

# THE INTERRELATIONSHIP BETWEEN EQUALITY AND SOCIO-ECONOMIC RIGHTS UNDER SOUTH AFRICA'S TRANSFORMATIVE CONSTITUTION

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## ABSTRACT

This article develops the interrelationship between the equality and socio-economic rights in the Bill of Rights to enhance the responsiveness of our jurisprudence to the mutually reinforcing patterns of poverty and inequality in South Africa. We proceed from the principle that rights are interdependent and interconnected, and examine the implications of this for our evolving socio-economic rights and equality jurisprudence. We argue that such a reading accords with the mandate of the courts to promote the foundational constitutional values of human dignity, equality and freedom in their interpretation of the Bill of Rights, and advances the transformative goals of the Constitution. The article examines how equality jurisprudence should be developed so as to be more responsive to material disadvantage and the values protected by socio-economic rights. Thereafter, it examines how an equality perspective can enrich South Africa's evolving jurisprudence on socio-economic rights. We demonstrate how the value of equality can be integrated within the model of reasonableness review developed by the Constitutional Court for evaluating positive socio-economic rights claims. Finally, some of the strategic implications of this interdependent reading of equality and socio-economic rights for developing a jurisprudence that facilitates the attainment of social and economic transformation in South Africa are considered.

## I INTRODUCTION

South Africa's history of colonialism and apartheid has created deep patterns of inequality and poverty.<sup>1</sup> Disadvantage in South Africa is complex and multifaceted. Although race has been the most evident and publicised marker of disadvantage in our society,<sup>2</sup> patterns of gender equality are also deeply embedded in our social fabric, historically reinforced by a plethora

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1 See generally S Terreblanche *A History of Inequality in South Africa 1652–2000* (2002); J Seekings & N Nattrass *Class, Race, and Inequality in South Africa* (2006).

2 Africans are the most impoverished segment of the population, constituting 91.1% of the 21.9 million poor in South Africa. United Nations Development Programme (UNDP) *South Africa Human Development Report 2003 — The Challenge of Sustainable Development in South Africa Unlocking People's Creativity* (2003) 42.

of discriminatory customary, common law and legislative provisions.<sup>3</sup> As Justice O'Regan observed, '[t]hese patterns of discrimination are particularly acute in the case of black women, as race and gender discrimination overlap'.<sup>4</sup> Widespread structural unemployment and deep levels of poverty perpetuate the systemic marginalisation of particularly black women.<sup>5</sup> Other intersecting axes of disadvantage include those based on HIV/AIDS status, disability, sexual orientation and nationality.

Since the inception of democracy in South Africa in 1994, the government has made important advances in areas of social delivery and infrastructural development such as electrification, water, housing, education and social assistance. The economy has grown rapidly and social spending has assumed an increasingly larger share of the budget. There remain, however, several gaps in government social policies that result in the inadequate provision of people's socio-economic rights. Despite economic growth, unemployment has increased or at best decreased marginally<sup>6</sup> and currently almost half of the population lives below the poverty line.<sup>7</sup> A UNDP study based on the Human Development Index has found that, in some respects, the conditions of the poor have worsened since apartheid ended.<sup>8</sup> Disadvantage has deepened in large part due to the impact of HIV/AIDS.<sup>9</sup> In addition, the income gap between rich and poor remains one of the largest in the world.<sup>10</sup> Critical voices in civil society have argued that government has adopted an essentially neo-liberal macro-economic policy that, while resulting in growth, has failed to

3 F Kaganas & C Murray 'Law and Women's Rights in South Africa: An Overview' (1994) *Acta Juridica* 1.

4 *Brink v Kitshoff* NO 1996 (4) SA 197 (CC) para 44. For a discussion of the intersecting gender and race dimensions of poverty see D Budlender *Women and Men in South Africa Five Years On* (2002).

5 See D Budlender 'Women and Poverty' (2005) 64 *Agenda* 30.

6 The official employment statistics (as of September 2005) put the official national rate of employment at 27.7%. According to the expanded definition (which incorporates discouraged work-seekers), the unemployment rate rises to 38.9%: Statistics SA (Statistical Release P0210) *Labour Force Survey* (September 2005) <<http://www.statssa.gov.za>>. Unemployment statistics obscure significant aspects of the nature of employment in South Africa which includes the related phenomena of the 'working poor' earning very low wages, the decline in formal sector employment, and the growth of non-standard forms of employment characterised by low wages, minimal benefits, and no security. See J Theron 'Employment is Not what it Used to Be: The Nature and Impact of the Restructuring of Work in South Africa' in E Webster & K Von Holdt (eds) *Beyond the Apartheid Workplace* (2005).

7 48.5% of South Africans lived below the poverty line in 2002 according to the UNDP (note 2 above) 41.

8 Ibid 44.

9 See M Steinberg, S Johnson, G Schierhout & D Ndegwa "Hitting Home" — *How Households Cope with the Impact of the HIV/AIDS Epidemic. A Survey of Households Affected by HIV/AIDS in South Africa* (2002); M Richter 'The Right to Social Security of People Living with HIV/AIDS in the Context of Public-Sector Provision of Highly-Active Antiretroviral Therapy' (2006) 22 *SAJHR* 197.

10 By 1996, the poorest quintile of the population received 1.5% of total income, compared to 65% received by the richest quintile: UNDP *South Africa Transformation for Human Development* (2000) 64. Between 1995 and 2001 the Gini coefficient rose suggesting that income inequality is worsening in South Africa (UNDP note 2 above, 43).

prioritise the needs and interests of the poor.<sup>11</sup> There remains a substantial overlap between class, racial and gender inequalities. As a result, significant sections of the population are unable to develop to their full potential, realise their life plans and participate as equals in the political, economic, social and cultural spheres of our democracy.

Both the state and civil society acknowledge that poverty and inequality are among the major challenges facing South Africa in its second decade of democracy. The Constitution is an important vehicle for ensuring that these challenges are addressed. It contains a detailed set of socio-economic rights that promise access to housing, education, water, social security, food and health care to everyone. It also contains a detailed equality right within a Bill of Rights committed to the values of dignity, equality and freedom. The development of a vibrant jurisprudence on both equality and socio-economic rights has led to some important improvements for the disadvantaged and poor. However, there is a sense that the transformative potential of these rights has not been fully realised.

This article seeks to develop the interrelationship between equality and socio-economic rights to enhance the responsiveness of our jurisprudence to the mutually reinforcing patterns of poverty and inequality in South Africa. We examine the implications of the notion of the interdependence and interconnectedness of rights for our evolving socio-economic rights and equality jurisprudence. We argue that such a reading accords with the mandate of the courts to promote the foundational constitutional values of human dignity, equality and freedom in their interpretation of the Bill of Rights,<sup>12</sup> and advances the transformative goals of the Constitution.

Part II of this article examines the significance of an interdependent interpretation of equality and socio-economic rights for advancing the transformative goals of the Constitution. In Part III, we examine how the interpretation of the equality guarantee should be informed by the socio-economic rights provisions in the Bill of Rights so as to make equality more responsive to poverty. Thereafter, in Part IV we examine how the value of equality should inform the interpretation of socio-economic rights to make that jurisprudence more responsive to systemic group-based disadvantage. We conclude by considering some of the strategic implications of this interdependent reading of equality and socio-economic rights for developing a jurisprudence that facilitates the attainment of social and economic transformation in South Africa.

11 See eg The Congress of South African Trade Unions (COSATU) *Accelerating Transformation COSATU's Engagement with Policy and Legislative Processes during South Africa's First Term of Democratic Governance* (2000) 83; H Marais *South Africa Limits to Change — The Political Economy of Transformation* (1998).

12 Section 39(2). This section indicates that the courts are expected to play an active role in promoting these foundational constitutional values through their interpretation of the rights in the Bill of Rights. We are of the view that all three foundational values can elucidate important dimensions of socio-economic rights jurisprudence. However, in this article we focus particularly on the value of equality in relation to socio-economic rights.

## II TRANSFORMATIVE CONSTITUTIONALISM AND THE INTERDEPENDENCE BETWEEN SUBSTANTIVE EQUALITY AND SOCIO-ECONOMIC RIGHTS

South Africa's Constitution is widely described in academic literature and judicial decisions as 'transformative'.<sup>13</sup> It aims to facilitate a fundamental transformation in the unjust political, economic and social conditions inherited from our colonial and apartheid past,<sup>14</sup> and to create a new society based on social justice, democracy and human rights. Thus the Constitution proclaims the founding values of South Africa to include 'human dignity, the achievement of equality and the advancement of human rights and freedoms'.<sup>15</sup> The dismantling of systemic forms of disadvantage and subordination in our post-apartheid society is central to the Constitution's transformative vision. This requires redressing pervasive forms of status subordination based on, for example, race, gender, and sexual orientation as well as systemic patterns of social and economic disadvantage.<sup>16</sup>

The Bill of Rights recognises this transformative imperative through including, inter alia, a strong and detailed equality clause in s 9 as well as an extensive range of socio-economic rights. This constitutes an important acknowledgment of the significance of both group-based disadvantage and socio-economic barriers to the attainment of social justice. The inclusion of civil and political as well as economic, social and cultural rights reflects a commitment to the principle of the interdependency of all human rights.

The notion of the interdependence and interrelatedness of rights is a fundamental tenet of international human rights law.<sup>17</sup> Its animating insight is that 'values seen as directly related to the full development of personhood

13 The description and theoretical notion of the South African Constitution as a transformative constitution was first developed by K Klare in his seminal article, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146. It has also been developed specifically in relation to the equality right in C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248 and in relation to socio-economic rights in S Liebenberg 'Needs, Rights and Transformation: Adjudicating Social Rights' (2006) 17 *Stellenbosch LR* 5. See further: D Moseneker 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 *SAJHR* 309; H Botha 'Metaphoric Reasoning and Transformative Constitutionalism (part 2)' (2003) *TSAR* 20; M Pieterse 'What Do We Mean When We Talk About Transformative Constitutionalism?' (2005) 20 *SAPL* 155; AJ van der Walt 'Legal History, Legal Culture and Transformation in a Constitutional Democracy' (2006) 12 *Fundamina* 1; P Langa 'Transformative Constitutionalism' (2006) 3 *Stell LR* 351; *S v Makwanyane* 1995 (3) SA 391 (CC) para 262; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) 490 (CC) paras 73–74; *Minister of Finance v Van Heerden* 2004 (6) 121 (CC) para 142; *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W) paras 51–52; *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C) para 100.

14 Thus the Preamble proclaims that the Constitution was adopted as the supreme law of the Republic so as to, amongst others, '[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'.

15 Section 1(a) and s 7(1) of the Constitution.

16 See Nancy Fraser on the interrelationship between status subordination and distributional injustice in N Fraser & A Honneth *Redistribution or Recognition? A Political-Philosophical Exchange* (2003) 1.

17 See eg *The Proclamation of Tehran* Final Act of the International Conference on Human Rights Tehran UN Doc A/CONF 32/41 (1968) art 13; *Vienna Declaration and Programme of Action* (1993) Part I, para 5.

cannot be protected and nurtured in isolation'.<sup>18</sup> Scott distinguishes between two senses of interdependence in human rights law: 'organic' and 'related interdependence'.<sup>19</sup> Organic interdependence arises when the jurisprudence treats one right as incorporated within the scope of another right. The classic example is the Indian Supreme Court's incorporation of socio-economic rights within the scope of the right to life in art 21 of the Indian Constitution.<sup>20</sup> Related interdependence involves the question whether a civil and political right, for example, the right to a fair hearing, can be applied to protect a socio-economic right such as the right to social security. In this case, the two sets of rights are treated as separate but complementary.<sup>21</sup> The approach argued for in this article is a form of related interdependence which we term 'interpretative interdependence'. It encourages courts to consider how the values and purposes underpinning one right (for example equality) may be relevant and useful to the development of the jurisprudence under another right (for example socio-economic rights).

An approach to the interpretation of equality and socio-economic rights that acknowledges the interrelationship between these rights is also more likely to be responsive to the reality that the most severe forms of disadvantage are usually experienced as a result of an intersection between group-based forms of discrimination and socio-economic marginalisation. In these situations, systemic patterns of race, gender and other forms of group-based discrimination contribute to the poverty and marginalisation of affected groups. For example, the multiple forms of discrimination against people with disabilities are manifested in diminished access to public transport, public and private buildings and facilities, education and employment opportunities. As a result, this group is disproportionately vulnerable to poverty and economic marginalisation.<sup>22</sup> For example, a lack of wheelchair ramps in public buildings and private places of employment for people with impaired mobility has a profound impact on their economic, social and cultural opportunities. Conversely, being poor exacerbates the impact of disability discrimination in that this group lacks the economic resources to mitigate the impact of their status-based disadvantages. This reinforces the stigma and prejudice experienced by groups living with disabilities.

Similarly, one cannot appreciate the nature and extent of gender inequality in South Africa without an understanding of how poverty and a lack of access to basic social services, such as potable water and health care, entrench and exacerbate such inequality. In evaluating a claim to such services by an improv-

18 C Scott 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27 *Osgoode Hall LJ* 769, 786.

19 *Ibid* 779–786.

20 For an illuminating discussion of this development, see S Muralidhar 'The Indian Jurisprudence on Socio-Economic Rights' in M Langford (ed) *Social Rights Jurisprudence Emerging Trends in International and Comparative Law* (forthcoming 1997).

21 Scott (note 18 above) 783.

22 See T Emmett 'Disability, Poverty, Gender and Race' in B Watermeyer, L Swartz, T Lorenzo, M Schneider & M Priestley (eds) *Disability and Social Change — A South African Agenda* (2006) 207.

erished group of women living in a rural area of South Africa, it would be remiss of a court to fail to consider the disproportionate gendered impact of the lack of these services on women as a group. An evaluation of this impact would take account of the fact that in rural communities and informal settlements, women and girls spend much more time and energy on the collection of water from rivers and communal standpipes. Moreover, women also overwhelmingly bear responsibility for children and care for elderly and ill relatives. They are thus disproportionately affected by a lack of accessible health-care facilities. This is not to argue that poor men should not also be entitled to such services. On the contrary, the constitutional commitment to ensuring that ‘everyone’ has access to socio-economic rights and the fact that poverty is a distinct indicator of systemic disadvantage, should create such an entitlement in the absence of cogent justifications. However, in evaluating the reasonableness of the state’s failure to provide such services to a group,<sup>23</sup> the impact of this omission on the constitutional goal of achieving racial and gender equality<sup>24</sup> is a relevant factor that should inform the inquiry. Alternatively, a social programme may be designed in such a way that it fails to take into account the needs of differently situated groups resulting in unequal access to the benefits the programme offers. Developing the interrelatedness between equality rights and socio-economic rights will enable our jurisprudence to be more responsive to the ways in which status-based discrimination and economic deprivation intersect and reinforce each other.<sup>25</sup> It also helps us to understand that poverty is not the result of individual blameworthiness or an inevitable consequence of some preordained natural economic order, but of choices about how we organise our society and economy and about deeply inscribed patterns of group discrimination. As Gwen Brodsky and Shelagh Day argue:

Seeing the group dimensions of poverty, and the layers of rights infringements it both causes and reflects, strengthens the claim that there is a societal obligation to address it. When we look at poverty through a group-based equality lens we open up new opportunities to see that poverty is more than an individual problem, because the patterns of who is poor are entrenched and reflect long-standing discrimination in the society. The analytical risk of failing to take account of the particular effects on disadvantaged groups is that the nature and extent of the harm of poverty-producing measures and their potential to reinforce pre-existing disadvantage and compromise fundamental interests may not be fully appreciated. Purely individualistic and gender-, race-, and disability-neutral explana-

23 The ‘reasonableness test’, developed by the Constitutional Court in the cases of *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC) and *Minister of Health v Treatment Action Campaign (TAC) (No 2)* 2002 (5) SA 721 for evaluating the failure by the state to comply with its positive obligations in terms of ss 26 and 27, is discussed further in Part IV(c) below.

24 The Constitution proclaims the achievement of equality and non-racialism and non-sexism as one of its founding values in s 1(a) and (b).

25 This interdependence is not confined to equality and socio-economic rights, but also extends to other rights such as the right to life (s 11), the right to freedom and security of the person (s 12), and political rights (s 19). For example, Nicholas Haysom argued at the time of the drafting of the 1996 Constitution in favour of the entrenchment of a minimum floor of socio-economic rights ‘to enrich political contest and democratic participation’ in ‘Constitutionalism, Majoritarian Democracy and Socio-Economic Rights’ (1992) 8 SAJHR 451, 461. On the interdependence between the right to life and socio-economic rights, see M Pieterse ‘A Different Shade of Red: Socio-Economic Dimensions of the Right to Life in South Africa’ (1999) 15 SAJHR 372.

tions of poverty are just too simplistic. Commentary about group-based effects tells more of the truth of what is happening; it can show that there are qualitatively different impacts on certain groups; it may implicate a range of different constitutional rights and treaty provisions; and it can help to call into question the validity of the thesis that poverty is all about individual responsibility.<sup>26</sup>

We accordingly argue that our jurisprudence should take account of the particular and complex interaction between socio-economic deprivation and status-based forms of discrimination.<sup>27</sup> This approach accords with the Court's injunction to interpret and understand rights in their social and historical context.<sup>28</sup>

The Constitutional Court explicitly endorsed the interdependence and indivisibility of rights in *Grootboom*, a case concerning the right to housing, in the following terms:

All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, equality and freedom, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential ... Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and in particular, in determining whether the state has met its obligations in terms of them.<sup>29</sup>

In the following two parts, we consider in greater detail the implications for our emerging equality and socio-economic rights jurisprudence of an interpretive approach, which takes seriously the interconnectedness between these rights.

### III THE ROLE OF SOCIO-ECONOMIC RIGHTS IN INFORMING EQUALITY JURISPRUDENCE

#### (a) Substantive equality and material disadvantage

Equality is a foundational value of the South African Constitution and must inform the interpretation of all rights in the Bill of Rights. It is also a 'guaranteed and justiciable right'.<sup>30</sup> The equality right is closely related to many other

26 G Brodsky & S Day 'Denial of the Means of Subsistence as an Equality Violation' (2005) *Acta Juridica* 149, 163–164.

27 Nancy Fraser observes: 'Economic issues such as income distribution have recognition subtexts: value patterns institutionalized in labour markets may privilege activities coded "masculine", "white" and so on over those coded "feminine" and "black". Conversely, recognition issues — judgments of aesthetic value, for instance — have distribution subtexts: diminished access to economic resources may impede equal participation in the making of art. The result can be a vicious circle of subordination, as the status order and the economic structure interpenetrate and reinforce each other.' N Fraser 'Rethinking Recognition' (2000) 3 *New Left Review* 107, 116–118.

28 *Grootboom* (note 23 above) para 25. The Court goes on to observe that the 'right to be free from unfair discrimination, for example, must be understood against our legacy of deep social inequality.'

29 *Ibid* paras 23–24.

30 *Minister of Finance v Van Heerden* (note 13 above) para 22.

constitutional rights. Thus, unfair discrimination on the ground of religion or culture must be understood in light of the freedom of religion, belief and opinion right in s 15 of the Constitution. Gender-based violence, prohibited in terms of the right to freedom and security of the person in s 12, is closely linked to unfair gender discrimination. Section 9(2) makes particular reference to equality's relationship to other rights: 'equality includes the full and equal enjoyment of all rights and freedoms'. Whenever a court is faced with a claim by a disadvantaged group for equal access to a state benefit or resource, the court must be mindful of the socio-economic rights that entitle all people to have access to the relevant social goods.

South Africa's equality jurisprudence emphasises the need to address an historic legacy of 'systemic inequality and disadvantage'.<sup>31</sup> The Court has said that the equality right is remedial and restitutionary.<sup>32</sup> It has also pointed to the persistent 'social and economic disparities' that must be addressed if the commitment of the Constitution is to be realised.<sup>33</sup> Klare explains that the Constitution contains a 'pervasive and overriding commitment to equality, specifically comprehending a substantive (redistributive), not just formal, conception of equality'.<sup>34</sup> He defines substantive equality as 'equality in lived, social and economic circumstances and opportunities needed to experience human self-realization'.<sup>35</sup> Albertyn and Goldblatt suggest that equality involves 'the eradication of systemic forms of domination and material disadvantage ... towards the development of opportunities which allow people to realise their full human potential within positive social relationships'.<sup>36</sup>

Substantive equality thus requires a dismantling of structural inequality and necessarily focuses on patterns of group-based disadvantage, rather than seeing discrimination as an individual infraction in an otherwise equal social order. It allows for measures that may appear to 'unequally' privilege a particular group, but are provided to address that group's disadvantaged position in the society.<sup>37</sup> Substantive equality also contains a forward looking vision of a society where people are provided with the resources and the

31 *Brink v Kitshoff* (note 4 above) paras 40–44.

32 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 112 (CC) para 61.

33 *Minister of Finance v Van Heerden* (note 13 above) para 23.

34 Klare (note 13 above) 153–154.

35 *Ibid.*

36 See Albertyn & Goldblatt (note 13 above) 249.

37 The Court has expressly adopted the term 'substantive equality' (in *National Coalition for Gay and Lesbian Equality v Minister of Justice* note 32 above para 61) and has given it this meaning (in *President of the RSA v Hugo* 1997 (4) SA 1 (CC) para 41).



opportunities to develop, participate and flourish equally as human beings.<sup>38</sup> Substantive equality is intimately linked to socio-economic rights since these rights are premised on the need to facilitate improved access to resources and services necessary for a fulfilled human existence. Only when black people in our country have access to meaningful education and adequate housing, for example, will the evils of Bantu education and apartheid urbanisation policies be addressed. Many other legacies of inequality will need to be eroded if all our people are to flourish in a society based on substantive equality (together with dignity and freedom). Thus, the South African Constitution embraces a vision of a society where social justice and equality are intertwined. Fredman demonstrates (through a discussion of the *Khosa* and *Van Heerden* cases) how the existence of socio-economic rights in the South African Constitution has allowed for the development of substantive equality in a way that is less possible in jurisdictions where these socio-economic rights do not exist (such as Canada and the UK).<sup>39</sup>

A key development in South Africa's equality jurisprudence has been the location of the value of dignity at the centre of the equality right. This has led to a concern that dignity may be interpreted narrowly to focus on harm to personality rights and could detract from the use of equality rights to redress material and systemic forms of disadvantage.<sup>40</sup> A transformative conception of dignity is necessary if the equality right is to address the conditions of poverty that constrain people's development and participation in our new democracy. As Brodsky and Day argue, discrimination is not only about stereotyping, but can arise when disadvantaged groups are denied the social support necessary to survive and participate in society.<sup>41</sup> The courts have sometimes given a more individualistic and personality-linked meaning to dignity that seems to limit its scope.<sup>42</sup> However, in a small number of cases a wider and more

38 While there is general agreement on the more 'remedial' dimensions of substantive equality and how it must be distinguished from a formal notion of equality, there is less clarity or commonality on what its vision of an equal society means. In *Hugo*, Goldstone J referred to the goal of 'a society which affords each human being equal treatment on the basis of equal worth and freedom' (ibid para 41). In this article we argue that substantive equality must include the material and redistributive dimensions suggested by Klare and others. For further discussion of the aims of substantive equality see S Fredman 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2006) 21 *SAJHR* 163, 167. Fredman identifies four specific aims of substantive equality: to break the cycle of disadvantage; to promote respect for equal dignity and worth; to affirm identity within community; to facilitate full social participation. Also see G Brodsky & S Day 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty' (2002) 14 *Canadian Journal of Women and the Law* 184.

39 Fredman ibid 180.

40 As discussed in Albertyn & Goldblatt (note 13 above) 256–260. Also see C Albertyn & B Goldblatt 'Equality' in S Woolman et al (eds) *Constitutional Law of South Africa* (2 ed 2007) 35, 8–13.

41 Brodsky & Day (note 26 above) 156–164. On the potential of developing a more expansive notion of human dignity that is responsive to conditions of material disadvantage, see S Cowen 'Can Dignity Guide our Equality Jurisprudence' (2001) 17 *SAJHR* 34; S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1.

42 Albertyn & Goldblatt (note 40 above) 9–10.

substantive interpretation of human dignity has been given.<sup>43</sup> The *Khosa* case (discussed below) used the value of dignity within the unfair discrimination enquiry to show material impact on the immigrant group as well as the harm to the group from which they were required to seek support as ‘suplicants’.<sup>44</sup> Dignity, alongside the value of equality, is capable of being (and should be) developed as an important interpretive vehicle for a substantive understanding of equality.<sup>45</sup>

### (b) Unfair discrimination

The Constitutional Court’s focus on impact, context, purpose and values in determination of unfair discrimination means that this examination is more amenable to the goal of substantive equality.<sup>46</sup> The criteria for considering fairness within the Court’s unfair discrimination enquiry<sup>47</sup> are all relevant to detecting patterns of socio-economic disadvantage. Thus an awareness of socio-economic deprivations may be central to the consideration of the group’s position in society and whether its members suffered past patterns of disadvantage. In considering the nature of the provision and its purpose, an awareness of socio-economic rights may be important where the purpose of a particular law was aimed at undoing past discrimination that had resulted in material harm. The final leg of the fairness test looks at the impact of the discriminatory conduct or omissions on the rights or interests of the complainants, and their human dignity. This should include a consideration of the impact of the discrimination on the socio-economic rights of the complainant group in appropriate cases. It should also incorporate an analysis of the extent to which the discrimination creates or perpetuates socio-economic disadvantage and marginalisation for the affected groups.

The s 36 limitations analysis that follows an unfair discrimination enquiry may also require that the equality right and relevant socio-economic rights be taken into account in considering whether a right may be limited. This might arise where a government policy is found to be unfair discrimination and in justifying its measure, the government argues that it was reasonable to limit a person’s equality right for financial reasons (as was argued by the state in the *Khosa* case). The court should take account of other rights, including socio-economic rights, implicated in the case at this justification stage (as well as earlier in its equality test).

43 The cases of *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) and *Hoffmann v South African Airways* 2000 (1) SA 1 (CC) also addressed material issues through the equality right.

44 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) para 76.

45 Albertyn & Goldblatt (note 40 above) 14.

46 C Albertyn ‘Substantive Equality and Transformation in South Africa’ (2007) 23 SAJHR 253, 258–260 argues that the Constitutional Court’s jurisprudence on substantive equality in South Africa contains four necessary elements. These are: a focus on context; attention to the impact of discrimination on the person complaining of it; an understanding of positive value of difference and diversity; and, the purpose of the right to equality and its underlying values in remedying systemic subordination and disadvantage.

47 See *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 38.

The *Khosa* case was the first to explore the relationship between the equality right and a socio-economic right when considering a claim by permanent residents to social assistance grants.<sup>48</sup> The case illustrated that where government was providing necessary social benefits, it could be forced to extend the reach of these benefits to exclude disadvantaged groups. The Court was willing to interrogate issues of affordability and decide that the government was required to allocate resources for this purpose.<sup>49</sup> The judgment recognised that the case concerned ‘intersecting rights which reinforce one another at the point of intersection’.<sup>50</sup> In this case, the Court found that equality was ‘implicit’ since the word ‘everyone’ in the right to social security meant that state provision could not result in the exclusion of any group. The Court stated that: ‘Those who are unable to survive without social assistance are equally desperate and equally in need of such assistance.’<sup>51</sup>

When considering whether the permanent residents had suffered unfair discrimination, the Court was mindful of the strained economic circumstances of the group. In considering the state’s argument that the self-sufficiency of immigrants is an important policy consideration to avoid such people becoming a burden on the state, the Court observed that such a policy might not be flawless and that certain permanent residents may at some point become a burden on the state. But, said the judge, this ‘may be a cost we have to pay for the constitutional commitment to developing a caring society, and granting access to socio-economic rights to all who make their homes here’.<sup>52</sup> In considering whether the policy to exclude permanent residents was unfair discrimination, the Court highlighted the various forms of vulnerability that the group faced as a political minority, as a stigmatised group and as a group facing poverty and lack of economic opportunities. The Court held that this exclusion constituted both unfair discrimination on the ground of citizenship and a violation of the right to social security, neither of which were justifiable. Mokgoro J noted that the legislation in question limited the rights of the applicants ‘in a manner that affects their dignity and equality in material respects’.<sup>53</sup> The linkages between poverty and equal citizenship were eloquently described in the following passage in the judgment:

Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society. (footnotes omitted)<sup>54</sup>

48 Note 44 above. For a critical discussion of this decision see D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 170–177.

49 *Khosa* ibid para 62.

50 Ibid para 41.

51 Ibid para 42.

52 Ibid para 65.

53 Ibid para 85.

54 Ibid para 74.

Section 9(3) contains a long and non-exhaustive list of grounds of unfair discrimination. The equality right could possibly be used to support a claim by a group of poor people for benefits that would improve their position (relative to those who are in a better economic position). Where such a claim relates to benefits incorporated in one of the socio-economic rights, the equality and socio-economic rights claims would be mutually reinforcing. Where there was no such overlap, the existence of socio-economic rights would still inform such a claim as they would point to the general constitutional promise of social and economic redress. One of the listed grounds of unfair discrimination is 'social origin'. While this ground has not been considered by our courts, it may be relevant in a discrimination claim by a group defining itself on the basis of its disadvantaged class position. The caste system in India is an obvious example of social stratification leading to an economic hierarchy. The history of racial capitalism in South Africa has led to the creation of distinct classes whose economic position has been significantly mediated by race.<sup>55</sup> It is possible that a poor community might approach the Court for example, for an exemption from paying toll fees where the road near their township is otherwise inaccessible. Such a claim could be based on the argument that requiring toll fees unfairly discriminates against them on the ground of social origin.

The Promotion of Equality and Prevention of Unfair Discrimination Act includes a set of listed grounds of unfair discrimination that mirror those in the Bill of Rights,<sup>56</sup> as well as five additional grounds to be considered for inclusion by the Equality Review Committee, a body set up in terms of the Act.<sup>57</sup> One of these is 'socio-economic status', defined as including 'a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications'.<sup>58</sup> While this ground has not yet been used,<sup>59</sup> its existence points to the possibility that cases will be brought by poor people as a group and that such cases might raise claims based both on the existence of discrimination and the need for positive measures to address their conditions. The ground of socio-economic status is most likely to be used to address issues of stereotyping of the poor, such as in cases of 'red lining' where banks refuse to give loans to people who live in certain 'poorer' areas. This would be valuable in addressing poverty as a source of stigma.<sup>60</sup> But it may also be used in the

55 Our equality right also allows for claims based on indirect discrimination. This may be important in cases where race is masked by geographical location or land ownership or other categories that reflect the overlap between race and poverty, particularly arising from our apartheid history. See *City Council of Pretoria v Walker* (note 44 above).

56 Act 4 of 2000. See C Albertyn, B Goldblatt & C Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001).

57 Section 34.

58 Section 1.

59 The status of these grounds is currently unclear and most of the Equality Court decisions are not reported.

60 M Jackman 'Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian Charter and Human Rights Law' (1994) II *Review of Constitutional Studies* 76.

more redistributive sense to ground a claim for benefits to address the poverty facing a particular group.<sup>61</sup>

The Court has said that there can also be discrimination on ‘unspecified’ grounds that, like the listed grounds, serve to ‘categorise, marginalize and often oppress persons who have had, or have been associated with, these attributes and characteristics’.<sup>62</sup> The courts have been prepared to develop new grounds such as citizenship and HIV-status to accommodate groups not directly covered by the list in s 9(3). It seems possible that the ground of ‘class’, used to found a claim by a group of poor people, could be recognised as an unspecified ground of unfair discrimination. Where a claim for services is brought by a group of poor people, the Court may prefer to adjudicate the claim under the relevant socio-economic right. For example, a claim for poverty relief might be brought by a group of able-bodied adults who do not qualify for any of the existing social assistance grants which are provided only to children, the elderly and the disabled. However, where poverty creates an inequality that is not easily accommodated within the scope of the socio-economic rights included in the Constitution, the courts might be willing to view such a claim in terms of class inequality. As discussed above, the existence of socio-economic rights in the Constitution might support such a claim since they help to realise the Constitution’s general commitment to social justice, the improvement of the quality of life for all and the freeing of the potential of each person.<sup>63</sup> Thus, for example, none of the socio-economic rights adequately covers the right of parents to state-provided child-care. Child-care is as basic a need as housing and health care since, without it, care givers do not have the time or opportunity to meet many of their other basic needs (such as to collect water, grow food, access health-care or education). The lack of child-care facilities in the public and private sector perpetuates the patterns of unequal gender relations in our society. The equality right may prove important in supporting positive rights to material goods or services where such claims cannot be easily accommodated within the scope of the existing socio-economic rights. An interdependent and transformative interpretation of the Constitution would allow for the development of the equality right as requiring measures to address poverty.

In addition, s 9(3) provides for the possibility of multiple listed and unlisted grounds arising in a single claim. Grounds may also overlap or ‘intersect’ leading to new forms of discrimination. Justice Sachs gives the example of discrimination of black foreigners that white foreigners or black South Africans might not experience.<sup>64</sup> A group of poor women might claim that they face unfair discrimination in accessing certain services because they do not have access to child-care. They would argue that the unequal gender relations that

61 Jackman raises some of the difficulties that might be encountered in arguing for poverty as a ground of discrimination (ibid 120). She nevertheless argues that recognising poverty in this way is a necessary step towards recognising poverty as a basic human rights issue.

62 *Harksen v Lane NO* (note 47 above) para 49.

63 See the Preamble of the Constitution.

64 *NCGLE v Minister of Justice* (note 32 above). See Albertyn & Goldblatt (note 40 above) 51–52.

locate them as carers, coupled with their lack of economic resources to obtain child-care, combine to deepen their disadvantage. Here, the ground of class or poverty, as it intersects with gender, could be used in a s 9(3) claim.

### (c) Positive measures

Section 9(2) of the equality right allows the state to take positive measures ‘designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination’ to promote the achievement of equality.<sup>65</sup> Section 9(2) also states that: ‘Equality includes the full and equal enjoyment of all rights and freedoms.’ The relationship between the two statements supports an interdependent interpretation of positive measures that takes account of the nature and purpose of the socio-economic rights elsewhere in the Bill of Rights. In the leading Constitutional Court case on this sub-section, *Van Heerden*, the Court signalled clear support for the robust use of s 9(2), saying: ‘Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality... must ... ring hollow.’<sup>66</sup>

This case is important in interpreting the equality right expansively to facilitate the state’s efforts to undo systemic disadvantage.<sup>67</sup> The majority in *Van Heerden* found that if a measure complies with the requirements of s 9(2) it cannot constitute unfair discrimination and there is thus no further examination of s 9 (nor, it seems, is there a limitations enquiry under s 36). Like socio-economic rights, justificatory and rights issues are built into the same enquiry.<sup>68</sup> Mokgoro J, in a minority judgment, argued for care to be taken in determining which measures fall within the scope of s 9(2) so that it is not used in circumstances for which it was not intended. She explained that improper use of s 9(2) could potentially lead to unfair discrimination.<sup>69</sup>

The high level of deference accorded to state action in this context may result in a state remedial programme surviving constitutional challenge where s 9(2) is relied on to defend the extending of benefits to one disadvantaged group rather than to another less disadvantaged group. The *Van Heerden* case was based on a claim by an historically disadvantaged group (black people) versus an historically advantaged group (white people). Sachs J, in a minority judgment in the case, noted that the Court had not had to address the ‘more difficult problem’ where a measure advances the interests of one disadvantaged

65 The Promotion of Equality and Prevention of Unfair Discrimination Act (note 56 above) contains a range of measures for the promotion of equality by the state and the private sector and requires special measures including codes of practice, reasonable accommodation, action plans etc to promote equality. The Act has only been operational for a few years so it is difficult to assess its impact but it offers great opportunities for far-reaching change.

66 *Minister of Finance v Van Heerden* (note 13 above) para 31.

67 See Fredman (note 38 above) 182–185 for a discussion of the case. See also Albertyn & Goldblatt (note 40 above) 29–42.

68 Albertyn & Goldblatt (note 40 above) 42.

69 *Van Heerden* (note 13 above) paras 86–89.

group over those of another disadvantaged group.<sup>70</sup> An example of such a case might be where the state introduces a law allowing HIV-positive women to be given free nutritious food. In this instance, poor women who are not HIV positive and poor men who are either HIV positive or HIV negative might claim that such a law unfairly discriminates against them and is not a reasonable measure in the sense that it deepens their disadvantage. The state might answer this claim by saying it is a positive measure designed to address the needs of a severely disadvantaged group. The groups of men and women who fall outside of this measure might also argue that their right to have access to sufficient food in s 27(1)(b), read with s 27 (2), has been violated.

This is a ‘difficult problem’ given the deferential nature of the *Van Heerden* test and its focus on the group being advantaged rather than the group opposing the measure. It uses only a ‘light brush of reasonableness’ rather than the stricter test of fairness that s 9(3) requires in relation to the group complaining of disadvantage.<sup>71</sup>

While very poor men and HIV-negative women may be less disadvantaged than poor HIV-positive women, they may nevertheless be desperately hungry and in urgent need of food. The attempt to benefit a disadvantaged group should not be used to justify failing to assist other disadvantaged groups. The state’s argument justifies a hierarchy of disadvantage, which is not supported by the entitlement in s 27 of ‘everyone’ to have access to sufficient food. An interdependent reading of s 9 and s 27 should support a result that extends state support to a larger section of the poor rather than limiting it to its existing reach. This accords with a transformative interpretation of the Constitution and a substantive approach to equality.

The case also points to the need to understand the position of the group of poor men and HIV-negative women ‘intersectionally’. Thus, it is incorrect simply to look at the ground of gender and to compare men and women. The disadvantage faced by the men is based on the intersection of their gender and their poverty. While men may be generally better off than women, these men remain deeply disadvantaged as a group. Similarly, for the HIV-negative women it would not be enough to look at their HIV status as they are also defined by their disadvantaged position as women and as part of the class of poor people.

It may be necessary for the Court to develop a less deferential approach to s 9(2) cases where both groups are disadvantaged (if not equally so). The existence of a concurrent claim based on socio-economic rights should be an important factor in the level of scrutiny developed for such circumstances. As argued in Part IV (e) below, situations where a vulnerable group lacks access to a basic socio-economic need require particularly compelling justifications from the state. The basic obligation affirmed in the socio-economic rights cases discussed below is that the state should provide relief to those whose needs are urgent or who are living in intolerable conditions.

70 Ibid para 149.

71 Albertyn & Goldblatt (note 40 above) 40.

In conclusion, the equality right, if interpreted substantively and understood in relation to the socio-economic rights in the Constitution, can be used to address the needs of the disadvantaged and poor in a range of ways. First, the right can be used to require government benefits available to certain groups to be extended to other disadvantaged groups. Second, it can be used to prevent government from taking away benefits because of the systemic inequality it will perpetuate and the disadvantage that this will produce. Third, it can be used to require that the state provide new services or benefits that will improve the circumstances of a disadvantaged group. The latter situation is illustrated by the Canadian case of *Eldridge* where the provincial government of British Columbia was required to provide sign language interpreters for deaf patients as part of the publicly funded health-care system.<sup>72</sup> In the following section, we examine how an equality perspective can enrich our socio-economic rights jurisprudence.

#### IV THE ROLE OF EQUALITY IN SOCIO-ECONOMIC RIGHTS JURISPRUDENCE

##### (a) An equality-sensitive approach to socio-economic rights claims

There has been a debate in the academic literature concerning the extent to which the value of equality can assist the development of the Court's jurisprudence on socio-economic rights. Certain authors have argued that the Court's socio-economic jurisprudence can be understood as a particular manifestation of substantive equality in that it focuses on the reasonableness of the exclusion of vulnerable and disadvantaged groups from social provisioning in spheres such as housing, health-care, social security.<sup>73</sup> Others have argued that equality cannot guide South Africa's socio-economic jurisprudence in that it is a comparative notion providing no substantive standard against which to measure whether there has been adequate fulfilment of socio-economic rights.<sup>74</sup>

As argued above, we understand substantive equality in the light of the transformative commitments of our Constitution. This entails a process of 'constitutional enactment, interpretation and enforcement' aimed at promoting, amongst other goals, a more egalitarian society.<sup>75</sup> This includes developing a jurisprudence on both equality and socio-economic rights that seeks to reduce inequalities in people's access to socio-economic services and resources.

72 *Eldridge v Attorney General of British Columbia* (1997) 151 DLR (4<sup>th</sup>) 577 (SCC).

73 See T Roux 'Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court' (2003) 10 *Democratization* 92, 97; P De Vos 'Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 *SAJHR* 258; B Porter 'The Crisis of ESC Rights and Strategies for Addressing It' in J Squires, M Langford & B Thiele (eds) *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (2005) 43, 61.

74 See, for example, A van der Walt 'A South African Reading of Frank Michelman's Theory of Social Justice' in H Botha, A van der Walt, J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2004) 163, 174–176; D Bilchitz (note 48 above) 167–170. Bilchitz argues that in order for substantive equality to provide meaningful guidance in our evolving socio-economic rights jurisprudence, it must provide an account of what must be equalised (welfare, resources or capabilities) (fn 135, 169).

75 Klare (note 13 above) 150.



Integrating the value of equality in our socio-economic rights jurisprudence is also justified in the light of the historical experience of oppression and subordination in the colonial and apartheid periods. The construction of systemic political, economic and social inequalities lay at the heart of the colonial and apartheid order.<sup>76</sup> Its legacy is still very much with us. It is manifest in the racialised geography and unequal provision of services characterising South African towns and cities, the vastly inferior quality of education experienced by black children in informal settlements in urban areas and in rural areas, and in the inadequate, overtaxed public health-care system serving mainly poor black patients, compared to a highly resourced private health-care system serving mainly middle-income to wealthy communities. Given this historical and social context, our jurisprudence on socio-economic rights will be impoverished by neglecting the constitutional value of equality.

Furthermore, an interpretative approach to socio-economic rights which integrates the value of equality has significant advantages. An approach to socio-economic rights that is blind to the disparate ways in which a lack of access to social services and economic resources affect different groups, and the consequent need for remedial programmes which take account of these differences, will curtail the transformative potential of our socio-economic rights jurisprudence. We highlighted in Part II the differential impact of a lack of access to water and health-care services on poor women and how this deepens gendered patterns of disadvantage in South Africa. An equality perspective alerts us to the fact that socio-economic programmes may be designed or implemented in such a way that they exclude or are practically inaccessible for disadvantaged groups. Examples would be a housing programme which failed to make provision for the housing needs of women seeking refuge from abusive partners, or a public works programme that fails to make provision for child-care thus restricting women's ability to participate in this programme. An understanding of the interconnections between poverty and other forms of group disadvantage is thus necessary to ensure that programmes which are designed to extend access to socio-economic rights benefit all groups equally. It also avoids the false impression that the poor are a homogenous group with uniform experiences of injustice and socio-economic needs.

Finally, without sensitivity to the value of equality, well-meaning socio-economic programmes can end up stigmatising and perpetuating discriminatory value judgments based on grounds such as race, gender and sexual orientation. For example, child support grant programmes may be designed to incorporate restrictive eligibility criteria and sanction state surveillance of care-givers. This reinforces public images of poor women (who in the South African context remain predominantly black) as irresponsible dependants on public welfare. Public policies and jurisprudence upholding such programmes serve

76 S Terreblanche (note 1 above); J Seekings & N Natrass (note 1 above).

to fuel the powerful undercurrents of gender- and poverty-based stereotypes in our society.<sup>77</sup>

### (b) The Court's socio-economic rights jurisprudence

The Constitutional Court has developed its jurisprudence on socio-economic rights in a series of landmark cases.<sup>78</sup> It has affirmed that both the negative and positive duties imposed by these rights are justiciable. A differential model of review has been developed in relation to these respective duties.<sup>79</sup>

Situations where individuals or groups are deprived of existing access to socio-economic rights are characterised as a violation of the negative obligation imposed by the rights.<sup>80</sup> This constitutes a limitation to the relevant right, which can only be justified in terms of the stringent requirements of the general limitations clause in s 36. Limitations to the rights in the Bill of Rights must be in terms of a law of general application and be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. The assessment of justifiability incorporates a proportionality inquiry which includes asking whether there are 'less restrictive means' available to achieve the state's purposes.<sup>81</sup> The foundational constitutional values are thus accorded a central role in assessing the justifiability of negative violations of socio-economic rights.

77 For a discussion of this issue in the context of the US Supreme Court decision in *Wyman v James* 400 US 309 (1971), see T Ross 'The Rhetoric of Poverty: Their Immorality, Our Helplessness' (1991) 79 *The Georgetown Law Journal* 1499 1522–1525. B Goldblatt 'Gender and Social Assistance in the First Decade of Democracy: A Case Study of South Africa's Child Support Grant' (2005) *Politikon* 239 includes research on stigmatisation of women recipients of the child support grant in South Africa including allegations that they are deliberately having babies in order to claim grants.

78 For analyses of this jurisprudence, see: M Pieterse 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 *SAJHR* 383; D Brand 'Introduction to Socio-Economic Rights in the South African Constitution' in D Brand & C Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 1; S Liebenberg 'South Africa: Adjudicating Socio-Economic Rights under a Transformative Constitution' in Langford (ed) (note 20 above).

79 There is a broader critique of the distinction between negative and positive duties and whether a differential model of review based on such a distinction is justified. See, for example: M Craven 'Assessment of the Progress on Adjudication of Economic, Social and Cultural Rights' in Squires et al (eds) note 73 above, 27, 34–36.

80 *Jaftha v Schoeman; Van Rooyen v Stoltz* 2006 (1) SA 220 (CC), para 34. See also *Grootboom* (note 23 above) para 34; *TAC* (note 23 above) para 46. The *Jaftha* case concerned a challenge to the provisions of the Magistrates' Court Act which permitted poor peoples' state-subsidised homes to be sold in execution for trifling debts without any form of judicial intervention. The Constitutional Court held that this constituted a negative violation of the right to housing in s 26(1) of the Constitution, which the state failed to justify in terms of the general limitations clause. By way of remedy the Court read provisions into the statute providing for judicial oversight over sales-in-execution against the immovable property of judgment debtors. See also the High Court decision in *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W).

81 Section 36(1)(e).

In the case of the positive duties imposed by socio-economic rights, the Court has developed the model of ‘reasonableness’ review for assessing compliance by the state with its duties.<sup>82</sup> Although not explicitly defined by the Court, the positive duties imposed by socio-economic rights refer to the measures which the state must take to ensure that individuals gain access to the services and resources guaranteed by the particular rights. The Court has held that this positive duty is qualified by three key elements: ‘(a) the obligation to “take reasonable legislative and other measures”’; (b) “to achieve the progressive realisation” of the right; and (c) “within available resources”’.<sup>83</sup> The contours of reasonableness review were developed in the landmark cases of *Govt of RSA v Grootboom* (*Grootboom*)<sup>84</sup> and *Minister of Health v Treatment Action Campaign* (*TAC*).<sup>85</sup> This article will focus on these positive obligations and the model of reasonableness review.

### (c) Evaluating ‘reasonableness review’

Essentially reasonableness review seeks to preserve a margin of discretion for the state in selecting particular policies to give effect to socio-economic rights whilst retaining the courts’ jurisdiction to review whether these choices are consistent with the Constitution.<sup>86</sup> Reasonableness review entails an assessment of whether government has adopted and properly implemented a coherent, comprehensive and transparent<sup>87</sup> programme that is capable of facilitating the realisation of the relevant rights.<sup>88</sup> A central requirement of a reasonable government programme is that it must cater for those whose needs are urgent and who are living in ‘intolerable conditions’.<sup>89</sup> This element is justified particularly by reference to the value of human dignity and the imperative to take into account the situation of those in a particularly vulnerable position for whom the enjoyment of all rights are imperilled.<sup>90</sup> In *Grootboom*, the state’s failure to adopt and implement an emergency programme catering for the shelter needs of those who were homeless was held to be unreasonable, and hence inconsistent with s 26. In *TAC*, the failure to extend the supply of Nevirapine from a limited number of research sites to hospitals and clinics throughout the public health sector so as to reduce mother-to-child transmission of HIV during childbirth was held to be unreasonable and a violation of s 27.

82 *Grootboom* (note 23 above) para 38; *TAC* (note 23 above) para 39.

83 *Grootboom* (note 23 above) para 38.

84 *Ibid.*

85 Note 23 above.

86 *Grootboom* (note 23 above) para 41.

87 The transparency of government social programmes was referred to as a relevant criterion in evaluating reasonableness in the *TAC* case (note 23 above) para 123.

88 *Grootboom* (note 23 above) paras 39–44.

89 *Ibid* paras 68, 99.

90 *Ibid* paras 44, 83; *TAC* (note 23 above) paras 68, 70.

Critics of the model of reasonableness review have focused particularly on the Court's failure to adopt the concept of minimum core obligations endorsed by the UN Committee on Economic, Social and Cultural Rights.<sup>91</sup> The Committee does not develop a particular standard for specifying the content of the minimum core, referring only to the duty incumbent on state parties 'to ensure the satisfaction of *minimum essential levels* of each of the rights'.<sup>92</sup> David Bilchitz argues that minimum core obligations in relation to socio-economic rights arise from the urgent interests which people have in survival.<sup>93</sup> He argues that people also have a more maximal interest 'in the general conditions that are necessary for the fulfilment of a wide range of purposes'.<sup>94</sup> However, the urgency of the former interest creates an obligation on the state to prioritise its fulfilment.<sup>95</sup> A related critique is that reasonableness review lacks content and is in danger of becoming an excessively deferential standard of review which will not advance the transformative goals of the Constitution.<sup>96</sup> Thus Davis argues that a court can 'mould the concept of reasonableness so that, on occasion, it resembles a test for rationality' thereby allowing it to 'give a wide berth to any possible engagement with direct issues of socio-economic policy'.<sup>97</sup>

The jurisprudence suggests that reasonableness review has developed into a context-sensitive standard which incorporates a number of substantive criteria and values for assessing the state's compliance with its positive duties.

91 The notion of 'minimum core obligations' was initially adopted by the UN Committee in General Comment No 3 (Fifth session, 1990) *The Nature of States Parties Obligations (art 2(1) of the Covenant)* UN Doc E/1991/23, para 10. It has been elaborated upon in subsequent General Comments, see General Comment No 14 (Twenty-second session 2000) *The Right to the Highest Attainable Standard of Health (art 12 of the Covenant)* UN Doc E/C12/2000/4, para 43; General Comment No 15 (Twenty-ninth session, 2002) *The Right to Water (arts 11 and 12 of the Covenant)* UN doc E/C.12/2002/11, paras 37–38.

92 General Comment No 3 *ibid* para 10.

93 See Bilchitz (note 48 above) 187–188. See also D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 1.

94 Bilchitz (note 48 above) 188.

95 *Ibid* 189. On the notion of priority and the minimum core, see 208–213.

96 D Brand 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or "What are Socio-Economic Rights For?"' in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2004) 33; D Davis 'Socio-Economic Rights in South Africa: The Record of the Constitutional Court after Ten Years' (2004) *ESR Review* 3; M Pieterse 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 *SAJHR* 383 410–411. Reasonableness review has also been defended as an appropriate model of review and preferable to the minimum core approach to socio-economic rights claims. See, for example: M Wesson 'Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court' (2004) 20 *SAJHR* 284; C Steinberg 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence' (2006) 123 *SAJL* 264; K Lehmann 'In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core' (2006) 22 *Am U Int L Rev* 163.

97 Davis *ibid* 5.

*Grootboom*, *TAC* and their progeny have resulted in the adoption of or extension of important social programmes in favour of the poor.<sup>98</sup>

Nevertheless, the danger that reasonableness review can degenerate into an excessively deferential or formal standard of review cannot be discounted.<sup>99</sup> Given the Court's commitment to reasonableness review for evaluating positive socio-economic rights claims,<sup>100</sup> it becomes important to ensure that reasonableness review develops a sufficiently substantive content which can advance the transformative aims of the Constitution. One of the ways in which this can be achieved is to develop the role of the foundational constitutional values of human dignity, equality and freedom as well as the impact of socio-economic deprivations on other intersecting rights within the assessment of reasonableness. As we have noted, the value of dignity has already been given an important place in the Court's assessment of reasonableness.<sup>101</sup> However, given the deep intersections between socio-economic deprivations and race, gender and other forms of inequality in South Africa, the value of equality within reasonableness review warrants further development.<sup>102</sup> In our view, the temptation to seek to justify socio-economic rights in terms of one overarching value or related right should be resisted. Such an approach is too restrictive and does not do justice to the range of values and fundamental interests which socio-economic rights were intended to promote in different contexts. Even the seeming clarity offered by standards such as 'survival' for justifying minimum core obligations is illusory and does not do justice to the diversity of different contexts and circumstances in which socio-economic rights claims are made. As Katharine Young observes:

[T]he focus on biological survival can set the interpretations of economic and social rights on the wrong ground. A focus on needs may disclose little about the ranking of alternative strategies designed to save lives, and is unhelpful in a mature recognition of the inevitability

98 There was a delay of over three years subsequent to the *Grootboom* judgment before the state adopted a programme for housing assistance in emergency housing circumstances. This programme now constitutes Chapter 12 of the National Housing Code. The implications of the non-implementation of this programme by local authorities in eviction applications were considered in the following cases: *City of Cape Town v Rudolph* 2004 (5) SA 545 (C); *The City of Johannesburg v Rand Properties (Pty) Ltd* (note 13 above); *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 SCA 25 (RSA) (at the date of writing the latter case has been appealed to the Constitutional Court and judgment is awaited). For an account of the role of the Court's socio-economic rights jurisprudence in the campaign for the adoption of national HIV/AIDS Treatment Plan, see M Heywood 'Shaping, Making and Breaking the Law in the Campaign for National HIV/AIDS Treatment Plan' in P Jones & K Stokke (eds) *Democratising Development The Politics of Socio-Economic Rights in South Africa* (2005) 181.

99 See also the discussion by B Porter 'The Crisis of ESC Rights and Strategies for Addressing It' in Squires et al (eds) (note 73 above) 43, 62.

100 In both *Grootboom* and *TAC*, the Constitutional Court has rejected arguments by amici curiae to adopt the concept of minimum core obligations. See *Grootboom* (note 23 above) paras 26–33; *TAC* (note 23 above) paras 26–39.

101 See, for example, *Grootboom* *ibid* para 44; *Khosa* (note 44 above) paras 40–45.

102 A similar observation applies to the value of freedom, but the relevance of this value to socio-economic rights claims deserves detailed consideration in a separate article. For a justification of socio-economic rights in terms of the value of autonomy, see C Fabre 'Constitutionalising Social Rights' (1998) 6 *The Journal of Political Philosophy* 263.

of death. Similarly, the emphasis on minimalism behind the core becomes suggestive, when attached to life, of a more scientific, needs-based assessment of the commodities necessary for biological survival.<sup>103</sup>

She goes on to point out how such technical approaches have tended to detract from the participatory dimensions of defining and claiming rights. This does not imply that the impact of socio-economic rights deprivations on people's survival prospects and life chances should not be important factors in the assessment of reasonableness. Our point is that biological survival is not necessarily the only or most relevant interest at stake in different kinds of socio-economic rights cases. For example, a claim for the provision or protection of shelter by abused women may be better understood in terms of the value of autonomy and freedom and security of the person. A claim by Hindu prisoners for the provision of vegetarian food is better justified by intersection of the right to food and respect for religious and cultural diversity.

The following sections focus specifically on the implications of integrating the value of equality within reasonableness review.

#### **(d) Integrating the value of equality in reasonableness review**

The jurisprudence to date suggests that the key factors influencing the assessment of reasonableness are a combination of the vulnerability of the group experiencing the deprivation, and the nature of the service or resource to which access is sought in the particular case. In *Grootboom*, the claimants were representative of impoverished communities 'who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations'.<sup>104</sup> They were seeking access to basic, emergency shelter until such time that their needs could be provided for within the formal housing programme. These were critical factors informing the Court's assessment that the state's housing programme in the area of the Cape Metropolitan Council failed to comply with s 26 of the Constitution.<sup>105</sup> In the *TAC* case, the government's restrictive programme to prevent mother-to-child transmission of HIV was unreasonable because impoverished women and their children, who were dependant on state-provided health-care services, were deprived of access to 'a simple, cheap and potentially lifesaving medical intervention'.<sup>106</sup> In *Khosa*, the Court emphasised the vulnerable position of permanent residents living in poverty and the severe impact on their dignity of denying them access to social assistance grants.<sup>107</sup> The purpose of such grants, according to the Court, is to ensure that people 'are afforded their basic needs'.<sup>108</sup> The Court linked

103 K Young 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale J Int'L* (forthcoming) Part II A (footnotes omitted).

104 *Grootboom* (note 23 above) paras 3–4, 65, 99.

105 *Ibid* para 36.

106 *TAC* (note 23 above) paras 70, 73, 78–79.

107 *Khosa* (note 44 above), paras 76–77, 81. See further the discussion in Part III (b) above.

108 *Khosa* *ibid* para 52.

the fulfilment of basic needs to the foundational constitutional values in the following terms: 'A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.'<sup>109</sup>

These factors incorporate an implicit substantive equality perspective that requires special consideration for the fulfilment of the basic needs of vulnerable and disadvantaged groups. Although the meeting of these needs will not result in an equal distribution of resources in society, it at least mitigates the impact of the existing stark economic inequalities and enables a greater measure of participation by marginalised groups in our society.<sup>110</sup> Moreover, in accordance with the obligation of 'progressive realisation' in ss 26(2) and 27(2), the state should be placed under an ongoing obligation to take reasonable measures to improve both access to socio-economic rights as well as the quality of socio-economic services and resources to which disadvantaged groups have access. This will contribute to reducing the socio-economic disparities in our society.<sup>111</sup> Socio-economic rights should advance both the meeting of basic needs and the achievement of greater equality in access to socio-economic services and resources. This advances one of the primary goals of transformative constitutionalism — the transformation of 'a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction'.<sup>112</sup>

A jurisprudence on reasonableness which integrates a substantive equality perspective would incorporate the following inquiries: (a) The historical and current social context in which the claimant group is situated. (b) The impact of the denial of access to the relevant socio-economic resource or service on this group.<sup>113</sup> In this regard, a court should inquire whether the socio-economic deprivation in question prevents the claimant group from developing to their full potential and participating as equals in society. Does the denial of access to the particular rights have the effect of entrenching and perpetuating systemic patterns of racial, gender and other forms of discrimination and subordination in our society? Does it create new and

109 Ibid.

110 See also the discussion on 'positive measures' in the context of equality rights in Part III (c) above.

111 The Court held in *Grootboom* in relation to the progressive realisation of the right of access to adequate housing in s 26: 'Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses' (para 45). Bilchitz (note 48 above, 193–194) critiques this interpretation of 'progressive realisation' on the basis that it implies 'that some receive housing now, and others receive it later'. In the light of his argument that the state has an immediate commitment to prioritising minimum core obligations, he understands 'progressive realisation' to impose a duty on the state to gradually improve the quality of housing provision. See also the discussion in S Liebenberg 'The Interpretation of Socio-Economic Rights' in Woolman et al (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> ed 2004) 33, 41–44.

112 Klare (note 13 above) 150.

113 See, for example, the detailed analysis by Sachs J of the historical and social context in which predominantly black communities in South Africa experience evictions from their homes, and the economic and social consequences of such evictions in *Port-Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 8–23.

invidious forms of disadvantage based, for example, on an intersection of grounds such as poverty, nationality and HIV-negative status?<sup>114</sup> (c) The nature of the resource or service to which access is sought. Is it accepted as a basic social need in South African law, comparative and international law? In this regard, it is relevant that the Court expressly held open the possibility in both *Grootboom* and *TAC* of having ‘regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable’.<sup>115</sup>

Such an analysis should not be limited to the traditional group-based grounds of discrimination, but extend to an acknowledgement of the distinct disadvantages suffered by the poor as a group. The Court has already acknowledged this in its jurisprudence to date. Thus in *Grootboom*, the Court held that the poor ‘are particularly vulnerable and their needs require special attention’.<sup>116</sup> This recognition of the distinctiveness of poverty as a ground of systemic disadvantage should be complemented by an analysis of how it interrelates with other axes of discrimination in particular cases.

### (e) Justifications

One of the particular features of reasonableness review is that it combines a consideration of the values and purposes underpinning the relevant rights and the impact of their denial on the complainant group with the state’s justifications for failing to fulfil the rights. Thus the Court observed in *Khosa*:

When the rights to life, dignity and equality are implicated in cases dealing with socio-economic rights, they have to be taken into account along with the availability of human and financial resources in determining whether the State has complied with the constitutional standard of reasonableness. This is, however, not a closed list and all relevant factors have to be taken into account in this exercise. What is relevant may vary from case to case depending on the particular facts and circumstances.<sup>117</sup>

The jurisprudence under ss 26 and 27 thus departs from the traditional two-stage approach to constitutional analysis in which the scope of the relevant right and whether it has been infringed is determined first, and thereafter the justifiability of a limitation to that right is considered. This conflation of the two stages within the reasonableness inquiry creates the danger that the inquiry becomes disproportionately focused on the state’s justificatory arguments. An approach which emphasises the purposes and values underpinning socio-economic rights and a contextual application of these values in the

114 As Henk Botha ‘Freedom and Constraint in Constitutional Adjudication’ (2004) 20 *SAJHR* 249, 277 observes: ‘The Constitution... does not seek simply to consolidate and preserve the outcome of past constitutional struggles, but requires us to carry these struggles forward through political action and openness to new struggles for recognition.’

115 *Grootboom* (note 23 above) para 33; *TAC* (note 23 above) para 34.

116 *Grootboom* *ibid* para 36. See also *TAC* *ibid* para 70: ‘To the extent that government limits the supply of Nevirapine to its research sites, it is the poor outside the catchment areas of these sites who will suffer. There is a difference in the positions of those who can afford to pay for services and those who cannot. State policy must take account of these differences’ (footnotes omitted).

117 *Khosa* (note 44 above) para 44. See also paras 83–84 and sources cited here.



particular case would focus the reasonableness inquiry, at least initially, on a value-based assessment of the context of the relevant rights and the impact of the socio-economic deprivation in question on the complainant group. It would require close attention to the historical, social, economic and political context in which groups experience a denial of access to socio-economic rights. This will help guard against reasonableness degenerating into an unprincipled and unduly deferential standard of review.

Where a disadvantaged group is deprived of access to a basic social or economic resource corresponding to the rights in ss 26 and 27 and the impact of this deprivation is severe, the Courts should require particularly compelling justifications from the state. A proportionality analysis should also be incorporated, requiring the state to consider alternative means of providing relief to the affected group when it is not possible within current resource constraints to provide all elements of the right. This strict standard of scrutiny was illustrated in the *Khosa* case where the fact that a vulnerable group of complainants (non-nationals) were denied access to a social grant with the effect that they were forced into relations of dependence on their community triggered 'a hard look' review of the state's policy and budgetary justifications.<sup>118</sup>

The standard of scrutiny should thus be informed by an understanding of the purposes and values underpinning the particular rights and a contextual analysis of the impact of the denial of the right on the complainant group. An incorporation of the value of equality within the reasonableness inquiry would demand particularly stringent justifications from the state in situations where the denial of access to socio-economic rights creates or reinforces patterns of inequality and marginalisation in our society.

Situations may arise in particular socio-economic cases where the state is able to show that its resources are demonstrably inadequate to satisfy everyone's basic needs. In these circumstances, it becomes reasonable to prioritise the urgent needs of those who are in a particularly disadvantaged or vulnerable position.<sup>119</sup> One indication of this heightened vulnerability is where groups experience intersecting forms of disadvantage based, for example, on race, gender and poverty. However, courts should guard against the danger of accepting too readily the state's resource constraints arguments and the temptation to seek refuge in the creation of categories of vulnerability among the poor as a class. Such an approach will leave intact, and in fact serve to legitimate, existing distributions of wealth and the pervasive class-based inequalities of our society.<sup>120</sup> It will not facilitate the transformation of our society in a participatory and egalitarian direction. Resource-based justifica-

118 *Khosa* *ibid* paras 53–67. See further the discussion in Part III (b) above.

119 The UN Committee on Economic, Social and Cultural Rights, which supervises states parties obligations under the International Covenant on Economic, Social and Cultural Rights (1966) has commented that 'even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes'. General Comment No 3 (note 91 above) para 12.

120 On the counterproductive implications of such an approach, see Lehmann (note 96 above).

tions for a failure to fulfil the basic socio-economic needs of everyone should thus be carefully scrutinised both in relation to existing budgetary allocations and the holistic range of resources commanded by the state.<sup>121</sup> If the context requires it, the state should be called upon to provide a reasoned justification why the failure to ensure the fulfilment of everyone's socio-economic rights cannot be remedied through the taking of redistributive measures.

## V CONCLUSION

We have argued that an interpretation of equality rights and socio-economic rights which takes seriously the interdependence between these rights is necessary to ensure that both sets of rights realise their transformative potential. The interrelationship between the two rights creates a number of strategic challenges for public interest litigation in South Africa. Decisions will have to be made as to whether, in the light of the facts of the particular case, the constitutional challenge is best brought solely on the basis of equality rights, or on the basis of socio-economic rights, or as a combination of the two. Where the state has adopted a social benefits programme or legislation which unfairly discriminates against or excludes a certain group on prohibited grounds, litigation can be initiated on the basis of a joint reading of equality and socio-economic rights. As argued above, such an intersection of rights should trigger a strict standard of scrutiny in respect of the state's justifications.

However, where the state has failed to enact social benefit programmes or legislation, it may be difficult to persuade a court to order the state to adopt such programmes solely on the basis of equality rights. Such positive measures stand a better chance of success when brought in terms of the socio-economic rights provisions of the Constitution, or as a combination of a substantive reading of equality and socio-economic rights.

Another set of difficult cases are those where the ground of discrimination is primarily based on a group's socio-economic status. This form of discrimination is endemic in a market economy where the wealthy can purchase social goods which the poor cannot afford, or goods of a superior quality such as health care, education and social security. Can these inequalities be challenged in terms of s 9 equality rights, or should they be exclusively adjudicated in terms of socio-economic rights? An example that arises in the South African context concerns the right of 'everyone' to 'social security, including, if they are unable to support themselves and their dependents, appropriate social assistance'.<sup>122</sup> At present South Africa has one of the most extensive social assistance programmes for a developing country with more than 11 million receiving one of the social grants.<sup>123</sup> The criteria for entitlement to these grants

121 For a discussion of the concept of 'available resources' in ss 26 and 27, see: Liebenberg (note 111 above) 33, 44–47; Bilchitz (note 48 above) 227–234.

122 Section 27(1)(c) read with s 27(2) of the Constitution.

123 Address by the Minister of Social Development, Dr Zola Skweyiya on the Occasion of the Debate on the President's State of the Nation Address, Parliament, Cape Town, 13 February 2007 <<http://www.welfare.gov.za/media/2007/debate.htm>>.

are youth (under 14), old age (over 60 for women, over 65 for men) and severe disability. The grant system excludes many millions more very poor South Africans who do not fall into the aforementioned categories, but face endemic structural unemployment. They are thus not in a position to earn enough to escape poverty. Many of the individuals and families who live without grants are worse off than those who access grants and face dire poverty and even starvation. Legal arguments for the extension of existing grants such as allowing children between the ages of 14 and 18 years to benefit from child support grants fit relatively comfortably within an equality framework. However, the courts may be less comfortable adjudicating a claim by able-bodied adults where there is no comparator other than those who are better off. Such a claim might be more strategically framed in terms of socio-economic rights. The existing jurisprudence on socio-economic rights can support such a claim by requiring the state to provide short-term measures of relief for those whose needs are urgent and to develop a transparent and participatory plan as a basis for the progressive realisation of the right to social security.<sup>124</sup> However, even in a case such as this, an integration of an equality perspective would strengthen such a claim. Thus, for example, a lack of a secure basic income deepens the disadvantages experienced by groups living with HIV/AIDS. In particular, the lack of social assistance prevents sick people from accessing existing services such as anti-retroviral programmes and adequate nutritional support as they often cannot afford the transport to clinics or the food that would complement their treatment.<sup>125</sup>

In conclusion, an interdependent interpretation of equality and socio-economic rights has significant potential to enhance the responsiveness of our jurisprudence to the complex causes and manifestations of poverty and inequality in South Africa. The striving to understand and respond to systemic disadvantage and injustice lies at the heart of transformative adjudication under our Constitution.

124 The UN Committee on Economic, Social and Cultural Rights views the adoption of a participatory and transparent plan of action and strategy for the realisation of the rights as a core obligation of states parties to the International Covenant on Economic, Social and Cultural Rights. See eg General Comment No 14 (note 91 above) para 43(f).

125 See further Richter (note 9 above).