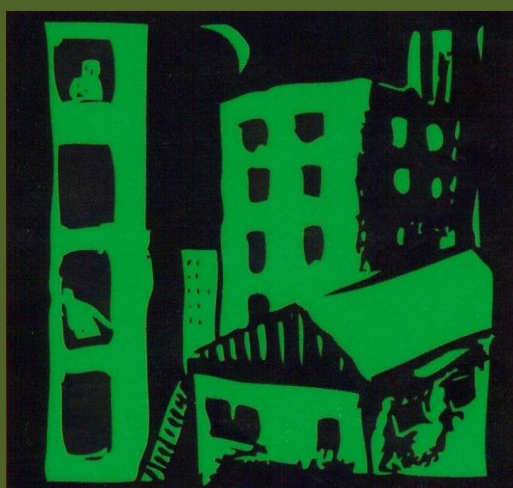


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In the face of judicial deference: Taking the “minimum core” of socio-economic rights to the local government sphere

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1 INTRODUCTION

The Constitution of the Republic of South Africa, 1996 (the Constitution) is transformative as it is committed to correcting the injustices of the country's past and to establishing a society based on democratic values, social justice and human rights.¹ The Bill of Rights in the Constitution guarantees a variety of human rights as one of the mechanisms for realising the transformative objectives of the Constitution.² These

¹ See the Preamble to the the Constitution.

² See, *inter alia*, Brand D “Introduction to socio-economic rights in the South African Constitution” in Brand D & Heyns C (eds) *Socio-economic rights in South Africa* (Pretoria: Pretoria University Law Press 2005) at 12-20.

guarantees include traditional civil liberties as well as justiciable socio-economic rights. The latter seek to secure a basic quality of life for all members of society and afford entitlements to the material conditions required for human welfare.³ They include the rights of access to housing,⁴ healthcare services (including reproductive health care), sufficient food and water, social security and social assistance,⁵ further education,⁶ land on an equitable basis,⁷ and an environment that is not harmful to health and wellbeing.⁸ Notably, in *Joseph & others v City of Johannesburg & others*⁹ the Constitutional Court relied on other constitutional and legislative provisions (the duties of the State) to also establish an implicit constitutional right to receive electricity.¹⁰ This methodology of the judiciary suggests that additional socio-economic rights that are not explicitly entrenched in the Constitution may be judicially construed, independent of other related more explicit constitutional rights and duties.¹¹

The Constitution requires that the government adopt reasonable legislation, policies and any other measures to realise the rights it grants in the Bill of Rights.¹² Every sphere of government and every organ of State is obliged to respect, protect, promote and fulfil these rights.¹³ Still, despite the constitutional commitment to social transformation, the explicit constitutional duties of the State and attempts by authorities to implement these rights to improve the lives of South Africans, progress is slow and millions continue to live under conditions of social hardship.¹⁴ This is evident, amongst other indicators, from the frequent recurrence of widespread protests over the lack or otherwise inadequate provision of social services at the grassroots level,¹⁵ with millions of South Africans being without access to basic amenities, such as, water, electricity and sanitation services. According to various government sources, this

³ See Brand (2005) at 3; Du Plessis A "South Africa's constitutional environmental right (generously) interpreted: What is in it for poverty?" (2011) 27(2) *South African Journal on Human Rights* 279 at 282.

⁴ See s 26 of the Constitution.

⁵ See s 27 of the Constitution.

⁶ See s 29(1)(b) of the Constitution.

⁷ See s 25(5) of the Constitution.

⁸ See s 24 of the Constitution. For a discussion of why the constitutional environmental right should be considered a socio-economic right, see: Du Plessis (2011) at 279-307; Fuo O "The transformative potential of the constitutional environmental right overlooked in *Grootboom*" 2013 34(1) *Obiter* 77 at 77-95.

⁹ 2010 (3) BCLR 212 (CC) (the *Joseph* case (2010)).

¹⁰ The *Joseph* case (2010) paras 34-40.

¹¹ On the right of access to sanitation, for example, see *Nokotyana & others v Ekurhuleni Metropolitan Municipality & others* 2010 (4) BCLR 312 (CC) at paras 46-49; Fuo O *Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* (unpublished LLD thesis, North-West University 2014) at 130.

¹² See ss 24(b), 25(5), 26(2), 27(2) and 29(b) of the Constitution.

¹³ See s 7(2) of the Constitution.

¹⁴ See *Government of the Republic of South Africa & others v Grootboom & others* 2000 (11) BCLR 1169 (CC) (the *Grootboom* case (2000)) at paras 1-2; South African Human Rights Commission *Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa* (Johannesburg: South African Human Rights Commission 2014).

¹⁵ Alexander P "Rebellion of the poor: South Africa's service delivery protests – a preliminary analysis" (2010) 37(123) *Review of African Political Economy* 25 at 40.

situation is exacerbated by the fact that South Africa remains one of the most unequal countries in the world.¹⁶

Some constitutional scholars have partly attributed the slow progress achieved in social transformation to the manner in which the Constitutional Court has thus far interpreted and enforced constitutional socio-economic rights.¹⁷ One of the main criticisms relates to the Constitutional Court's failure to embrace the minimum core concept.¹⁸ Briefly, the minimum core concept refers to the obligation on States to ensure that no significant number of individuals is deprived of the "minimum essential levels" of socio-economic rights.¹⁹ This obligation thus establishes a minimum core of socio-economic entitlement on the premise that a basic minimum level of subsistence is required for the enjoyment of a dignified human existence.

In its judgments, the Constitutional Court generally avoids having to elaborate on the normative minimum core content of constitutional socio-economic rights by immediately turning to an examination of the rights-based obligations imposed on government and scrutinising the reasonableness of the government's measures.²⁰ The Constitutional Court has continuously deferred the responsibility of defining the content of socio-economic rights to the legislative and executive branches of the government on the grounds *inter alia* of its self-imposed institutional incapacity, the need for institutional comity, and reverence for the doctrine of the separation of powers.²¹

¹⁶ National Planning Commission (NPC) *National Development Plan: Vision for 2030* (Pretoria: NPC 2011) at 3; NPC *Development Indicators* (Pretoria: NPC 2010) at 25; Gelb S "Macroeconomic policy and development: From crisis to crisis" in Freund B & Witt H (eds) *Development dilemmas in post-apartheid South Africa* (Scottsville: UKN Press 2010) at 33.

¹⁷ Authoritative sources on this subject cannot be exhausted here. However, see for example: Stewart L "Adjudicating socio-economic rights under a transformative constitution" (2010) 28 *Penn State International Law Review* 487 at 492-493; Bilchitz D "Is the Constitutional Court wasting away the rights of the poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*: Notes" (2010) 127(4) *South African Law Journal* 591 at 591-605; Davis D "The relationship between courts and the other arms of government in promoting and protecting socio-economic rights in South Africa: What about separation of powers?" (2012) 15(5) *Potchefstroom Electronic Law Journal* 1 at 1-14; Davis D "Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?" (2006) 22 *South African Journal on Human Rights* 301 at 301-327; Brand D "Judicial deference and democracy in socio-economic rights cases in South Africa" (2011) 3 *Stellenbosch Law Review* 614 at 614-638; Liebenberg S *Socio-economic rights: Adjudicating under a transformative constitution* (Cape Town: Juta 2010) at 131-227; Kapindu R "The desperate left in desperation: A court in retreat - *Nokotyana v Ekurhuleni Metropolitan Municipality* revisited" (2010) 3 *Constitutional Court Review* 201 at 201-222.

¹⁸ Stewart (2010) at 493; Bilchitz D "Giving socio-economic rights teeth: The minimum core and its importance" (2002) 119 *South African Law Journal* 484 at 484-501; Bilchitz D "Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence" (2003) 19 *South African Journal on Human Rights* 1 at 1-26. Generally, the Court has been intensely criticised for its refusal to give normative content to constitutional socio-economic rights. See Liebenberg (2010) at 131-223; Bilchitz (2002) at 485-501; Stewart (2010) at 492.

¹⁹ See African Commission on Human and People's Rights (ACHPR) *Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples Rights* (Banjul: ACHPR 2010) at 13.

²⁰ See Stewart (2010) at 493; Bilchitz (2003) at 1-11.

²¹ For a detailed discussion of this topic, see: Brand (2011) at 614-638; Brand D *Courts, socio-economic rights and transformative politics* (unpublished PhD thesis, University of Stellenbosch 2009).

In view of the Constitutional Court's reluctance to embrace, define and develop the minimum core content of socio-economic rights and its general deferent attitude towards the legislature, this article investigates the possibility that local government could afford a minimum core to some socio-economic rights through the exercise of its executive and legislative powers. The authors argue that South African municipalities are competent to afford a minimum core specifically to the rights of access to water, sanitation and electricity. This argument is sustained by a host of legally entrenched features of local government, including (a) their relatively autonomous powers and (b) the socio-economically related functions and sectors of competence of "developmental local government."²²

The article comprises four main parts. The first part briefly and in general situates the notion of the minimum core in the context of international and African regional human rights law. The second part reviews how the minimum core has thus far been dealt with in South Africa, with specific reference to the approaches adopted in the jurisprudence of the Constitutional Court. Part three briefly reviews the gist of the critique and the viewpoints expressed in the minimum core discourse in South Africa. Part four proposes by way of introduction an alternative approach to the adoption and actualisation of the minimum core concept by asking to what extent the execution of their executive and legislative powers put municipalities in a position to afford a minimum core to the rights of access to water, sanitation and electricity. Part four further considers the role of local government against the backdrop of the meaning and use of the principle of subsidiarity as implicitly entrenched in the Constitution.

2 THE MINIMUM CORE OBLIGATION IN THE CONTEXT OF INTERNATIONAL AND AFRICAN HUMAN RIGHTS LAW

The Constitution obliges courts and any other tribunals or fora that are confronted with the interpretation of the Bill of Rights to look to international law for guidance.²³ The wording of section 39(1) of the Constitution indicates that this injunction is, however, not limited to the courts but extends to other deliberative fora (parliament, provincial legislatures and municipal councils) and the executive arm of government, with all the spheres and branches of the government being jointly responsible for the implementation of the Bill of Rights.²⁴ To the extent that the concept of the minimum

²² For details of the notion of "developmental local government" see para 1 of "Section B: Developmental Local Government" in the Ministry for Provincial Affairs and Constitutional Development *White Paper on Local Government* (Pretoria: The Department 1998) (the *White Paper*); Du Plessis A *Fulfilment of South Africa's constitutional environmental right in the local government sphere* (unpublished LLD thesis, North-West University 2009) at 461-462; Fuo (2014) at 89-100.

²³ S 39(1) of the Constitution provides: "When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) *must consider international law*; and (c) may consider foreign law". Own emphasis. In the landmark case of *S v Makwanyane & another* 1995 (6) BCLR 665 (CC), the Constitutional Court interpreted s 39(1)(b) of the Constitution as requiring courts to use both binding and non-binding international law as guiding tools to interpret the Bill of Rights. See paras 35, 37 and 39.

²⁴ In South Africa, parliament, provincial legislatures and municipalities are deliberative bodies that exercise original legislative authority. See Fuo O "Constitutional basis for the enforcement of executive

core obligation has become part of international law,²⁵ it may be necessary, where appropriate, for the courts as well as the other two branches of government responsible for the interpretation and implementation of constitutional socio-economic rights in South Africa to consider and implement the “minimum core obligation”.

The concept of a minimum core for socio-economic rights owes its origin to the work of the United Nations (UN) Committee on Economic, Social and Cultural Rights²⁶ (the Committee on ESCR) as it seeks to establish a minimum legal content for such rights that must be realised by State Parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966).²⁷ In interpreting the nature of State Parties’ minimum core obligations under the ICESCR, the Committee on ESCR explains as follows:

On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining State parties’ reports, *the committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent on every State party.* Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would largely be deprived of its *raison d’être*. *By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.* Article 2(2) obliges each State party to take the necessary steps ‘to the maximum of its available resources’. *In order for a State party to be able to attribute its failure to meet at least its minimum core obligation to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.*²⁸

policies that give effect to socio-economic rights in South Africa” (2013) 16(4) *Potchefstroom Electronic Law Journal* 1 at 20-21; s 44(a) read with s 44 of the Constitution; s 43(b) read with s 104 of the Constitution; and s 43(c) read with s 156 of the Constitution. In the context of this discussion, this suggests that these deliberative bodies should also have regard to international and foreign law when they seek to give content to constitutional socio-economic rights.

²⁵ See Young K “The minimum core of economic and social rights: A concept in search of content” (2008) 33 *Yale Journal of International Law* 113 at 120-123; Rosa S & Dutschke M *Child rights at the core: A commentary on the use of international law in South African court cases on children’s socio-economic rights* (Cape Town: Children’s Institute of University of Cape Town 2006) at 12-13 and 26-28; Liebenberg (2010) at 106-107.

²⁶ This Committee is the body of 18 independent experts that was established under the UN Economic and Social Council (ECOSOC) Resolution 1985/17 of 28 May 1985 to monitor State parties’ implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by UN General Assembly resolution 2200A (XXI) of 16 December 1966. See Office of the High Commissioner for Human Rights “Committee on Economic, Social and Cultural Rights” (2014) at <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx> (accessed 31 March 2014).

²⁷ Young (2008) at 113; Mbazira C *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (Pretoria: PULP 2009) at 61. South Africa ratified the ICESCR on 16 January 2015 and it entered into force on 12 April 2015 See: South Africa’s Depository Notification that can be obtained at http://www.seri-sa.org/images/ICESR_CN_23_2015-Eng.pdf (accessed 05 August 2015). This means that the country is bound by the ICESCR.

²⁸ Committee on ESCR *General Comment No 3: The Nature of State Parties’ Obligations* (1990) at para 10. Own emphasis. The minimum core obligation is further confirmed in the *Maastricht Guidelines on Violation of Economic, Social and Cultural Rights* (1997) at paras 9-10.

Over the past decades the Committee on ESCR has further developed the minimum core obligation of some socio-economic rights guaranteed in the ICESCR in a number of its General Comments.²⁹ It has also firmly established that the minimum core obligation translates into a right to basic socio-economic entitlements that can be claimed by everyone in desperate need.³⁰

Closer to home, within the context of the African regional human rights system, the African Commission on Human and People's Rights (ACHPR)³¹ has embraced the notion of the minimum core obligation in its interpretation of State Parties' obligations in terms of the African Charter on Human and Peoples' Rights (the African Charter).³² According to the ACHPR, State Parties have an obligation at least to ensure the satisfaction of the minimum essential levels of each of the socio-economic rights guaranteed in the Charter.³³ This obligation requires State Parties to ensure that no significant number of individuals is deprived of the essential elements of a particular socio-economic right.³⁴ According to the ACHPR, the minimum core obligation exists, regardless of the availability of resources, and is non-derogable.³⁵ The ACHPR has stressed that where a State Party suffers from demonstrable resource constraints it remains under the obligation to implement the minimum essential levels of each right for vulnerable and disadvantaged groups by prioritising them in all legislative and policy interventions.³⁶ Vulnerable and disadvantaged groups in this context are people who have faced and/or continue to face significant obstacles to their enjoyment of socio-economic amenities.³⁷ The obligation to realise the minimum core content of socio-economic rights means that "the state should prioritise the realisation of the rights for the poorest and most vulnerable in society" while progressively seeking to realise the rights of all.³⁸ The "poorest segment of society" could in this context refer to those living in extreme social deprivation. The position taken by the ACHPR appears to create an almost absolute right for the poorest people in society to receive minimum essential services under the rights provided for in the African Charter.

²⁹ See for example: *General Comment No 4: The Right to Adequate Housing* (1991) at paras 8-10 and 13; *General Comment No 12: The Right to Adequate Food* (1999) at paras 8, 14 and 17; *General Comment No 14: The Right to the Highest Attainable Standard of Health* (2000) at paras 43-44; *General Comment No 15: The Right to Water* (2003) at para 37(a)-(i).

³⁰ See *General Comment 15: The Right to Water* (2003) at para 44; Wesson M "Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court" (2004) 20 *South African Journal on Human Rights* 284 at 298.

³¹ The African Commission on Human and Peoples Rights was established *inter alia* to help with the interpretation of the African Charter on Human and Peoples' Rights ACHPR - adopted in Nairobi, Kenya, on 27 June 1981 and entered into force on 21 October 1986.

³² See ACHPR (2010) at 13. The African (Banjul) Charter on Human and Peoples' Rights was adopted on 27 June 1981 and entered into force on 21 October 1986.

³³ ACHPR (2010) at 13.

³⁴ ACHPR (2010) at 13.

³⁵ ACHPR (2010) at 13.

³⁶ ACHPR (2010) at 13.

³⁷ ACHPR (2010) at 8-9. There is a long list of people classified as disadvantaged and vulnerable. See ACHPR (2010) at 8-9.

³⁸ ACHPR (2010) at 13.

From the above it can be discerned that internationally the Committee and the ACHPR acknowledge and place a high value on the minimum core obligation of socio-economic rights on the basis of the understanding that human beings should not have to attempt to live without the basic resources needed to maintain their survival.³⁹

3 THE MINIMUM CORE IN SOUTH AFRICAN SOCIO-ECONOMIC RIGHTS JURISPRUDENCE

The South African discourse on the minimum core traditionally focuses on its potential role in the judicial enforcement of constitutional socio-economic rights.⁴⁰ In other words, the discussion turns on why and how the Constitutional Court should define the minimum core when assessing compliance with the government's socio-economic rights-based duties.⁴¹ As will become evident below, despite the Court's awareness of international jurisprudence and the fact that the text of the Constitution does not rule out a minimum core approach,⁴² the Court has to date refused to define and develop the minimum core of constitutional socio-economic rights for a variety of reasons.⁴³ This position of the Court is likely to remain unchanged for the time being.⁴⁴

This part briefly reviews the existing academic literature and jurisprudence that deal with the minimum core in the South African context. Specific attention is paid to four main reasons that have thus far been advanced by the Court for its refusal to define and develop the minimum core. In order to be concise, the discussion does not venture into the facts of relevant cases or the arguments that were submitted to the Court. It focuses primarily on the reasons that have been advanced by the Court for refusing to define and develop the minimum core. The literature review is followed by a brief critique of the Court's position.

3.1 Arguments of the Constitutional Court for abstaining from defining the minimum core

In three socio-economic rights cases before the Constitutional Court,⁴⁵ it advanced "principled, textual, pragmatic and institutional objections" why it was not in a position

³⁹ Mbazira (2009) at 61.

⁴⁰ See Bilchitz (2003) at 1-26; Bilchitz (2002) at 484-501. See also Liebenberg (2010) at 146-198.

⁴¹ See Bilchitz (2003) at 1-26; Bilchitz (2002) at 484-501; Mbazira (2009) at 68-72; Liebenberg (2010) at 163-198.

⁴² Davis (2006) at 304; Wesson (2004) at 302.

⁴³ See the discussion in 3.1 below.

⁴⁴ In an almost prophetic tone, Davis, J argues: "A review of the relevant case law reveals that the jurisprudence relating to ss 26-28 has run its course. No amount of jurisprudential gnashing of analytical teeth or academic concern about the failure to follow comparative or international law will change an approach which is reluctant to give clear content to the rights contained in ss 26-28. If the Constitutional Court does define these rights with any precision, the burden placed upon the executive by the courts is significantly increased. This is precisely what the Court's approach to these sections is designed to prevent". See Davis (2006) at 304-305.

⁴⁵ *Grootboom* at paras 18-29; *Minister of Health & others v Treatment Action Campaign & others* (No 2) 2002 (10) BCLR 1033 (CC) (the *Treatment Action Campaign* case) at paras 26-33; and *Mazibuko & others v City of Johannesburg & others* 2010 (3) BCLR 239 (CC) (the *Mazibuko* case). Although the applicants in

to determine or prescribe the minimum core content of the socio-economic rights entrenched in the Constitution.⁴⁶ These objections are discussed below.

3.1.1 *Lack of access to information*

The Court observed that although the Committee on ESCR has established that the socio-economic rights guaranteed in the ICESCR impose a minimum core obligation, its General Comment “does not specify precisely what the minimum core is”.⁴⁷ The Court reasoned that the Committee was able to develop the minimum core concept based on extensive experience gained from examining reports on State compliance with the ICESCR’s obligations over many years.⁴⁸ The Court stressed that even if it were appropriate to have regard to the minimum core obligation to determine the reasonableness of the South African government’s measures in relation to applicable domestic constitutional rights, this could not be done unless sufficient information were available to the Court.⁴⁹ The Court indicated that in the absence of comparable types of information and evidence, it was more difficult to define the minimum core in the domestic context.⁵⁰

In the *Grootboom* case (2000) it seems as if the reluctance of the Court to define the minimum core was based on the lack of comparable information.⁵¹ However, in these cases the Court’s implicit acknowledgment of the idea of a minimum core is discernible from some of the statements it made. It stated, for example, that “[t]he minimum core might not be easy to define, but includes at least the minimum decencies of life consistent with human dignity.”⁵²

3.1.2 *Varying local conditions*

The Court expressed the view that it is not possible to determine the minimum threshold for the progressive realisation of socio-economic rights because the needs and opportunities for the enjoyment of a right may vary according to a wide range of factors.⁵³ The needs and opportunities would first have to be determined.⁵⁴ In the case of housing, needs and opportunities are typically dependent on factors, such as, income, unemployment, the availability of land, and poverty; differences between urban and rural communities; and the economic and social history and specific circumstances of a country.⁵⁵ The Court used this reasoning to underscore the type of complexities that must be taken into consideration to be able to delineate the minimum core.⁵⁶ In the

Mazibuko did not expressly phrase their arguments as involving a minimum core obligation, the Court reasoned that the arguments were similar. For details, see *Mazibuko* at paras 44-61.

⁴⁶ See *Grootboom* at paras 31 and 33; Liebenberg (2010) at 149-151.

⁴⁷ See *Grootboom* at para 30.

⁴⁸ See *Grootboom* at paras 31 and 32.

⁴⁹ See *Grootboom* at para 33.

⁵⁰ See *Grootboom* at paras 31 and 32.

⁵¹ See *Grootboom* at para 32; *Treatment Action Campaign* at para 28.

⁵² See *Treatment Action Campaign* at para 28.

⁵³ See *Grootboom* at para 32; *Mazibuko* at para 60.

⁵⁴ See *Grootboom* at para 32.

⁵⁵ See *Grootboom* at para 32.

⁵⁶ See *Grootboom* at para 32.

context of the right to housing, the Court noted that while some people might need only land to realise their right of access to adequate housing, others might need financial assistance or both land and financial assistance.⁵⁷ In view of this needs-based diversity and variability, the Court expressed its doubts as to whether, for example, the minimum core obligation should be defined generally or more narrowly with regards to specific groups of people.⁵⁸ The Court reasoned that fixing “a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context”, which was at the centre of the reasonableness enquiry.⁵⁹

3.1.3 *Textual formulation of the rights*

The Court reasoned that the textual formulation of the socio-economic rights in sections 26(1) and 27(1) of the Constitution did not create minimum core entitlements for everyone in need.⁶⁰ The content of the rights created by these provisions could be understood only in the context of the obligations imposed on the State by sections 26(2) and 27(2) of the Constitution.⁶¹ Based on a joint reading of these provisions, the Court argued that the Constitution does not oblige the State to provide everyone access to the minimum core immediately or on demand.⁶² All that was possible, and all that could be expected of the State, was that it should act reasonably to provide with access to the socio-economic rights in sections 26 and 27 on a progressive basis.⁶³ The Court noted that although evidence in a particular case might show that there is a minimum core of a particular service that should be taken into account in determining whether or not measures adopted by the State are reasonable, the socio-economic rights in the Constitution should not be construed as entitling everyone to demand that the minimum core of every right be provided to them.⁶⁴ Based on this construction, the Court observed that it would treat the minimum core as possibly being relevant to the reasonableness enquiry under sections 26(2) and 27(2), and not as an independent rights-based claim conferred on everyone by sections 26(1) and 27(1).⁶⁵

3.1.4 *Lack of institutional capacity*

The Court also declined to define the minimum core content of socio-economic rights on the ground that it lacked the institutional capacity to do so.⁶⁶ The Court held that the judiciary is not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum core of a socio-economic right should be.⁶⁷ This was said to be primarily the responsibility of the executive and legislative arms of government, which are best placed to investigate socio-economic

⁵⁷ See *Grootboom* at para 33.

⁵⁸ See *Grootboom* at para 33.

⁵⁹ See *Mazibuko* at para 60.

⁶⁰ See *Treatment Action Campaign* at paras 26-29; *Mazibuko* at paras 48-49 and 57.

⁶¹ See *Mazibuko* at paras 46-48.

⁶² See generally *Treatment Action Campaign* at paras 28, 35-37; *Mazibuko* at para 57.

⁶³ See *Treatment Action Campaign* at para 35.

⁶⁴ See *Treatment Action Campaign* at para 34.

⁶⁵ See *Treatment Action Campaign* at para 34.

⁶⁶ See *Treatment Action Campaign* at paras 36-39; *Grootboom* at para 33.

⁶⁷ See *Treatment Action Campaign* at para 37.

conditions and to determine what targets are achievable in relation to specific socio-economic rights.⁶⁸ In addition, the Court reasoned, as a matter of democratic accountability, it was desirable that the executive and the legislature should determine the content of socio-economic rights because it was their programmes and promises that were subjected to democratic choice.⁶⁹ The Court expressed the view that its role in respect of socio-economic rights was to ensure that the *legislative and other measures* adopted by government were reasonable and that democratic processes of translation were protected to ensure accountability, responsiveness and openness.⁷⁰ According to the Court, where the minimum core of a socio-economic right could in fact be determined, this ought to be the responsibility of the legislative and executive arms of government.

From the jurisprudence in the *Grootboom*, *Treatment Action Campaign* and *Mazibuko* cases it appears that although the Constitutional Court has to date refused to describe to what extent socio-economic rights impose minimum core obligations that must be realised immediately by the government, it has not blandly characterised this concept of international law as being irrelevant to South Africa. The Court acknowledges the existence of the concept and indicates that in some instances it may be willing to have regard to it when enforcing socio-economic rights. Still, in the cases to date where the minimum core argument was raised, the Constitutional Court took time to advance various reasons why it (and other courts) are not suitably positioned to determine the minimum core content/obligation of South Africa's constitutional socio-economic rights.

3.2 Critique of the Constitutional Court's position

The criticism by scholars and others of the Constitutional Court's position as explained above can be discussed according to the following most prominent points of critique.

3.2.1 Deferring responsibility for defining the minimum core to other branches of government

The Court's jurisprudence on the minimum core has been criticised largely on the basis of its methodology, which excessively defers the responsibility for defining the substantive/core content of socio-economic rights to the executive and legislative branches of the government.⁷¹ This deference manifests itself in the Court's application of the "reasonableness criteria" to determine if the executive and legislative measures of the government that are aimed to effect socio-economic rights pass constitutional muster.⁷² Critics argue that this trend in method is theoretically faulty and that it may have undesirable consequences for the realisation of socio-economic rights for those in

⁶⁸ See *Mazibuko* at para 61.

⁶⁹ See *Mazibuko* at para 61.

⁷⁰ See *Treatment Action Campaign* at para 36.

⁷¹ See Bilchitz (2002) at 484-501; Mbazira (2009) at 55-57 and 65; Davis (2010) at 95-97; Davis (2006) at 311-312; Lehmann K "In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core" (2006) 22(1) *American University International Law Review* 163 at 177-178.

⁷² The most detailed critique of the Court's approach to the enforcement of socio-economic rights is offered by Brand. See Brand (2009).

desperate need.⁷³ They argue that, in scrutinising the reasonableness of the government measures adopted to realise constitutional socio-economic rights, the Court should first establish and define a norm or general standard and establish the minimum obligations which such a standard imposes on the State.⁷⁴ The critics argue in this manner on the basis that the notion of a minimum core does not refer to the *means per se* by which a socio-economic right must be realised. Rather, it has to do with the expected norm, i.e. the standard of provision (e.g. of water services and housing) necessary to meet people's basic needs.⁷⁵ Accordingly, it has been maintained, the minimum core obligation imposes a higher burden of justification than "reasonableness" in cases of non-compliance by the State authorities.⁷⁶

3.2.2 *The minimum core does not require policy reformulation*

Critics further argue that defining the minimum core does not require that courts should rewrite policy or prescribe specific government measures, such as, the passing of specific legislation.⁷⁷ The courts should, however, set an invariable nationally applicable "standard" against which the government's compliance with its socio-economic rights obligations can be evaluated.⁷⁸ The argument is that without such a standard that applies for the whole of South Africa, the courts will not be able to establish, in the first place whether or not the measures taken by the government may be regarded as reasonable.⁷⁹ A "universal" standard will, however, provide a referent or benchmark against which the reasonableness of government measures can be examined and evaluated.⁸⁰ It also creates a means by which to inform the setting of government priorities with respect to those in society whose survival is threatened by extreme deprivation.⁸¹

3.2.3 *Complexities arising from the diversity of needs*

The Court is also criticised for refusing to define the minimum core because of the complexities presented by the diversity of needs.⁸² It has been argued that this is irrelevant in the determination of the minimum core, as all people are entitled to the same level of provision (in the case of housing).⁸³ The view has been raised that the differential needs of people should instead determine *the way* in which government will

⁷³ For details, see Bilchitz (2002) at 484-500; Bilchitz (2003) at 2.

⁷⁴ See Bilchitz (2003) at 5-13; Bilchitz (2002) at 487-488; Stewart (2010) at 494; Steinberg C "Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence" (2006) 23 *South African Law Journal* 264 at 267-268.

⁷⁵ Bilchitz (2002) at 488; Mbazira (2009) at 61-62.

⁷⁶ Bilchitz (2003) at 17-18; Wesson (2004) at 302.

⁷⁷ See Bilchitz (2002) at 492-493; Stewart (2010) at 494; Stewart L "Interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socio-economic rights of others" (2008) 24 *South African Journal on Human Rights* 472 at 482.

⁷⁸ See Bilchitz (2002) at 492-493; Stewart (2010) at 494; Stewart (2008) at 482.

⁷⁹ Stewart (2010) at 494; Stewart (2008) at 482; Bilchitz (2003) at 1-26.

⁸⁰ Stewart (2010) at 494.

⁸¹ Bilchitz (2003) at 15; Mbazira (2009) at 70-72.

⁸² Bilchitz (2002) at 489; Mbazira (2009) at 63-64.

⁸³ Bilchitz (2002) at 489.

have to assist them⁸⁴ - although individual needs may vary, the general and standard obligations imposed on government with regards to people's socio-economic needs should not vary.⁸⁵ What this argument means in effect is that what really differs (and needs to be addressed) in an unequal society is how far off from the minimum core (or the "universal" standard) each person lies, and therefore what must be provided by the State for each to alleviate his or her needs up to the set minimum level or standard.⁸⁶

4 IN NEED OF A DIFFERENT APPROACH TO THE MINIMUM CORE IN SOUTH AFRICA

While the criticism regarding the minimum core of socio-economic rights has to date mostly been directed at the reasoning and methodology of the judicial arm of government, a potential alternative seems to have been downplayed. The Constitution in essence makes it the primary responsibility of the *legislature* and *executive* (not the judiciary) to give concrete content to the socio-economic rights in the Bill of Rights.⁸⁷ Furthermore, although the notion of the minimum core obligation features prominently in international and African regional human rights jurisprudence, neither the Committee on ESCR nor the ACHPR expects to define and develop the minimum core to the exclusion of the courts in State Parties. In fact, the jurisprudence on the minimum core developed by the Committee on ESCR and the ACHPR guides State Parties in their implementation of socio-economic rights with specific reference to measures that transcend the function of the courts. In similar vein, Liebenberg argues:

*However, the meeting of minimum core obligations should enjoy prioritised consideration in social policy-making and in the judicial enforcement of these rights, due to the urgency of the interests they protect. Without the meeting of minimum essential needs which people require to survive, the State's obligation to progressively achieve the full realisation of the rights becomes meaningless.*⁸⁸

It may be discerned from the above that the minimum core obligation should also be prioritised in policy making processes (a function of the executive) that seek to give effect to socio-economic rights. Steinberg states in this regard that defining the minimum content of socio-economic rights should be recognised as a specialised policy making exercise that is not (necessarily) well-suited for the process of adjudication.⁸⁹ This strongly supports the view that it is the primary responsibility of the executive, and by extension also the legislature, to give content (including minimum core content) to socio-economic rights.⁹⁰

⁸⁴ Bilchitz (2002) at 489.

⁸⁵ Bilchitz (2002) at 489.

⁸⁶ Bilchitz (2002) at 489.

⁸⁷ Courts can also give content to constitutional socio-economic rights through interpretation and have a quasi-lawmaking role to translate these rights into enforceable legal claims. See Liebenberg (2010) at 40; Pieterse M "Legislative and executive translation of the right to have access to health care services" (2010) 14 *Law, Democracy and Development* 231 at 232; Brand (2005) at 12; Stewart (2010) at 506; Fuo "Constitutional basis" (2013) at 14.

⁸⁸ Liebenberg (2010) at 164 (own emphasis).

⁸⁹ Steinberg (2006) at 268-269.

⁹⁰ See Liebenberg (2010) at 40; Pieterse (2010) at 232; *Mazibuko* at para 67.

Although the authors share the view that the minimum core concept should be given substance outside of the judicial domain,⁹¹ the courts will always be critical in testing the content of socio-economic rights (and their translation into law and policy) against the principles, values and provisions of the Constitution. It is agreed with Liebenberg that the courts, for example, should give effect to government prioritisation inherent in the minimum core concept by demanding reasons for any failure on the part of the state to fulfil survival related needs as the top priority.⁹² This suggests that a link exists between the minimum core concept and the role and function of the judiciary, the legislature and the executive – a link which is usefully and in general illustrated by the reasoning of the German Federal Constitutional Court in the famous *Hartz IV Case* (2010) (*Hartz*).⁹³

The ruling of the German Federal Constitutional Court in *Hartz*⁹⁴ illustrates first of all how the minimum core concept can be domesticated in a national constitutional system. The case involved the Court's intense scrutiny of the legislature's calculation of welfare benefits, in line with the subsistence minimum needed for the purpose of respecting and protecting the inviolable right to human dignity guaranteed by Article 1(1) of Germany's Basic Law (the Basic Law). Although requirements for a subsistence minimum in German welfare laws was not directly inspired by the minimum core obligation as developed by the UN Committee on ESCR,⁹⁵ the decision points to the fact that countries can adopt context specific minimum legal content for welfare rights. In *Hartz*, the Court did not, however, make any reference to international law in deciding that the amount of legislated social assistance benefits in question was insufficient to meet the minimum subsistence requirements. It relied on Articles 1(1) and 20(1) of the Basic Law – respectively, guaranteeing the right to human dignity as an inviolable right, and entrenching the social state principle – to construct a constitutional right to guarantee, by statute, a subsistence minimum.⁹⁶ The Court declared certain provisions of the existing social welfare legislation to be incompatible with the fundamental right

⁹¹ Young (2008) at 125.

⁹² Liebenberg (2010) at 164.

⁹³ See Davis (2012) at 11. The full version of the *Hartz IV* judgment, written in English, can be accessed at http://www.bverfg.de/entscheidungen/lis20100209_1bvl000109en.html (accessed 31 March 2014). See also Williams L "The role of courts in the quantitative implementation of social and economic rights: A comparative study" (2010) 2 *Constitutional Court Review* 141; Heinig H "The political and the basic law's *sozialstaat* principle: Perspectives from constitutional law and theory" (2011) 12(11) *German Law Journal* 1887-1900; Schwebel C "Welfare rights in Canadian and German constitutional law" (2011) 12(11) *German Law Journal* 1901; Bittner C "Casenote – Human dignity as a matter of legislative consistency in an ideal world: The fundamental right to guarantee a subsistence minimum in the German Federal Constitutional Court's judgment of 9 February 2010" (2011) 12(11) *German Law Journal* 1941-1960; Stefanie E "Casenote – The fundamental right to the guarantee of a subsistence minimum in the *Hartz IV Case* of the German Federal Constitutional Court" (2011) 12(11) *German Law Journal* 1961. On how the Constitutional Court could adopt stricter methods of justification, also see Pieterse M "Coming to terms with judicial enforcement of socio-economic rights" (2004) 20 *South African Journal on Human Rights* 383 at 395-396, and 409-416.

⁹⁴ For a detailed background, see *Hartz IV Case* (2010) at paras 1-106. See also Williams (2010) at 151-156.

⁹⁵ For a discussion on German constitutional developments on this topic, see: Bittner (2011) at 1941-1944.

⁹⁶ See *Hartz* at paras 132-211; Bittner (2011) at 1941-1942.

to a subsistence minimum that was in line with human dignity and the principle of a social welfare state.⁹⁷ However, the Court ordered that the unconstitutional provisions stay in force until the legislature had recalibrated and adopted new provisions that were constitutionally compliant.⁹⁸ Notably, the Court refrained from determining specific benefit amounts (that is a minimum content) on the basis of its own assessments and evaluations on the ground that it was not empowered to do so.⁹⁹

A few points of the German Constitutional Court's jurisprudence must be stressed for current purposes. First, although a constitutional right to a subsistence minimum was established, the Court indicated that the legislature enjoys a certain degree of latitude on a) how the right to that minimum can be given concrete form and b) regularly updating the law to ensure that benefits are in line with existing conditions of life.¹⁰⁰ *Hartz* suggests that the scope of social benefits and the types of needs of people must be informed by society's views of what is necessary for an existence that is in line with human dignity, the concrete circumstances of the person in need of assistance, and the economic and technical circumstances.¹⁰¹ The legislature must assess all expenditure that is necessary for one's existence in a way that is logical, realistic and transparent, and through expedient proceedings according to actual needs.¹⁰² To be constitutionally compliant, the calibration of minimum subsistence benefits must be based on sound empirical evidence and not random estimates.¹⁰³ This makes it possible for the legislature to take prevailing circumstances into consideration.

Notably, the *Hartz* judgment also illustrates that although the general obligation (i.e. the standard norm) arising from socio-economic rights (in terms of negative and positive duties) does not vary, the minimum substantive content of quantifiable socio-economic rights may differ from one context to another, amongst age groups and geographic regions. In addition, it shows that even where the minimum core obligation is expressly grounded in the Basic Law, the executive and legislative branches of government have the primary responsibility to calibrate the minimum or standard – albeit still in line with the constitutional requirements.

In view of the German example it is possible to question how, in the three-sphere South African government with its executive, legislative and judicial branches, the minimum core concept may best be adopted, developed and applied. Given the pervasive trend of deference in the judicial branch of government we propose that an increased focus be directed on the role and place of the executive and legislative branches of government. Because of the nature of many of the socio-economic rights in the Bill of Rights, we further propose that the role and place of the executive and legislative powers in the local government sphere specifically be explored. Several of

⁹⁷ See *Hartz* at paras 133-211.

⁹⁸ See *Hartz* at para 212.

⁹⁹ See *Hartz* at para 212.

¹⁰⁰ See *Hartz* at para 133.

¹⁰¹ See *Hartz* at para 138.

¹⁰² See *Hartz* at paras 139-144 and 162.

¹⁰³ See *Hartz* at paras 138 and 162-198.

the constitutional socio-economic rights are directly related to the services to be rendered by municipalities in South Africa.

The focus on municipalities (approximately 270 presently exist in South Africa), however, brings into question the “universal” standard element of the minimum core referred to earlier. Some writers have argued in this regard that the minimum core should be understood as a “relative core minimum”, which would still render it possible for a sub-national level standard (a minimum core) to be developed (for example, in provinces or federal states) that (a) meets or exceeds any applicable national standards and (b) takes into account the prevalent circumstances.¹⁰⁴ Young agrees that it is possible to develop different standards within countries for different sub-units of government, such as, regions, provinces, localities (cities) and authorities in rural areas.¹⁰⁵ The development of different (tailor-made) minimum standards for different sub-units within a State would arguably enable government to address needs diversity as it occurs in different parts of the country. Young further submits that there is no inherent contradiction where the State adopts different *measures* in different contexts and areas so as to meet more centrally set minimum core requirements.¹⁰⁶ This suggests that (a) the details of what constitutes the minimum core obligation of especially quantitative socio-economic rights (such as water and electricity) may differ across a country depending on area-specific conditions in sub-national geographic or administrative areas so long as it meets national/centrally set minimum standards,¹⁰⁷ and (b) different measures may be adopted in different sub-national geographic or administrative areas to meet national/centrally set minimum standards. Young submits that lessons gathered from sub-national levels can be used to inform national minimum standards over time. Based on such developments, national government can codify/legislate minimum standards for sub-national governments generally.¹⁰⁸ Allowing sub-national units to develop minimum standards within their geographic and administrative boundaries provides a valuable opportunity for information gathering and learning. This is compatible with the flexibility and tailoring needed for a social service provision.¹⁰⁹

The minimum core concept perceived through the lens of local government and the executive and legislative branches as opposed to the judicial branch of government makes for a particularly democratic approach to the realisation of socio-economic rights. A more diversified approach of this kind is increasingly being favoured by South African constitutional law scholars.¹¹⁰ Liebenberg and others hold, for example, that democracy and constitutional rights mutually support one another and create the space

¹⁰⁴ See Mbazira (2009) at 63-64; Young (2008) at 125.

¹⁰⁵ See Young (2008) at 165-167.

¹⁰⁶ See Young (2008) at 165-167.

¹⁰⁷ See Young (2008) at 167.

¹⁰⁸ See Young (2008) at 167.

¹⁰⁹ See Young (2008) at 167.

¹¹⁰ See Brand (2011) at 622-625; Liebenberg S “Engaging the paradoxes of the universal and the particular in human rights adjudication: The possibilities and pitfalls of meaningful engagement” (2012) 12 *African Human Rights Law Journal* 1 at 7-10; Stewart L “The politics of poverty: Do socio-economic rights become real only when enforced by courts?” (2011) IV *Diritto Pubblico Comparato ed Europeo* 1510 at 1515 and 1525-1526.

for debate and continuous revision or reformulation of the content of socio-economic rights.¹¹¹ A more democratic approach enables communities to participate in a meaningful fashion in the socio-economic related decisions that affect them and the larger society of which they are a part.¹¹² Such participation further enables government and communities a) to better understand, for example, each other's needs, concerns and limitations as created by resource availability, prioritisation in government, work and living environments, and b) to make mutually acceptable trade-offs¹¹³ in defining and developing a minimum content for socio-economic rights. However, especially as far as it concerns quantifiable socio-economic interests, the application of this alternative and more democratic approach may still depend, as was held in *Hartz*, on area specific empirical data, statistics and other relevant scientifically verified information

5 THE POTENTIAL ROLE OF LOCAL GOVERNMENT

The understanding of the use of the minimum core concept in the legislative and executive branches of government remains at most embryonic, and so does the preliminary hypothesis that the legislative and executive authority of *local government* position municipalities appropriately to afford a minimum core to some socio-economic rights. This premise is sustained, however, by a host of relevant, legally entrenched features of local government, including a) municipalities' relatively autonomous and extensive post-1996 legislative and executive authority and b) the substantive areas of competence of developmental local government, some of which are at the heart of some socio-economic rights. Our interest in local government *vis-à-vis* the provincial and national legislatures and executives is triggered by three meaningful contextual factors: (a) the principle of subsidiarity as applicable in South Africa suggests that a minimum core for socio-economic rights may best be established in the local sphere; (b) the fact that since 1996 all municipalities in South Africa have a developmental character and extended functions that are inextricably linked to the delivery of socio-economic goods, such as, water, sanitation and electricity; and (c) the fact that only in the local government sphere is provision made for participatory strategic level planning for the socio-economic development of local communities.

5.1 The legislative and executive authority of local government

Unlike the situation in many other countries, local government in South Africa is constitutionally recognised as an autonomous sphere of government with significant institutional integrity.¹¹⁴ Municipalities are not creatures of statute and function with substantial autonomy and power within a three-sphere co-operative government

¹¹¹ Liebenberg (2012) at 28; Brand (2009) at 18; Stewart (2011) at 1525-1526.

¹¹² Brand (2009) at 30; Brand (2011) at 622-625.

¹¹³ Liebenberg (2012) at 9-10 and 25.

¹¹⁴ De Visser J *Developmental local government: A case study of South Africa* (Antwerpen: Intersentia 2005) at 114. See Christmas A & De Visser J "Bridging the gap between theory and practice: Reviewing the functions and powers of local government in South Africa" (2009) 2 *Commonwealth Journal of Local Governance* 107 at 111.

system.¹¹⁵ The original legislative and executive powers of local government span a range of constitutionally listed areas of competence while municipalities may also be assigned additional powers and functions in line with enabling provisions in the Constitution. This means that since 1996 local government has officially been removed as a “mere competence or functional area” of another level of government and has become a sphere of government in its own right.¹¹⁶ This position has been judicially confirmed in a number of cases,¹¹⁷ while the Constitution describes the legislative and executive authority of local government in sections 156(1) and (2) as follows:

(1) A municipality has executive authority in respect of, and has the right to administer (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and (b) any other matter assigned to it by national or provincial legislation. (2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

The schedules referred to list, for example, the provision of electricity, air quality management, municipal health services, the provision of water and sanitation services, solid waste management, and the provision of street lighting as areas that fall within the legislative and executive authority of local government.

The Local Government: Municipal Systems Act 32 of 2000 (Systems Act)¹¹⁸ in section 11(3) extends the understanding of the constitutionally entrenched authority of local government by stating that a municipality executes its legislative and executive powers via its Council by means *inter alia* of developing and adopting policies, plans, strategies and programmes, including setting targets for delivery; administering and regulating its internal affairs and the local government affairs of the local community; implementing applicable national and provincial legislation and its by-laws; providing municipal services to the local community, or appointing appropriate service providers; preparing, approving and implementing its budgets; monitoring the impact and effectiveness of any services, policies, programmes or plans; and establishing and implementing performance management systems. It follows that the execution of local government’s legislative and executive powers plays out in various ways and with respect to a number of listed, substantive areas of regulation.

¹¹⁵ In para 36 of *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council & others* 1998 (12) BCLR 1458 (CC) (the *Fedsure Life Assurance* case), the Court described the then “new” constitutional powers of local government within the context of the Interim Constitution (1993) as follows: “The constitutional status of local government is thus materially different to what it was when parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures. The institution of elected local government could then have been terminated at any time and its functions entrusted to administrators appointed by central or provincial governments. That is no longer the position. Local governments have a place in the constitutional order ... and are entitled to certain powers, including the power to make by-laws and impose rates.”

¹¹⁶ De Visser (2005) at 65.

¹¹⁷ See for example: *Fedsure Life Assurance* at paras 35-38; *City of Cape Town & others v Robertson & others* 2005 (2) SA 323 (CC) at paras 55-60.

¹¹⁸ S 11(3) of the Systems Act.

Regardless of the form it takes, the execution of these powers must consistently be informed by the constitutional objectives of local government,¹¹⁹ which include to ensure the provision of services to communities in a sustainable manner; to promote social and economic development; to promote a safe and healthy environment; and to encourage community involvement. From this it may be discerned that local government has the constitutionally entrenched authority to develop, adopt and implement various local governance instruments and processes – instruments and processes that must be put to use to operationalise its legal duties. This includes, for example, the setting of minimum performance targets and priorities to meet the municipal duties that arise from socio-economic rights.

5.2 Institutional subsidiarity and the absorption of socio-economic rights in “developmental” local government

As indicated earlier, the entire government is by virtue of section 7(2) of the Constitution responsible for the realisation of the socio-economic rights in the Bill of Rights. It is only in the constitutional “objects” of local government referred to above, however, that supplementary mention is made of social and economic development. The Constitution further created “developmental local government” through its framing of the duties of local government as “developmental” duties.¹²⁰ These are (a) to structure and manage a municipality’s administration, and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community and (b) to participate in national and provincial development programmes.

The notion of developmental local government is further unpacked in national local government law and policy. Notably, the *White Paper on Local Government* of 1998 (the White Paper) defines developmental local government in an extended definition that emphasises “public participation”, “the meeting of basic social, economic and material needs”, the “improvement of quality of life”, the “protection of human rights”, and the protection of “members and groups within our communities that are most often marginalised or excluded, such as women, disabled people and very poor people.”¹²¹ This description of developmental local government is permeated by socio-economic rights jargon and suggests a close conceptual link between the goods intended to be provided and protected in terms of socio-economic rights and the constitutional ambition with, and purpose of, local government.

¹¹⁹ S 152 of the Constitution.

¹²⁰ S 153 of the Constitution.

¹²¹ The exact definition is provided in “Characteristics of developmental local government”, “Section B: Developmental Local Government” in the *White Paper*: “Developmental local government is local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives...In the future, developmental local government must play a central role in representing our communities, protecting our human rights and meeting our basic needs. It must focus its efforts and resources on improving the quality of life of our communities, especially those members and groups within our communities that are most often marginalised or excluded, such as women, disabled people and very poor people.”

Arguably the most prominent link between developmental local government and the realisation of socio-economic rights is to be found in the Systems Act. The Act provides that municipal councils, within their financial and administrative capacity and having regard to practical considerations, have the duty to “contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution”¹²² and that “a municipality must in the exercise of its executive and legislative authority respect the rights of citizens and those of other persons protected by the Bill of Rights.”¹²³

The principle of subsidiarity offers an additional point of convergence between the substantive areas of developmental local government competence and the socio-economic rights in the Bill of Rights. This principle applies in fields, such as, political science, management and government, and is an organising principle of decentralisation which states that a societal matter ought to be handled by the smallest, lowest, or least centralised authority capable of addressing that matter affectively.¹²⁴ In governance and politics the principle ties in with the institutional design of governments and the notions of federalism, pluralism and co-responsibility, as subsidiarity suggests that a central authority (eg national government) should have a subsidiarity function *vis-à-vis* lower level authorities, performing only those tasks which cannot be performed effectively at a more immediate or local level.¹²⁵ In South Africa the principle of subsidiarity is hidden in the phraseology of section 156(4) of the Constitution:

The national government and provincial governments *must* assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if - (a) that matter would most *effectively* be administered locally; and (b) the municipality has the *capacity* to administer it.¹²⁶

It may be gleaned from this that in principle every socio-economic right matter that does not ordinarily fall within the domain of local government¹²⁷ but which can best be “administered” by municipalities must be assigned to local government for it to be

¹²² S 4(2)(j) of the Systems Act.

¹²³ S 4(3) of the Systems Act. In line with s 7(2) and the provisions on co-operative government in the Constitution, the positive duty to “progressively realise” the socio-economic rights referred to has not, however, been framed to exclusively apply to local government. Naturally, the negative duty “to respect” is similarly not framed as an exclusive local government duty - the language of the Systems Act is such that every municipality is legally compelled to execute its legislative and executive authority as described earlier, in a way that will not negate or compromise any socio-economic right.

¹²⁴ See Vischer R “Subsidiarity as a principle of governance: Beyond devolution” (2001) 35(1) *Indiana Law Review* 103 at 103-142; Follesdal A “Subsidiarity, democracy, and human rights in the constitutional treaty of Europe” (2006) 37(1) *Journal of Social Philosophy* 61 at 64, for example.

¹²⁵ See Vischer (2001) at 103; Follesdal (2006) at 64.

¹²⁶ Own emphasis. See also De Visser J “Institutional Subsidiarity in the South African Constitution” (2010) 1 *Stellenbosch Law Review* 90.

¹²⁷ In other words, all matters that are not listed in relation to local government in Schedules 4B and 5B of the Constitution. Such matters, for example, include housing, welfare and education. Various socio-economic matters are already matters of local government through their original inclusion in Schedules 4B and 5B.

“administered”¹²⁸ locally and as close to the local community as possible. However, in terms of section 156(4) two pronounced preconditions apply, namely, that municipalities must be able to do so “effectively” and that they should have the necessary “capacity”.

Drawing on the general gist of the principle of subsidiarity and against the background of the focus of this article, two observations may be made: (a) in theory, developmental local government is in a favourable position to determine the minimum core of socio-economic rights pertaining to a range of substantive areas within the competence of local government; and (b) elected municipal councils bestowed with the legislative and executive authority of the municipality ought to be the sub-national government structures of choice for the determination of a minimum core for some socio-economic rights. However, regardless of the possibility and promise encapsulated in (a), we are of the view that too many variables are at play if local government were to take on responsibility for sectors that are not listed in the Constitution as an original function of local government. For this reason we argue in favour of the development of a minimum core in the local sphere by elected municipal councils, albeit only in relation to the socio-economic rights that mirror the original and constitutionally entrenched areas of competence of local government - ie the rights of access to sufficient water, sanitation and electricity.

The question remains how the municipal determination of a minimum core content for the said socio-economic rights may actually be expected to work. How exactly is a minimum core to be developed by municipalities in the face of diversity, complexity, and well-known local government problems, such as, a lack of adequate human and financial resources, political turmoil, corruption, damning audit reports, and severe service delivery deficiencies in many parts of the country?

5.3 Instrumentation available for the “minimum core” in local government

By way of introduction we contend that a minimum core developed in the local sphere should be developed and engineered by means of the legal instrumentation available in local government and ancillary legislation. However, considering the localised diversity implied and exemplified by the principle of subsidiarity, it is important to note that it is not for any one municipality to read an enforceable minimum core content into any socio-economic right *per se*. Guided by national and provincial legislation, policy and accompanying norms and standards, every municipality must establish a local minimum core threshold for *the quantity and quality of the basic socio-economic goods and services that it is constitutionally (in terms of entrenched rights) obliged to provide, especially to people living in poverty*. Where resources allow, the locally set minimum threshold for water services, for example, *must meet*, and where possible *exceed*, the expectations or minimum thresholds set by national or provincial authorities. It is to be expected that all thresholds set in the national, provincial and local spheres should be directed at progressive improvement and should oppose any form or degree of regression. As

¹²⁸ While it is not abundantly clear what “administration” refers to in this context, it may be assumed that it refers to the overall governance of a specific matter.

submitted in part 4 above, lessons gathered in developing minimum core standards in different municipalities across the country could potentially be used to develop and codify national minimum core standards.

We argue that of the municipal governance instrumentation provided in the Systems Act and other legislation at least five instruments have significant potential in the determination, pursuit, actualisation and monitoring of a local minimum core threshold, namely, (a) public participation in local government; (b) municipal integrated development planning; (c) municipal budgeting; (d) performance management; and (e) municipal by-laws and policies.

5.3.1 *Public participation in local government*

One of the constitutional and statutory objectives of local government in South Africa is to encourage the involvement of communities and community organisations in the matters of local government.¹²⁹ This objective is complemented by Chapter 10 of the Constitution, which determines that the South African public administration system must respond to the needs of people, while the public must be encouraged to participate in law- and policy-making processes as well as the planning functions of government. These provisions complement the call for a more democratic approach to the realisation of socio-economic rights referred to earlier - municipalities will have to engage with communities in order to arrive at the basic (minimum) quality and quantity of social goods and services to be provided for. Municipal councils must, for example, consult the local community about the level, quality, range and impact of municipal services and related options for service delivery.¹³⁰

A municipality must also allow for and enable public or community participation¹³¹ through a) its political structures (such as the municipal council), b) its municipal committees (to which the general public has access), c) the structures and processes of the municipal administration mandated to receive petitions and complaints, and d) forums for community participation in respect of public inputs into and review of the municipality's integrated development plan (IDP), performance management system (PMS), budget, and the development of its by-laws. The Municipal Planning and Performance Management Regulations¹³² provide for the establishment of an IDP forum where no other municipality-wide structures for community participation exist. The purpose of such an IDP forum is to facilitate the legally required community participation in the IDP process. Municipal committees, in general (including the council's portfolio committees) and ward committees, in particular, are additional structural instruments to ensure that participatory local government is established and sustained.¹³³ Municipalities may, for example, establish advisory committees to support

¹²⁹ S 152(1)(e) of the Constitution.

¹³⁰ S 4(2)(e) of the Systems Act.

¹³¹ See ss 17, 18, 19 and 20 of the Systems Act; Fuo (2014) at 229-245.

¹³² Regulation 15 of the Local Government: Municipal Planning and Performance Management Regulations (2001) GN R796 in GG 22605 of 24 August 2001.

¹³³ Institute for a Democratic Alternative for South Africa (IDASA) *Ward Committee Resource Book* (Pretoria: IDASA 2005) at 10.

the effective and efficient performance of any municipal functions or powers (for example, water and sanitation related functions and powers). Such committees may consist of members of council and advisory members who are not members of council, such as locally based experts in law, science or development studies.¹³⁴ Ward committees must enhance participatory democracy in local government,¹³⁵ while they are also responsible for making recommendations on any matter (including socio-economic rights matters or concerns) affecting a ward. Recommendations can also be made to the ward councillor or through the said councillor to the municipal council.¹³⁶ Provision is made in several environmental, water and other sector laws for additional participative structures. However, not all of these structures are required by legislation that has an exclusive local government application.

5.3.2 Provision for socio-economic needs in integrated development planning

Every municipality in South Africa is legally obliged to do operational and development oriented planning.¹³⁷ Integrated development planning is required: (a) to achieve local government objectives; (b) to give effect to the developmental duties of municipalities; and (c) for municipalities to contribute, in association with other organs of State, to the progressive realisation of constitutional rights.¹³⁸ The output of integrated development planning is an IDP.¹³⁹ Nothing may be more important for a local minimum core for some socio-economic rights than periodical strategic planning in local government, which directs the internal governance of municipalities, as every municipality must “conduct its affairs in a manner that is consistent with its integrated development plan.”¹⁴⁰ The appeal of integrated development planning as an instrument for the actualisation of a minimum core for some socio-economic rights is further found in the fact that it is subject to provincial monitoring and support, and that the plan must be annually reviewed.¹⁴¹

However, the Systems Act is largely silent about the socio-economic rights interface of IDPs. The linkage between integrated development planning and socio-economic development is subtly made in terms of a range of national sector laws. Some environmental sector laws require that municipalities must, in addition to the sector plans mentioned in the Systems Act, generate specific sector management plans as supplementary parts of their IDPs.¹⁴² Examples are integrated spatial development

¹³⁴ See s 79 of the Local Government: Municipal Structures Act 117 of 1998 (Structures Act).

¹³⁵ S 72 of the Structures Act.

¹³⁶ S 74 of the Structures Act. See also IDASA (2005); South African Local Government Association (SALGA) “Code of Conduct for Ward Committee Members” (date unknown) at <http://www.salga.org.za/pages/knowledge--hub/Guidelines-for-municipalities> (accessed 05 August 2014).

¹³⁷ Fuo (2014) at 343-386.

¹³⁸ S 23(1) of the Systems Act.

¹³⁹ The Systems Act provides in detail for the process, drafting, content, review and status of IDPs.

¹⁴⁰ S 36 of the Systems Act.

¹⁴¹ See ss 31 and 34 of the Systems Act.

¹⁴² Fuo (2014) at 355-357 outlines the legally prescribed sector plans provided for in legislation other than the Systems Act.

plans, energy plans,¹⁴³ and water services development plans.¹⁴⁴ The legal framework for integrated development planning is further enabling insofar as only the *minimum* requirements in terms of substance and the IDP process are specified. It follows that nothing prevents any municipality from innovatively using its IDP (including its sector plans) in combination with other local government instruments (such as its PMS, indigent policies and budget) to leverage resources to set, and work towards, specific and agreed minimum targets for the provision of basic social goods in the jurisdiction of the municipality – access to which is protected in the Bill of Rights.

Considering that the generation of, adherence to and reporting of the performance of IDPs are mandatory, they are powerful instruments to drive and direct municipalities in the areas of water services, sanitation and electricity.¹⁴⁵ However, for any IDP to optimally fulfil its potential function as an instrument for the actualisation of a minimum core it must: (a) identify and focus on and prioritise community needs; (b) plan for and define realistic objectives and targets to discharge the duties specified by municipal and other law as well as the rights in the Bill of Rights; and (c) realistically inform the municipal PMS, the audit committee, budgeting and financing processes as well as any other internal governance control processes. The effectiveness of integrated development planning in relation to the fulfilment of socio-economic rights further depends on the design, content and implementation of the municipal development priorities and strategies in their order of priority; the operational strategies of the council, the performance indicators and targets defined in terms of the IDP, and the nature and extent of oversight functions afforded by the municipal PMS.¹⁴⁶

However, it is important to note that despite provision in local government law and policy, some municipalities often underutilise their powers in developing context specific basic minimum standards in relation to water, electricity and sanitation, for example.¹⁴⁷ As a result, some municipalities have adopted *mutatis mutandis* national minimum standards in relation to water, electricity and sanitation, prescribed by the National Indigent Policy (2006) without much regard to local conditions.¹⁴⁸

5.3.3 *Rights based duties embodied in performance management*

The legally required municipal PMS¹⁴⁹ complements the IDP, planning and implementation as well as budgeting processes by reporting performance against the municipality's socio-economic rights related priorities, strategies, targets and key performance indicators¹⁵⁰ committed to in a municipality's IDP.¹⁵¹

¹⁴³ S 8.1 of the Department of Minerals and Energy *White Paper on the Energy Policy of the Republic of South Africa* (Pretoria: The Department 1998).

¹⁴⁴ S 3.3 of the Water Services Act 108 of 1997.

¹⁴⁵ Ss 25 and 36 of the Systems Act.

¹⁴⁶ These priorities, strategies, indicators and targets form part of the legally prescribed content of every municipality's IDP. See s 26 of the Systems Act.

¹⁴⁷ See Fuo O "Local government indigent policies in the pursuit of social justice in South Africa through the lenses of Fraser" (2014) 1 *Stellenbosch Law Review* 187 at 207.

¹⁴⁸ See Fuo "Local government indigent policies" (2014) at 207.

¹⁴⁹ See the detailed provisions in chap 6 of the Systems Act.

¹⁵⁰ S 41(1)(c) of the Systems Act.

The actualisation of a locally set minimum core arguably demands checks on delivery and accountability as (a) the entire government remains responsible for the realisation of socio-economic rights and (b) measures must be in place to check for “progressive” development. An important internal assurance function can be served by PMSs as they enable the municipality’s audit committee and others charged with overseeing municipal performance to verify the municipality’s performance and assure adherence to internal controls. As part of its performance management the municipality should also take steps to improve performance with regard to those development priorities and objectives where performance targets are not met, and should establish a process of regular reporting on performance levels to the council, to the community, and to other organs of State.¹⁵² The performance of an IDP is reported to overseeing agents in the national and provincial spheres of government. In terms of the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA), a municipality must annually submit an IDP performance report, together with its financial report, to the MEC for local government. The provincial legislatures should then report municipal performance to the Minister.¹⁵³ The Minister submits an overall and consolidated municipal performance report to Parliament and to the MECs for Local Government.

5.3.4 Municipal budgeting and financing for socio-economic needs

In addition to local strategic planning and performance management there are two enabling processes to ensure effective local government which may be prerequisites for the actualisation of a minimum core set for socio-economic rights locally, namely, (a) the municipal budget process, and (b) the accessing of funding to execute IDP commitments. The total structuring, management and control of accessing, using and reporting on municipal financial resources constitute the financial management system of a municipality.¹⁵⁴ Sourcing funding as a key element of the financial management system is critical for most municipalities as they are dependent on provincial and national authorities and other sources for some of the financial resources¹⁵⁵ required to enable them to implement their IDP commitments.

It is beyond the scope of this article to discuss in any detail the financial management system, or even the budgeting process and the related fiscal functions and

¹⁵¹ The executive committee or executive mayor is responsible: to generate the municipality’s PMS; to assign responsibilities in this regard to the municipal manager; and to see to the adoption of the PMS by council. See s 39 of the Systems Act.

¹⁵² S 41(1)(d) of the Systems Act. The procedural requirements include that an IDP must be generated in a participative and inclusive way and that it must be publicly available. Municipal performance in terms of the IDP must also be publicly reported and verified by the Auditor-General.

¹⁵³ Ss 47 and 48 of the Systems Act.

¹⁵⁴ Financial management systems in local government may be said to have four prominent purposes: safeguarding income assets and capital; monitoring performance; accountability through auditing etc; and budgeting.

¹⁵⁵ An extensive legal and policy framework regulates municipal finance management in South Africa. This framework includes, for example, the MFMA, the Annual Division of Revenue Acts, the Provincial Division of Revenue Acts, the Public Finance Management Act 1 of 1999, and the Intergovernmental Fiscal Relations Act 97 of 1997.

duties of municipalities. It is sufficient to indicate that detailed provision is made in legislation to regulate matters, such as, the requisite structures required to manage the financial processes, and the responsibilities of office bearers who are responsible for specific tasks such as revenue management, budgeting, general financial management, and financial auditing etc. Accessing funding instruments and unlocking funds to finance IDP related projects are key elements of local governance. The South African legal dispensation¹⁵⁶ for funding local government has been significantly transformed in recent years, providing for a decentralised financial management system¹⁵⁷ and the increased financial autonomy of municipalities. Local government typically has access to five sources of funds: revenue from its own sources e.g. municipal property rates and service fees, (b) direct transfers¹⁵⁸ from other spheres of government, (c) public and other grants available on demand, (d) collaborative agreements, such as, public/private partnerships, and e) loans and bonds. Thus, apart from the direct transfer of funds from other spheres of government, local funding sources range from (a) municipal rates and taxes, to (b) other service fees, (c) income sources such as sales of electricity and water, (d) development levies or charges, and (e) the sale of assets. However, these funding sources are generally insufficient to fund the maintenance of infrastructure, the eradication of service delivery backlogs and the provision of basic services on a sustainable basis.

Since the quantum of available financial resources would determine the ability of a municipality to actualise any locally set minimum core, it is important to note that a number of alternative capital sources may be available to those municipalities which have the foresight, suitable capacity and skills to unlock and leverage capital. Examples include government grants and grants from other private funders,¹⁵⁹ public-private partnerships, and loans and bonds.

¹⁵⁶ The legal framework consists of the Constitution, the Division of Revenue Act 6 of 2011 (DORA), the MFMA and the Local Government: Municipal Property Rates Act 6 of 2004, among others.

¹⁵⁷ Girishankar N, DeGroot D & Pillay TV "Measuring intergovernmental fiscal performance in South Africa: Issues in municipal grant monitoring" (2006). Available at <http://www.worldbank.org/afr/wps/wp98.pdf> (accessed 17 February 2015).

¹⁵⁸ Allocations from national to local government are provided for in terms of s 6(3) of the DORA. National and provincial departments can also transfer some of their own resources to authorities in other spheres in the form of grants. Grants may be conditional, unconditional or needs-based. Approximately 22 line-function departments may be directly or indirectly involved. The DORA provides different types of grants and grant categories including, for example, the Municipal Infrastructure Grant (MIG), the Neighbourhood Development Partnership Grant (NDPG), the Urban Settlements Development Grant, the Land Care Programme Grant: Poverty and Infrastructure Development; and the Human Settlements Development Grant. See further the Schedules to the DORA.

¹⁵⁹ Municipalities have access to a several funds administered by a number of funding agencies. The challenge for most municipalities is to identify potential funds and then to apply for and responsibly use such funds. The Department of Water Affairs, for example, published a Guideline Document in 2008 listing funding agencies ranging from government and other public sector funds to international funders and private funding agencies that may consider funding water-related infrastructure projects. See Department of Water Affairs and Department for International Development *Funding Agency Booklet* (Pretoria: Department of Water Affairs 2008) at 6-41.

5.3.5 *Municipal by-laws and policies*

A municipality's by-laws are binding local laws – local legislation that binds both the municipality and the local community. By-laws may be critical for regulating community behaviour in a way that makes it possible for a municipality to sustainably deliver the minimum of basic social goods and services it has committed to in its IDP, budget and other plans. Municipalities derive their legislative power to draft and issue by-laws from the Constitution and legislation.¹⁶⁰ They may develop, adopt, implement and enforce by-laws in all of the areas listed in Schedules 4B and 5B of the Constitution as well as in additional areas that may be provided for in national legislation. All by-laws¹⁶¹ must conform to the by-law making process specified in the Systems Act and they must be published for public comment before their adoption.¹⁶² By-laws may also not be in conflict with national or provincial laws.¹⁶³ A municipal by-law may be enforced only after it has been published in the relevant provincial *Official Gazette*.¹⁶⁴

Other than these formalistic requirements, municipalities may creatively devise their legislative power to set minimum local standards for the provision of access to water, sanitation and electricity, for example. A municipality has wide-ranging powers to “do anything else within its legislative and executive competence” to give effect to its mandate.¹⁶⁵ A by-law may therefore create wide-ranging powers, such as, (a) to grant municipal officials a right to conduct inspections and audits, b) to gain access to property, data and information, c) to conduct validations after an occurrence and do periodic external reviews of the performance of regulated entities, such as, external service providers, and d) to monitor certain activities¹⁶⁶ against drinking water and sewer effluent water quality etc.¹⁶⁷ It is recommended that the framing of by-laws be preceded and informed by consideration of the municipality's policies, strategies, programmes and plans, such as, IDPs and policies for the indigent.¹⁶⁸ A municipality must compile and maintain hard and electronic copies of its collection of by-laws.¹⁶⁹

In addition to using by-laws, municipalities may typically also use local policies to allocate resources, regulate people's behaviour, promote public participation, communicate their understanding of the problems confronting communities, and express their vision for the future.¹⁷⁰ Municipalities may adopt and implement policies

¹⁶⁰ See chap 7 of the Constitution and chap 3 of the Systems Act.

¹⁶¹ S 11(3)(m) of the Systems Act.

¹⁶² S 12 of the Systems Act.

¹⁶³ S 156 of the Constitution.

¹⁶⁴ S 162 of the Constitution.

¹⁶⁵ S 11(3)(n) of the Systems Act.

¹⁶⁶ Breton A & Salmon P “Compliance in decentralized environmental governance” in Breton A, Brosio G, Dalmazzone S & Garrone G (eds) *Governing the environment: Salient institutional issues* (Cheltenham: Edward Elgar 2009) at 176.

¹⁶⁷ Breton & Salmon (2009) at 177.

¹⁶⁸ S 11(3)(a) of the Systems Act. Municipalities may monitor the impact and effectiveness of any of its services, policies, programmes and plans. See s11(3)(j).

¹⁶⁹ The files must be regularly updated and annotated and they must be kept at the municipal head office as the municipal official record of all applicable bylaws. See s 15 of the Systems Act.

¹⁷⁰ See Fuo (2014) at 380; Fuo “Local government indigent policies” (2014) at 188.

in all of the areas where they have original powers and functions. The power of municipalities to develop, adopt and implement policies is most clearly articulated in section 11(3) of the Systems Act. Municipalities may be innovative in designing and implementing local policies, especially because the Systems Act does not prescribe the process that should be followed or the scope of the content of municipal policies.

Local government policies for the indigent constitute a specific type of policy that could productively be put to use by municipalities towards the realisation of some constitutional socio-economic rights.¹⁷¹ Through its indigent policy a municipality might for example define the minimum quality and quantity of social goods (such as water and electricity) that it seeks to provide to households living in poverty within its jurisdiction. As suggested earlier, municipalities that possess the necessary means are at liberty to go beyond the levels and range of free basic services guaranteed at the national level.¹⁷² However, no municipality is permitted to go below the minimum thresholds set at the national level.

6 CONCLUSION

As part of the pursuit of the constitutional transformative objectives of the Constitution, this article advances an alternative perspective on the inception of the concept of a minimum core content for constitutional socio-economic rights in the South African context. Despite our recognition of the prevalence of judicial resistance to adopting, developing and using the idea of a minimum core content in the courts' evaluation of State measures to realise the socio-economic rights in the Bill of Rights, we argue that such core content could be determined and realised through the exercise of the legislative and executive authority of municipalities, and that a selection of the accompanying municipal instruments might be put to valuable use. On the basis of the fact that developmental local government and the suite of socio-economic rights were designed to ensure the protection of a basic quality of life for all members of South African society and the provision of entitlements to the material conditions required for human welfare, we conclude with the following main observations.

First, municipalities should accept the trend of judicial deference regarding the minimum core meaning of relevant socio-economic rights as affording them an opportunity to cater for basic local needs according to their local capacity and in their local context. Furthermore, the local government system of integrated development planning, performance management and budgeting enables municipalities to overcome the challenges faced by the judiciary in terms of determining the minimum core. The judiciary bemoans its lack of access to sufficient information on basic human and welfare needs, varying local conditions, and its apparent lack of institutional capacity to make factual and political enquiries. Municipalities, on the other hand, have such information immediately available, and are empowered by the Constitution and local

¹⁷¹ See Fuo (2014) at 380-391; Fuo "Local government indigent policies" (2014) at 194-199.

¹⁷² Department of Provincial and Local Government (DPLG) (now Department of Co-operative Governance and Traditional Affairs) (CoGTA) *National Framework for Municipal Indigent Policies* (Pretoria: DPLG 2006) at 23.

government law to address local needs in certain respects. Thus, they are able to decide on the means and the standard of provision to meet people's basic needs with respect *inter alia* to water, sanitation and electricity. In addition, needs diversity for the purposes of establishing a minimum core for some socio-economic rights poses less of a challenge for a local authority than for a provincial or State organ, as it would develop such standards for a smaller and more homogenous local community. Furthermore, municipalities may successfully put to use their by-law and policy making authority to calibrate local standards with newly published provincial or national standards, while they are able to regularly update by-laws and policies dealing with the ever-changing basic needs of the members of the local community.

This alternative approach to the inception of the minimum core does not undermine the role of courts in the enforcement of constitutional socio-economic rights. As we have argued, rather than dictating the minimum core of a socio-economic right, courts should adopt a stringent approach to justification akin to that of the Federal German Constitutional Court in *Hartz*. Courts should ensure that adopted minimum standards are informed by sound empirical evidence, for example. Therefore, litigation remains a potent instrument for ensuring that local authorities and government, in general, remain accountable to communities on the measures put in place to give effect to socio-economic rights.