Introduction

It is an honor to be invited to give the Samuel Rubin Lecture. I am conscious of this and feel privileged indeed to have been invited to deliver the Thirty Third Rubin Lecture. And I think it is also appropriate to use this opportunity to record my gratitude for having been offered the opportunity to teach a seminar on the role of courts in the enforcement of socio-economic rights as the Samuel Rubin Professor of Law during this Fall. In this regard I am doubly indebted to both the Reed Foundation and Columbia Law School for this special privilege.

It has been a rich and a rewarding experience for me to take a break from the day-to-day demands of my judicial commitments and come to Columbia Law School and reflect on some of the issues that come before our Court. This has provided me with a unique opportunity to stand back from my work and to reflect on some of the issues involved in the process of adjudication as we painstakingly reconstruct our society and bring the constitutional guarantees within the reach of all.
For this opportunity, I owe a huge debt of gratitude to the Law School which provided the space for such reflection and to the Reed Foundation for making it possible for me to occupy that space as a Visiting Professor.

Samuel Rubin was committed to the pursuit of peace and justice, and the search for an equitable reallocation of the resources of the world. However, he was conscious of the fact that the achievement of this vision lay in the full implementation of social, economic, cultural, civil and political rights. In a sense he believed in the full implementation of the fundamental human rights and freedoms enshrined in the Universal Declaration of Human Rights, as well as in other instruments on human rights, as a means of achieving peace. Implicit in his vision is a belief in the interdependence and the indivisibility of the human rights enshrined in these instruments.

Indeed, as the United Nations High Commissioner for Human Rights has pointed out, the international and other instruments on economic, social and cultural rights, in spirit and substance, assert that social and economic development, which is crucial for the improvement of individual and collective welfare, and security, which is the framework for peace, cannot be
sustained or attained, without full respect for human rights.\textsuperscript{1} This proposition was advanced as long ago as 1944, by President Roosevelt in his State of the Union Address of January 11, 1944, when he argued that security “means not only physical security which provides safety from attacks by aggressors,” but also includes “economic security, social security, moral security.”\textsuperscript{2} And he maintained that “essential to peace is the decent standard of living for all individual men and women and children in all nations”, and concluded that “[f]reedom from fear is eternally linked with freedom from want.”\textsuperscript{3}

Recently we have witnessed the collapse of oppressive regimes and the emergence of new democracies. One of the greatest challenges facing the emerging democracies is to transform their respective societies from ones characterized by political, economic, and social injustice into societies based on respect for human dignity and fundamental human rights and freedoms. The implementation of socio-economic rights and civil and political rights is essential to this transformation. The Rubin Lectures provide the opportunity for reflecting on the implementation of these rights.

\textsuperscript{1} Statement by Ms Louise Arbour, United Nations High Commissioner for Human Rights on the opening of the 61\textsuperscript{st} session of the Commission on Human Rights, Geneva, 14 March 2005.  File://E:\UN Com Speech.htm
\textsuperscript{3} Id
The broad issue that I would like to consider this evening is the role of courts in this transformation.

South Africa is one of those countries that have miraculously emerged from a repressive legal order to embrace democracy. A new constitution was adopted. The goal that we have fashioned for ourselves in the Constitution is to “establish a society based on democratic values, social justice and fundamental human rights.” Indeed, the very first provision of the Constitution which establishes the founding values of our constitutional democracy includes as part of those values, human dignity, the achievement of equality, and the advancement of human rights and freedoms.

The new constitutional order requires fundamental change to the political, social, and economic conditions which previously existed in our country. A commitment to address the injustices of our past and to transform our society into the one envisioned in the Constitution lies at the heart of the new constitutional order.

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4 Preamble of the Constitution of South Africa.
In keeping with the vision of the Samuel Rubin Foundation, I propose to reflect on the role that the Constitutional Court has played in the implementation of socio-economic rights, an aspect that is crucial to the transformation demanded by our Constitution. Perhaps to provide the context for this discussion, I should first describe the new constitutional order, and thereafter, briefly sketch the foundational jurisprudence that has been developed by the Court to guide it and other South African courts in protecting the Constitution and democracy.

**The New Constitutional Order**

The Constitution has introduced a new constitutional order that is very different to that which previously prevailed. It established the foundational values on which our constitutional democracy has been established. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms; non racialism and non-sexism; the supremacy of the Constitution and the rule of law; and universal adult suffrage, a common voter’s roll, regular elections and a multi-party system of democratic government, to ensure accountability,

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5 Section 1(a) of the Constitution.
6 Section 1(b) of the Constitution.
7 Section 1(c) of the Constitution.
responsiveness and openness.  

These foundational values are the pillars of our constitutional democracy and are therefore crucial not only to the transformation of our society, but also to the transformation of our legal system. In this sense the Constitution embodies an objective, normative value system. It embodies “fundamental constitutional values for all areas of law which should act as a guiding principle and stimulus for the legislature, executive and judiciary.”

The common law, including indigenous law must now be influenced by these fundamental constitutional values. And the impact of the new foundational values goes beyond common law and indigenous law. It also affects the continued vitality of all South African legal precedents. Prior precedents construing pre-constitutional legislation might no longer be followed where they were based on values that are inconsistent with the values introduced by the new constitutional order.

A Bill of Rights has been introduced to give effect to these foundational values. The Bill of Rights guarantees, among other rights,
political and civil rights. And to alleviate poverty and other adverse socio-economic conditions brought about by our past, the Bill of Rights makes provision for socio-economic rights.

In order to protect these fundamental rights and freedoms, the new constitutional order introduced a legal system premised on the supremacy of the Constitution and the rule of law. The very second provision of the Constitution proclaims the supremacy of the Constitution and declares that any law or conduct that is inconsistent with the Constitution is invalid, and requires that “the obligations imposed by [the Constitution] must be fulfilled.” Courts are given the central role to uphold the Constitution and give life to the foundational values. They are given the power to “declare . . . any law or conduct that is inconsistent with the Constitution . . . invalid” and in addition, to “make any order that is just and equitable.”

The Role of Foundational Jurisprudence

The Constitutional Court, which sits at the apex of the judicial system, has been in existence now for about twelve years. During this period, the Court has handed down a number of landmark decisions which have made

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12 Section 2 of Constitution.
13 Section 172(1) of Constitution.
headlines both in South Africa and around the world. In handing down these opinions, the Court had to write on a blank slate. There was no constitutional jurisprudence to guide it. The Court therefore has also spent a great deal of time in this formative period performing a far less visible but equally important task; formulating the foundational jurisprudence that will guide it and other courts in adjudicating human rights. This is a task that must be confronted by any new court in an emerging democracy. This jurisprudence forms the essential background to the adjudication of human rights.

Broadly speaking, this jurisprudence, first, locates the space occupied by the Court in this new order; secondly, it deals with the contours of the separation of powers and defines the Court’s relationship with other branches of government; and thirdly, it deals with the tools for bridging the gap between the common law, which includes indigenous law and precedent, and the legal norms brought about by the new constitutional order. However, for the purposes of this lecture, it will sufficient to refer to the first two aspects of this jurisprudence which is relevant to the task of implementing socio-economic rights and thus the transformation of our society.
The Place of the Constitutional Court

One of the features of our constitutional democracy that strikes an outside observer is the high degree of reliance that was placed upon the Court to resolve issues that had been left unclear or undecided by the political process during the creation of the Constitution.\textsuperscript{14} During the constitution making process, the Court was entrusted with the responsibility of certifying that the new text of the Constitution complied with the Constitutional Principles that had been agreed upon during the multi-party constitutional negotiations.\textsuperscript{15} It took two certification judgments to have the text of the Constitution approved by the Court.

As one of its earliest tasks, therefore, the Court had to decide on a constitution that was to be crucial to the transformation of our society. The Constitution itself is a product of the Court’s exercise of its power of judicial review.

\textsuperscript{14} The Court was established under the interim Constitution which was a transitional constitution until a new Constitution was drafted by a democratically elected Constitutional Assembly in 1996.

\textsuperscript{15} These Constitutional Principles were set forth in the interim Constitution. The multi part negotiations resulted in the adoption of the interim Constitution. In its First Certification Judgment, the Court declined to certify the first text of the Constitution, holding that it did not comply with the Constitutional Principles in various respects. The Constitutional Assembly obediently reconvened and amended the text to meet the Court’s objections. The new Constitution itself is therefore the product of judicial review.
Under the new constitutional order the Constitutional Court is the highest court in constitutional matters and this makes it the ultimate guardian of the Constitution and its values. The special place occupied by the Court in our constitutional democracy is amply demonstrated by the exclusive powers that have been conferred on it in a number of crucial political areas. For example, it is the Constitutional Court alone that can decide disputes between organs of state in the national or provincial sphere, the constitutionality of any parliamentary or provincial bill, the constitutionality of any amendment to the Constitution, and whether Parliament or the President has failed to fulfill a constitutional obligation.

The purpose of giving the Court these powers is “to preserve comity between the judicial branch of government” and the other branches of government “by ensuring that only the highest court in constitutional matters intrudes into the domain” of the other branches of government. This is implicit in the power of the Court to supervise the exercise of judicial review by other courts. While other courts are given the power to declare statutes

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16 President of the Republic of South Africa and Others v South African Rugby Football Union and Others (“SARFU 2”) 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) at para 72.
17 Section 167(4) (a) of the Constitution.
18 Section 167(4) (b) of the Constitution.
19 Section 167(4) (d) of the Constitution.
20 Section 167(4) (e) of the Constitution.
21 SARFU 1 at para. 29; Doctors for Life International v. The Speaker of the National Assembly, decided on 17 August 2006, CCT 12/05, as yet unreported, at para. 23.
and the conduct of the President inconsistent with the Constitution and therefore invalid, the Constitution entrusts to the Constitutional Court “the duty of supervising the exercise of this power and requires it to consider every case in which an order of invalidity has been made [and] decide whether or not this has been properly done.”\textsuperscript{22}

The role of the Court as the ultimate guardian of the Constitution and its values derives from the supremacy of the Constitution itself,\textsuperscript{23} which requires all branches of government to “act in accordance with, and within the limits of, the Constitution”\textsuperscript{24}. The Court has emphasized that it is the duty of the courts “to ensure that all branches of government act within the law [and the Constitution].”\textsuperscript{25} This authorizes the Court “when it is appropriate, to… make orders that affect [other branches of government].”\textsuperscript{26} Given these wide powers, the Court has said that “[i]t would… [therefore] require clear language of the Constitution to deprive [the] Court of its jurisdiction to enforce the Constitution.”\textsuperscript{27}

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\textsuperscript{22} Doctors for Life International, at para 23.
\textsuperscript{23} Doctors for Life International at para 38
\textsuperscript{24} Section 44(4) of the Constitution
\textsuperscript{25} President of the Republic of South Africa and Others v United Democratic Movement (UDM case) 2003 (1) SA 472(CC) at para 25; Doctors for Life International at para 38
\textsuperscript{26} Minister of Health and Others v Treatment Action Campaign (2) 2002 (5) SA 721 (CC) (TAC) at para 113; Doctors for Life International at para 199.
\textsuperscript{27} Doctors for Life International at para 38. Indeed, it has found that its power to consider the Constitutionality of a parliamentary or provincial bill is limited to the circumstances expressly stipulated in the Constitution. It has said that the Constitution “contains clear and express provisions which preclude
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Defining its relationship with other branches of government

Locating its appropriate place within the new constitutional order required the Court to simultaneously define its relationship with other branches of government. In marking its territory, it had to guard against standing in the way of other branches of government, and thus obstructing them in the performance of their constitutional obligations which are equally crucial to the transformation of South Africa; it had to find a place for itself that is neither too much in the way of other branches of government nor too easily ignored. It had to address the separation of powers concern which was certain to arise given its powers to decide matters with important political implications.  

Significantly, the Court recognized right from the beginning that in any court from considering of a Bill save in the limited circumstances referred to in section 79 and 121 of the Constitution.” President of the Republic of South Africa and Others v United Democratic Movement (“UDM”) 2003 (1) SA 472 (CC); 2002 (11) BCLR 1164 (CC) at para. 26; In re Constitutionality of the Mpumalanga Petitions Bill, 2000, 2002 (1) SA 447 (CC) at para. 11; Ex parte President of the Republic of South Africa: in re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC) at para 12.

28 The Court considered the doctrine of separation of powers in the First Certification judgment, albeit in the context of the relationship between the legislature and the executive. Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996(4) SA 744 (CC). The principal objection was directed at a provision of the Constitution which provides for members of the executive branch to also be members of the legislature. In addressing this issue, the Court established the foundation for managing relationships between the various branches of government, and, in particular, the relationship between the judiciary and other branches of government. It made three points in this regard; first, there is no universal model of separation of powers, “the relationship between different branches of government and the power or influence that one branch of government has over the other, differs from one country to another”; secondly, separation of powers “is not a fixed or rigid constitutional doctrine,” but “it is given expression in many different forms and made subject to checks and balances of many kinds”.

democratic systems of government like ours in which a system of checks and balances is observed, “there is no separation that is absolute” and that there will be occasions when the intrusion of one branch into the domain of another will be necessary or unavoidable, saying:

The principle of the separation of powers, on the one hand, recognizes the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping the power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another.\(^{29}\)

It is precisely when courts, in the exercise of their authority to uphold the Constitution, are required to intrude on the terrain of other branches of government, that the potential for tension arises. Courts must manage and contain this tension by developing a doctrine of separation of powers which, as the Constitutional Court has said, should:

\(^{29}\) *Id* at para 109.
"reflect a delicate balancing informed both by [our] history and [our] new dispensation between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that government is unable to take timely measures in the public interest."\textsuperscript{30}

The problem of separation of powers arises more sharply in those cases where the Court has to evaluate policies or conduct of other branches of government. The enforcement of socio-economic rights and the opportunity for the public to participate in the making of the laws by which they are governed directly raise the problem of separation of powers. The assessment of claims based on the violation of these rights inevitably requires the Court to intrude into the domain of other branches of government. It is here where the Court faces its greatest challenge.

\textsuperscript{30} DeLange v. Smuts NO and Others, 1998(3) SA 785 (CC) at para. 60
In assessing claims based on these rights the Court has strived to achieve the appropriate balance between, on one hand, its role to enforce the Constitution and, on the other hand, the respect the Court is required to accord to other branches of government as required by the doctrine of the separation of powers.\footnote{Doctors for Life, International, para. 70.} This is not an easy task, but one required by the terms of the Constitution itself. It will be sufficient to refer to two cases to illustrate how the Court has navigated the murky waters of separation of powers and applied this approach.

**The Right to Political Participation**

The problem of the separation of powers was recently raised in two decisions of the Court which concerned the opportunity for the public to participate in the making of the laws by which they are governed. In *Doctors for Life International*\footnote{In the *Doctors for Life International*, an organization by that name, which has interest in health matters lodged a constitutional challenge alleging that the National Council of Provinces (“NCOP”), a second house of Parliament, in passing certain health bills, had not invited written submissions and conducted public hearings on these Bills as required by its obligation to facilitate public participation in its law making process. The central question presented in this case was whether the NCOP had such constitutional obligation, and, if it did, whether it had complied with it, and the consequences for non compliance with this duty on the resulting legislation.} and *Matatiele*,\footnote{In the second case, *Matatiele* (CCT 73/05, 27 February 2006, (5) BCLR 622), which was argued after *Doctors for Life*, Parliament had adopted a constitutional amendment which, among other changes, altered the boundary between the provinces of KwaZulu-Natal and the Eastern Cape. One of the consequences of the alteration of this boundary was that the area that previously formed the local municipality of Matatiele was transferred from KwaZulu-Natal province into the Eastern Cape Province. It was the transfer of this area which was at the centre of the constitutional challenge.} the Court had to consider
the scope and the meaning of the provisions in the Constitution which require a legislative body to “facilitate public involvement in [its] legislative process [and those of] its committees”.

The central question presented in each case was whether these provisions require the public to participate in the law-making process, and, if so, whether the obligation imposed by these provisions is enforceable in court, and in turn, the consequences of failure to comply with this obligation with respect to the resulting legislation. These two cases required the Court to intervene in the law-making process of Parliament. And these issues lie at the heart of our constitutional democracy.

The Court upheld the constitutional challenges, and in striking down the legislation and the constitutional amendment respectively at issue in these cases, the Court emphasized that our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated in our Constitution is partly representative and partly participatory, is accountable, responsive and

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Under the Constitution, a boundary of a province may not be altered without its approval. The provincial legislature of KwaZulu-Natal had consented to the transfer of this area without consulting the people of Matatiele before agreeing to this transfer. The central question present in this case was whether prior to consenting to the constitutional amendment, the provincial legislature was obliged by the duty to facilitate public participation to permit the communities that are to be affected to make representations to it before it decides whether to approve the reduction of its boundary.

Sections 59 (1), 72 (1) and 118 (1).
transparent and makes provision for public participation in the law-making processes.

The Court announced three principles that are crucial to our democracy, in particular, the relationship between the Court and the other branches of government. First, public involvement provisions impose a constitutional obligation on legislative bodies to facilitate public participation in their law making processes. Secondly, legislative bodies have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public participation in a given case, so long as they act reasonably. Finally, the obligation to facilitate public participation is enforceable in court. The Court rejected the government’s argument that the doctrine of separation of powers precluded the court from declaring invalid the resulting statutes and constitutional amendment.

The framework developed by the Constitutional Court in dealing with claims that Parliament must facilitate public participation in the law making process shows that it is possible to hold Parliament accountable to its constitutional obligation without dictating to Parliament how it should fulfill its obligation.
The importance of these decisions goes beyond the doctrine of the separation of powers. They underscore the importance of allowing the people to have a voice in the making of the laws by which they are governed. This is especially important in South Africa where a majority of people, were for many years denied the right to have say in the making of the laws by which they are governed. Commitment to the right to public participation derives not just from the belief that participation in the law making process will improve the quality of legislation, and ensure that it is informed and responsive. It also derives from the sense that public participation in the law making process is necessary to preserve human dignity and self-respect. It gives people a sense of dignity to know that in their country their voices count. And this facilitates dialogue between the people and the law makers.

It is in this context that the role of the Court in the transformation of our society, in particular, the implementation of socio-economic rights, must be understood. As this jurisprudence illustrates, during this formative period, the Court has not only firmly established a place for itself in the new constitutional order as the ultimate guardian of the Constitution and its
values, but it has also defined its relationship with other branches of government and developed a broad framework for addressing concerns relating to the separation of powers, a concern which is vital to the adjudication of socio-economic rights. It is to that aspect that I now turn.

The Court and the inclusion of Socio-Economic Rights in the Bill of Rights

The story of the Constitutional Court and the implementation of socio-economic rights begin with the First Certification Judgment. One of the questions that the Court had to resolve in its First Certification Judgment was the question of whether socio-economic rights should be included in the Constitution, and if so, whether these rights should be enforceable in courts. Three objections were advanced: firstly, these rights are not universally accepted human rights; secondly, the inclusion of these rights in the Constitution is inconsistent with the separation of powers because their enforcement by the judiciary would result in the judiciary trespassing into the domain of other branches of government; and lastly, they are not justiciable, because their enforcement raises budgetary issues.
The Court rejected all these arguments. Firstly, the Court held that the Constitutional Principles contemplate that the Bill of Rights will include other fundamental human rights that are not universally accepted.\textsuperscript{35} Secondly, while the Court accepted that the enforcement of socio-economic rights would have budgetary implications, it held that the same is true of the enforcement of many civil and political rights, pointing to the right to a fair trial, by way of an example. It concluded in the end that the “inclusion of socio-economic rights in the Bill of Rights does not confer a task . . . upon the courts so different from that ordinarily conferred upon them by a Bill of Rights that it results in a breach of the separation of powers.”\textsuperscript{36}

Then finally, while the Court noted that the Constitutional Principles do not require the justiciability of these rights, it held that “these rights are at best to some extent, justiciable,”\textsuperscript{37} and concluded that:

The fact that socio-economic rights will almost inevitably give rise to [budgetary] implication . . . [is] not . . . a bar to their

\textsuperscript{35} First Certification Judgment at para 76.

\textsuperscript{36} Id. at para 77.

\textsuperscript{37} Id. at para 78.
justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.\textsuperscript{38}

Two points need to be made about this decision. Firstly, the Court paved the way for the inclusion of the socio-economic right in the Bill of Rights; and secondly, it declared that these rights may be enforced in courts. In doing so, the Court sowed the seed for future judicial enforcement of socio-economic rights. The decision itself has become the springboard for the evolution of our jurisprudence on socio-economic rights. The importance of this judgment also lies in the role that the court played in facilitating the social and economic transformation of our society through ensuring that socio-economic rights are not only included in the Bill of Rights but that they are also enforceable in courts.

The socio-economic rights that were ultimately included in the Constitution are focused on education,\textsuperscript{39} fair labor practices,\textsuperscript{40} access to land,\textsuperscript{41} access to adequate housing,\textsuperscript{42} health care,\textsuperscript{43} food and water,\textsuperscript{44} and

\textsuperscript{38} Id at 78.

\textsuperscript{39} Section 29 of the Constitution
\textsuperscript{40} Section 23 (1) of the Constitution.
\textsuperscript{41} Section 25 (5) of the Constitution.
\textsuperscript{42} Section 26 of the Constitution.
\textsuperscript{43} Section 27 (1) (a) of the Constitution.
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social security. Provision is also made for children’s rights and environmental rights.

These rights have been formulated in ways that place positive duties on the state. Everyone has the right to basic education, including basic adult education. As far as further education is concerned, this must be made progressively available and accessible by the state, to everyone through reasonable measures. The state is required to take reasonable measures, within its available resources, to achieve the progressive realization of the rights of access to adequate housing, health care services, food, water and social security.

The new constitutional order that emerged requires fundamental changes to the political, social, and economic conditions which previously existed in our country. One of the goals of our constitutional democracy is to address economic and social injustice brought about by the apartheid legal order. Socio-economic rights were included in the Bill of Rights to address these injustices and to facilitate the transformation of our society from one

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44 Section 27 (1) (b) of the Constitution.
45 Section 27 (1) (c) of the Constitution.
46 Section 28 of the Constitution.
47 Section 24 of the Constitution
characterized by racial and social injustice into “a society based on democratic values, social justice and fundamental human rights.”

And when the Constitutional Court was called upon to consider for the first time a claim based on socio-economic rights, it acknowledged these goals and drew attention to the fact that:

“Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of the new constitutional order.”

The enforcement of Socio-Economic Rights

The inclusion of socio-economic rights in the Constitution has placed the judicial enforcement of these rights in South Africa beyond any

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48 Preamble to South African Constitution
49 Soobramoney v Minister of Health, Kwa Zulu Natal 1998 (1) SA 765 (CC) at para. 8
question. The State is required to give effect to these rights consistent with its constitutional obligation “to respect, protect, promote and fulfill” rights contained in the Bill of Rights. And courts, consistent with their obligation to enforce the Constitution, are bound to ensure that socio-economic rights are protected and fulfilled.

The Court has rejected the argument that the doctrine of the separation of powers precludes courts from making orders that would have the effect of requiring government to pursue a particular policy. It has emphasized that if a state policy is challenged under the socio-economic provisions of the constitution, courts have an obligation to consider whether the policy is consistent with the obligation of the state in relation to these rights. It has made it clear that “[i]f it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.”

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50 Government of the Republic of South Africa and Others v Grootboom and Others, 2001 (1) SA 46 (CC) at para. 20.
51 Section 7(2) of the Constitution.
52 Minister of Health and Others v Treatment Action Campaign (2) 2002 (5) SA 721 (CC) (TAC) at para 99.
In South Africa therefore, the question is not whether socio-economic rights are enforceable under our Constitution, but how to enforce them in a given case. It is precisely in addressing this question that the role of courts in a constitutional democracy arises. This issue arises not so much in the context of whether courts can or should enforce these rights, but in the context of how courts should deal with claims based on socio-economic rights.

These claims are admittedly at the edges of the spheres of power of the judiciary and other branches of government. They draw courts into policy matters, including the State’s budget itself. What compounds this issue are the multiple demands on the government purse, with limited resources to meet these demands. As a result, government must make difficult and agonizing decisions as to how limited budgets are best allocated.

In adjudicating these claims, courts are required to strike a balance between their role as the ultimate guardian of the Constitution, and the role of the government in a democratic society as the policy and law-maker. Precisely how that balance is to be struck is the challenge facing the South
African courts. This challenge requires courts to develop a legal framework for adjudicating claims based on socio-economic rights, one which is sensitive to these issues.

To meet this challenge, the Court has begun to develop a template for dealing with claims based on socio-economic rights which, broadly speaking, deals with the proper approach for assessing these claims; the nature and extent of the obligations imposed and the rights protected; and the standard for assessing violations of these rights.

**Rights and obligations**

The obligation imposed on the state is “take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of [these] rights.”\(^{53}\) What is apparent from this formulation is that both the rights guaranteed and the obligations imposed are limited. The obligation imposed on the state is dependent upon the availability of the resources and the corresponding rights are limited by the lack of resources. What is implicit, if not explicit from this formulation is that these rights are not available on demand, but are subject to the availability of the resources.

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\(^{53}\) Section 26(2) and section 27(2).
As the Court put it, “the State is not obliged to go beyond available resources or to realize these rights immediately.”\(^{54}\)

What is contemplated by the Constitution is that the obligation in respect of socio-economic rights will be met progressively over time. It will take time to meet these demands. This is a relevant consideration in determining the extent to which the government has complied with its obligation in relation to these rights.

The Court has, however, emphasized that this does not mean that nothing could or should be done in the meantime. Progressive realization of these rights requires the state “to take steps to achieve the constitutional goal of affording basic needs to all.”\(^{55}\) And what this entails is that “accessibility should be progressively facilitated”.\(^{56}\) The state has “an obligation to move as expeditiously and effectively as possible towards [the] goal” to afford basic needs to all.\(^{57}\) But the measures taken to achieve this goal and the rate

\(^{54}\) *Grootboom* at para 94; *TAC* at para 32.

\(^{55}\) *Grootboom* at para. 45.

\(^{56}\) Id.

\(^{57}\) Id., citing with approval paragraph 9 of the General Comment 3 of the UN Committee on Economic, Social and Cultural rights, 1990.
at which these measures are taken must be reasonable having regard to the resources that are available.\textsuperscript{58}

\textbf{Do Socio-Economic Rights only impose positive obligations?}

In discussing the extent of the obligation imposed by socio-economic rights, it is necessary to comment on an issue that is not always apparent or acknowledged in the debate on socio-economic rights: socio-economic have a negative and a positive component. The debate on socio-economic rights tends to focus on the positive obligation that they impose.

The Court has recognized this in its \textit{First Certification Judgment}, saying “[a]t the very minimum, socio-economic rights can be negatively protected from improper invasion.”\textsuperscript{59} And when it considered the right of access to adequate housing, the Court emphasized that although the Constitution “does not expressly say so, there is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to [these rights].”\textsuperscript{60}

\begin{itemize}
\item \textsuperscript{58} \textit{Grootboom} at para. 46.
\item \textsuperscript{59} \textit{First Certification Judgment}, at para. 78.
\item \textsuperscript{60} \textit{Grootboom}, at para. 34.
\end{itemize}
The importance of the negative component of socio-economic rights should not be underestimated. It is equally important and can provide protection to vulnerable groups when these rights are threatened. Consistent with this, the Court has struck down a provision in a statute which permits houses of the poor to be sold in execution to satisfy judgment debts, holding that this provision violates the negative component of the right to have access to adequate housing.\textsuperscript{61}

However, the distinction between positive and negative components of socio-economic rights should not be ignored. The positive component of socio-economic rights calls for a different approach in adjudication. Here the courts are not concerned with protecting existing access to these rights,

\textsuperscript{61} This was issue that arose in the \textit{Jaftha}, a case involving a claim based on the impairment of the right of access to adequate housing. The claimants challenged the constitutional validity of a provision in a statute dealing with the execution of judgment debts. The provision in issue allowed a house to be sold in execution of a judgment, in circumstances in which the sale would render the judgment debtor homeless. \textit{Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others} 2005 (1) BCLR 78 (CC) In upholding the constitutional challenge, the Court noted three constitutional defects in the provision: firstly, there was no adequate court control over the execution process; secondly, the provision exposed judgment debtors who are poor and ignorant to eviction from their homes, rendering them homeless; and thirdly, all of this occurs in circumstances where other means were available for securing payment of the debt. The court therefore concluded that this was a violation of the negative component of the right that everyone has to have access to adequate housing. In another case, \textit{Residents of Bon Vista Mansions v. Southern Metropolitan Local Council}. 2002 (6) BCLR 625(W), a high court held that the disconnection of the water supply by the city council was a limitation of the right of access to water and that the council bore the onus of showing that this was justified and that fair procedures had been followed before the decision to disconnect was taken). In \textit{Goldberg v Kelly} 397 U.S. 259 the U.S. Supreme Court held that procedural due process required that the recipient of a public assistance program be afforded an evidentiary hearing before the termination of welfare benefits. The court noted that the termination of welfare benefits “may deprive an eligible recipient of the very means by which to live while he waits.” Id. at 1018.
but are concerned with claims that access to certain benefits should be provided by the state.

Adjudicating these rights will inevitably require courts to evaluate state policies and make decisions that have an impact on the expenditure of public funds. These decisions may well have implications beyond the case before the court. They may have multiple social and economic consequences for the community, and affect the ability of the state to fulfill its other obligations. Yet courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary to give effect to obligations relating to socio-economic rights. Nor are they competent to decide how public funds should most effectively be spent.62

The standard of review

Against this background, the Court has developed a standard of review which recognizes, on the one hand, these institutional limitations and the role of other branches of government in the protection of socio-economic rights, and, on the other hand, the Court’s duty to uphold the Constitution, including the protection and enforcement of socio-economic rights. The

62 TAC at para 37.
Court has held that the measures adopted must be reasonable, and that reasonableness is the standard of review to be applied in evaluating compliance with the obligation to give effect to socio-economic rights.

The Court has emphasized that in considering “reasonableness” the inquiry is not “whether other more desirable or favorable measures could have been adopted, or whether public money could have been better spent,” but rather, the inquiry should be confined to the question whether the measures that have been adopted are reasonable, bearing in mind “that a wide range of possible measures could be adopted by the state to meet its obligations,” and that “many of these would meet the requirement of reasonableness”. But “[o]nce it is shown that the measures do so, [the] requirement [of reasonableness] is met.”

But why did the Court adopt reasonableness as a standard of review? The adoption of reasonableness as the standard of review can be attributed to three factors:

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63 Grootboom at para. 41.
In the first place, the extent of the obligation in respect of socio-economic rights is explicitly set forth in the Constitution. The state is required “to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of these rights.” The Constitution therefore explicitly states that legislation or policies adopted to give effect to these rights must be reasonable. Similarly, when the state does nothing, the question will be, as the Court pointed out in *Grootboom*, whether conduct of the state in doing nothing is reasonable. Reasonableness is therefore a standard of review prescribed by the Constitution itself.

In the second place the specific reference in the Constitution to “available resources” and “progressive realization” is relevant to what is reasonable. What is required is for the state to take steps to achieve this goal, and this must be progressively facilitated subject to the availability of the resources. What may be reasonable today may not be reasonable tomorrow.

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64 *Rail Commuters Action Group and Others v Transnet Ltd T/a Metrorail* 2005 (4) BCLR 301 (CC), at para. 69.
65 *Grootboom* at para 41 and *TAC* at para 38.
66 Subsections 26(2) and 27(2)
In the third place, in assessing claims based on socio-economic rights, it should be recognized that the obligation to give effect to these rights lies first with the state. In giving effect to this obligation, however, the state has to manage its limited resources in order to address the extensive needs of millions of people not only for access to a particular social right, but also for access to a multiplicity of social needs such as health, housing, food and water, and social security. Meeting some of these demands may affect its ability to meet other demands.

Adopting measures that are reasonable will inevitably involve the striking of a balance between a range of competing interests or considerations. And in striking this balance, the state may have to make difficult and agonizing decisions “as to how a limited budget is best allocated to the maximum advantage of the maximum number of [people].”67 There will thus be times when the state will be required “to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of a particular individual”, as the Court has pointed out.68 The standard of reasonableness is sensitive to these issues.

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67 R v Cambridge Health Authority, [1995] 2 ALL ER 129 (CA) at 137 (d)-(f); Soobramoney at para. 30.
68 Soobramoney at para 31.
This is the kind of decision that was faced by the state hospital in *Soobramoney*. The claimant, a diabetic, who also suffered from chronic kidney failure and other heart diseases, sought treatment at a state hospital. There was a huge demand for dialysis machines at the hospital. Evidence showed that renal dialysis facilities were costly and scarce. Resources were limited. The hospital had as a result developed guidelines that regulated access to these machines. The guidelines established priorities. Those who could be cured – namely patients suffering from acute illness which could be treated - and patients who were candidates for kidney transplant, and required dialysis to keep them alive while waiting for a donor, were given preference. Regrettably the claimant did not fall into either of these categories. He was therefore refused treatment.

The Court evaluated the claimant’s claim in the context of these realities, in particular, the resources available to the state and the needs that the health services providers had to meet. The Court found that having regard to the limited resources of the provincial government, the guidelines adopted by the provincial government were reasonable and therefore constitutional. In reaching its decision the Court emphasized that it is the primary responsibility of the state to decide how much funding should be
made available for health and how such funding should be spent, and stated that courts should be slow to interfere with these decisions, saying:

"These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."\(^{69}\)

But at the same time the standard of reasonableness enables courts to hold the state accountable in a manner consistent with the doctrine of the separation of powers. If a case is presented alleging that the state has failed to comply with its constitutional obligations in relation to socio-economic rights, the state is required to respond to the claim and to show that it has adopted and implemented measures which comply with its constitutional obligations. Those measures are then subjected to close evaluation by the courts to determine whether they comply with the constitutional standard of

\(^{69}\) Id. at 29.
reasonableness. And if the measures do not meet the constitutional standard, the Court is obliged to say so.

Thus, in *Grootboom* the Court found that the state’s policy failed to make reasonable provision within its available resources for the people in the Cape Metropolitan area who had no access to land, and no roof over their heads, and were living in intolerable conditions. The persons concerned came from the most disadvantaged sections of the community. The court emphasized that to be reasonable, measures should not leave out those who are in desperate need of shelter. As the Court stated, “[t]hose whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realization of the right.”

Similarly, in *Treatment Action Campaign (TAC)* the Court upheld a challenge to a government policy which prevented the supply of an anti-retroviral drug, nevirapine, to public hospitals that fell outside of the areas where the government was conducting a pilot project. Neither the efficacy nor the safety of the drug was in issue. The evidence established that the

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70 *Grootboom* at para. 44.
administration of a single dose of nevirapine to mother and child at the time of birth would save the lives of a significant number of babies. The use of nevirapine for the prevention of mother-to-child transmission of HIV had not only been recommended by the World Health Organization, but had also been approved by the Medical Research Council, the body that is responsible for assessing the safety of drugs in South Africa.

Nor were the costs and the availability of the drug in issue. The drug was freely available in the private sector and the manufacturer of the drug had offered to supply the drug to public hospitals free of charge for a period of five years. In addition, the government was using the drug in the areas that fell within its pilot program. There were public hospitals outside of the pilot projects that had the capacity to administer the drug. The risk of resistance was minimal, and, in any event, outweighed by the benefit of saving thousands of babies.

The Court concluded that, in these circumstances, it was unreasonable for the government to confine the supply of a potentially lifesaving drug to research sites when the drug was available and had not
been shown to be harmful to mothers or children.\textsuperscript{71} The Court ordered the government to extend the supply of the drug to areas outside of the research sites and to extend training and counseling facilities to public hospitals which did not already have them.

\textbf{Lessons from this Jurisprudence.}

What are the lessons from this jurisprudence?

The lessons that stand out are these: First, it is possible for courts to adjudicate on socio-economic rights in a manner that recognizes the institutional incapacity of courts to deal with polycentric issues and respect the role of other branches of government, while still holding the branches of government accountable to their obligation; second, it is possible to assess these claims without requiring more than existing resources will allow; third, it is possible to adjudicate on these rights in a manner that leaves it to the government to determine and set priorities, while ensuring that in setting these priorities, the government has regard to its constitutional obligations; and finally, courts have a crucial role to play in the enforcement of these rights.

\footnotesize{\textsuperscript{71} Id at para 80.}
This nuanced approach permits government maximum flexibility in fulfilling its responsibilities. It recognizes the overlapping spheres of authority among all three branches of government that is inherent in the context of socio-economic rights, and provides a basis for a co-operative relationship which is essential in the implementation of these rights. It underscores the proposition that protection of socio-economic rights requires courts to develop a flexible relationship with other branches of government if these rights are to be enforced.

This model requires continual interaction between the branches of government in defining and redefining their respective roles and powers in different contexts.\textsuperscript{72} What is required is a constitutional dialogue between the courts and other branches of government. Within this model courts have a significant role to play in the enforcement of socio-economic rights. They may force the other branches of government into action to realize these rights while at the same time leaving it to them to decide the most appropriate method of advancing these rights.\textsuperscript{73}

Conclusion

The South African jurisprudence on socio-economic rights as well as the jurisprudence from other countries - including this country, which I have not been able to deal with in this lecture - amply demonstrates that today there can no longer be any question about whether courts can or should enforce socio-economic rights. The debate on socio-economic rights should therefore focus not on the question whether courts can or should enforce socio-economic right, but what is the appropriate role for courts in the enforcement of these rights.

Such a debate can contribute immensely to the work of the courts as they develop this evolving area of law. It will help courts to refine their thinking on these issues and strengthen the effort to realize socio-economic rights for all, a vision foreshadowed in the Universal Declaration of Human Rights and other international human rights instruments, a vision shared by the Samuel Rubin Foundation.

In the case of South Africa, courts have an important role to play in the transformation demanded by our Constitution. They have been given very wide powers to uphold and protect our constitutional democracy and to
bring all aspects of our law into line with our new constitutional values. This allows courts to develop the law and facilitate the transformation of our society. But also entails a heavy responsibility.

How courts discharge their responsibilities, and, in particular, the way in which they develop the law to give effect to the foundational values of our democracy, and promote values of human dignity, equality, and freedom, has important implications for the process of transformation envisioned by the Constitution and the establishment of the society contemplated by the Constitution: a society based on democratic values, social justice and fundamental human rights.

Thank you for your attention.

Sandile Ngcobo
Columbia Law School
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