National Development Agency *Strategic Plan 2016-2021* undated
<https://www.nda.org.za/assets/resources/3BE50F99-C163-494E-B564-2E16BA55A0C7/NDAStrategicPlan2016-2021PR6.pdf> accessed 23 May 2022
- Ndlovu 2014 *Transformative Constitutionalism: The Best Tactic to Achieve It*
Ndlovu NSL *Transformative Constitutionalism: The Best Tactic to Achieve It* (Master of Laws Dissertation University of Pretoria 2014)
- Ndlovu-Gatsheni 2013 *Journal of Developing Societies*
Ndlovu-Gatsheni S "The Entrapment of Africa within the Global Matrices of Power" 2013 *Journal of Developing Societies* 331-353
- Neves and Du Toit 2013 *Journal of Agrarian Change*
Neves D and Du Toit A "Rural Livelihoods in South Africa: Complexity, Vulnerability and Differentiation" 2013 *Journal of Agrarian Change* 93-115
- Ngang 2014 *African Human Rights Law Journal*
Ngang CC "Judicial Enforcement of Socio-Economic Rights and the Separation of Powers Objection: The Obligation to Take 'Other Measures'" 2014 *African Human Rights Law Journal* 655-680
- Ngwane "Ideologies, Strategies and Tactics of Township Protest"
Ngwane T 2011 "Ideologies, Strategies and Tactics of Township Protest" in Maharaj B, Desai A and Bond P (eds) *Zuma's Own Goal: Losing South Africa's War on Poverty* (Africa World Press Asmara Eritrea 2011)
- Nkondo 2007 *International Journal of African Renaissance Studies*
Nkondo GM "Ubuntu as Public Policy in South Africa: A Conceptual Framework" 2007 *International Journal of African Renaissance Studies* 88-100
- Nkrumah *Neo-colonialism: the Last Stage of Imperialism*
Nkrumah K *Neo-colonialism: the Last Stage of Imperialism* (Thomas Nelson & Sons London 1965)

Nyenti 2014 "The Role of Access to Justice in the Development of Socio-economic Rights in South Africa"

Nyenti MAT "The Role of Access to Justice in the Development of Socio-economic Rights in South Africa" Unpublished contribution delivered at *Twenty Years of South African Constitutionalism Conference* (2014 New York)

O'Connell 2008 *International Journal of Constitutional Law*

O'Connell C "The Role of Dignity in Equality Law: Lessons from Canada and South Africa" 2008 *International Journal of Constitutional Law* 267-286

Oliver and Oliver 2017 *HTS Theological Studies*

Oliver WH and Oliver E "The Colonisation of South Africa: A Unique Case" 2017 *HTS Theological Studies* 1-8

Olsaretti 2013 *Economics and Philosophy*

Olsaretti S "Rescuing Justice and Equality from Libertarianism" 2013 *Economics and Philosophy* 43-63

Opotow 2001 *Social Justice Research*

Opotow S "Reconciliation in Times of Impunity: Challenges for Social Justice" 2001 *Social Justice Research* 149-170

Oppong 2006 *African Human Rights Law Journal*

Oppong RF "Trade and Human Rights: A Perspective for Agents of Trade Policy Using a Rights-based Approach" 2006 *African Human Rights Law Journal* 123-145

Oxfam International *Reward Work, Not Wealth*

Oxfam International *Reward Work, Not Wealth* (2018)
<https://www.oxfam.org/en/research/reward-work-not-wealth> accessed 19 September 2021

Palat 2008 *Futures*

Palat RA "A New Bandung? Economic Growth v Distributive Justice Among Emerging Powers" 2008 *Futures* 721-734

Parliament of the Republic of South Africa *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change*

Parliament of the Republic of South Africa *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017)

https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf accessed 12 December 2021

- Parliament of the Republic of South Africa *Oversight Model of the South African Legislative Sector*
 Parliament of the Republic of South Africa *Oversight Model of the South African Legislative Sector* (2012)
<https://www.parliament.gov.za/storage/app/media/oversight-reports/ovac-model.pdf> accessed 12 December 2021
- Parliament of the Republic of South Africa *Poverty Land and Agrarian Studies 2016 Diagnostic Report on Land Reform in South Africa*
 Parliament of the Republic of South Africa *Poverty Land and Agrarian Studies 2016 Diagnostic Report on Land Reform in South Africa*
https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Land_Restitution_Ramutsindela_et_al.pdf accessed 9 October 2021
- Patel 2012 *Plos Medicine*
 Patel RC "Food Sovereignty: Power, Gender and the Right to Food" 2012 *Plos Medicine* 1-5
- Peet 2002 *Antipode*
 Peet R "Ideology, Discourse and the Geography of Hegemony – from Socialist to Neoliberal Development in Post-apartheid South Africa" 2002 *Antipode* 54-84
- Pierce and Martin 2017 *Urban Studies*
 Pierce J and Martin D "The Law is not Enough: Seeking the Theoretical Frontier of Urban Justice via Legal Tools" 2017 *Urban Studies* 256-265
- Pieterse 2004 *Human Rights Quarterly*
 Pieterse M "Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience" 2004 *Human Rights Quarterly* 882-905
- Pieterse 2004 *South African Journal on Human Rights*
 Pieterse M "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" 2004 *South African Journal on Human Rights* 383-417
- Pieterse 2005 *SA Public Law*
 Pieterse M "What Do We Mean When We Talk about Transformative Constitutionalism?" 2005 *SA Public Law* 155-166
- Poruthiyil 2013 *Journal of Business Ethics*
 Poruthiyil PV "Weaning Business Ethics from Strategic Economism: The Development Ethics Perspective" 2013 *Journal of Business Ethics* 735-749

- Poscher *Hermeneutics, Jurisprudence and Law*
 Poscher R *Hermeneutics, Jurisprudence and Law* (2014)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2394503 accessed 21
 March 2017
- Presidency of the Republic of South Africa *State of the Nation Address 2018*
 Presidency of the Republic of South Africa *State of the Nation Address 2018*
<https://www.gov.za/speeches/president-cyril-ramaphosa-2018-state-nation-address-16-feb-2018-0000> accessed 2 February 2019
- Presidency of the Republic of South Africa *National Development Plan 2030*
 Presidency of the Republic of South Africa *National Development Plan 2030*
 (2012) <https://www.greengrowthknowledge.org/national-documents/south-africa-national-development-plan-2030-our-future-make-it-work> accessed 19
 September 2021
- Prieto-Carron *et al* 2006 *International Affairs*
 Prieto-Carron M *et al* "Critical Perspectives on CSR and Development: What
 We Know, What We Don't, and What We Need to Know" 2006 *International
 Affairs* 977-987
- Putterman Roemer and Silvestre 1998 *Journal of Economic Literature*
 Putterman L Roemer JE and Silvestre J "Does Egalitarianism Have a Future?"
 1998 *Journal of Economic Literature* 861-902
- Quinot 2012 *South African Law Journal*
 Quinot G "Transformative Legal Education" 2012 *South African Law Journal*
 411-433
- Rapatsa 2014 *Mediterranean Journal of Social Sciences*
 Rapatsa M "Transformative Constitutionalism in South Africa: 20 Years of
 Democracy" 2014 *Mediterranean Journal of Social Sciences* 887-895
- Rapatsa 2015 *Euro Economica*
 Rapatsa M "Poverty: A Socio-economic Threat to Sustainable Development as
 Envisaged by South Africa's Transformative Regime" 2015 *Euro Economica* 41-
 48
- Rapatsa 2015 *Judicial Tribune*
 Rapatsa M "South Africa's Transformative Constitution: from Civil and Political
 Rights Doctrines to Socio-Economic Rights Promises" 2015 *Judicial Tribune*
 208-219
- Rapatsa 2015 *Acta Universitatis Danubius Juridica*
 Rapatsa M "The Right to Equality under South Africa's Transformative
 Constitutionalism: A Myth or Reality?" 2015 *Acta Universitatis Danubius
 Juridica* 18-35

- Roderer 2015 *Northwestern Journal of International Human Rights*
 Roderer CJ "The Transformation of South African Private Law after Twenty Years of Democracy" 2015 *Northwestern Journal of International Human Rights* 1-56
- Rodrik 2014 *Journal of Economic Perspectives*
 Rodrik "When Ideas Trump Interests: Preferences, World Views and Policy Innovations" 2014 *Journal of Economic Perspectives* 189-208
- Roemer 2008 *Eastern Economic Journal*
 Roemer JE "Socialism vs Social Democracy as Income-Equalizing Institutions" 2008 *Eastern Economic Journal* 14-26
- Rosa 2011 *Stellenbosch Law Review*
 Rosa S "Transformative Constitutionalism in a Democratic Developmental State" 2011 *Stellenbosch Law Review* 542-565
- Rosales 2008 *Conservation Biology*
 Rosales J "Economic Growth, Climate Change, Biodiversity Loss: Distributive Justice for the Global North and South" 2008 *Conservation Biology* 1409-1417
- Rotberg and Salahub *African Legislative Effectiveness*
 Rotberg RI and Salahub JE *African Legislative Effectiveness* (2013)
<http://www.nsi-ins.ca/wp-content/uploads/2013/10/2013-African-Legislative-Effectiveness1.pdf> accessed 29 December 2021
- Roth 2004 *Human Rights Quarterly*
 Roth K "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization" 2004 *Human Rights Quarterly* 63-73
- Sai-wing Ho and Schneider 2002 *Journal of Economic Issues*
 Sai-wing Ho P and Schneider G E "African Drama: Myrdal and Progressive Institutional Change in South Africa" 2002 *Journal of Economic Issues* 507-515
- Samson 2007 *Africa Development*
 Samson M "Developmental Local Government in Post-Apartheid South Africa? A Feminist Rethinking of the State and Development in the Context of Neo-liberalism" 2007 *Africa Development* 26-57
- Samuel *et al Social Isolation and its Relationship to Multidimensional Poverty*
 Samuel K *et al Social Isolation and its Relationship to Multidimensional Poverty* (2014) <https://eprints.whiterose.ac.uk/116624/2/Manuscript%252010-16%5B1%5D.pdf> accessed 8 May 2022

- Sanders and Chopra 2006 *American Journal of Public Health*
 Sanders D and Chopra M "Key Challenges to Achieving Health for All in an Inequitable Society: the Case of South Africa" 2006 *American Journal of Public Health* 73-78
- Sarkin and Daly 2004 *Columbia Human Rights Law Review*
 Sarkin J and Daly E "Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies" 2004 *Columbia Human Rights Law Review* 662-728
- Savransky 2017 *Sociology*
 Savransky M "A Decolonial Imagination: Sociology, Anthropology and the Politics of Reality" 2017 *Sociology* 11-26
- Scheffler 2003 *Philosophy and Public Affairs*
 Scheffler S "What is Egalitarianism?" 2003 *Philosophy and Public Affairs* 5-39
- Schierup 2016 *Critical Sociology*
 Schierup C "Under the Rainbow: Migration, Precarity and People Power in Post-Apartheid South Africa" 2016 *Critical Sociology* 1051-1068
- Schneider 2003 *Review of Social Economy*
 Schneider GE "Neoliberalism and Economic Justice in South Africa: Revisiting the Debate on Economic Apartheid" 2003 *Review of Social Economy* 23-50
- Schneider 2008 *Forum for Social Economics*
 Schneider GE "Comparative Institutional Advantage and the Appropriate Model for Sub-Saharan Africa" 2008 *Forum for Social Economics* 115-124
- Schotte, Zizzamia and Leibbrandt *Social Stratification, Life Chances and Vulnerability to Poverty in South Africa*
 Schotte S, Zizzamia R and Leibbrandt M *Social Stratification, Life Chances and Vulnerability to Poverty in South Africa* (2017)
<https://econpapers.repec.org/paper/ldrwpaper/208.htm> accessed 8 May 2022
- Schroeder *et al* 2008 *Society and Natural Resources*
 Schroeder R *et al* "Third World Environmental Justice" 2008 *Society and Natural Resources* 547-555
- Seagle 1945 *University of Chicago Law Review*
 Seagle W "Rudolf von Jhering: Or Law as a Means to an End" 1945 *University of Chicago Law Review* 71-89
- Section 27 *Too Many Children Left Behind: Exclusion in the South African Inclusive Education System*
 Section 27 *Too Many Children Left Behind: Exclusion in the South African Inclusive Education System* (2016) <https://section27.org.za/2016/08/too-many-children-left-behind-exclusion-in-the-south-african-inclusive-education-system/> accessed 9 October 2021

Seekings *The Colour of Desert: Class and Distributive Justice in Post-Apartheid South Africa*

Seekings J *The Colour of Desert: Class and Distributive Justice in Post-Apartheid South Africa* (2005)
<https://open.uct.ac.za/handle/11427/19410?show=full> accessed 8 May 2022

Seekings *The Developmental and Welfare State in South Africa: Lessons for the Southern African Region*

Seekings J *The Developmental and Welfare State in South Africa: Lessons for the Southern African Region* (2015)
<https://open.uct.ac.za/handle/11427/19178> accessed 24 September 2021

Seekings 2016 *European Journal of Social Theory*

Seekings J "State Building, Market Regulation and Citizenship in South Africa" 2016 *European Journal of Social Theory* 191-209

Seekings *Poverty and Inequality After Apartheid*

Seekings J *Poverty and Inequality After Apartheid* (2007)
https://sarprn.org/documents/d003024/Poverty_inequality_Seekings_Sep2007
accessed 15 May 2022

Seekings and Mattison *The Continuing Politics of Basic Income in South Africa*

Seekings J and Mattison H *The Continuing Politics of Basic Income in South Africa* (2010) <https://open.uct.ac.za/handle/11427/19173> accessed 24 September 2020

Segatti and Pons-Vignon 2013 *Review of African Political Economy*

Segatti A and Pons-Vignon N "Stuck in Stabilisation? South-Africa's Post-apartheid Macro-economic Policy between Ideological Conversion and Technocratic Capture" 2013 *Review of African Political Economy* 537-555

Sekhampu 2013 *Journal of Social Sciences*

Sekhampu T J "Determinants of Poverty in a South African Township" 2013 *Journal of Social Sciences* 145-153

Sen "Development as Capability Expansion"

Sen A "Development as Capability Expansion" in Fukuda-Parr *et al* (eds) *Readings in Human Development* (Oxford University Press New York and New Delhi 2003)

Sen *Development as Freedom*

Sen A *Development as Freedom* (Oxford University Press London 1999)

Sen *Equality of What?*

Sen A *Equality of What?* (1979) https://www.ophi.org.uk/wp-content/uploads/Sen-1979_Equality-of-What.pdf accessed 13 May 2022

- Sen 2005 *Economic and Political Weekly*
 Sen A "The Three R's of Reform" 2005 *Economic and Political Weekly* 1971-1974
- Shaw *Assessing the Sustainability of an Independent Power Producer's Social Investment in a Community: A Case Study of Scatec Solar*
 Shaw J *Assessing the Sustainability of an Independent Power Producer's Social Investment in a Community: A Case Study of Scatec Solar* (Master of Public Administration Dissertation Stellenbosch University 2017)
- Shohat 1992 *Social Text*
 Shohat E "Notes on the Post-colonial" 1992 *Social Text* 99-113
- Sibanda 2011 *Stellenbosch Law Review*
 Sibanda S "Not Purpose-made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty" 2011 *Stellenbosch Law Review* 482-500
- Silva-Leander and Seth 2017 *Social Choice and Welfare*
 Silva-Leander S and Seth S "Revealed Preferences with Plural Motives: Axiomatic Foundations of Normative Assessments in Non-utilitarian Welfare Economics" 2017 *Social Choice and Welfare* 1-13
- Siyo and Mubangizi 2015 *Potchefstroom Electronic Law Journal*
 Siyo L and Mubangizi JC "The Independence of South African Judges: A Constitutional and Legislative Perspective" 2015 *Potchefstroom Electronic Law Journal* 817-846
- Smith 1997 *Environment and Planning*
 Smith DM "Back to the Good Life: Towards an Enlarged Conception of Social Justice" 1997 *Environment and Planning* 19-35
- Solanki *et al* 2021 *South African Medical Journal*
 Solanki GC *et al* "The National Health Insurance Bill: Responses and Options for the Portfolio Committee on Health" 2021 *South African Medical Journal* 812-813
- South African Legislative Sector *Oversight Model of the South African Legislative Sector*
 South African Legislative Sector *Oversight Model of the South African Legislative Sector* (2012) http://sals.gov.za/research/oversight_model.pdf accessed 10 October 2021

- South African Social Security Agency *Annual Report 2015/2016*
 South African Social Security Agency *Annual Report 2015/2016* (2016)
[https://nationalgovernment.co.za/entity_annual/1087/2016-south-african-social-security-agency-\(sassa\)-annual-report.pdf](https://nationalgovernment.co.za/entity_annual/1087/2016-south-african-social-security-agency-(sassa)-annual-report.pdf) accessed 7 May 2022
- South African Social Security Agency *Annual Performance Plan 2019-2020*
 South African Social Security Agency *Annual Performance Plan 2019 -2020*
 (2020) <https://www.sassa.gov.za/annual-performance-plans/Documents/Annual%20Performance%20Plan%202019.PDF> accessed 20 September 2020
- Southall 2014 *Journal of Contemporary African Studies*
 Southall R "From Liberation Movement to Party Machine? The ANC in South Africa" 2014 *Journal of Contemporary African Studies* 331-348
- Southall 2014 *Annals of the American Academy of Political and Social Science*
 Southall R "Democracy at Risk: Politics and Governance under the ANC" 2014 *Annals of the American Academy of Political and Social Science* 48-69
- Spaull 2013 *International Journal of Educational Development*
 Spaull N "Poverty and Privilege: Primary School Inequality in South Africa" 2013 *International Journal of Educational Development* 436-447
- Statistics South Africa *How Unequal is South Africa?*
 Statistics South Africa *How Unequal is South Africa?* (date unknown)
<http://www.statssa.gov.za/?p=12930> accessed 20 May 2018
- Statistics South Africa date unknown *Quarterly Labour Force Survey Quarter 1 2021*
 Statistics South Africa date unknown <http://www.statssa.gov.za/?p=12930> accessed 17 September 2021
- Statistics South Africa *Quarterly Labour Force Survey Quarter 3 2021*
 Statistics South Africa *Quarterly Labour Force Survey Quarter 3 2021*
<http://www.statssa.gov.za/publications/P0211/P02113rdQuarter2021.pdf>
 accessed 17 January 2022
- Statistics South Africa *Poverty Trends in South Africa 2006-2011*
 Statistics South Africa *Poverty Trends in South Africa 2006 – 2011* (2015)
<http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf> accessed 17 September 2021
- St Clair 2014 *Journal of Global Ethics*
 St Clair AL "The Four Tasks of Development Ethics at Times of a Changing Climate" 2014 *Journal of Global Ethics* 283-291

- Steigleder 2016 *Journal of Human Rights*
 Steigleder K "Climate Risks, Climate Economics and the Foundations of Rights-based Ethics" 2016 *Journal of Human Rights* 251-271
- Stewart 2014 *Law, Democracy and Development*
 Stewart L "Rights Discourses and Practices, Everyday Violence and Social Protests: Who Counts as Subject and Whose Lives are Real in the Neo-colonial South African Nation State?" 2014 *Law Democracy and Development* 1-21
- Struwig, Roberts and Davids 2011 *Human Sciences Research Council Review*
 Struwig J, Roberts B and Davids YD "From Bonds to Bridges: Towards a Social Cohesion Barometer for South Africa" 2011 *Human Sciences Research Council Review* 10-11
- Swilling, Musango and Wakeford 2015 *Journal of Environmental Policy and Planning*
 Swilling M, Musango J and Wakeford J "Developmental States and Sustainability Transitions: Prospects of a Just Transition in South Africa" 2015 *Journal of Environmental Policy and Planning* 1-24
- Taysir and Pazarcik 2013 *Procedia Social and Behavioural Sciences*
 Taysir EA and Pazarcik Y "Business Ethics, Social Responsibility and Corporate Governance: Does the Strategic Management Field Really Care about These Concepts?" 2013 *Procedia Social and Behavioural Sciences* 294-303
- Terreblanche *Lost in Transformation*
 Terreblanche S *Lost in Transformation* (K M M Review Publishing Company Johannesburg 2012)
- Terreblanche *A Wealth Tax for South Africa*
 Terreblanche S *A Wealth Tax for South Africa* (2018)
<https://www.ekon.sun.ac.za/sampieterreblanche/wp-content/uploads/2018/04/SCIS-Wealth-Tax-for-SA-2018-SJT.pdf> accessed 16 May 2022
- Tissington *Targeting the Poor: An Analysis of Free Basic Services and Municipal Indigent Policies in South Africa*
 Tissington K *Targeting the Poor: An Analysis of Free Basic Services and Municipal Indigent Policies in South Africa* (2013) http://www.seri-sa.org/images/Targeting_the_Poor_Nov13.pdf accessed 20 June 2019
- Tregenna and Tsela 2012 *Development South Africa*
 Tregenna F and Tsela M "Inequality in South Africa: the Distribution of Income, Expenditure and Earning" 2012 *Development South Africa* 35-61
- Triegaardt 2009 *Social Work*
 Triegaardt J "Pursuing a Social Development Agenda in the Context of Globalisation: A South African Perspective" 2009 *Social Work* 1-10

- Trispiotis 2012 *Opticon*
 Trispiotis T "Socio-Economic Rights: Legally Enforceable or Just Aspirational?"
 2010 *Opticon* 1-10
- Turok 2016 *Local Economy*
 Turok I "South Africa's New Urban Agenda: Transformation or Compensation?"
 2016 *Local Economy* 9-2
- Tyler 1994 *Journal of Personality and Social Psychology*
 Tyler TR "Psychological Models of the Justice Motive: Antecedents of
 Distributive and Procedural Justice" 1994 *Journal of Personality and Social
 Psychology* 850-863
- Ulriksen 2012 *Development South Africa*
 Ulriksen M S "How Social Security Policies and Economic Transformation Affect
 Poverty and Inequality: Lessons for South Africa" 2012 *Development South
 Africa* 29(1) 3-18
- United Nations Commissioner for Human Rights *Principles and Guidelines for a
 Human Rights Approach to Poverty Reduction Strategies*
 United Nations Commissioner for Human Rights *Principles and Guidelines for
 a Human Rights Approach to Poverty Reduction Strategies* (2012)
<https://www.ohchr.org/documents/publications/povertystrategiesen.pdf>
 accessed 26 September 2021
- United Nations Development Programme *Human Development Report 2015*
 United Nations Development Programme *Human Development Report 2015*
 (2015)
http://hdr.undp.org/sites/default/files/2015_human_development_report.pdf
 f accessed 17 September 2021
- United Nations Department of Economic and Social Affairs *World Economic and
 Social Survey*
 United Nations Department of Economic and Social Affairs *World Economic
 and Social Survey* (2018)
https://www.un.org/development/desa/dpad/document_gem/wess-report/
 accessed 8 May 2022
- Uzogiwe 2019 *Journal of Global South Studies*
 Uzogiwe GN "Neocolonialism is Dead: Long Live Neocolonialism" 2019 *Journal
 of Global South Studies* 59-87
- Vaaltein and Schiller 2017 *Children and Youth Services Review*
 Vaaltein S and Schiller U "Addressing Multi-dimensional Child Poverty: The
 Experiences of Care-Givers in the Eastern Cape, South Africa" 2017 *Children
 and Youth Services Review* 227-236

- Vaisvila 2009 *Jurisprudence*
 Vaisvila A "Human Dignity and the Right to Dignity in terms of Legal Personalism (from Conception of Static Dignity to Conception of Dynamic Dignity) 2009 *Jurisprudence* 111-127
- Vallentyne 2007 *Social Philosophy and Policy*
 Vallentyne P "Libertarianism and the State" 2007 *Social Philosophy and Policy* 1-29
- Vally "The Political Economy of State Repression in South Africa"
 Vally S "The Political Economy of State Repression in South Africa" in Ndungu KS (ed) *The Right to Dissent: Freedom of Expression, Assembly and Demonstration* (Freedom of Expression Institute Johannesburg 2003)
- Van Parijs 2013 *Politics and Society*
 Van Parijs P "The Universal Basic Income: Why Utopian Thinking Matters, and How Sociologists Can Contribute to It" 2013 *Politics and Society* 171-182
- Verdonck 2015 *Human Rights and International Legal Discourse*
 Verdonck L "Human Rights in an Age of Economic Globalisation: The Case of the Mogalakwena Mine, South Africa" 2015 *Human Rights and International Legal Discourse* 34-65
- Vieira 2012 *Global Society*
 Vieira M "Rising States and Distributive Justice: Reforming International Order in the Twenty First Century" 2012 *Global Society* 311-329
- Visser 2001 *Urban Studies*
 Visser G "Social Justice, Integrated Development Planning and Post-apartheid Urban Reconstruction" 2001 *Urban Studies* 1673-1699
- Von Fintel, Zoch and Van der Berg 2017 *Child Indicators Research South*
 Von Fintel M, Zoch A and Van der Berg S "The Dynamics of Child Poverty in Africa between 2008 and 2012" 2017 *Child Indicators Research* 945-969
- Waldorf 2012 *Social and Legal Studies*
 Waldorf L "Anticipating the Past: Transitional Justice and Socio-Economic Wrongs" 2012 *Social and Legal Studies* 171-186
- Waldron J 2012 *Cambridge Law Journal*
 Waldron J "How Law Protects Dignity" 2012 *Cambridge Law Journal* 200-222
- Watson 1999 *Journal of Ethics*
 Watson G "Soft Libertarianism and Hard Compatibilism" 1999 *Journal of Ethics* 351-365

- Wesson 2004 *South African Journal on Human Rights*
 Wesson M "Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court" 2004 *South African Journal on Human Rights* 284-308
- Wight *Ethics in Economics: An Introduction to Moral Frameworks*
 Wight J *Ethics in Economics: An Introduction to Moral Frameworks* (Stanford University Press Stanford 2015)
- Williams 2005 *South African Journal on Human Rights*
 Williams LA "Issues and Challenges in Addressing Poverty and Legal Rights: A comparative United States/South African Analysis" 2005 *South African Journal on Human Rights* 436-472
- Wilson 2011 *South African Journal on Human Rights*
 Wilson S "Litigating Housing Rights in Johannesburg's Inner City: 2004-2008" 2011 *South African Journal on Human Rights* 127-151
- Wilson and Dugard 2011 *Stellenbosch Law Review*
 Wilson S and Dugard J "Taking Poverty Seriously: The South African Constitutional Court and Socio-economic Rights" 2011 *Stellenbosch Law Review* 664-682
- Wlokas, Westoby and Soal 2017 *Journal of Energy in Southern Africa*
 Wlokas H L, Westoby P and Soal S "Learning from the Literature on Community Development for the Implementation of Community Renewables in South Africa" 2017 *Journal of Energy in Southern Africa* 35-44
- Woolard *Overview of Poverty and Inequality in South Africa*
 Woolard I *Overview of Poverty and Inequality in South Africa* (2002)
https://sarpn.org/documents/e0000006/Poverty_Inequality_SA.pdf accessed 8 May 2022
- Woolman 2016 *New York Law School Law Review*
 Woolman S "Understanding South Africa's Aspirational Constitution as Scaffolding" 2016 *New York Law School Law Review* 283-295
- World Bank *Shock Waves: Managing the Impacts of Climate Change on Poverty*
 World Bank *Shock Waves: Managing the Impacts of Climate Change on Poverty* (2016)
<https://www.worldbank.org/en/topic/climatechange/brief/shock-waves-managing-the-impacts-of-climate-change-on-poverty-background-papers>
 accessed 25 September 2021
- World Bank *South Africa Economic Update*
 World Bank *South Africa Economic Update* (2018)
<https://thedocs.worldbank.org/en/doc/798731523331698204->

0010022018/original/SouthAfricaEconomicUpdateApril2018.pdf accessed 19 September 2021

World Bank Institute *Legislative Oversight and Budgeting*
World Bank Institute *Legislative Oversight and Budgeting* (2008)
<http://www.nsi-ins.ca/wp-content/uploads/2013/10/2013-African-Legislative-Effectiveness1.pdf> accessed 21 September 2021

Wright *et al* 2015 *Development Southern Africa*
Wright G *et al* "Social Assistance and Dignity: South African Women's Experiences of the Child Support Grant" 2015 *Development Southern Africa* 443-457

Wright *Legal Perspectives on the Prevention and Minimisation of Corruption for Sustainability in South African Municipalities*
Wright JS *Legal Perspectives on the Prevention and Minimisation of Corruption for Sustainability in South African Municipalities* (PhD Thesis, Northwest University 2021)

Zantsi 2020 *African Evaluation Journal*
Zantsi R "The Evaluative Role of Legislatures in Creating a Responsive Executive" 2020 *African Evaluation Journal* 1 – 6

Zhanje and Tala 2016 *Journal of Public Administration*
Zhanje S and Tala L "Is Economic Growth Instrumental in Addressing Socio-economic Challenges in the Post-Apartheid South Africa?" 2016 *Journal of Public Administration* 278-292

Zoch 2015 *Development Southern Africa*
Zoch A "Life Chances and Class: Estimating Inequality of Opportunity for Children and Adolescents in South Africa" 2015 *Development Southern Africa* 257-275

Case Law

Adonisi and others v MEC Transport and Public Works and others 2021 (4) All SA 69 (WCHC)

Baleni and Others v Minister of Mineral Resources and Others 2019 (2) SA 453 (GP)

Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening) 2017 (3) SA 335 (CC)

Camps Bay Ratepayers and Residents' Association and another v Harrison and another 2012 (11) BCLR 1143 (CC)

Chamber of Mines of South Africa v Minister of Mineral Resources and Others 2018 (4) SA 581 (GP)

City Council of Pretoria v Walker 1998 (3) BCLR 257 (CC)

City of Cape Town v Marcel Mouzakis Strümpher 2012 ZASCA 34

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd 2011 (2) SA 104 (CC)

Daniels v Scribante and Another 2017 (4) SA 341 (CC)

Dhlomo Dhlomo Community v The Minister of Agriculture and Land Affairs and others 2016 JOL 35741 (LCC)

Farai Mushoriwa v City of Harare 2014 ZWHHC 195

Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng 2016 ZACC 14

Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School 2014 (2) SA 228 (CC)

Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2007 (6) SA 4 (CC)

Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC)

Governing Body of the Juma Masjid Primary School & Others v Essay NO and Others 2011 (8) BCLR 761 (CC)

Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)

Human Rights Commission of South Africa v South African Broadcasting Corporation 2003 (1) BCLR 92 (BCCSA)

In re: Certification of the Constitution of the RSA 1996 1996 (10) BCLR 1253 CC

Joseph and others v City of Johannesburg and others 2010 (4) SA 55 (CC)

Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development 2004 (6) SA 505 (CC).

Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC)

MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School 2014 (6) SA 582 (CC).

Minister of Finance v Van Heerden 2004 (6) SA 121 (CC)

Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 72 (CC)

Mohlomi v Minister of Defence 1996 (12) BCLR 1559 (CC)

National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others 1999 (1) SA 6 (CC)

New Nation Movement NPC and Others v President of the Republic of South Africa and Others 2020 (6) SA 257 (CC)

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

Pheko and others v Ekurhuleni Metropolitan Municipality and others 2012 (2) SA 598 (CC)

President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC)

Rates Action Group v City of Cape Town 2004 12 BCLR 1328 (CC)

Road Accident Fund and another v Mdeyide 2011 1 BCLR 1 (CC)

South African Human Rights Commission v Msundizi Local Municipality and others 2021 (6) SA 500 (KZP)

Soobramoney v Minister of Health, Kwazulu-Natal 1998 (1) SA 765 (CC)

S v Makwanyane and another 1995 (3) SA 391 (CC)

S v Qamata 1997 1 All SA 657 (E)

S v Sithole 2004 JOL 12410 (T)

Transman (Pty) Ltd v Cosatu 2017 JOL 37191 (GSJ)

Trustees of the Time Being of the Groundwork Trust and another v Minister of Environmental Affairs and others 2022 ZAGPPHC 208

Unemployed Peoples Movement v Premier Eastern Cape 2020 ZAECGHC 47

V & A Waterfront (Pty) Ltd v Police Commissioner of the Western Cape and others 2004 (5) BCLR 538 (C)

Walkers Fruit Farms Association and Watch v etv 2004 JOL 13235 (BCCSA)

Legislation

Broad Based Black Economic Empowerment Act 53 of 2003

Constitution of the Republic of South Africa 1996

Employment Equity Act 55 of 1998

Gas Act 48 of 2001

Intergovernmental Relations Framework Act 13 of 2005

Labour Relations Act 66 of 1995

Land Reform: Provision of Land Assistance Act 126 of 1993

Local Government: Municipal Structures Act 117 of 1998

Local Government: Municipal Systems Act 32 of 2000

Mineral and Petroleum Resources Development Act 28 of 2000

National Development Agency Act 108 of 1998

National Education Policy Act 27 of 1996

National Energy Act 34 of 2008

National Environmental Management Act 107 of 1998

National Environmental Management: Air Quality Act 39 of 2004

National Environmental Management: Integrated Coastal Management Act 24 of 2008

National Environmental Management: Waste Act 59 of 2008

National Health Act 61 of 2003

National Minimum Wage Act 9 of 2018

Preferential Procurement Policy Framework Act 5 of 2000

Public Administration Management Act 11 of 2014

Restitution of Land Rights Act 22 of 1994

Social Assistance Act 13 of 2004

Social Security Agency Act 9 of 2004

South African Schools Act 84 of 1996

Spatial Planning and Land Use Management Act 16 of 2013

Government Publications (Normal Header)

Department of Education *National Norms and Standards for School Funding*
Department of Education *National Norms and Standards for School Funding*
GN1282 GG39473 14 December 2006

Department of Environmental Affairs *Municipal Waste Sector Plan in terms of the National Environmental Management: Waste Act*
Department of Environmental Affairs 2012 *Municipal Waste Sector Plan in terms of the National Environmental Management: Waste Act* GN 270 GG 35206 30 March 2012

Internet Sources

Brookings Institution 2021 <https://www.brookings.edu/blog/africa-in-focus/2021/02/19/how-have-the-washington-consensus-reforms-affected-economic-performance-in-sub-saharan-africa>

Brookings Institution 2021 <https://www.brookings.edu/blog/africa-in-focus/2021/02/19/how-have-the-washington-consensus-reforms-affected-economic-performance-in-sub-saharan-africa> accessed 24 September 2022

Business Tech <https://businesstech.co.za/news/government/549578/two-big-changes-planned-for-south-africa-in-2022-ramaphosa/>.

Business Tech *Two Big Changes Planned for South Africa in 2022* (2022) <https://businesstech.co.za/news/government/549578/two-big-changes-planned-for-south-africa-in-2022-ramaphosa/> accessed 20 April 2022

Cambridge Dictionary date unknown
<https://dictionary.cambridge.org/dictionary/english/transdisciplinary>

Cambridge Dictionary date unknown
<https://dictionary.cambridge.org/dictionary/english/transdisciplinary>
accessed 28 August 2021

Cambridge Dictionary date unknown
<https://dictionary.cambridge.org/dictionary/english/multidisciplinary>

Cambridge Dictionary date unknown
<https://dictionary.cambridge.org/dictionary/english/multidisciplinary>
accessed 21 April 2021

Cambridge Dictionary date unknown
<https://dictionary.cambridge.org/dictionary/english/redress>

Cambridge Dictionary date unknown
<https://dictionary.cambridge.org/dictionary/english/redress> accessed 12 February 2022

Corporate Finance Institute date unknown
<https://corporatefinanceinstitute.com/resources/knowledge/economics/expansionary-monetary-policy/>

Corporate Finance Institute date unknown
<https://corporatefinanceinstitute.com/resources/knowledge/economics/expansionary-monetary-policy/> accessed 5 February 2022

Daily Maverick <https://www.dailymaverick.co.za/article/2021-05-24-the-totalish-cost-of-the-guptas-state-capture-r49157323233-68/>

Daily Maverick 2021 *The Total(ish) Cost of the Gupta's State Capture* (2021) <https://www.dailymaverick.co.za/article/2021-05-24-the-totalish-cost-of-the-guptas-state-capture-r49157323233-68/> accessed 20 February 2022

Economics Online 2020
https://www.economicsonline.co.uk/global_economics/trade_protectionism.html/
2020

Economics Online 2020
https://www.economicsonline.co.uk/global_economics/trade_protectionism.html/ 2020 accessed 5 February 2022

Global Citizen date unknown <https://www.globalcitizen.org/en/content/ubuntu-south-africa-together-nelson-mandela/>
Global Citizen date unknown
<https://www.globalcitizen.org/en/content/ubuntu-south-africa-together-nelson-mandela/> accessed 5 April 2021

GNH Centre Bhutan date unknown <https://www.ghncentrebhutan.org/ghn-happiness-index>
GNH Centre Bhutan date unknown <https://www.ghncentrebhutan.org/ghn-happiness-index> accessed 8 October 2022

Independent Online date unknown <https://www.iol.co.za/the-star/sa-cant-afford-a-scheme-like-the-nhi-1980009>
Independent Online date unknown <https://www.iol.co.za/the-star/sa-cant-afford-a-scheme-like-the-nhi-1980009> accessed 27 July 2018

Internet Encyclopedia of Philosophy date unknown <https://iep.utm.edu/neocolon/>
Internet Encyclopedia of Philosophy date unknown
<https://iep.utm.edu/neocolon/> accessed 30 December 2020

Investopedia date unknown
<https://www.investopedia.com/terms/e/egalitarianism.asp>
Investopedia date unknown
<https://www.investopedia.com/terms/e/egalitarianism.asp> accessed 12 September 2021.

Investopedia date unknown <https://www.investopedia.com/terms/g/gini-index.asp>
Investopedia date unknown <https://www.investopedia.com/terms/g/gini-index.asp> accessed 7 May 2021

Investopedia date unknown <https://www.investopedia.com/terms/n/neoclassical-growth-theory.asp>
Investopedia date unknown
<https://www.investopedia.com/terms/n/neoclassical-growth-theory.asp> accessed 25 January 2021

Investopedia date unknown <https://www.investopedia.com/terms/g/gdp.asp>
Investopedia date unknown <https://www.investopedia.com/terms/g/gdp.asp> accessed 25 January 2021

Investopedia date unknown
<https://www.investopedia.com/terms/n/neoliberalism.asp>
Investopedia date unknown
<https://www.investopedia.com/terms/n/neoliberalism.asp> accessed 20
December 2020

Investopedia date unknown
<https://www.investopedia.com/terms/u/utilitarianism.asp>
Investopedia date unknown
<https://www.investopedia.com/terms/u/utilitarianism.asp> accessed 20
February 2021

Investopedia date unknown
<https://www.investopedia.com/terms/e/economicgrowth.asp>
Investopedia date unknown
<https://www.investopedia.com/terms/e/economicgrowth.asp>
accessed 27 December 2020

Investopedia date unknown <https://www.investopedia.com/terms/m/marginal-analysis.asp>
Investopedia date unknown
<https://www.investopedia.com/terms/m/marginal-analysis.asp> accessed 25
January 2021

Investopedia date unknown <https://www.investopedia.com/terms/b/brics.asp>
Investopedia date unknown <https://www.investopedia.com/terms/b/brics.asp>
accessed 11 September 2021

Investopedia date unknown <https://www.investopedia.com/terms/s/socialism.asp>
Investopedia date unknown
<https://www.investopedia.com/terms/s/socialism.asp> accessed 23 April 2021

Knowledge date unknown <https://knowledge.insead.edu/blog/insead-blog/the-wise-power-of-utopian-thinking-11471>
Knowledge date unknown <https://knowledge.insead.edu/blog/insead-blog/the-wise-power-of-utopian-thinking-11471> accessed 20 May 2021

Lexico date unknown <https://www.lexico.com/definition/developmentalism>
Lexico <https://www.lexico.com/definition/developmentalism> accessed 25 May
2021

Moneyweb date unknown <https://www.moneyweb.co.za/news/south-africa/expropriation-bill-set-to-face-constitutional-challenge>
Moneyweb date unknown <https://www.moneyweb.co.za/news/south-africa/expropriation-bill-set-to-face-constitutional-challenge> accessed 15
October 2022

Office of the Chief Justice date unknown
<https://www.judiciary.org.za/index.php/ocj/about-the-ocj/historical-background>
Office of the Chief Justice date unknown
<https://www.judiciary.org.za/index.php/ocj/about-the-ocj/historical-background> accessed 23 April 2022

Organisation for Economic Co-operation and Development date unknown
<https://www.oecd.org/development/development-finance-institutions-private-sector-development.htm>.

Organisation for Economic Co-operation and Development date unknown
<https://www.oecd.org/development/development-finance-institutions-private-sector-development.htm> accessed 5 February 2022

Oxford Bibliographies date unknown
<https://www.oxfordbibliographies.com/view/document/obo-9780190221911/obo-9780190221911-0069.xml>
Oxford Bibliographies date unknown
<https://www.oxfordbibliographies.com/view/document/obo-9780190221911/obo-9780190221911-0069.xml> accessed 19 February 2021

Oxford Dictionaries date unknown <https://en.oxforddictionaries.com/definition/neo->
Oxford Dictionaries date unknown
<https://en.oxforddictionaries.com/definition/neo->

South African History Online date unknown
<https://www.sahistory.org.za/archive/better-life-all> accessed
South African History Online date unknown
<https://www.sahistory.org.za/archive/better-life-all> accessed 6 May 2021

South African History Online date unknown
<https://www.sahistory.org.za/article/marikana-massacre-16-august-2012>
South African History Online date unknown
<https://www.sahistory.org.za/article/marikana-massacre-16-august-2012>
accessed 30 June 2020

Stanford Encyclopaedia of Philosophy date unknown
<https://plato.stanford.edu/entries/constitutionalism/>
Stanford Encyclopaedia of Philosophy date unknown
<https://plato.stanford.edu/entries/constitutionalism/> accessed 19 January 2022

Stanford Encyclopaedia of Philosophy date unknown
<https://plato.stanford.edu/entries/hermeneutics/>
Stanford Encyclopaedia of Philosophy date unknown
<https://plato.stanford.edu/entries/hermeneutics/> accessed 3 March 2021

Stanford Encyclopaedia of Philosophy date unknown
<https://plato.stanford.edu/entries/justice-distributive/>
Stanford Encyclopaedia of Philosophy date unknown
<https://plato.stanford.edu/entries/justice-distributive/> accessed 8 January 2022

Statistics South Africa date unknown <http://www.statssa.gov.za/?p=12930>
Statistics South Africa date unknown <http://www.statssa.gov.za/?p=12930>
accessed 20 May 2022

The Economist 2010 <https://www.economist.com/johnson/2010/10/08/the-isms-of-the-week-liberalism-and-libertarianism>
The Economist 2010 <https://www.economist.com/johnson/2010/10/08/the-isms-of-the-week-liberalism-and-libertarianism> accessed 13 February 2019

The Telegraph www.telegraph.co.uk/news/uknews/1482735/Poverty-like-apartheid-is-man-made-says-Mandela
The Telegraph www.telegraph.co.uk/news/uknews/1482735/Poverty-like-apartheid-is-man-made-says-Mandela accessed 17 July 2018

Thomson Reuters date unknown www.uk.practicallaw.thomsonreuters.com/5-200-3419
Thomson Reuters date unknown www.uk.practicallaw.thomsonreuters.com/5-200-3419 accessed 24 September 2022

Times Live 2017 <https://www.timeslive.co.za/ideas/2017-07-03-lets-be-honest-state-is-not-capable-of-brimplementing-nhi/>
Times Live 2017 <https://www.timeslive.co.za/ideas/2017-07-03-lets-be-honest-state-is-not-capable-of-brimplementing-nhi/> accessed 27 July 2018