POST-1996 SERVICE DELIVERY IN SOUTH AFRICA: CONSTITUTIONAL AND SOCIAL CONTRACT PERSPECTIVES

A DOCTORAL THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENT FOR THE AWARD OF THE DEGREE OF DOCTOR OF LAWS (LLD) IN THE FACULTY OF LAW AT THE UNIVERSITY OF THE WESTERN CAPE

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DECLARATION

By submitting this dissertation electronically, I, **Ebi Achigbe Okeng Ebi**, declare that **Post-1996 service delivery in South Africa: Constitutional and social contract perspectives** is my original work, which has never been presented to any other University, or to the University of the Western Cape. I have acknowledged the work of others and provided references correctly.

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DEDICATION

This dissertation is dedicated to my two beautiful and exceptionally talented daughters, Ms. Abuja Ikwot Ebi and Ms. Ekima Kiki Ebi, my father Mr. Emmanuel Ebi Okeng Ebi, and my brother, Nelson Arisa Ebi Okeng. I will forever be indebted to you all. All of you inspired me tremendously to exceed expectations and leave a legal legacy, whilst attempting to make a positive contribution to our community. Thank you kindly for all your immense support.

Abbreviations and keywords

ANC	African National Congress
AIDS	Acquired Immune Deficiency Syndrome
CA	Constitutional Assembly
CBPP	Community Based People Participation
CBP	Citizen-Based Participation
CESCR	Committee on Economic and Social and Cultural Rights
CC	Constitutional Court of South Africa
CODESA	Convention for a Democratic South Africa
CP	Constitutional Principles
CESCR	Committee on Economic, Social and Cultural Rights
GEAR	Growth, Employment, and Redistribution
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFP	Inkatha Freedom Party
KCCI	Khoisan Chinese Coloureds and Indians
MEC	Member of the Executive Council
MFMA	Municipal Finance Management Act
TLGFA	Traditional Leadership and Governance Framework Act
MTCT	Mother to Child Transmission of HIV
NCOP	National Council of Province
NDP	National Development Plan
NP	National Party
NPA	National Prosecuting Authority
PAC	Pan African Congress
PSCBC	Public Service Coordinating Bargaining Council
PSC	Public Service Commission
PIE	Prevention of Illegal Eviction
SALGA	South African Local Government Association
SAHRC	South African Human Rights Commission
SCA	Supreme Court of Appeal
SPII	Studies in Poverty and Inequality Institute
TAC	Treatment Action Campaign
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
USA	United States of America

Abstract

The human rights movement, which emerged after the end of the Second World War, has created consensus in the international community that basic social amenities are indispensable for human development. These amenities are increasingly accepted as fundamental human rights in national constitutions, with varying degrees of judicial enforceability. However, the efficient provision of basic amenities by states remains a problematic issue in the global South. It is particularly challenging in South Africa, where the introduction of democratic governance after many decades of repressive rule aimed to heal the discriminatory divisions of the apartheid past and establish a society based on equity, dignity, and social justice. Unsurprisingly, the 1996 Constitution makes service delivery a shared obligation among the three spheres of government. However, there is ambiguity in the principle of cooperative governance between the national, provincial, and local governments. Furthermore, the municipality is limited in its service delivery capacity due to inadequate funding and personnel. Against this background, this doctrinal study uses the social contract theory to analyse the legal and policy framework of service delivery in South Africa. It argues that the country's history, constitutional framework, and democratic values make service delivery a social contract, whose performance is measured by how the state provides basic amenities to citizens. It finds that municipalities are over supervised by the national and provincial governments. The study is qualitative in nature, using primary and secondary sources derived from the review of legislation, policies, case law, empirical reports, and academic writings.

KEY WORDS: *Social contract theory, 1996 Constitution, socio-economic rights, South Africa, basic amenities, separation of powers doctrine, judicial review, minimum core*.

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CHAPTER 1: INTRODUCTION AND CONCEPTUAL OVERVIEW OF STUDY

1.1. Introduction

Prior to the 20th century, governance in most parts of the global North operated on varying levels of despotism, territorialism, and "political capitalism."[1] After several centuries of conflicts in Europe led to the Thirty Years War, the Peace of Westphalia of 1648 cemented the idea of state sovereignty.[2] However, international acceptance of state autonomy over territories and their inhabitants neither ended war nor promoted human welfare. Since no state held another sovereign state accountable for the manner it treated its citizens, conflicts continued across the world, especially in Europe. Europe's imperial ventures sucked in other parts of the world into major territorial wars such as the Great War of 1914-1918 and the Second World War.[3] Eventually, the United States of America used nuclear weapons to end World War II in 1945. The massive destruction of lives and properties experienced in this war served as a wake-up call to humanity over the nature of interpersonal relations, the limits of state sovereignty, and the purpose of the modern state.[4]

Appalled at the human tendency to abuse power, world leaders reappraised the concept of human rights and governance. In October 1945, they gathered in San Francisco and formed the United Nations Organisation. Its primary aims were to maintain international peace and security, curb the unlimited exercise of state power, and thereby promote human welfare through international cooperation. Since the United Nations was formed, the world has undergone remarkable transformation in its ideas of rights, duties, and the scope of state power. The adoption of the Universal Declaration on Human Rights in December 1948 was followed less than two decades later by two treaties with vital significance for basic service delivery.

[1] Arrighi, G. *The long twentieth century: Money, power, and the origins of our times* (Verso, 2010, 1st ed. 1994) 36-47.

[2] Croxton, D. 'The Peace of Westphalia of 1648 and the origins of sovereignty' (1999) 21(3) *International History Review* 569-591.

[3] Porter, A.N. *European imperialism*, *1860-1914* (Palgrave Macmillan, 1994).

[4] Gill, G. *The nature and development of the modern state* (Palgrave Macmillan, 2016 (1st ed. 2003).

The first is the International Covenant on Civil and Political Rights.[5] The second is the International Covenant on Economic, Social and Cultural Rights (ICESCR).[6] While the first treaty is regarded as embodying first generation or so-called fundamental human rights that are fully justiciable, the second contains second and third generation rights, whose justiciability depends on the availability of state resources. These second and third generation rights range from the right to healthcare, education, social security, and fair conditions of work to the right to self-determination. Later, human rights advocates began extrapolating the rights in the ICESCR. For example, the right to health was expanded to include the right to a clean environment and sustainable development. Eventually, in 1993, the World Conference on Human Rights declared in Vienna that "All human rights are universal, indivisible, interdependent and interrelated."[7] Ultimately, human rights treaties, declarations, and case law killed the idea that the state has an unlimited power in the way it treats its citizens. However, their impact went beyond the limits of state power.

In the last 70 years, the world has embraced the idea that state power must be exercised alongside a duty to promote the welfare of citizens. This idea recognises that the provision of socio-economic rights is the primary purpose of governance.[8] In short, governance has advanced to the extent that elected officials owe a duty of care to the people who elected them. In return for this duty, the electorate demonstrate their loyalty to the state by voting in elections, serving in the armed forces, paying taxes and rates, and performing similar civic obligations. As this study shall demonstrate, the relationship between the state's duty of care and citizens' loyalty to the state describes the theory of the social contract. This theory is particularly relevant to South Africa, whose notorious history of repression under the apartheid system of governance demands action to remedy the injustices of the past.

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[5] International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966 (entered into force on 23 March 1976).

[6] International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966 (entered into force on 3 January 1976).

[7] Vienna Declaration and Programme of Action, endorsed by the United Nations General Assembly Resolution 48/121 on 20 December 1993.

[8] Heyns C. 'A struggle approach to human rights' in Soeteman, A. (ed.) *Pluralism and law* (Dordrecht: Springer, 2001) 171-190.

Following the repeal of apartheid legislation in June 1991, South Africa began transitioning to a democratic regime of political accountability and judicial review. The injustices of the past gave way to a new democratic dispensation that is founded on a liberal Constitution that guarantees the human rights of all South Africans.[9] For example, the first two paragraphs of the preamble of the 1996 Constitution affirms the quest to "establish a society based on democratic values, social justice and fundamental human rights," in order to establish "a democratic and open society in which government is based on the will of the people." Apart from proclaiming itself as the supreme law of the Republic and guaranteeing that every citizen is equally protected by law, the Constitution aims to "Improve the quality of life of all citizens and free the potential of each person."[10]

Obviously, the word "we" in the Constitution denotes the people of South African. On its part, the statement "improve the quality of life of all citizens and free the potential of each person" hints at a social contract in the Constitution. Indeed, other laws and policy frameworks affirm a social contract as the basis of governance. For example, the Service Charter states:

> This Service Charter is a social contract, commitment and agreement between the State and public servants. It is a written and signed document which sets out the partners' roles and responsibilities to improve performance, enhance and fast track the delivery of services to improve the lives of our people. It … enables service beneficiaries to understand what they can expect from the State and will form the basis of engagement between government and citizens or organs of civil society.[11]

Since government arises from, and is conducted through freely elected representatives, there is an obligation on the state to provide basic amenities to the people.[12] Accordingly, this study argues that South Africa's history, constitutional

[9] In the preamble of the Constitution of South Africa, it states that "We, the people of South Africa, recognise the injustices of our past; honour those who suffered for justice and freedom in our land; respect those have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity.

[10] Paragraphs 1-3 of the preamble of the Constitution.

[11] See 3.1 and 3.2 of the definition sections of the Service Charter, adopted by the Public Service Co-ordinating Bargaining Council's Resolution 1 of 2013.

[12] The word 'We' therefore means delegation of authority through freely elected representatives.

framework, and democratic values combine to make service delivery an enforceable social contract. In turn, the effectiveness of this contract is gauged from how the state provides basic amenities to the people of South Africa.

1.2. Theoretical framework and argument

As evident in the introduction of this study, the core function of the modern state is to promote human welfare. This function explains the plethora of international human rights instruments, all of which seek to promote human rights by holding the state to account for the manner it promotes human rights. These human rights instruments have had a tremendous influence on the framing and content of many national constitutions. South Africa is not left out in this influence.

Other than the interrelated nature of human rights, the right to basic service delivery finds its foundation and protection in sections 27(1) and 153 of the Constitution. Section 27(1) clearly states that all citizens have rights to basic amenities such as access to healthcare services, food, water and social assistance for all persons who cannot provide for themselves and their families.[13] Section 153 demands that "a municipality must structure and manage its administration, budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community." Furthermore, the Constitution states that any law that is inconsistent with its provisions is invalid and the obligation imposed by it must be fulfilled.[14] Therefore, the failure to create an environment that allows and assists each individual in the society to reach their full potential and enjoy a good life is a violation of the principle of social contract inherent in the South African Constitution. This research therefore scrutinises the obligation of

[13] Section 27(1): Everyone has the right to have access to— (a) healthcare services, including reproductive healthcare; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

[14] Section 2 of Constitution of South Africa (hereinafter referred to as the Constitution) provides for the supremacy of Constitution: This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

the South African state to provide basic amenities to its citizens in line with the social contract theory.[15]

The social contract theory is a moral and philosophical idea of political authority, which is one of the most influential theories to emerge in the Western world.[16] In fact, it became so influential that it was used to justify the United States Declaration of Independence in Philadelphia, Pennsylvania, on 4 July 1776.[17] Simply described, it denotes an agreement between a group or community and the state regarding the rights and obligations they owe to each other.[18] It was first articulated by Thomas Hobbes. After him, other prominent scholars such as John Locke, Immanuel Kant, Jean-Jacques Rousseau, and John Rawls popularised it.[19] The social contract is based on the notion that real sovereignty belongs to the people or the electorate, not the abstract entity called the state. Accordingly, when the people adopt or approve a Constitution and elect representatives to govern them, an agreement is created between the governed and the governors.[20] In simple terms, this agreement involves

[15] The Bill of Rights extensively addresses constitutional welfare rights. See sections 25, 26, and 27 of the Constitution of South Africa. See also Tusnet, M. 'The issue of state action/ horizontal effect in comparative constitutional law' (2003) 1(1) *International Journal of Constitutional Law* 79-98 at 89.

[16] Weber, E.T. 'Social contract theory – Old and new' (2009) 7(2) *Review Journal of Political Philosophy* 1-23.

[17] The theory later found its way into the preamble of the American Constitution. See Tate, T.W. 'The social contract in America, 1774-1787: Revolutionary theory as a conservative instrument' (1965) 22(3) *The William and Mary Quarterly: A Magazine of Early American History* 376-391.

[18] Loewe, M., Zintl, T. and Houdret, A. 'The social contract as a tool of analysis: Introduction to the special issue on "Framing the evolution of new social contracts in Middle Eastern and North African countries'" (2021) 145 *World Development* 1-16.

[19] Dienstag, J.F. 'Between history and nature: Social contract theory in Locke and the founders' (1996) 58(4) *The Journal of Politics* 985-1009; Boucher, D. and Kelly, P. *The social contract from Hobbes to Rawls* (Routledge, 2003).

[20] Rosenfeld, M. 'Contract and justice: The relation between classical contract law and social contract theory' (1985) 70 *Iowa Law Review* 769-900.

reciprocal obligations and duties.[21] In return for their loyalty and taxes, the state provides basic services such as security, roads, health, electricity, and water.[22]

Against this background, this dissertation argues that a social contract exists between the South African state and its citizens because of the nature of the country's constitutional democracy. Accordingly, it seeks to examine the statutory framework of service delivery to highlight the link between a social contract and the constitutional obligation to provide basic amenities.[23] It turns to the problems that inform this quest.

1.3. Statement of the research problem

Poor people's access to basic services such as water, sanitation, and electricity is a local and global concern.[24] It is such a pressing concern that the United Nations General Assembly articulated it in goals six and seven of the sustainable development goals.[25] Despite this concern, the state of service delivery in South Africa is deplorable.[26] This assertion is supported by the alarming number of service delivery protests since the onset of democratic governance in 1994. According to data from Municipal IQ, there have been over 2000 service delivery protests in South Africa since 2004 when systematic records began.[27] The graphs below show that this number would have been higher if there had been no pandemic-induced lockdown in 2020.[28]

[21] Mcloughlin, C. 'When does service delivery improves the legitimacy of a fragile or conflict affected state?' (2015) 28(3) *Governance: An international Journal of Policy, Administration and Institutions* 341-356 at 342.

[22] Mitlin, D. 'With and beyond the state – co-production as a route to political influence, power and transformation for grassroots organizations' (2008) 20(2) *Environment and Urbanisation* 339-360 at 339.

[23] Section 1 of the Constitution.

[24] Pariente, W. 'Urbanization in sub-Saharan Africa and the challenge of access to basic services' (2017) 83(1) *Journal of Demographic Economics* 31-39.

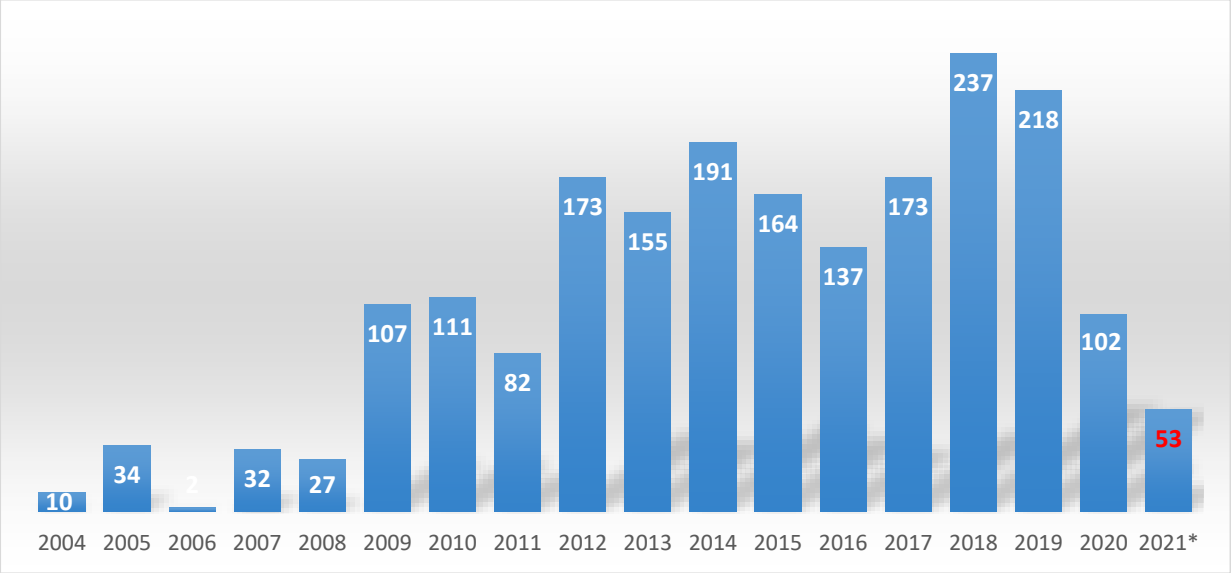
[25] United Nations General Assembly Resolution, adopted on 25 September 2015 in Washington, DC, United States of America.

[26] Masiya, T., Davids, Y.D. and Mangai, M.S. 'Assessing service delivery: Public perception of municipal service delivery in South Africa' (2019) 14(2) *Theoretical and Empirical Researches in Urban Management* 20-40.

[27] Municipal IQ is a web-based data and intelligence service specialising in the monitoring and assessment of all of South Africa's 278 municipalities.

[28] This monitor records protests that are staged by community members (identified by their ward/s) against a municipality, using media reports or other public sources such as police press releases. To

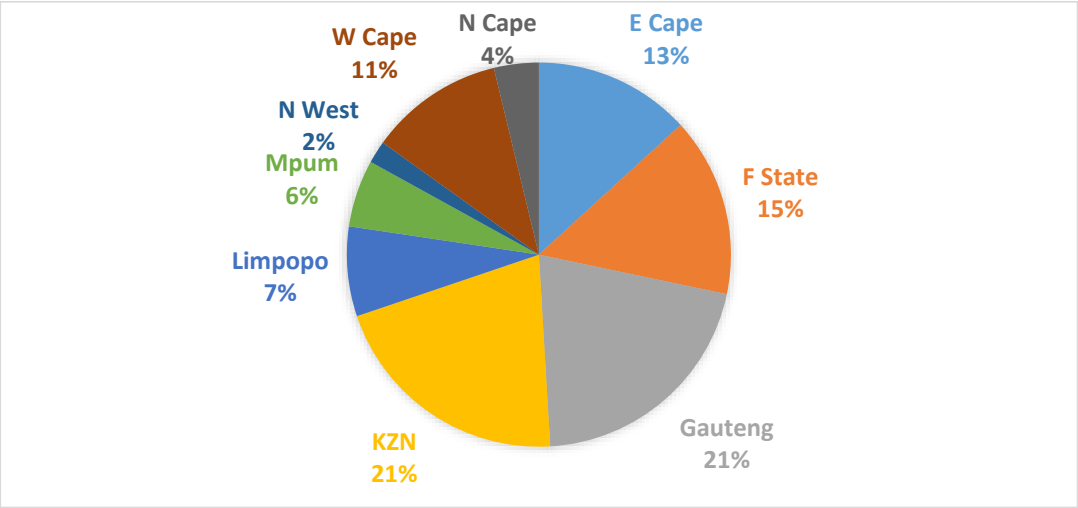
Figure 1: Major service delivery protests by year (2004 –2021)*



[Source: Municipal IQ Municipal Hotspots Monitor] *Jan-May 2021

Available data indicates that recent service delivery protests are most prominent in the Gauteng and KwaZulu-Natal provinces, in line with a similar pattern in 2020 and 2019. Although the Free State has a relatively smaller population than the Eastern and Western Cape provinces, it has a comparatively high rate of service delivery protests.

*Figure 2: Service delivery protests by province, 2021**



[Source: Municipal IQ Municipal Hotspots Monitor] *Jan-May 2021

be recorded, these protesters must raise issues that are the responsibility or perceived responsibility of local government alone.

A recent study by researchers in the Human Sciences Research Council on the status of basic service delivery and satisfaction within informal settlements in Gauteng Province sheds light on the state of service delivery in South Africa.[29] This study analysed the relationship between people's satisfaction with basic amenities such as electricity, health, housing, water, sanitation, refuse and some common predictors of satisfaction. These predictors include individual factors, household factors, community factors and service-related factors. The study found that the most common source of drinking water, toilet facilities, and refuse disposal methods were derived from communal taps (55%) pit latrines (53%), and the efforts of municipal authorities (34%), respectively. A little over half (52%) of the respondents reported lack of access to electricity. Significantly, these informal settlements were targeted for upgrading and located in a province that is relatively more urbanised than provinces with large rural populations like Limpopo and Kwa-Zulu Natal. This is significant because there appears to be "a clearly urban bias in the design of local government institutions, policies and programmes that has reinforced the historical advantage of cities and held back advances in the rural areas."[30]

Furthermore, South Africa has an alarming income disparity gap, which explains why it is widely regarded as one of the most unequal countries in the world.[31] Most of this inequality emerged from backlogs in basic amenities inherited from the apartheid era. As a parliamentary report shows, inequality contravenes the essence of government, which is arguably articulated in the social contract theory.[32] As shown

[29] Mutyambizi, C., Mokhele, T., Ndinda, C. and Hongoro, C. 'Access to and satisfaction with basic services in informal settlements: Results from a baseline assessment survey' (2020) 17(12) *International Journal of Environmental Research and Public Health* 4400.

[30] Piper, L. 'Book review: Building a Capable State: Service Delivery in Post-Apartheid South Africa' (2019) 56(9) *Urban Studies* 1920-1922.

[31] Nattrass, N. and Seekings, J. 'Democracy and distribution in highly unequal economies: the case of South Africa' (2001) 39(3) *Journal of Modern African Studies* 471-498; Davids, N. 'Inequality in South Africa is a 'ticking timebomb' UCT News 21 May 2021 <https://www.news.uct.ac.za/article/-2021-05-21-inequality-in-south-africa-is-a-ticking-timebomb> (last accessed 2 September 2021).

[32] See Centre for Development and Enterprise 'Overcoming the Triple Challenge: A Report to the High-Level Parliamentary Committee from the Centre for Development and Enterprise –Draft Report' <www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_WG1_CDE_Draft_Report_response_to_committees_comments_24.4.17.pdf> (last accessed 2

in the introduction of this dissertation, the purpose of the modern state is to ensure the welfare of its citizens. The deplorable provision of basic amenities in South Africa owes much to the legacy of apartheid. For example, the spatial planning of the apartheid system segregated the South African population in terms of race. Since this planning system was not completely dismantled, it means that access to basic services remains racialised.[33] "Thus, in terms of race, indigenous Africans have the lowest levels of access to basic services such as sanitation, as they constitute the majority in informal settlements which are essentially spaces of exclusion and marginalization."[34]

The state of service delivery in South Africa therefore demands a study of how the Constitution recognises a social contract and guarantees the delivery of basic services to all South Africans. Two aspects of these realities are explained below.

Firstly, service delivery is a shared obligation among the different levels of government, which finds its bedrock in the provisions of the Constitution, especially in Sections 40 and 41.[35] In addition to these provisions, the Constitution imposes a duty of fulfilling service delivery on municipalities through a combined reading of sections 155 (7), 156 (1) and Part B of the Fourth Schedule. This schedule contains major obligations of service delivery. However, it creates a gap in service delivery on two levels. One, the municipality is limited in its capacity due to disparate funding between the spheres of government. Two, section 153 of the Constitution demands that "a municipality must structure and manage its administration, budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community." By placing such a weighty constitutional mandate on municipalities, the local sphere of governance is made to shoulder the major obligations of service delivery in South Africa without the commensurate budget and political clout of the other spheres. Indeed, commentators

September 2021). The report identified service delivery as suffering from the triple challenge of high poverty, high inequality, and high unemployment.

[33] Ndinda, C., Uzodike, O. and Winaar, L. 'Equality of access to sanitation in South Africa' (2013) 43 *Africanus* 96–114.

[34] Mutyambizi, C., Mokhele, T., Ndinda, C. and Hongoro, C. 'Access to and satisfaction with basic services in informal settlements: Results from a baseline assessment survey' (2020) 17(12) *International Journal of Environmental Research and Public Health* 4400.

[35] Section 40(2) & 41 (1) of the Constitution.

have criticised the inadequate support given to local government by the provincial and national departments and condemned the excessive control of municipalities.[36]

Secondly, the delineation of service delivery in the statutory framework does not meet the expectations of the social contract and the transformative purpose of the Constitution because the local government carries the heaviest burden of service delivery. This burden is notwithstanding the fact that it is at the lowest rung of the organisational and financial ladder. This situation is almost like setting up the local government to fail. It therefore contributes to poor service delivery. Considering that the Constitution is premised on the concept of a social contract, the practical abdication of basic service delivery by the national and provincial spheres of government sits uncomfortably with the principle of social contract recognised in the preamble of the Constitution.[37] For example, Schedule 4 of the Constitution provides for municipal health care services. Assuming that an injured person in a rural areas requires an ambulance, s/he may not be able to obtain this service because s/he is in a location with poor or non-existent medical facilities arising from the financial constraints and poor capacities of the concerned municipal government.

The practical effect of the statutory delineation of service delivery is that the local government is hindered from fulfilling its obligations due to lack of capacity. Where funding is available, capacity is lacking, which explain why some municipalities return unspent budget to the treasury. Of course, poor capacitation violates the principle of the social contract, considering that the people do not expect only one organ of government to fulfil service delivery obligations.

The undue burden placed on municipalities reflects in a long line of cases. An example is *Moqhaka Local Municipality Case and Mnquma Local Municipality* case.[38] This case highlights the complicated nature of the legal framework that regulates the responsibilities and capacity of municipalities and their relationships with other levels of government. It also highlights the disproportionate quantum of service delivery responsibility placed on municipalities.

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[36] Palmer, I., Moodley, N. and Parnell, S. *Building a capable state: Service delivery in post-apartheid South Africa* (Zed Books Ltd., 2017).

[37] Sees also sections 27 (2), 40(1), 41 and 152 (2) of the Constitution.

[38] *Mnquma Local Municipality & Another v Premier of the Eastern Cape others (231/2009) [2009] ZAECBHC 14 (5 August 2009) (hereinafter refers to as Mnquma Local Municipality case)*.

Furthermore, the study shows that although the Constitution envisages cooperative governance, the supervisory tendencies of the national and provincial spheres defeats the Constitution's cooperative mandate. The current delineation of basic service delivery, which grants the national and provincial governments too much supervisory powers over municipalities, hampers the delivery of basic services. The basic amenities provided to most South Africans, especially the poor, is not sufficient, let alone accessible to the millions of people who find themselves in precarious financial positions. It is therefore useful to examine the manner the South African government addresses the challenges of basic services delivery.

1.4. Research Question

Against the foregoing contextual background, this thesis interrogates one central question: How does South Africa's legal framework ensure the delivery of basic services in the context of the social contract theory? To answer this question, the following sub-questions will be explored:

a) How does the 1996 Constitution reflect the social contract theory in the context of basic service delivery?
b) What is the constitutional framework of governance in South Africa?
c) What is the attitude of judges to the enforcement of socio-economic rights?
d) What lessons can South Africa draw from other countries on service delivery?
e) What are the major enforcement challenges of effective service delivery?
f) In what ways can the delivery of basic services be improved in South Africa?

1.5. Objectives of the Study

Against the background of the social contract theory, this dissertation seeks to ascertain how South Africa's legal framework provides for the delivery of basic services. In order to do this, it analyses the delineation of multilevel government in terms of basic service delivery. It also comparatively probes how the judiciary enforces socio-economic rights, the enforcement challenges faced by the executive in service delivery, and best practices on service delivery. It emphasises the implications of the cooperative principle of governance in the Constitution.[39] In the course of the research,

[39] See section 41 of the Constitution.

issues and solutions are identified through a careful analysis of primary and secondary sources within and outside the South African jurisdiction.

The dissertation critiques the current constitutional delineation of basic service delivery in South Africa, which places too much emphasis on the local government. It rather argues that the service delivery obligation of municipalities should be handled in a more cooperative and less burdensome manner than what is currently available.

Specifically, the objectives of the study are as follows:

a) To determine the extent to which the social contract theory resonates with the Constitution's provisions on service delivery.
b) To establish how South Africa's legal framework provides for service delivery.
c) To draw best practices from judges' attitude to the enforcement of socio-economic rights in some Latin American countries.
d) To identify lessons that South Africa can draw from other jurisprudence on effective basic service delivery.

1.6. Justification of the study

This study will contribute to understandings of the legal framework of service delivery in South Africa. In turn, this contribution will potentially shed light on good governance practices in developmental economies. Generally, good governance is the primary aim of democracy or popular sovereignty.[40] To quote the famous words of Abraham Lincoln, democracy is best known as the "government of the people, by the people, for the people." From this definition, it is obvious that the idea of the people choosing their government through regular, free, and fair elections is the primary purpose of democracy.[41] Usually, democracy is regulated by a constitution. This document defines the scope of public power, sets out the rights and duties of citizens and their leaders, and guarantees the freedoms and human rights of the electorate. It empowers citizens to bring about positive change in their lives through active participation in governance in order to ensure that powerful individuals act for the greater good. In short, a constitution seeks to limit the human tendency to abuse power and ensure

[40] Joseph, S. 'Democratic good governance: New agenda for change' (2001) 36(12) *Economic and Political Weekly* 1011-1014 at 1011.

[41] Berg-Schlosser, D. 'Indicators of democracy and good governance as measures of the quality of democracy in Africa: A critical appraisal' (2004) 39(3) *Acta Politica* 248-278.

that public officials perform their duties. In this sense alone, a national constitution is a social contract, irrespective of whether it does not expressly say so.

Furthermore, since the efficient provision of basic amenities is the mark of good governance, it follows that corruption is incompatible with efficient service delivery. Accordingly, this study will contribute to knowledge of the impact of corruption on service delivery and good governance. Scholars have identified corruption as a potent threat to sustainable development in South Africa.[42] This is because corruption defeats the very purpose of organised government. For example, Pillay argues that "corruption fundamentally runs contrary to accountability and the rule of law because it undermines governance, diminishes public trust in the credibility of the state, and threatens the ethics of government and society."[43]

Finally, the study promises to show the link between rebellion and the social contract theory. Many violent protests across the world seem to have been inspired by anger and betrayal at the state's breach of its social contract with the people. A good example is the Arab Spring of the early 2010s, which saw millions of North Africans take to the streets to protest against the bad governance of their leaders. Scholars believe that these protests were sparked by "perceptions of declining standards of living," as well as "dissatisfaction with the quality of public services, the shortage of formal-sector jobs, and corruption."[44] Without doubt, public protests in South Africa are usually against poor service delivery.[45] However, there seems to be a dearth of

[42] See, for example, Heymans, C. and Lipietz, B. 'Corruption and development' (*Institute for Security Studies Monograph Series volume 40,* Sept. 1999) 9-20; Pillay, S. 'Corruption–the challenge to good governance: A South African perspective' (2004) 17(7) *International Journal of Public Sector Management* 586-605; Naidoo, G. 'The critical need for ethical leadership to curb corruption and promote good governance in the South African public sector'(2012) 47(3) *Journal of Public Administration* 656-683, Fraser-Moleketi, G. 'Towards a common understanding of corruption in Africa' (2009) 24(3) *Public Policy and Administration* 331-338.

[43] Pillay, S. 'Corruption – The challenge to good governance' *ibid*.

[44] Devarajan, S. and Lanchovichina, E. 'A broken social contract, not high inequality, led to the Arab Spring' (2018) 64 *Review of Income and Wealth* S5-S25. See also Salih, K.E.O. 'The roots and causes of the 2011 Arab uprisings' (2013) 35(2) *Arab Studies Quarterly* 184-206, QadirMushtaq, A. and Afzal, M. 'Arab Spring: Its causes and consequences' (2017) 30(1) *Journal of the Punjab University Historical Society* 1-10.

[45] See for example Nleya, N. 'Linking service delivery and protest in South Africa: An exploration of evidence from Khayelitsha' (2011) 41(1) *Africanus* 3-13.

research that focuses on basic service delivery and the theory of social contract, particularly in South Africa. The study attempts to reflect on the constitutional commitment to social contract and socio-economic rights entrenched in the Constitution. The work contributes to understandings of the link between socio-economic rights, delivery of basic services, and good governance. It draws lessons from the Latin American system of judicial review for best practices and measures to ensure effective service delivery in South Africa.

1.7. Research methodology

This dissertation uses the doctrinal research method to investigate how South Africa's legal framework provides for the delivery of basic services in the context of the social contract theory. As a legal research method, doctrinal research focuses on the letter of the law rather than how the law operates on the ground.[46] It involves a descriptive and usually detailed analysis of legal rules, as contained in primary sources such as case law, statutes, and regulations. Here, it involves critical analysis of legislation, empirical reports written by civil society organisations, and literature review of scholarly works on social contract, service delivery, and good governance. Content analysis is used to analyse relevant sections of the Constitution and other statutory instruments, while a comparative literature review is used in chapter four to analyse the judicial approach to socio-economic rights in Latin America. Colombia, Brazil, and Argentina are selected because of their notoriety in the enforcement of socio-economic rights that affect the delivery of basic services by the state.

The dissertation relies on the empirical work done by organisations such as Municipal IQ, the Parliamentary Monitoring Group, and the Human Sciences Research Council. It also relies on academic writings on the social contract theory, local government, and service delivery, especially in South Africa. The purpose of the chosen research method is to establish the development of legal rules governing service delivery, the interface of the legal framework and social contract, and to identify best practices for improving service delivery in South Africa.

1.8. Literature Review

[46] Hutchinson, T. 'The doctrinal method: Incorporating interdisciplinary methods in reforming the law' (2015) 8 *Erasmus Law Review* 130-138.

As indicated in the research background, the social contract theory is well-established. Accordingly, it will not be reviewed here, except in the context of service delivery and good governance. Moreover, ideas about social contract will be discussed throughout this dissertation. This review focusses on intellectual ideas and debates about the nature and scope of good governance and service delivery, particularly in South Africa.

Good governance has become the mantra of development practitioners. Along with rule of law reforms, it has become a condition precedent for the grant of loans and other development assistance by international financial institutions.[47] According to the United Nations Economic and Social Commission for Asia and the Pacific, good governance is characterised by eight features.[48] These are participation, agreement or consensus, accountability, transparency, responsiveness, effectiveness and efficiency, and equity. All these elements revolve around inclusiveness and adherence to the rule of law. Their purpose in good governance is to ensure that corruption is minimized, the views of minorities are considered, and "the voices of the most vulnerable in society are heard in decision-making."[49]

For Abioye, constitutionality is legitimate governance that is based on the mandate of the governed.[50] This means that the people must agree, consent, and give their mandate to be governed by whoever they choose. In fact, "the medium through which they 'agree', 'consent to' and 'give their mandate' to be governed is captured in their participation in the constitution-making process."[51] It is obvious that participation by the governed is a key element of democratic governance, without which government will lack legitimacy. This element of participation implies that the concept of state sovereignty is not as powerful as it is assumed to be.

[47] Nanda, V.P. 'The "good governance" concept revisited' (2006) 603 (1) *The ANNALS of the American academy of political and social science* 269-283 at 271.

[48] United Nations Economic and Social Commission for Asia and the Pacific 2006 'What is good governance?' <http://www.unescap.org/huset/gg/governance.htm> (last accessed 12 October 2021).

[49] *Ibid*.

[50] Abioye, F.T. Constitution-making, legitimacy and rule of law: A comparative analysis (2011) 44(1) *Comparative and International Law Journal of Southern Africa* 59-79.

[51] *Ibid* at 65.

Bellamy and Castiglione offer a definition of sovereignty that furthers the consent basis of government and its social contract nature.[52] They define legitimacy as "the normatively conditioned and voluntary acceptance by the ruled of the government of their rulers."[53] They feel that it possesses both internal and external dimensions. The internal is linked to the values of the political actors themselves and the external is linked to the principles employed to evaluate a political system, and to assess its effects for outsiders and insiders. This requirement of consent as the basis of legitimacy has been challenged by Barnett, who has questioned the attribution of consent as the basis of legitimacy in the United States Constitution.[54] In what he challenges as the fiction of *We the People*, he argued that the USA Constitution ordinarily denotes that people have on their side an agreement for government to uphold their liberty and other rights necessary for human welfare. However, the courts have been eroding the agreement in the original Constitution and its amendments to eliminate the sections that protect the liberty of the citizens from the overbearing power of government. Accordingly, the basis of legitimacy cannot be said to be the electorate's consent because of the ability of government, especially the courts, to restrict people's freedom. Therefore, for the consent basis of government to be genuine, the courts must be conscious of the social contract of government with the electorate, and refrain from interfering with the people's ability to enforce this contract in litigation about socio-economic rights. Also, the courts must be willing to compel government officials to enforce their service delivery obligations without undue deference to executive discretion. Fowkes makes a similar argument when he showed how the heralded judgments of the Constitutional Court of South Africa are actually products of support from, and tacit negotiation with the ruling African National Congress and other major political actors.[55]

Generally, service delivery has become a popular description of how the state meets or attempts to meet communal needs for amenities such as housing, water,

[52] Bellamy, R. and Castiglione, D. 'Building the Union: The nature of sovereignty in the political architecture of Europe' (1997) 16(4) *Law and philosophy* 421-445.

[53] Bellamy, R. and Castiglione, D. 'Legitimizing the Euro-'polity' and its 'regime': The normative turn in EU studies' (2003) 2(1) *European Journal of Political Theory* 7-34 at 10.

[54] Barnett, R.E. *Restoring the lost constitution* (Princeton University Press, 2013).

[55] Fowkes, J. *Building the constitution: The practice of constitutional interpretation in post-apartheid South Africa* (Cambridge University Press, 2016).

sanitation, electricity, healthcare, and other infrastructure, which are necessary for human survival.[56] The literature reveals two major views about efficient service delivery in developing countries. The first view links service delivery to the strength or efficacy of institutional mechanisms. For example, Koelble and LiPuma argued that poor service delivery in South Africa is caused by "a series of institutional shortcomings ranging from incoherence in national policy towards rural and urban development, … [poor] financial controls and competencies, and a lack of skills affecting local officials … to technical competencies in the core areas of electrification, basic water and sanitation, and refuse collection."[57] Kenosi argued that a poor record keeping culture promotes bad governance and poor service delivery.[58] Others like Mathenjwa believe that excessive assignment of functions from the other spheres of government to the local government is at the heart of poor service delivery in South Africa.[59] This excessive burden on the local government creates an imbalance in governmental functions, since municipalities lack the capacity to fulfil their service delivery obligations without sustained assistance from the national and provincial spheres of government. The literature shows that poor support to the local government is partly attributable to the inherited systems of apartheid and its institutionalised racism. As is well-known, apartheid gave service delivery priority to segregated white-only areas, with little or no concern for the areas inhabited by the majority black South Africans.[60]

The second view regards the efficacy of service delivery as dependent on the political abilities and commitment of public officials. This actor-oriented view of service delivery puts the blame on poor service delivery on individuals. Accordingly, it

[56] Statistics South Africa 'The state of basic service delivery in South Africa: In-depth analysis of the Community Survey 2016 data' Report No. 03-01-22, Statistics South Africa 2016; available at <https://www.statssa.gov.za/publications/Report%2003-01-22/Report%2003-01-222016.pdf> (last accessed 1 November 2021).

[57] Koelble, T.A. and LiPuma, E. 'Institutional obstacles to service delivery in South Africa' (2010) 36(3) *Social Dynamics* 565-589.

[58] Kenosi, L. 'Good governance, service delivery and records: the African tragedy' (2011) 44 *Journal of the South African Society of Archivists* 19-25.

[59] Mathenjwa, M. 'Contemporary trends in provincial government supervision of local government in South Africa' (2014) 18 *Law, Democracy and Development* 178-201 at 181.

[60] Sithole S. and Mathonsi S. 'Local governance service delivery issues during Apartheid and Post-Apartheid South Africa' (2015) *Africa's Public Service Delivery and Performance Review* 5-30 at 14.

emphasises human elements such as corruption, ethnicity, political interests, religious inclination, and lack of skills as key influences on service delivery. Arguably, the flipside of this view is that strong human agency can make up for the deficiencies of institutional mechanisms. This is partly the claim in *Building a Capable State: Service Delivery in Post-Apartheid South Africa*.[61] Here, Ian Palmer *et al* used a comparison with fellow middle-income countries to argue that South Africans have enjoyed improved access to basic amenities since 1994 due to political commitment to transformation. They further argue that even though improved service delivery has led to only a marginal decrease in poverty levels, building a capable post-apartheid state is a long-term project that requires concerted agency. Their work is significant for the theory of the social contract because of its claim that the provision of basic amenities by the state should be assessed through the concept of 'capability' rather than 'capacity.' As they put it, the capability of the state includes not only "human, natural and financial resources, and systems, but also the values, relationships and organisational culture' of government agencies.[62] Accordingly, state officials have the power to exercise their agency in a transformative way that recognises their progressive realisation of service delivery. This claim resonates with the refusal of the South African Constitutional Court to adopt the minimum core obligation of the state in the enforcement of socio-economic rights.[63]

Irrespective of the side of the service delivery debate that one adopts, the reality is that service delivery is a core function of government, whose breach encourages public protests.[64] In this sense, service delivery underlies the social contract theory. One may even go as far as saying that service delivery is a human right, whose violation should attract remedial action though protests and judicial enforcement of socio-economic rights. Service delivery also underlies the concept of developmental governance. Scholars believe this concept encapsulates the purpose of the modern

[61] Palmer, I., Moodley, N. and Parnell, S. *Building a capable state: Service delivery in post-apartheid South Africa* (Zed Books Ltd, 2017).

[62] *Ibid* at 9.

[63] See the discussion in chapter four of this dissertation.

[64] Alexander, P. 'Rebellion of the poor: South Africa's service delivery protests – A preliminary analysis' (2010) 37(123) *Review of African political economy* 25-40.

state.[65] Indeed, the Local Government White Paper describes developmental governance as the commitment of local government to "work with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives."[66] The White Paper enjoins state officials to privilege service delivery to disadvantaged individuals and groups in communities, who have historically been marginalised or excluded from equitable distribution of basic amenities. In short, it demands that government must play a 'developmental role' in nation-building by taking reasonable steps, within available resources, to ensure that all South Africans have access to adequate housing, health care, education, food, water and social security. This demand is in furtherance of constitutional requirements on social transformation.

Finally, scholars recognise that the South African Constitution envisaged a system of cooperative governance.[67] Thus, the different levels of government are to cooperate in the provision of basic services. Cooperative governance usually involves hybrid governance. Rousseau gave the best explanation of a hybrid system of government.[68] According to him, "there is no such thing as a simple government. An isolated ruler must have subordinate magistrates; a popular government must have a head. There is therefore, in the distribution of the executive power, always a gradation (sic) from the greater to the lesser number."[69] Scholars are fairly united that deviation from cooperative governance between the national, provincial and local government presents a conflict with the Constitution.[70] This dissertation will rely on their works to

[65] Mogale, T.M. 'Developmental local government and decentralised service delivery in the democratic South Africa' (2003) *Governance in the new South Africa* 215-243.

[66] The White Paper on Local Government, 9 March 1998.

[67] Mathenjwa, M. 'Contemporary trends in provincial government supervision of local government in South Africa' (2014) 18 *Law Democracy and Development* 179.

[68] Rousseau, J.J. and Cole, G.D.H. *The social contract, or, principles of political right* (University of Virginia Library, 2001).

[69] *Ibid* at 38.

[70] Koma, S.B. ' The state of local government in South Africa: Issues, trends and options' (2010) 45(si-1) *Journal of Public Administration* 111-120 , Mubangizi, B.C. 'Improving public service delivery in the new South Africa: some reflections' (2005) 40(si-3) *Journal of Public Administration* 633-648, Edwards, T. 'Cooperative governance in South Africa, with specific reference to the challenges of intergovernmental relations' (2008) 27(1) *Politeia* 65-85, Du Plessis, W. 'Legal mechanisms for cooperative governance in South Africa: Successes and failures' (2008) 23(1) *SA Public Law* 87-110,

show how too much burden on municipalities to provide infrastructure hampers the ability of local government to engage in efficient service delivery in South Africa.

1.9. Definition of relevant concepts

This study is founded on the concept of social contract. It is one of the most influential moral and political theories of the modern world. As shown in chapter two, it influenced the declaration of independence by the United States of America in July 1776. Thus, it is wise to provide the definition of social contract, basic service delivery, constitutionalism, and good governance. Ascertaining the extent of the concept of social contract is highly important, not only for the purpose of understanding the constitutional right of access to basic service delivery, but also for the purpose of obtaining a broader understanding of what the social contract concept means for good governance in the South African context.

1.9.1. Social contract

Social contract refers to a situation whereby state authority is derived from the willing consent of the people, who are also referred to as the electorate. The idea developed from people's realisation that a State of Nature, in which 'might is right', is not conducive for long-term human welfare. It means that the people decide to voluntarily give up certain rights that they have under a state of nature in order to obtain the benefits that come with cooperative social relations or organised government.[71] In this sense, the state exists to serve the people by promoting their welfare and giving them the opportunity to reach their full potential. The notion of social contract implies that the people have enforceable claims against the government when it fails to fulfil its part of the bargain. The legislative framework of these claims shall be examined in detail in chapters three and five, while manner the courts enforce socio-economic rights shall be discussed in chapter four.

1.9.2. Constitutionalism

Kanyane, M. 'Exploring challenges of municipal service delivery in South Africa (1994-2013)' (2014) 2(1) *Africa's Public Service Delivery & Performance Review* 90-110.

[71] Taylor, B.B. 'Second Treatise of Social Contract: A comparative Analysis of Locke and Rousseau' (2015) 1 *Black and Gold* 4.

Constitutionalism seeks to ensure that the actions of government are legitimate and that its officials conduct their public duties in line with existing laws or pre-determined guidelines. It is also the idea that governmental power is not unlimited, and that its authority is defined by certain laid down limits. Usually, these limits are stipulated in a supreme document known as the constitution. Among others, the Webster dictionary defines a constitution in the following terms:

> 1a: the basic principles and laws of a nation, state, or social group that determine the powers and duties of the government and guarantee certain rights to the people in it
>
> 1b: a written instrument embodying the rules of a political or social organization
>
> 2a: the physical makeup of the individual especially with respect to the health, strength, and appearance of the body
>
> b: the structure, composition, physical makeup, or nature of something.[72]

Chambers defines a constitution as a "*thing"* antecedent to government.[73] The constitution of a country is not the act of its government, but of *the people* constituting a government.[74] It is the body of elements to which you can refer and quote article by article; and which contains the principles upon which the government shall be established, the manner in which it shall be organized, the powers it shall have, the mode of elections, the duration of parliaments, or by whatever names such bodies may be called such as the executive.

In my opinion, a constitution may be described as a body of rules, which are voluntarily adopted by the people, and through which they consent to be governed by their representatives in return for certain rights and responsibilities. In most constitutional systems, it has been said that a norm is legitimate if it was set up in a democratic decision-making process and if it meets fundamental societal values, such as individual rights or collective goods. Therefore, legitimacy in a system would only apply if the system was set up by a process which was democratic, and if such system

[72] Webster, M. <https://www.merriam-webster.com/dictionary/constitution> (last accessed 17 January 2019).

[73] Chambers, S. 'Contract or conversation? Theoretical lessons from the Canadian constitutional crisis' (1998) 26(1) *Politics and Society* 145.

[74] *Ibid* at 145.

meets fundamental societal values, such as the rights of individuals or the rights to collective goods, constitutional democracy can be said to be present.

Bulmer identified two constitutional archetypes.[75] These are the procedural and prescriptive types. The differences between them relate to their nature and purposes. Procedural constitutions define the legal and political structures of public institutions and set out the legal limits of government power in order to protect democratic processes and fundamental human rights. A procedural constitution may be appropriate in cases where it is difficult to arrive at a common agreement over issues of values or identity. The process through which South Africa attained its constitutional dispensation can be construed according to Bulmer's position as procedural constitutionalism. Bulmer cited the Canadian constitution of 1867 and 1982 and the Dutch constitutions of 1848 and 1983 as being closely reflective of the procedural archetype. He stated:

> They [procedural constitutions] proclaim no single vision of a good society but rest only on the minimal commitment to live together, to solve common problems through political institutions and to respect the rights of those who differ or disagree. They make little or no explicit mention of nation-building or of fundamental philosophical or ideological principles. They contain few substantive provisions (provisions settling particular policy issues) except where such provisions reflect pragmatic attempts to settle practical problems of cooperation in a pluralist society.[76]

On the other hand, prescriptive constitutionalism "emphasizes the foundational function of the constitution as a 'basic charter of the state's identity', which plays 'a key role in representing the ultimate goals and shared values that underpin the state.'"[77] for Bulmer, a prescriptive constitution "provides a collective vision of what might be considered a good society based on the common values and aspirations of a homogeneous community." Irrespective of its different types, constitutionalism is intriguing because it purports to legally restrict the powers of government. As is

[75] Bulmer, W.E. 'What is a constitution? Principles and concepts' (Stockholm: International Institute for Democracy and Electoral Assistance, 2014).

[76] *Ibid* at 9.

[77] Lerner, H. *Making constitutions in deeply divided societies* (Cambridge: Cambridge University Press, 2011) 18.

widely known, government is an entity that creates the law itself. In this respect, Waluchow pondered, “How can a government be legally limited if law is the creation of government? Does this mean that a government can be ‘self-limiting’?”[78]

This question is significant for South Africa, where constitutionalism was shaped by the people’s representatives, who came to the Convention for a Democratic South Africa (CODESA) to negotiate the end of apartheid. During these negotiations, agreement was reached between the political parties to limit the powers of the three formal organs of governmental functions: legislative power (law making), executive power (law implementation) and judicial power (adjudication of legal disputes). The limitation or regulation of governmental functions recognises that power is exercised within boundaries and for specific purposes. In this sense, constitutionalism complements the notion of social contract, since both acknowledge a body of rules and regulations that are accepted by the people as a charter of rights binding both the state and its citizens. By adopting a constitutional form of government, South Africa entered a social contract between government and the electorate, whose purpose is good governance.

1.9.3. Good governance

Good governance means governance that is legitimate and conducted in a manner that is beneficial to the citizenry. On its part, governance denotes the entire process of planning, decision-making and execution of public functions.[79] In the context of public service, it usually expresses ideas of how political and administrative decisions are arrived at, the processes that inform decision-making, as well as how formal and informal institutions affect the manner governmental systems operate.[80] Since the end of the Second World War, good governance has been closely associated with democratic rule.

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[78] Waluchow, W. ‘Constitutionalism’ in Zalta, E.N. (ed.) *The Stanford Encyclopaedia of Philosophy* 2012 <http://plato.stanford.edu/archives/win2012/entries/constitutionalism/> (last accessed 11 September 2021).

[79] Nanda, V.P. ‘The “good governance” concept revisited’ (2006) 603(1) *The ANNALS of the American academy of political and social science* 269-283.

[80] Grindle, M.S. ‘Good governance, RIP: A critique and an alternative’ (2017) 30(1) *Governance* 17-22 at 17.

Democracy derives from the Greek word demos, or people. It is defined, basically, as government in which the supreme power is vested in the people. In some small communities, democracy can be exercised directly by the people. However, in large societies, it is usually exercised by the people through their elected agents or representatives. Commonly, democracy occurs through free, fair, and openly contested elections.[81] In its grassroot understanding, democracy is simply regarded as a government of the people, by the people for the people. This understanding emerged from the definition of democracy given by former United States of America President, Abraham Lincoln, in his Gettysburg speech on 19 November 1863. Good governance emerges from merging the words 'constitution' and 'democracy' into one functioning phrase, constitutional democracy. This phrase maybe described as an agreement or a contract between the governed and the government. It entails a system whereby the laws that dictate the actions of the government is derived from a universally supreme national document called the constitution, which is usually pre-agreed as the foundation for free and consensual democratic government.

A legitimate democratic government is said to exist when there is public participation or consent in the law-making process. Abioye described legitimate governance as referring to three basic elements. Firstly, *constitutionality* means that governance must be based on the mandate of the governed, as well as on principles, rules and conventions, which form the core of state action.[82] The second element is *accountability*. It implies that those holding official positions do so on behalf of the governed, and must submit to measures aimed at transparency and integrity. The third element is *participation*. This means that the governed must actively participate and not be excluded on any basis. The first and the last elements mark essential features of the theories that will be discussed in this thesis.

1.9.4. Basic service delivery

[81] Cheibub, J.A., Ghandi J. and Vreeland, J.R. 'Democracy and dictatorship revisited' (2010) 143 *Public Choice* 67-101 at 69.

[82] Abioye, F.T. 'Constitution-making, legitimacy and rule of law: a comparative analysis' (2011) 44(1) *Comparative and International Law Journal of Southern Africa* 59-79.

Basic service delivery refers to the distribution of basic resources that citizens depend on such as water, electricity, housing, health care, and access to education.[83] The delivery of basic services is made in recognition of the right to life and human dignity. These rights are inherent in everyone simply by virtue of being human. Accordingly, public officials have a duty to ensure that the right to dignity is respected and protected.

1.9.5. Progressive realisation of rights

Ordinarily, states have obligations under international human rights treaties to protect and promote economic, social and cultural rights. However, the notion of progressive realisation of rights recognises that the full enjoyment of socio-economic rights may not be achieved in a short period of time due to resource constraints.[84] Accordingly, sections 26(2) 27(2) and 29(1)*(b)* of the 1996 Constitution provide as follows: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights".

Progressive realisation requires the state to make the most efforts to improve people's enjoyment of socio-economic rights to the maximum extent possible, and irrespective of the state's limited resources. As discussed extensively in chapter four, the concept assesses a state on two main yardsticks: (a) the extent to which people enjoy socio-economic rights at a given moment, and (b) the state's resource capacity to fulfil these socio-economic rights. Nevertheless, some rights such as the right to be protected against arbitrary evictions, the socio-economic rights of children (in section 28 of the South African Constitution), and some rights of detained persons are immediately realisable.

1.9.6. Enforcement of rights

Enforcement of rights is a constitutional right to bring a lawsuit against the state and/or its agents to compel it to perform some action or refrain from performing an action. For example, a person who was falsely detained can claim damages from the police or

[83] Chen, Le., Dean, J., Frant, J. and Kumar, R. 'What does service delivery really mean?' World Policy Blog <https://worldpolicy.org/2014/05/13/what-does-service-delivery-really-mean/> (last accessed 9 January 2019).

[84] Chenwi, L. 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46(3) *De Jure* 742-769.

ask the court to order his release. As shown in chapters two, four and six, enforcement of socio-economic rights is the main platform on which government is compelled to fulfil its service delivery obligations. Section 38 of the Constitution empowers anyone listed in the section to approach a competent court with a complaint that a right in the Bill of Rights has been infringed or threatened. It also authorises the court to grant a suitable relief, including a declaration of rights. According to section 38, the persons who may approach a court are —

> (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.

Enforcement of rights is often associated with the right of access to justice and public interest litigation. Generally, it developed from the legal right of citizens to seek redress from judges by demonstrating sufficient connection to an issue that has caused or is likely to cause them harm.

1.9.7. Statutory interpretation

The interpretation of statutes concerns the nature, motivations, and style of legal reasoning. In the context of socio-economic rights, it is important because it influences the manner judges compel the state to perform its service delivery functions. Section 39 of the Constitution, which is titled Interpretation of Bill of Rights, provides as follows:

> (1) When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Chapter five will show the conservative attitude of the Constitutional Court in controversial cases requiring robust interpretation of socio-economic rights.

1.9.8. Cooperative government

Cooperative governance is the idea that the three arms of government should work together to provide citizens with essential services. It requires them to assist, support, and promote each other, share information, and coordinate their activities. Section 41 of the Constitution enjoins all spheres of government and state departments to preserve the peace, national unity and the indivisibility of the Republic, promote the well-being of its people, provide them with "effective, transparent, accountable and coherent government, [and] respect the constitutional status, institutions, powers and functions of government in the other spheres." It also requires them to "co-operate with one another in mutual trust and good faith by fostering friendly relations, assisting and supporting one another … consulting one another on matters of common interest [and] avoiding legal proceedings against one another." Cooperative governance is so important that an entire department was created to promote it.[85] Chapters three and five shall analyse how cooperative governance affects service delivery in South Africa.

1.10. Organisation of chapters

This research consists of seven chapters. Following this introductory chapter, the outline of the other chapters is as follows:

Chapter 2: Conceptualising social contract and service delivery in South Africa

This chapter conceptualises the theory of social contract by identifying the significance of the State of Nature for governance systems and aspirations. Thomas Hobbes, who originally articulated this theory, conceived of the State of Nature as violent and lawless. Conversely, Jean-Jacques Rousseau and others imagined it as peaceful and harmonious, arguing that the growth of private property marked a movement away from this tranquillity to violent conflicts. The chapter also examines the theory in the context of South Africa's obligation to provide basic services. The social contract view of governance is the corner stone of modern states due to the mutual expectations of government and the governed. To overcome inequality and insecurity that emerges from or is prevalent in the State of Nature, humanity surrendered certain rights to a

[85] See the website of the Department of Cooperative Governance and Traditional Affairs <https://nationalgovernment.co.za/units/view/10/department-of-cooperative-governance-dcog> (last accessed on 13 October 2021).

public authority in return for certain services. The chapter argues that the 1996 Constitution created a social contract between government and South Africans. On the one hand, the Constitution is a historically negotiated settlement, whose shameful past demands redress and therefore imposes an obligation on government to deliver basic services. On the other hand, the Constitution's preamble reveals that the people submit to state authority in return for basic services. The chapter ends by outlining the implications of the social contract and poor service delivery for state legitimacy.

Chapter 3: Statutory framework of local governance and service delivery

Service delivery is a measure of effective governance. Since the democratic dispensation in 1994, the spheres of government have intervened in many forms to deliver services to the people with mixed success. Oftentimes, municipalities are overburdened by the other spheres of government, especially in relation to social amenities. Service delivery failures have contributed to violent protests, which are now a part of South African life. These protests question the effectiveness of municipalities as an effective machinery in service delivery. This chapter examines the non-constitutional legal framework of local governance such as the Municipal Structures Act 117 of 1998, the Municipal Systems Act 32 of 2000, the Traditional Leadership and Governance Framework Act 41 of 2003 and the Charter for Public Service in Africa. The chapter argues that the social contract theory offers a lens for understanding effective service delivery at the local government level. The discussion provides a contrast for measuring the constitutional framework of service delivery against other statutory frameworks. The chapter finds that the non-constitutional legal framework promotes service delivery by reflecting the social contract theory. However, poor implementation caused by inadequate funding of municipalities and non-cooperative governance hinder municipalities from adhering to this social contract.

Chapter 4: Cooperative and multilevel government in South Africa

Recent spikes in service-related protests in South Africa underlie the need for clarity in the legislative framework on service delivery. This clarity is justified by the social contract theory, which demands the state to ensure a decent standard of life, especially to people living on the margins of social life. In this social contract context, this chapter argues that failure to provide basic services is tantamount to violation of people's human dignity, equality, and advancement of freedoms. It examines how the

Constitution delineates functions among the various spheres of government, and how this delineation has engaged the interest of constitutional scholars and political scientists in post-apartheid South Africa. Relying on empirical work done by scholars, it focuses on practical problems arising from the delineation of functions between government organs. The chapter begins by identifying constitutional provisions relevant to multilevel government such as sections 40, 41, 152, 154 and 156 and schedule 4 and 5. It concludes by analysing how less supervision and more support between the various spheres of government impacts on service delivery.

Chapter 5: Judicial approach to service delivery

In modern democracies, the constitution defines the perimeters of power and sets out the rights and responsibilities of both the government and the governed. In South Africa, the Constitution is the supreme law of the Republic. Any law or conduct that is inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. In this context, this chapter examines the extent to which South African judges enforce socioeconomic rights. It argues that the judiciary should interpret the socio-economic rights in the Constitution with the spirit of a social contract between citizens and the government. The judiciary does not only act as a check and balance to protect the excesses of the executive and legislature. Rather, the judiciary has an obligation under the social contract theory to ensure that basic services are accessible to the people. The chapter finds that the Constitutional Court has consistently refused to adopt the minimum core. Instead, it pays undue adherence to the separation of powers doctrine. The Court regards the minimum core as indeterminate, beyond the scope of judicial review, and a matter of policy assessment that is best left for the political branches to resolve. Rather than use the minimum core, it prefers a reasonableness approach, which it regards as more democratic because it leaves room for dialogue with the political branches of government. Its jurisprudence is in stark contrast with the attitude of courts in Latin America, who use the minimum core concept to enforce socio-economic rights for underprivileged people. For example, Colombian judges have granted numerous individual remedies under a constitutional complaint mechanism known as the tutela. The tutela system is notable for its minimal administrative hurdles and its fast dispensation of justice. The chapter urges South African judges to recognise that civil and political rights, whose enforceability is unrestrained in the 1996 Constitution, are inseparably connected to socio-economic rights.

Chapter 6: **Enforcement challenges of service delivery in South Africa**

In an era of unprecedented economic, political, social, and technological changes, efficient service delivery has emerged as a serious developmental challenge in the global South. It is particularly problematic in South Africa because of two notable factors. The first is the Constitution's indirect reference to a social contract between government and the electorate, which imposes an obligation on government to ensure the welfare of its citizens. The second is how the supervisory oversight of local governments sits uncomfortably with cooperative governance between municipalities, the provincial government, and the national government. The complicated manner in which the legal framework places municipalities under the supervision of the national and provincial governments creates a legislative paradox that affects service delivery. This is the context in which this chapter analysed empirical literature on the enforcement challenges faced by public officials in their delivery of basic services in South Africa. It relied on qualitative data published by research institutes, government agencies, and international organisations published in the post-apartheid era. The chapter finds that the most prominent challenges to service delivery are corruption, unqualified service personnel, and lack of transparency. Others are poor planning, budget management, and grassroots participation.

Chapter 7: Conclusion and recommendations

This chapter concludes the dissertation with a summary of all the chapters, the research questions they probed, and the findings they reached. It makes wide ranging recommendations that are based on the identified problems. The chapter ends by pointing the way for further research.

CHAPTER 2: CONCEPTUALISING SOCIAL CONTRACT AND SERVICE DELIVERY IN SOUTH AFRICA

2.1. Introduction

This chapter examines South Africa's obligation to provide basic services on the premise that the 1996 Constitution created a social contract between government and South Africans. In terms of the social contract theory, the legitimacy of states is not founded on force, but on the consent of the people. In furtherance of this consent, the people or electorate choose representatives and endow them with power to promote their best interests. The implication of this arrangement is that when the people withdraw their consent to be governed, their social contract with the state is broken and elected officials immediately lose their authority over citizens. Based on the social contract therefore, this chapter argues that on the one hand, South Africa's Constitution is a historically negotiated settlement, whose apartheid past brought about an obligation to deliver basic services on the part of government. On the other hand, the Constitution's preamble reveals that the people agree to submit to the state's authority in return for the state providing them with basic services.

Arguably, the state is aware that its power is derived from a social contract with the people. In a speech reported by the News 24 newspaper in 2016, the then Minister of Finance Pravin Gordhan stated that the Constitution is a social contract.[1] According to him, the manner this social contract between government and the people is executed determines the country's development. In his words, "Once our actions are seen to be incongruent with this important document of our democracy, we must know that we have moved away from our duty to serve our people. We have broken that contract."[2] Arguably, this statement supports this dissertation's hypothesis that the Constitution is a social contract that was created to ensure basic service delivery. I explain the structure of the chapter below.

Firstly, the chapter defines and critiques the concept of social contract, its proponents and opponents, its applicability to constitutional democracy, and its

[1] News 24 'Constitution is a social contract – Gordhan' 4 April 2016 <*https://www.news24.com/SouthAfrica/News/constitution-is-a-social-contract-gordhan-20160404*> (last accessed 13 October 2021).

[2] *Ibid*.

relationship with the principles of basic service delivery. Next, it examines scholarly and historical perspectives on constitutional democracy and social contract. Thereafter, it explains governance views that provide a foundation for constitutional democracy and the idea of social contract, with emphasis on their relationship with constitutional provisions that guarantee basic service delivery. Finally, the chapter examines the ways in which the theory of social contract can be interpreted to enhance basic service delivery to all South Africans. It concludes that the framers of the Constitution intended a social contract to be indispensable for service delivery.

2.2. Description of social contract

The term, social contract, refers to a state of affairs whereby state authority is derived from the consent of the people in return for their allegiance and performance of certain civic obligations.[3] This reward or expectation received in return for the people's consent may be tacit or overt. In other words, the people decide to voluntarily give up their right to self-help under the state of nature in order to derive the benefits of peace provided by a centralised authority.[4] The state that is created from this centralised authority allows each individual the opportunity to reach his or her full potential.[5]

Thus, the concept of social contract is used to describe the classes of philosophical views that have the implied agreement of people to form a nation state and maintain a social order as part of their peaceful co-existence with each other in the broader society. This implies that people give up some of their right to autonomy or self-governance, and allow their elected representatives to become their government and symbol of authority. Authorities that typify social contracts include a king in a monarchy,[6] a council in an oligarchy, a constitutional parliament in a democracy, and hybrids of these forms of government such as the United Kingdom.

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[3] Taylor, B.B. 'Second Treatise of Social Contract: A comparative Analysis of Locke and Rousseau' (2015) 1 *Black and Gold* 4.

[4] De Vattel, E. *The law of nations, or the principles of law of nature applied to the conduct and the affairs of nations and sovereigns with three early essays on the origin and nature of natural law and on luxury* (1844 Philadelphia: T. & J. W. Johnson) 44.

[5] Royce, M. 'Philosophical perspectives on the social contract theory: Hobbes, Kant and Buchanan revisited: A comparison of historical thought surrounding the philosophical consequences of the social contract and modern public choice theory' (2010) 1(4) *Post Modern Openings* 45-62 at 45.

[6] *Ibid*.

With respect to service delivery, the theory of social contract assumes that from its inception or earliest beginnings, humanity lived in a State of Nature. In this prehistoric state, it had no government and no organised laws to obey, except the law of survival. To conquer its challenges of insecurity, humanity was compelled to enter into two related agreements. The first may be referred to as *pactum union*, translated to mean union agreement, while the second is *pactum subjections*, translated to mean submission agreement.[7] In the first union agreement, humanity sought protection over lives and property. In the second agreement, humanity united under an authority and surrendered the whole or part of its freedom and rights to this authority.[8] This authority guaranteed everyone protection of life, property, and to a certain extent, liberty.

Thus, people agreed to establish governance by collectively and reciprocally renouncing the rights they had against one another in a State of Nature and submitting these rights to an individual or a group of persons with the authority and power to enforce their agreement. In other words, to ensure their escape from the state of nature, people agreed to live together under common laws and create an enforcement mechanism for reciprocal claims and obligations.[9] By agreeing to submit themselves to either union agreements or submission agreements, the people expect that, in return, those who are the custodians of the rules or agreement will uphold their side of the bargain. I now turn to an in-depth conceptualisation of social contract in order to show its significance for good governance, constitutionalism, and service delivery by the state.

2.3. Conceptualisation of social contract

Christianity and Judaism had a tremendous influence on Western philosophy.[10] This influence found its way into ideas of political and economic organisation. Thus, political legitimacy in medieval Europe was based on male primogeniture, which was traceable

[7] Hobbes, T. *Leviathan* (London: Penguin Books, 1981).

[8] Rousseau, J.J. *The social contract and the first and second discourses* (Dunn, S. ed., with contributions from May, G., Bellah, R., Bromwich, D., O'Brien, C.) (Yale University Press, 2002).

[9] Adams, R. 'South Africa's social contract: The Economic Freedom Fighters and the rise of a new constituent power?' (2018) *Acta Academica* 102-121 at 106.

[10] Glick, L.B. *Abraham's heirs: Jews and Christians in medieval Europe* (Syracuse University Press, 1999).

to the patriarchal slant of the Christian bible and the agrarian basis of feudal life.[11] This is the context in which the social contract theory emerged. It primarily sought to replace primogeniture with the principle of general consent as the foundation of political legitimacy. Thomas Hobbes was the first person to articulate the idea of a social contract in his famous book, *Leviathan*.[12] His ideas were inspired by the savagery of the English civil war in the 17th Century. According to Hobbes, a social contract emerged from a destructive 'State of Nature.' He described this as a pre-civilisation condition, in which people obeyed the law of survival with attendant consequences of violence, destruction, and immorality. Hobbes asserted that without a State of Nature, there would be no rational need for a social contract, and by implication, no need for the existence of the modern state as we know it.

Just over a century after Hobbes first articulated the social contract, Jean-Jacques Rousseau questioned his ideas about the relationship between the State of Nature and the social contract.[13] For Rousseau, an original State of Nature could not have been as violent as Hobbes imagined it. This is because Rousseau imagined a State of Nature as consisting of small groups of people, who presumably thrived on cooperative hunting, food gathering, and subsistence agriculture. Rousseau conjectured people in these agrarian societies as living harmoniously with one another and satisfying their basic needs through natural resources such as fruits, plants, trees, rivers, and rock shelters.[14] However, as human populations exploded and societies developed into complex systems of organisation, inequality emerged in the relationships of different groups living in a State of Nature. These relationships became increasingly strained, and eventually led to violent struggles for resources.[15] Significantly, these struggles for resources centred primarily on the notion of private

[11] Bitel, L.M. and Lifshitz, F. eds. *Gender and Christianity in Medieval Europe: New perspectives* (University of Pennsylvania Press, 2008).

[12] Hobbes, T. *Leviathan* (London: Penguin Books, 1981).

[13] Rousseau, J.J. *The social contract and the first and second discourses* (Dunn, S. ed.) (Yale University Press, 2002) 87-148.

[14] *Ibid* at 90; Bertram, C. *Routledge philosophy guidebook to Rousseau and the social contract* (Routledge: London and New York, 2004) 53-63, 72-89.

[15] Rousseau, J.J. *The social contract and the first and second discourses* (Dunn, S. ed.) (Yale University Press, 2002) 87-148.

property, which may be expressed as individual claims over material goods.[16] Presumably, most of the successful property claims were bred by greed and executed with violence. For Rousseau, the invention of private property was a pivotal moment in humanity's transition from an innocent condition to a state of greed, competition, inequality, and corruption. In his words, it marked "the fall from tranquillity and the downward spiral into … corruption."[17] The violent nature of property claims worsened inequality and created the need for a social contract to protect those who held property against those who were strong enough to use force to take the property away from them. Rousseau explained the underlying motives for his ideas of inequality as follows:

> I conceive two species of inequality among men; one which I call natural, or physical inequality, because it is established by nature, and consists in the difference of age, health, bodily strength, and the qualities of the mind, or of the soul; the other which may be termed moral, or political inequality, because it depends on a kind of convention, and is established, or at least authorized by the common consent of mankind. This species of inequality consists in the different privileges, which some men enjoy, to the prejudice of others, such as that of being richer, more honored, more powerful, and even that of exacting obedience from them.[18]

From the above quote, we see that political and economic inequality accompanied violent claims as society moved out of a State of Nature. This is important for distinguishing Rousseau's ideas of government from Hobbes' ideas. Unlike Hobbes, who postulated that organised government arose "to guarantee equality and protection for all" and end the violence in a State of Nature, Rousseau argued that government is actually established to concretise the very inequalities that private property produced after society moved away from the State of Nature. "In other words, the (social) contract, which claims to be in the interests of everyone equally, is really in the interests of the few who have become stronger and richer as a result of the developments of private property."[19] Whereas Hobbes regarded the State of Nature

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[16] Hampton, J. *Hobbes and the social contract tradition* (Cambridge University Press, 1988) 58-79.

[17] Rousseau, J.J. *The social contract and the first and second discourses* 6.

[18] *Ibid* at 87.

[19] Friend, C. 'Social contract theory' (2004) *The Internet Encyclopaedia of Philosophy.* <*https://iep.utm.edu/soc-cont*/> (last accessed 18 October 2021).

as violent, Rousseau considered it harmonious. Thus, for Rousseau, only the movement away from the State of Nature towards capitalist notions of property created violent struggles that forced people to adopt a social contract to enable them to enjoy the benefits of organised government.[20]

However, unless governance is properly implemented, Rousseau's ideas of the social contract could produce a negative result. This negative result is because the benefits of organised government could perpetuate systemic injustice in favour of those who are well placed to utilise the power of government to enhance their property claims. For the victims of systemic injustice, only an efficient delivery of basic services could save them, even in modern democracies.[21] There is therefore a 'before' or preceding condition of the State of Nature,[22] and an 'after' or consequences that necessitate the adoption of a social contract.

In the South African context, the 'before' and 'after' of the State of Nature are important for understanding the importance of the social contract to service delivery. Here, Rousseau's position seems more appropriate than Hobbes'. On the one hand, the systemic inequalities of the colonial and apartheid regimes may be regarded as South Africa's movement away from a State of Nature. On the other hand, the aftermath of this movement makes the Constitution a social contract that was aimed at redressing the injustices of apartheid.[23] However, the manner this contract is enforced, which may be gauged from the efficiency of service delivery, could end up maintaining the inequalities of the colonial and apartheid past. But this is not all.

The social contract theory has further implications for governance and state legitimacy. As argued in the concluding chapter of this dissertation, its implication in South Africa is quite significant, since the state loses legitimacy if it fails in its constitutional duty to ensure effective service delivery. It is therefore worthwhile to examine the status of the social contract theory in governance systems.

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[20] Adams, R. 'South Africa's social contract' (2018) 50(3) *Acta Academica* 102-121.

[21] Rousseau, J.J. *The major political writings of Jean-Jacques Rousseau: The two "discourses" and the "social contract"* (John T. Scott ed.) (University of Chicago Press, 2012) xiv.

[22] Rawls called this the 'original position.' See Rawls, J. *A theory of justice* (Cambridge, MA: Harvard University Press, 1999) 11-15, 102-104.

[23] Arato, A. *The adventures of constituent power: beyond revolutions* (Cambridge: Cambridge University Press, 2017) 63.

2.4. Influence of social contract on types of governance

Differences in ideas as to who constitutes an authority in governance underpin variations in opinions of social contract.[24] For instance, the Kantian standpoint differs significantly from Locke, since Locke avers that no one ought to harm another in the State of Nature, while Kant postulates that man is in a state of conflict and not co-existing in a State of Nature.[25] It is worth restating that the social contract theory seeks to describe the relationship between government and the governed. This relationship takes different forms, in line with the beliefs and temperaments of the people involved. Accordingly, there are five kinds of governance that are influenced by the social contract theory. These are, broadly, absolutism, anarchism, contractarianism, liberalism, and Marxism.[26] Each of them will be outlined below to show their pros and cons for the idea of governance as a social contract.

As a governance system, absolutism, better known as absolute monarchy, allows a monarch to exercise supreme autocratic authority that is not restricted by any written law. It comes from the idea of a philosopher king which was developed in Plato's Republic.[27] Absolutism is usually believed to be based on the idea of supernatural authority. Thus, whatever the state does is seen as being for the good of the people, because of the divine right of its leader to rule. This philosophy differs remarkably from the accountability of constitutional monarchs.[28]

The second kind of governance is inspired by moral claims about the importance of individual liberty and their accompanying distrust of centralised authority and all forms of hierarchy.[29] To the anarchists, the state is nothing but an unnecessary evil, whose power ought to be removed.[30] For the anarchists, the consent of the

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[24] Royce, M. 'Philosophical perspectives on the social contract theory' (2010) 1(4) *Post Modern Openings* 45-62.

[25] *Ibid* at 51.

[26] Waldron, J. 'Theoretical foundation of liberalism' (1950) 37(147) *The Philosophical Quarterly* 127-150 at 127.

[27] Dereck, B. *'Philosophical kingship and enlightened despotism'* in (Goldie, M. & Wokler, R.) *The Cambridge history of eighteenth-century political thought* (Cambridge University Press, 2006) 495-524.

[28] Woolf, A. *Systems of Government Democracy* (Evans Brothers, 2009) 9-10.

[29] Bakunin, M.A., Bakunin, M. and Michael, B. *Bakunin: Statism and Anarchy* (Cambridge University Press, 1990).

[30] Rothbard, M.N. 'Society without a State' (1978) 19 *NOMOS: American Society for Political and Legal Philosophy* 191-207 at 191.

majority to the formation of government is not sufficient. This is because they are not necessarily genuine representations of the governed.[31] These philosophers believe that the restrictions, rules, and regulations put in place by the state impede individual creativity and prevent people from learning how to fulfil their potential. Thus, it emphasises government as antagonist to the poor.[32] To them, such restrictions and laws should be abolished to enable people to attain creative ways of sorting out their difficulties and issues by themselves. However, unregulated social life would potentially create a situation of chaos, as people would likely employ self-help to sort out their differences.

The third kind of governance is the contractarian philosophy, which is based on the social contract theory made popular by Hobbes, Locke, and Rousseau, and later refined by John Rawls in his work on justice and fairness.[33] It does not need further elaboration because it is the main focus of this chapter.

The fourth kind of governance is the theory of liberalism, which is an offshoot of the contractarian theory, and thus a similar philosophy of state formation. It is based on ideas of liberty, consensual governance, and equality before the law.[34] Liberalism is inspired by the natural rights theory, which regards rights as inalienable and independent of state recognition or restriction.[35] Thus, the powers of the state must be subjected to natural rights that inheres in humans simply by virtue of being human.

The fifth kind of governance theory is Marxism. Marxism is a philosophy based on the idea of class conflict.[36] Originally articulated by Karl Marx and Friedrich Engels,[37] it believes that the productive capacity of society forms its foundation, and as such, gives rise to different classes within society, which are constantly in conflict

[31] Yarros, V.S. 'Philosophical anarchism: Its rise, decline and eclipse' (1936) 41(4) *The American Journal of Sociology* 470-483 at 473.

[32] *Ibid* at 474.

[33] Rawls, J. *A theory of justice* (Cambridge, MA: Harvard University Press, 1971) 211.

[34] Hobhouse, L.T. *Liberalism* (Oxford University Press, 1964).

[35] Zuckert, M.P. *Natural rights and the new republicanism* (Princeton University Press, 2011).

[36] Kolakowski, L. 'Marxism and Human Rights' (1983) 112(4) *Daedalus* 81-92 at 84.

[37] Marx, K. and Engels, F. *The Communist Manifesto* (Translated by Samuel Moore 1967, London: Penguin Books, 1848).

or struggle against each other. It proposes that class struggles lead society through different stages such as slavery, feudalism, capitalism, socialism, and communism.[38]

The above five philosophies inform ideas on state formation and operation. Governance institutions, including in South Arica, would usually fall into either one of these categories. Since South Africa adopted a democratic constitution in 1994 under unique political circumstances, it must have been the intention of its framers to ensure that it operates in line with their aspirations. Accordingly, it is important to explore ideas on the formation of states to find out how South Africa is situated within mainstream views of governance. This exploration will explain the foundation for the powers and limitations of the state in relation to the social contract theory. It will also set the stage for understanding the relationship between social contract, separation of powers, and basic service delivery in South Africa.

2.4.1. Contractual view of governance

The contractual view is founded on the idea that the state is established by people who willingly give their consent to be bound to meet the needs of the collective good of the society. As Hobbes, Locke, and Rousseau argued, the contract view holds that political legitimacy, authority, and obligations are derived from the consent of the people, who create a state and operate it on a similar basis as contract law using means of representation, majoritarianism, and tacit consent.[39] The implication of the above view is that legitimacy and duties depend on the social contract – that is on voluntary individual acts, rather than patriarchy, theocracy, divine right, custom, or convenience.[40] Thus, this view of social contract sees governance as a binding obligation between the state and the people, defining and limiting rights and responsibilities of the state and the people.[41]

In the modern European context, the contractual viewpoint includes a collective agreement that regulates employment and wages, and that is secured through

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[38] Rawls, J. 'Justice as fairness' (1958) 67(2) *The Philosophical Review* 164-194 at 167.

[39] Waldron, J. 'John Locke: Social Contract versus Political Anthropology' (1989) 51(1) *The Review of Politics* 3-28 at 22.

[40] Royce, M. 'Philosophical perspectives on the social contract theory' (2010) 1(4) *Post Modern Openings* 45-62 at 59.

[41] Royce, M. 'Philosophical perspectives on the social contract theory' (2010) 1(4) *Post Modern Openings* 45-62 at 59.

bargaining among representatives of the state.[42] This contractarian view arguably guided and informed the democratic dispensation in South Africa.[43] Here, constitutional democracy is the supreme law of the land, and any law inconsistent with it is invalid. Constitutional democracy is system where a constitution is the document from which the state derives its authority for governance. Therefore, constitutional democracy is now the foundation of South African legal jurisprudence.[44]

2.4.2. Conflictual view of governance

The conflict view holds that the state did not originate from a conscious decision. Rather, it emerged from violent conflict, wherein the people battled with each other for control of resources, and the winning side is the dominant side.[45] There is a sense in which this view applies to South Africa. This is because the period of apartheid qualifies as violent conflict, from which constitutional democracy eventually emerged.

2.4.3. Supernatural or divine right view of governance

The supernatural or divine right viewpoint holds that there is a higher power at work in state formation. In other words, this higher power divinely ordains states and their leaders.[46] This is also associated with the divine right of Kings. The first philosophical view is based on the theory of the supernatural authority, and thus all the existing structure of traditions and hierarchies are seen as benefitting society overall. Anything the state does is seen as being for the good of the people, because of the divine right of the state. This philosophy is quite similar to that of liberalism, which views everything as a product of God's creation.[47]

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[42] *Ibid* at 60.

[43] See the preamble of the Constitution of South Africa.

[44] See section 2 (Supremacy of Constitution This Constitution) is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

[45] Selby, J. 'Oil and water: The contrasting anatomies of resource conflicts' (2005) 40(2) *Government and opposition* 200-224 at 216.

[46] Burgess, G. 'The divine right of Kings reconsidered' (1992) 107(425) *The English Historical Review* 837-861 at 841.

[47] Waldron, J. 'Theoretical foundation of liberalism' (1950) 37(147) *The Philosophical Quarterly* 127-150 at 130.

2.4.4. The natural rights view

The natural rights view holds that because human beings have certain rights that are naturally inherent in them as humans, the right to good governance is not contractual in nature.[48] These rights are usually regarded as universal and inalienable.[49] States are thus established for the protection of these rights.

These philosophies, which are not mutually exclusive, influence ideas and applications of the social contract theory. As this chapter shows, a close examination of the social contract theory and its emphasis on the consent of the people as the basis of governmental legitimacy fits South Africa's constitutional democracy. For fuller comprehension of this discussion, I will precede it with a brief analysis of the components of the social contract theory.

2.5. Components of social contract

Inspired by D'Agostino *et al*,[50] I have identified four major elements of the social contract theory. These are the (1) role of a social contract (2) parties to the contract (3) substance of the contract, and (4) execution of the contract. Each of these elements will be examined briefly in turn.

2.5.1. Role of social contract

As shown above, a social contract emerged as an avenue for people to enjoy the benefits of organised government. However, organised government cannot exist in the absence of law and order. In this context, a social contract demonstrates that people endorse and comply with widely accepted rules and regulations to govern their conduct with not just one another but also the state. Usually, these rules and regulations are enshrined or outlined in a constitution, which is universally binding on

[48] Steiner, H. 'The natural right to the means of production' (1950) 27(106) *Philosophical Quarterly* 41-49.

[49] *Ibid* at 41.

[50] D'Agostino, F., Gaus, G. and Thrasher, J. 'Contemporary approaches to the social contract' in Zalta, E.N. (ed.) *The Stanford Encyclopaedia of Philosophy* (Winter 2021 Edition) <https://plato.stanford.edu/entries/contractarianism-contemporary/> (last accessed 12 September 2021).

everyone in the state. The implication of constitutional supremacy is that the state itself is bound to comply with the constitution, failing which it loses legitimacy.[51]

Accordingly, a social contract acts as a watchdog for good governance. In other words, it implies that public officials owe a duty of care to the people who elected them. As D'Agostino observed, this duty demands rational justification of the state's purpose when the key objectives of the social contract are not met. Thus, the electorate reserve the right to determine "whether or not a given regime is legitimate and therefore worthy of loyalty."[52] In chapters five, six, and seven, this dissertation will examine the extent to which the South African state fulfils its basic service delivery obligations in furtherance of its social contract with the people.

2.5.2. Parties to social contract

Perceptions of the actors in a social contract may be dependent on a justification problem.[53] The justification problem concerns the motives and commitments to a social contract, which are issues that are largely determined by its parties. Ordinarily, the parties to a social contract are citizens and their elected representatives. However, identifying the parties is not so simple, since not everyone in society votes during elections, nor vote for a particular party, nor even support the democratic process. For example, one can argue that the South African transition to a democratic government was a political settlement that was reached by elites with negligible contribution from the masses.[54] In a realistic sense, are these masses also part of the social contract? Do the elites themselves have the interest of the masses at heart or are they driven by their own greed and lust for power? These are significant questions with weighty implications. In fact, they are so weighty that Gauthier called them the "foundational crisis" of morality.[55] The parties to a social contract are most relevant for South Africa.

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[51] Heyns, C. 'A struggle approach to human rights,' in Soeteman, A. (ed) *Pluralism and law* (Dordrecht: Springer, 2001) 171-190.

[52] D'Agostino, F. *Free public reason: Making it up as we go* (Oxford University Press, 1996) 23.

[53] Sadurski, W. 'Problems of Justification: Social contract and intuition' in *Giving desert its due: Social justice and legal theory Vol. 2* (Dordrecht: D. Reidel Publishing Company, 1985) 57-76.

[54] Herbst, J. 'Prospects for elite-driven democracy in South Africa' (1997) 112(4) *Political science quarterly* 595-615.

[55] Gauthier, D. 'Why Contractarianism?' in Vallentyne, P. (ed.) *Contractarianism and Rational Choice* (Cambridge: Cambridge University Press, 1991) 15–30 at 16.

As is well known, the transition to democracy in South Africa was initiated through compromises between the minority Afrikaans ruling party and the black-majority, anti-apartheid groups. This was mainly achieved through the Convention for a Democratic South Africa (CODESA), which negotiated the end of apartheid and transition to democracy. Even though CODESA included very broad civil society representation, it lacked unity. For example, the Afrikaner Weerstandsbeweging (AWB), the Azanian Peoples' Organisation and the Pan Africanist Congress of Azania boycotted the proceedings.[56] The vast majority of black South Africans in rural areas had little or no input in the grand provisions on socio-economic rights in the Constitution. Similarly, they had little input in the structure of government, especially the mechanisms put in place to ensure efficient basic service delivery. Expectedly, the political settlement reached by the CODESA "has failed to translate into an economic and social settlement that results in just livelihood strategies and equitable service delivery that addresses historical grievances."[57] As shown in chapters six and seven, the delivery of basic amenities suffers from "slow and uneven rollout of services in historically black areas where, despite increases in access, the quality and maintenance of these services has often served to reinforce spatial and socioeconomic inequality."[58]

Accordingly, understanding the nature of the parties to a social contract and their motivations is important, since it cannot be assumed that everyone consents to the contract nor commits to abide by it. Understanding the parties to a social contract is particularly important because elite democracy seems to have continued after South Africa's transition to democracy. In this respect, Mattes observed:

> [South African] citizens have been left behind by the past decade's preoccupation with elite bargaining and institutional design. South Africans need to shift the focus onto problems of citizenship, representation, and participation.

[56] The Pan Africanist Congress of Azania even accused the African National Congress of betraying the liberation struggle by 'selling out' to the apartheid oppressor, the National (Afrikaans) Party. See Maharaj, M. *The ANC and South Africa's negotiated transition to democracy and peace* (Berlin: Berghof-Forschungszentrum für Konstruktive Konfliktbearbeitung,2008) 26.

[57] Ndinga-Kanga, M., van der Merwe, H. and Hartford, D. 'Forging a resilient social contract in South Africa: states and societies sustaining peace in the post-apartheid era' (2020) 14(1) *Journal of Intervention and Statebuilding* 22-41.

[58] *Ibid* at 23.

> In the next decade, they need to put as much emphasis on building a grassroots culture of citizenship as they have already put on building a culture of elite accommodation.[59]

2.5.3. Substance of social contract

Other than parties, a social contract is founded on two key elements. These are consent or agreement and substance or purpose of the agreement. By "consent," its proponents assumed that individuals possess behavioural power over their lives.[60] But this is not always the case, since some laws (such as traffic laws) are obeyed more because of the threat of sanctions than from genuine acceptance of the law. This explains why scholars such as Rawls regard people's duty to obey social rules as a matter of how individuals interpret morality.[61] In sum, "Social contract views work from the intuitive idea of agreement."[62]

In its original formulation by Hobbes and Locke, the social contract concerned the terms of a survivalist form of political association. It operated on the assumption that "life under government" is a whole lot better than "life under anarchy."[63] Later, it moved from political association to "the social role of norms in public life."[64] Here, emphasis was on individual compliance to state rules for the benefit of public welfare. Today, the substance of a social contract is usually the constitution of a state or group. For constitutions, the most important aspects are bills of rights, socio-economic rights, and their means of enforcement.

The substance of the social contract has influenced some of the most important political documents in modern times. The most notable examples include the United

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[59] Mattes, R.B. 'South Africa: democracy without the people?' (2002) 13(1) *Journal of Democracy* 22-36 at 34.

[60] D'Agostino, F., Gaus, G. and Thrasher,J. 'Contemporary Approaches to the Social Contract' in Zalta, E.N. (ed.) *The Stanford Encyclopedia of Philosophy* (Winter 2021 Edition) <https://plato.stanford.edu/entries/contractarianism-contemporary/> (last accessed 11 September 2021).

[61] Rawls, J. A. *Theory of justice* (Cambridge, MA: Belknap Press, 1999) 293.

[62] Freeman, S. *Justice and the social contract* (Oxford: Oxford University Press, 2007) 17. However, some scholars such as Kant do not believe that consent is crucial to a social contract. See Kant, I. [*Metaphysical elements of justice*, 2nd edition, John Ladd (trans.), (Indianapolis: Hackett, 1999).

[63] Hardin, R. *Indeterminacy and society* (Princeton: Princeton University Press, 2003) 43.

[64] Freeman, S. *Justice and the social contract* (Oxford: Oxford University Press, 2007) 23.

States of America Declaration of Independence of 1776, the French Declaration of the Rights of Man and Citizen of 1789, and the Universal Declaration of Human Rights of 1948. The words of the United States Declaration of Independence are particularly noteworthy for the substance of a social contract. It states among others:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, -- That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[65]

2.5.4. Execution of agreement

In the public sphere, the performance of a social contract ordinarily results in the provision of essential services by the state. In its simplest description, the efficient execution of a social contract requires a caring government. Chapters five to seven of this dissertation will show how the South African state has treated the contract it has with its citizens through the promotion of socio-economic rights such access to shelter, food, healthcare, and social security.

2.6. Critiques of social contract

As laudable as the concept of social contract is, it has not escaped criticism. Ironically, its critiques centre on how it provides an account of "the historical origins of sovereign power and the moral origins of the principles that make sovereign power just and/or

[65] 'Original text of The Unanimous Declaration of the Thirteen United States of America' 4 July 1776 <https://www.archives.gov/founding-docs/declaration-transcript> (last accessed 19 October 2021).

legitimate."[66] For example, Hume regards the theory as too abstract. Since no one has personal experience of what the State of Nature looked like, it can only be imagined.[67]

One of the main criticisms is traceable to Marxist notions of law, power, and economics. For example, Sulkunen argues that contemporary ideas about the social contract are mistaken because "society is not a plan and cannot be based on an agreement."[68] Thus, the social contract is an illusion because it imagines relationships of domination as voluntary agreements and exaggerates the power of people's agency in the contract, especially when it grants it to "those who have little or no capacity for it."[69] This critique certainly resonates with the millions of South Africans who were dispossessed by apartheid and remain voiceless even after the movement to democratic government.

Mills condemned the Western idea of the social contract by linking it to European expansionism and racism in the last five hundred years.[70] He showed how the European brand of democracy is an unacknowledged 'contract' that has bred a system of global European hegemony that divides peoples into 'whites' and 'non-whites.' Further, Mills showed how the social contract influences the imposition of white moral philosophy on non-whites through ideological conditioning and violence, thereby making modern society a continuation of racism or white supremacy.

Finally, some have critiqued the inherently lopsided nature of parties in the original conception of the social contract. For example, Hobbes presented it as a simultaneous agreement to abandon full use of their powers by everyone except the new sovereign. This implies that "the sovereign is really a beneficiary rather than a party to the Hobbesian social contract."[71] We know that modern democracies do not work this way. While I acknowledge its criticisms, I nevertheless rely on the social contract to assess the extent of service delivery in South Africa. It does this because

[66] Neidleman, J. 'The social contract theory in global context' (2012) 9 E-International Relations 1-6 <http://www.e-ir.info/2012/10/09/the-social-contract-theory-in-a-global-context> (last accessed 19 October 2021).

[67] Hume, D. 'Of the original contract,' in Hume, D. (ed.) *Essays: Moral, political, literary, volume 1* (Longmans, Green, and Company, 1907) 443-460.

[68] Sulkunen, P. 'Re-inventing the Social Contract' (2007) 50(3) *Acta Sociologica* 325-333 at 325.

[69] *Ibid*.

[70] Mills, C. *The racial contract* (Ithaca and London: Cornell University Press, 1997) at 3 and 29.

[71] Evers, W.M. Social contract: A critique (1977) 1(3) *Journal of Libertarian Studies* 185-194 at 187.

the theory offers a sensible explanation for the origins and structure of the modern state. Also, its elements explain the principles of justice that make the state legitimate. Finally, these same principles hold the state to account for the ways it exercises power.

2.7. The social contract theory in South Africa

Undoubtedly, states exist because the people allow them. In South Africa's case, the state's existence is supposed to be for the general good of the society. The people give up certain rights to elected representatives in return for services and in order to avoid self-help.[72] The elected representatives therefore accept an obligation to provide the electorate with basic service delivery,[73] in return for the people's duty to pay taxes, obey laws, and avoid self-help to ensure justice and fairness.[74] Currently, South Africa operates a written constitution as the supreme law of the land.[75] This constitution provides for basic service delivery. Arguably, service delivery in South Africa will not be complete if the constitutional dispensation fails to draw a link between social contract and government's obligations to citizens.[76] Indeed, the history of democratic governance in South Africa implies that social contract is part of South Africa's constitutional dispensation.[77]

Support for this argument may be drawn from Canada, where the social contract theory forms the basis of the Canadian Constitution.[78] Canada demonstrates that the rights and duties provided in its constitution result from the collective rights and desires of the people, which are freely given up in order to form a legitimate political society.[79] As a result of the historical injustices of the past perpetrated by the

[72] Taylor, B.B. 'Second Treatise of Social Contract: A comparative Analysis of Locke and Rousseau' (2015) 1 *Black and Gold* 1-14 at 7.

[73] *Ibid* at 4.

[74] Rawls, J. 'Justice as farness' (1958) 67(2) *The Philosophical Review* 164-194.

[75] See section 2 of the Constitution.

[76] See section 152 of the Constitution of the Republic of South Africa. It is not clearly evident which services should be provided and or are paramount in the provision of basic service delivery by local government.

[77] Ruiters, G. 'The moving line between state benevolence and control: Municipal indigent programmes in South Africa' (2018) 53(2) *Journal of Asian and African Studies* 169-186.

[78] Chambers, S. 'Contract or conversation? Theoretical lessons from the Canadian constitutional crisis' (1998) 26 (1) *Politics & Society* 143-172.

[79] *Ibid*.

apartheid government, there was a desire to bring about constitutional democracy based on the will of the people. The scholarly community is split over the extent of the social contract in South Africa. Drawing on democratic policy theory, specifically the writings of Joshua Cohen and Joel Rogers, Basset argues that the social contract theory has failed in South Africa.[80] As evidence of this failure, she cited the ruling party's rhetorical shift from "social contract" to "social compact."[81] Writing in the context of divided/conflict societies, Sisk describes the realisation of social contract in South Africa as elusive.[82] Hickey questions the efficacy of a social contract approach to social protection, arguing that contractual forms of social protection are complex and controversial.[83]

To better reveal the close link between social contract and service delivery, I proceed to anaylse the historical development of constitutionalism in South Africa. This analysis will buttress my arguments on how South Africa arrived at a constitutional democracy that is founded on a social contract.

2.8. Historical development of constitutional law in South Africa

During the colonial and apartheid eras, Roman Dutch law was imposed on South Africa by European colonialists. This legal system was primarily designed to meet the needs of the Europeans who settled in South Africa to build their colonial empires. Subsequently, it became part of South African legal system and common law.[84]

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[80] Bassett, C. 'The Demise of the Social Contract in South Africa' (2004) 38 *South African Journal on Human Rights* 543-557 at 544 and 555.

[81] *Ibid*.

[82] Sisk, T. *Democratization in South Africa: The elusive social contract*. Vol. 4838. (Princeton University Press, 2017).

[83] Hickey, S. 'The politics of social protection: what do we get from a 'social contract 'approach?'' (2011) 32 (4) *Canadian Journal of Development Studies* 426-438.

[84] Sachs, A. 'The future of Roman Dutch Law in a non-racial democratic South Africa: Some preliminary observation' (1992) 1 *Social & Legal Status* 217-227 at 219. The South African legal system is widely known as one that is basically premised on Roman-Dutch law. In the mid-seventeenth century, Dutch settlers began to colonise and occupy the part of South Africa now known as the Western Cape. In 1806, English forces defeated the Dutch settlers and took the Cape of Good Hope as a British possession. South African law reflects this history of successive colonial governance. The 'common law' of the country (in this context, 'common law' implies law of non-statutory origin) is based on the 'Roman-Dutch' law of the original Dutch settlers.

Conceivably, the necessity for social contract to protect basic service delivery was borne out of the discriminatory apartheid policies that divided the South African society. The Population Registration Act of 1950 provided the basic framework for apartheid by classifying all South Africans by race, including Bantu (black Africans), Coloured (mixed race) and white. A fourth category, Asian (meaning Indian and Pakistani) was later added. Apartheid was implemented with the notion that the Afrikaners and White race or group were superior to other races such as the black South Africans, Afro-Africans (AF) and South African Indians.[85] As inferior racial groups, inferior basic services were designed for them.[86] The government had banned marriages between whites and people of other races, and prohibited sexual relations between black and white South Africans. In some cases, the legislation split families; parents could be classified into a racial group while their children were classified as another.

A series of Land Acts set aside more than 80 percent of the country's land for the white minority, and "pass laws" required non-whites to carry documents authorizing their presence in restricted areas. In order to limit contact between the races, the government established separate public facilities for whites and non-whites, limited the activity of non-white labour unions and denied non-white participation in national government. It was only after the inauguration of a constitutional dispensation that these marginalised racial groups were grouped as Blacks, a designation that included the Khoisan, the Chinese, Coloureds, and Indians (KCCI).[87] The apartheid division of racial groups brought abject poverty, brute force, segregation, immense hardship amongst majority of South Africans, and internal conflicts of economic, social and political proportions in the country.[88] It became necessary and inevitable, at the end

[85] 'A history of apartheid in South Africa' South African History online 6 May 2016 <https://www.sahistory.org.za/article/history-apartheid-south-africa> (last accessed 6 April 2019).

[86] Mooler, V. 'Quality of life in South Africa: Post-apartheid trends (1998) 43(1) *Social Indicators Research* 27-68 at 29.

[87] Adhikari, M. 'God made the white man, God made the black man: Popular racial stereotyping of coloured people in Apartheid South Africa' (2006) 56(1) *South African Historical Journal* 149-1950.

[88] Maylam, P. 'The Rise and Decline of Urban Apartheid in South Africa' (1990) 89(354) *African Affairs* 57-84.

of apartheid, to implement constitutional democracy that would enhance inclusive growth and development, which was lacking under apartheid policies of segregation.[89]

Social contract in the Constitution created obligations for the state on one side and duties on the part of the citizens.[90] The Constitution incorporated social contract as a means to protect and do away with the discrimination suffered by majority of the people of South Africa. The apartheid government was characterised by instability, minority rule, and lack of growth due to the sanctions imposed by the international community to abolish discrimination in South Africa.[91] The multiparty system led by the African National Congress (ANC), Pan African Congress (PAC), Inkatha Freedom Party (IFP) and others were no longer going to stand by and watch white minority government kill its people and destroy the fabric of the South African society.[92] As a result, the Congress of the People adopted a Freedom Charter in 1955 asserting that "South Africa belongs to all who live in it." Moreover, Sharpesville massacre convinced many anti-apartheid leaders that they could not achieve their objectives by peaceful means, and both the PAC and ANC established military wings, neither of which ever posed a serious military threat to the state. However, this led to the imprisonment of many leaders including Nelson Mandela, the founder of Umkhonto we Sizwe), the military wing of the ANC, who was incarcerated from 1963 to 1990; his imprisonment would draw international attention and help garner support for the anti-apartheid cause.[93]

With South Africans waking up to the realisation that they had to take responsibility for their own future, something drastic had to happen to change the dynamics of government. Racial segregation had to be replaced with a constitutional

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[89] Moll, T. 'Did the Apartheid economy fail?' (1991) 17(2) *Journal of Southern African Studies* 271-291.

[90] See the preamble of the Constitution of South Africa. It states that "We, the people of South Africa, recognise the injustices of our past; honour those who suffered for justice and freedom in our land; respect those have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity".

[91] Booth, D. 'Hitting apartheid for six? The politics of the South African sports boycott (2003) 38(3) *Journal of contemporary history* 477-493.

[92] Yung, C. and Shapiro, I. 'South Africa's negotiated transition: Democracy, opposition and the new constitutional order' (1995) 23(3) *Politics and Society* 269-308 at 270.

[93] Davis, S.R. *The ANC's war against apartheid: Umkhonto We Sizwe and the liberation of South Africa* (Indiana University Press, 2018).

democracy that would guarantee the rights of all who lived and domiciled in South Africa.[94] The new constitutional dispensation sought to ensure the protection of the socio-economic rights of all citizens, and end the oppression of the majority indigenous people of South Africa. Such a new dispensation could only be based on a social contract. Accordingly, the link between social contract and basic service theory needs detailed explanation. These two concepts will now be analysed within constitutional provisions to show how they expand the arguments of this thesis.[95]

2.9. Social contract as basis for basic service delivery in South Africa

Generally, South Africa has witnessed an improvement in the delivery of basic services when compared with the situation during apartheid. This has been due primarily to the mode of local government adopted. Section 153 of the Constitution expressly provides for the functions of a municipality (or local government). These functions include the provision of a democratic and accountable government for local communities and the provision of services to communities in a sustainable manner.[96] This has therefore spurred municipalities to provide the necessary administrative and institutional structures necessary for providing social services to the communities.[97] However, service delivery still remains inaccessible to many households and the majority of people in these communities still lack access to basic services such as clean water, sanitation, health care and electricity.[98] More than half of South Africans

[94] Yung, C. and Shapiro, I. 'South Africa's negotiated transition: Democracy, opposition and the new constitutional order' (1995) 23(3) *Politics & Society* 269-308 at 283.

[95] See section 1 of the constitution of South Africa (Republic of South Africa The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness).

[96] Section 153 of the Constitution of the Republic of South Africa.

[97] Akinbade, O.A, Mokwena, M.P. and Kinfack, E.C. 'Understanding citizens' participation in service delivery protests in South Africa's Sedibeng district municipality' (2013) 40 (5) *International Journal of Social Economics* 458-478 at 459-460.

[98] Hirsch, A. 'How compromises and mistakes made in the Mandela era hobbled South Africa's economy' The Conversation 23 December 2015 <https://theconversation.com/how-compromises-and-mistakes-made-in-the-mandela-era-hobbled-south-africas-economy-52156> (last accessed 21 July

believe that municipalities fair badly or very badly in the provision of basic services to the public.[99] It therefore becomes necessary to examine the basis upon which service delivery to the people can be founded.

The social contract theory offers a normative basis for understanding the delivery of basic services by the government to the people. As earlier stated, this theory implies that the people relinquish their individual rights to a central authority called government. This authority holds such power jointly for the people and for ensuring their security and wellbeing. This relinquishing of individual power thus creates a contract between the members of the community and the government with both parties having rights and responsibilities under this contract. The provision of basic service by the public sector can thus be explained on the basis of this exchange.[100]

Social contract and basic service delivery are two interrelated, mutually dependent concepts, which are arguably the "glue that binds the state and society together".[101] Scholars are however divided on how each of these concepts relates to the other or how one is dependent on the other. The concepts of social contract and basic service delivery, though borrowed from European jurisprudence, arrived formally in South Africa in the era of negotiated settlement that saw the introduction of constitutional democracy to South Africa. It was given prominence during the 1994 constitutional dispensation.[102] In the quest to bring about constitutional development and

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2019); Akinbade, O.A., Mokwena, M.P. and Kinfack, E.C. 'Understanding citizens' participation in service delivery protests in South Africa's Sedibeng district municipality' (2013) 40 (5) *International Journal of Social Economics* 458-478 at 459-460.

[99] Nkomo, S. 'Public Service Delivery in South Africa: Councillors and Citizens Critical Links in overcoming persistent Inequities' (2017) 42 *Afrobarometer Policy Paper* at 2.

[100] Bilchitz, D. 'Citizenship and community: exploring the right to receive basic municipal services in Joseph' (2010) 3 (1) *Constitutional Court Review* 45-78 at 59.

[101] Mcloughlin, C. 'When does service delivery improves the legitimacy of a fragile or conflict affected state?' (2015) 28 (3) *Governance: An international Journal of Policy, Administration and Institutions* 341-356 at 343.

[102] Convention for a democratic South Africa (CODESA) <*https://www.sahistory.org.za/article/convention-democratic-south-africa-codesa*> (last accessed 4 February 2019). The New Constitution was negotiated between May 1994 and October 1996 in the country's first democratically elected convention, the Constitutional Assembly. However, the demand for a democratic constitutional dispensation was not new, and was in fact as old as South Africa itself.

democracy, South Africa deliberately and/or unconsciously incorporated social contract into the constitutional system. I argue that by so doing, it guaranteed that government will ensure basic service delivery.[103]

As shown above, social contract implies that people in the society agreed to give up certain rights to submit to the authority of an elected representative in return for basic service delivery. With respect to the issue at hand, South African citizens, through the Constitution, freely negotiated their form of government and agreed to pay taxes. In turn, government accepts the obligation to provide basic service delivery to all who live in South Africa.[104] By this, the rights of the society is pooled together, and such is then exercised by delegating them to elected representative to act for the good of the society as a whole and to do so within a framework of structures and procedures enshrined in the Constitution.[105] The elected representative may not exercise any power not provided for in the Constitution and any law inconsistent with the Constitution is invalid.[106]

The social contract is evident in the constitution making process itself, by which representatives of the various communities forming a state are appointed by the community to represent them on a constitutional drafting committee or similar body set up for such purpose. If one looks at the different ways in which constitutions are made, one sees that the process is meant to be representative of the wish, consent, and aspirations of the people and of the intention of the people to give up their individual rights under the natural state in return for good governance.

The social contract concept emphasises the consent of people that have to be governed. The government is legitimate not because it is inherently so, but because

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The Constitution was not a product solely of negotiation in the Constitutional Assembly. Experiences in other parts of the world played a role in its development, and many of its provisions are the realisation of years of struggle and are imbued with historical significance.

[103] Section 2 of Constitution of South Africa (hereinafter referred to as the Constitution) Supremacy of Constitution this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

[104] See the Preamble of the Constitution of South Africa.

[105] Section 156 of the Constitution of South Africa.

[106] Section 2 of Constitution of South Africa (hereinafter referred to as the Constitution) Supremacy of Constitution this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

the people conferred legitimacy on it by agreeing to be governed. This is further evidenced in the preamble of the Constitution of South Africa that starts with the expression '*We the people'.*[107] The people of South Africa were determined to end apartheid and a negotiated settlement was therefore the only way to resolve the impasse.[108] As a result of the agreement, the new democratic constitutional dispensation forbids differentiation and discrimination in service delivery and the apartheid categorization of race must therefore be dealt with to guarantee delivery of basic services to the people.

2.9.1. How seriously is social contract taken in South Africa?

Even though the 1996 Constitution has been hailed as one of the best and one of the most progressive constitutions in the world, it is necessary to ask if it reflects the hopes and aspirations of the people of South Africa on basic service delivery. Does it really give effect to the wish, consent and agreement of the people in terms of basic service delivery? The conundrum facing the delivery of basic services to the people of South Africa in the presence of a constitutional democracy with an entrenched social contract persists.[109] Arguably, citizens' access to basic service delivery is a requirement for proper fulfilment of fundamental rights as provided for in the Constitution. When constitutional democracy was introduced into South Africa, a social contract was created to guarantee human welfare. The case of *Mazibuko v City of Johannesburg* is instructive in this regard.

[107] In the preamble of the Constitution of South Africa, it states that "We, the people of South Africa, recognise the injustices of our pasts; honour those who suffered for justice and freedom in our land; respect those have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity.

[108] Adopt this Constitution as the supreme law of the republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of the people and every citizens is equally protected by law; improve the quality of life of all citizen and free the potential of each person; and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

[109] Reddy, P.S. 'The politics of service delivery in South Africa: The local government sphere in context' (2016) 12(1) *The Journal for transdisciplinary research in Southern Africa* 1-8 at 4.

The applicants had a lease agreement with a landlord and paid their electricity bills as part of the lease. Unfortunately, the landlord had defaulted in electricity payments to the city. The electricity in the house was disconnected and hence this action.[110] The applicants contended that they had a right to be heard before the disconnection and such violation amounted to a breach of their right to dignity. As expected, the respondents argued before the courts that they had no contractual relationship with the applicants who were the tenants. The tenants were merely third parties with whom they had no privity of contract. In its ruling, the court found that the rights of the tenants to receive basic services had been violated. However, this right was not founded on the electricity contract. Instead, the court held that the right was founded on the local government's duty to 'meet the basic needs of all inhabitants of South Africa'.[111] The court further held that the discharge of this duty was not dependent on the existent of a contractual relationship.[112]

The question that follows is, what is the foundational principle upon which the court held that there is a relationship between the city and the tenants for the supply of electricity even in the absence of an actual electricity contract between them? Bilchitz provides some direction. He explains that the Hobbesian notion of individuals conceding their natural rights in order to obtain security from harm was extendable to the modern society. Our Hobbesian State of Nature, according to him, is a situation where 'each is not guaranteed the basic goods necessary to survive and flourish'.[113] The state (or government) is therefore formed to help ensure that every member has access to basic goods and services. This social contract is thus what creates a 'contractual relationship' between the tenants in *Joseph case* and City Power even in the absence of an actual electricity contract. The provision of these basic needs becomes the basis for the people's acceptance of the government and its exercise of authority. The people can therefore claim delivery of such goods.[114]

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[110] 2010 SA 5 (CC).

[111] 2010 SA 5 (CC) Para 34.

[112] 2010 SA 5 (CC) Para 34.

[113] Bilchitz, D. 'Citizenship and community: Exploring the right to receive basic municipal services in Joseph' (2010) 3 (1) *Constitutional Court Review* 45-78 at 60.

[114] *Ibid* at 62.

The right to basic service delivery is constitutionally guaranteed under chapter 2 of the South African Constitution. However, the right to basic service delivery is subject to numerous debates. This is due to the fact that a number of basic services such as education, health, housing, and environment amongst others are still accessible only to those who can afford them through privatisation and other means.[115] Conversely, less privileged people have limited access to these services. The state is therefore under an obligation to respect, protect, promote and enforce the rights in chapter two of the Constitution.

However, it is important to note that the right to basic service delivery is subject to limitation clauses as set out in section 36 and elsewhere in the Bill of Rights.[116] This enquiry rightly turns on the provisions that guarantee equal enjoyment of all rights by the citizens of South Africa as provided for in section 1 of the Constitution.[117] The protection afforded by the Constitution is available to all citizens in equal proportion no matter the condition of the citizens. One of the greatest features of the South African Constitution that sets it apart from other constitutions of the world such as those of the United States, Britain, and Canada, is the Bill of Rights, which protects socio-economic rights and promotes access to basic service delivery.

2.9.2. Social contract and the Bill of Rights

The Bill of Rights contains the rights of all people in South Africa and affirms the democratic values of human dignity, equality, and freedom.[118] It occupies a place of primacy in constitutional interpretation.[119] In other words, any interpretation of the Constitution must be in line with the dictates of the provisions of the Bill of Rights. The

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[115] See Section 26(1) of the constitution of the Republic of South Africa.

[116] See Section 27(2) of the constitution of the Republic of South Africa.

See Section 29(1) of the constitution of the Republic of South Africa.

[117] Section 1 of the Constitution reads as follows: "The Republic of South Africa is one sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms, (b) Non-racialism and non-sexism, (c) Supremacy of the Constitution and the rule of law, (d) universal adult suffrage, a natural common voters roll, regular elections, and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[118] See Section 7 (1) of the Constitution of the Republic of South Africa.

[119] Section 39(2) of the Constitution of the Federal Republic of South Africa.

Courts are empowered with the authority to declare any law that is inconsistent with the Bill of Rights void and invalid to the extent of such inconsistency.[120] They are also empowered to consider international law in their application of the Bill of Rights.[121] Furthermore, the Constitution states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation if they are consistent with the Bill of Rights.[122]

In the context of the Constitution, the right to basic service delivery means that everyone has a right to essential services irrespective of whether they can afford to pay for them. Basic service delivery should be accessible to all and not only a selected few who are wealthy or who are influential enough to receive it.[123] It becomes an exercise in futility if the government or the provisions of the Constitution are not adhered to by the relevant authorities.[124] For example, in section 27 (2), the government must, within its available resources, make available to everyone access to health care facilities that can be accessible when the need for such facilities arises. In realising this, the state must take reasonable legislative and other measures, as prescribed by the Constitution, to achieve a progressive realisation of the right. In doing so, the right to have access to health care services would not only be regarded as fulfilled, but the people would be constitutionally protected. As shown in chapter five's analysis of the case of *Soobramoney v Minister of Health*, it is important to distinguish between the right to have access to health care services from the right to emergency medical treatment, as the courts distinguish between the two.[125]

The state is not obliged to provide healthcare services at a time required by a particular citizen in order to maintain life, but that value judgment must be the criteria to follow in making decisions as to who gets which type of healthcare services.

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[120] This Constitution is the supreme law of the Republic. Law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. See Section 2 of the Constitution of the Republic of South Africa

[121] Section 39(1)(b) of the Constitution of the Republic of South Africa, Sloss, D. *The role of domestic courts in treaty enforcement*: *A comparative study* (Cambridge University Press, 2009) 475.

[122] See Section 39 of the Constitution of the Republic of South Africa.

[123] See Section 27 (2) of the Constitution.

[124] Currie, I. and de Waal, J. *The Bill of Rights handbook* (Cape Town: Juta 6th ed., 2013) 564-566.

[125] *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).

Furthermore, the state is only obliged to provide healthcare services or facilities and make them accessible by all citizens using its available resources. This is because services can only be provided within the resources that are at the disposal of the state. Therefore, the provisions of section 27 would not be violated, as the state's responsibility is also subject to the limitation set out in section 36.[126] In other words, the state is only mandated to take actions that apply generally to citizens and are open and transparent, based on the state's available resources. In doing so, the obligations placed upon the state will be seen as fulfilled in line with the provisions of the Constitution.[127]

Scholars and certain sections of civil society are beginning to question the applicability of the social contract with respect to basic service delivery in South Africa. Bohler-Muller *et al* acknowledge that democracy and the 1996 Constitution had opened up a path to certain rights for all South Africans.[128] However, the aspirations and expectations ushered in by the post-apartheid dispensation have been largely unmet. As they argue, "the progressive realisation of socio-economic rights … remains a pipe dream for many poor and vulnerable people, 23 years after the collapse of apartheid."[129] Oosthuizen points out that certain parts of the South African society now question the 'social contract' in South Africa. According to this group, which is largely represented by the youths, the negotiated settlement was a "victory for white monopoly capital at the expense of the legitimate claims of the black majority."[130]

2.10. Official attitude to the social contract theory

On several occasions, the executive branch of government has accused the courts of encroaching on their constitutionally assigned functions, thereby jeopardising the

[126] See Section 36 of the Constitution.

[127] *Soobramoney v Minister of Health (Kwazulu-Natal)* para 11. See also section 27 and 36 of the Constitution.

[128] Bohler-Muller, N., Kanyane, M., Pophiwa, N. and Dipholo, M. 'Life after judgment: The Nokotyana case re-examined' (2018) 36(1) *Journal of Contemporary African Studies* 143-159.

[129] *Ibid* at 143.

[130] Oosthuizen, M. 'Why South Africa can't deliver on the social contract set out in its constitution' The Conversation 21 November 2016 <https://theconversation.com/why-south-africa-cant-deliver-on-the-social-contract-set-out-in-its-constitution-69119> (last accessed 19 October 2021).

doctrine of separation of powers.[131] This doctrine denotes the division of the state into separate, independent branches with allocated powers and responsibilities that respect the boundaries of each other.[132] Indeed, the doctrine of separation of powers took a centre-stage in several cases before the Constitutional Court. For example, in *South African Association of Personal Injury Lawyers v Heath and Others*, Chaskalson P, while comparing the constitutional dispensations of South Africa, the United States of America, and Australia, noted that "in all three countries, there is a clear although not absolute separation between the legislature, executive, and courts".[133] In most cases, the Constitutional Court has held that the doctrine of separation of powers does not always have to be strictly applied.

In *Nokotyana and others v Ekurhuleni Metropolitan Municipality and others*,[134] the applicant community members had applied to the court to compel the municipality to provide certain basic services (portable water, sanitation, toilets and street lights) and to upgrade the settlement. The Constitutional Court held that its role in ensuring the achievement of socio-economic goals though important, was limited. The court thus relied on technicalities to avoid engaging substantively with the content of justiciable rights.[135] What the court does instead is to identify already existing government policy to rely on and demand for the implementation of such policy. By so doing, the court avoids getting involved in what it deems as an executive function and violating the separation of powers.

Scholars have queried this approach on the basis that the rights upon which the court was called to adjudicate upon were within the purview of judicial powers.[136]

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[131] Ngang, C.C. 'Judicial enforcement of socio-economic rights in South Africa and the separation of powers objection: The obligation to take other measures' (2014) *African Human Rights Law Journal* 660-662 at 655-680 at 657.

[132] Separation of powers was first articulated in 1748 by Charles de Secondat, Baron de Montesquieu. See Baron de Montesquieu, C.D.S., *The spirit of laws Vol. 2* (Trans. By T. Nugent) (Colonial Press, 1900).

[133] *South African Association of Personal Injury Lawyers v Health and Others* (CCT27/00) [2000] ZACC 22; 2001 (1) BCLR 77 (28 November 2000).

[134] 2010 (4) BCLR 312 (CC).

[135] Bohler-Muller, N., et al. 'Life after judgment: The Nokotyana case re-examined' (2018) 36(1) *Journal of Contemporary African Studies* 143-159 at 146.

[136] *Ibid* at 143-159, Bilchitz, D. 'Citizenship and community: exploring the right to receive basic municipal services in Joseph' (2010) 3(1) *Constitutional Court Review* 45-78.

However, one may argue that the adjudication before the court was not whether socio-economic rights existed, but rather how they are to be implemented. Obviously, implementation remains within the jurisdiction of the executive. The case shows that the role of courts in the achievement of basic service delivery is very complex due to the often technical and bureaucratic nature of service delivery. As Van der Westhuizen remarked, "bureaucratic efficiency and close co-operation between different spheres of government and communities are essential."[137]

In the first certification judgment, *Ex parte Chairperson of the Constitutional Assembly of the Republic of South Africa*, the court stated that "there is no universal model of separation of powers and, in democratic system of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation of powers that is absolute.[138] The principle of separation of powers, on the one hand, recognises 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 prevents the branches of government from usurping power from one another. In this sense it anticipates the necessity or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers.

In a constitutional dispensation, the doctrine of separation of powers is not fixed or rigid. The courts are duty bound to develop a distinctively South African model that fits the particular system of government provided for in the Constitution. This is meant to reflect a delicate balance informed by South Africa's history and its new dispensation between the need to control government by separating powers and enforcing checks and balances. Since 1994 and the welcoming of a new democratic government, the doctrine of separation of powers has been investigated extensively in various judgments of the Constitutional Court. The judiciary has spent time in developing a home-grown model of the doctrine as envisaged by the Constitution. Ultimately, the courts have concluded that there is no absolute separation of powers.

However, it is not surprising to find some cases from the Constitutional Court in which judges have strictly applied the doctrine. This is usually in cases that involve a

[137] 2010 (4) BCLR 312 (CC) para 4.

[138] *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Republic of South Africa* 1996 (First Certification judgment) 1996 (4) SA 744 (CC) [13].

close relationship between the arms of government in the adjudication of law and justice. For example, in *De Lange v Smuts No and Others*, the Constitutional Court held that a member of the executive may not be given the power to commit an un-cooperative witness to prison.[139] This is because only the courts have the power to send someone to prison. It ruled that committal to prison is a judicial function and not an executive one. Furthermore, in *South African Association of Personal Injury Lawyers v Health and Others*, the Constitutional Court held that a judicial officer may not be appointed as the head of a criminal investigation unit.[140] This is because the power to investigate and prosecute crimes is an executive rather than judicial function.

The Court also held in *S v Dodo* that while the legislature may determine a minimum sentence for a particular crime, it may not determine the sentence that should be imposed in a particular case because the power to impose a sentence on the offender is a judicial function.[141] In *Executive Council Western Cape Legislature v President of Republic of South Africa*, the Constitutional Court held that while the legislature may not delegate plenary law-making powers to the executive, it may delegate subordinate law-making powers.[142] In the context of separation of powers, therefore the Constitutional Court has declared severally that socio-economic rights are justiciable.[143] This implies that in South Africa, socio-economic rights can be adjudicated or enforced judicially just as political and civil rights.

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[139] *De Lange v Smuts No and Others* (CCT26/97) [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (28 May 1998).

[140] *South African Association of Personal Injury Lawyers v Health and Others* (CCT27/00) [2000] ZACC 22; 2001 (1) BCLR 77 (28 November 2000).

[141] *S v Dodo* (CCT 1/01) [2001] ZACC 16; 2001 (3) SA 382 (CC; 2001 (5) BCLR 423 (CC) (5 April 2001).

[142] *De Lange v Smuts NO and Others* para 24, *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* para 21 and 109, *South African Association of Personal Injury Lawyers v Heath and Others* para 20, *S v Dodo* para 26. See *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995).

[143] See Certification of the Constitution of the Republic of South Africa para 49.

Finally, some proponents argue that socio-economic rights are, by their nature, non-justiciable and should not be incorporated in the Constitution.[144] Although these rights, including the right of access to health, food, social security, housing, and education, are declared as justiciable by the Constitutional Court, they are subjected to limitations set out in sections 26(2), 27(2) and 36 of the Constitution.[145] It is in line with this limitation that Carstens and Pearmain advise that the manner in which the right to health care services is limited is crucial for an understanding of the right of access to health care services.[146] This is important because the state is only required to take reasonable legislative and other measures within its available resources to achieve its realisation.[147] Accordingly, there is an acknowledgement within the Constitution that there may be limits to the realization of this class of rights which includes the right of access to health care services

When the practical application of sections 26, 27 and 29 of the South African Constitution is considered, it will appear as if the rationing of basic service delivery violates the aforesaid provision.[148] Allowing public and private organisations to engage in rationing basic services might result in inequities in accessing health care services. This inequality is mostly evident in public hospitals, where resources are much more restricted due to severe rationing policies as compared to private hospitals.

In public hospitals, the equipment does not only suffer from depreciation, but they are also inadequate for all patients.[149] Given the conditions of public hospitals,

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[144] McLean, K. 'Constitutional Deference, Courts and Socio-Economic Rights in South Africa' (Pretoria University Law Press, 2009) 109.

[145] See Section 36 of the Constitution.

[146] Carstens, P. and Pearmain, D. *Foundation Principles of South African Medical Law (LexisNexis*, 2007) 38.

[147] See also section 27(2) of the Constitution.

[148] Carsten, P. and Pearmain, D. *Foundation Principles of South African Medical Law* (LexisNexis, 2007) 45.

[149] *Soobramoney v Minister of Health* para 10*.* See sections 26 and 27 of the Constitution; contain the following provisions: 26. Housing (1) everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right. (3) . . . . 27. Health care, food, water and social security (1) Everyone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. (2) The state must take reasonable

rationing becomes inevitable and severe. In private organisations, less severe rationing mechanisms are employed although basic services are expensive.[150] This makes accessibility easy to those who can afford care facilities. The disparity between rationing mechanism employed by the public and private organisations could be construed to violate the constitutional provision of sections 26, 27 and 29. This is because those who can afford private basic services will have immediate access to basic service delivery when compared with the majority whose financial resources are limited and can only resort to public services due to resource constraints.

In spite of the above, rationing becomes very essential in the light of limited resources available to provide access to basic service delivery. In the context of South Africa, most studies agree that rationing is inevitable as a result of scarce resources, although the severity of rationing is different between public and private organisations.[151] As rationing becomes a necessity, the government is confronted with the need to provide basic services to all its citizens. Moreover, there are mounting challenges pertaining to efficiency and equality in the implementation of its policy on rationing. Take for instance, public health care facility or hospital like Addington hospital in Durban, a city in which there are more than one thousand patients waiting to be dialysed at government public hospitals. Among these people are a good number of senior citizens ranging from fifty to a hundred years old. On the other hand, there are a group of young people from the age of one month to forty years old. In such cases, the hospitals are faced with the dilemma of considering which of the above age groups should be given priority when it comes to dialysis treatment access.

In the *Soobramoney case*, the appellant who was refused dialysis on the ground of insufficient resources was a 41-year-old adult who had worked and paid his taxes for many years. Accordingly, he could argue that the equipment at the hospital was bought with his taxes and therefore qualified him for the required medical services. Similarly, senior citizens may argue that because they worked hard to make

legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights. (3) No one may be refused emergency medical treatment".

[150] National Health Insurance 'Rationing as a response to supply side constraints' NHI Note 5 (11 May 2017) <https://hasa.co.za/article/rationing-as-a-response-to-supply-side-constraints/> (last accessed 19 December 2021).

[151] See NHI Note 5, (2010) 1.

the society a better place, they should be given priority. The question that arises is this: on what basis should the hospital provide dialysis? Should the hospital provide dialysis to a young child who has his whole life ahead or to an aging person? At what point can and should the law interfere with a hospital's policy decision? As shown in chapter five, these questions were canvassed before the Constitutional Court in the *Soobramoney* case, which rejected the argument that the applicant's situation fell to be decided under section 27(3) dealing with the right not to be refused emergency medical treatment.[152]

2.11. Conclusion

The social contract theory has become one of the most influential political philosophies of the modern world. It developed from people's need to mitigate conflicts in social relationships and promote human welfare. To conquer the challenge of insecurity, people were compelled to enter into two agreements. The first sought protection over lives and property under a public authority by surrendering individual freedoms and rights to this authority. The second required this authority to guarantee everyone protection of life, property, and to a certain extent, liberty. Therefore, people agreed to establish governance by collectively and reciprocally renouncing the rights they had against one another in a State of Nature and submitting these rights to someone or a group of persons with the authority and power to enforce their agreement. This view of governance, which is widely regarded as contractarian, is now considered the corner stone of state formation and constitutional forms of government.

However, the two main ideas about the origins of the social contract are pivotal to understanding its relationship with basic service delivery. For Hobbes, who originated the theory, a brutish State of Nature inspired people to adopt the idea of a social contract. Thus, the idea sought to curb the prevalent law of survival, in which the strong preyed on the weak. Contrariwise, Locke posited that a State of Nature thrived on peaceful, cooperative relations involving hunter-gatherers and subsistence agriculturalists. Later, as social organisation became more complex, violence arose from contestations over private property. Significantly for Locke, the instigators of a social contract are individuals who sought to preserve their property (wealth) through

[152] *Soobramoney v Minister of Health* para 21.

the legal structures of an organised government.[153] In other words, the social contract was not originally designed to promote the welfare of the general population, but to protect the wealth of an elite or minority who have access to government. This latter view is significant for South Africa's transition from a repressive apartheid regime to a democratic and accountable system of government.

South Africa's transition to a democracy emerged from political negotiations by comparatively few elites, who represented the majority of the masses at the Convention for a Democratic South Africa. Their negotiations were heavily influenced by the trauma of apartheid and the need to redress its legacy.[154] The resultant elections that ushered in a democratic system relied on the consent of the people as the basis of political legitimacy and authority. In return for this authority, the state committed to the delivery of basic amenities to its citizens. Indeed, the drafting process of the South African Constitution reflected a desire to remove discriminatory service delivery.[155] The drafters aimed to entrench a founding document on which all exercise of governmental power would be measured. On face value therefore, the 1996 Constitution is a social contract. The question is the nature of this contract – that is how it reflects Hobbes or Locke's ideas about a State of Nature. Arguably, the efficacy of service delivery provides clues to answering this question.

If service delivery is efficient in South Africa, then Hobbes' idea of the State of Nature applies to the Constitution. However, if access to service delivery is accessible only to the elite, then the social contract in South Africa may be said to reflect Locke's ideas of the elite hiding behind the legitimacy of a constitutional government to protect their property interests. There is therefore a need for the constitution making process to be carried out in such a way that society is invested in the resultant document and regards it as binding. Public investment in the constitution-making process is important in view of the problems experienced in South Africa regarding governance, basic

[153] Bertram, C. *Routledge philosophy guidebook to Rousseau and the social contract* (Routledge, 2004) 75-89.

[154] Sarkin, J. 'The drafting of South Africa's final constitution from a human-rights perspective' 1999 47(1) *The American Journal of Comparative Law* 67-87 at 67-69.

[155] *Ibid*.

service delivery, and enthronement of the rule of law. Accordingly, it was necessary for this chapter to examine historical perspectives on forms of democracy.

The chapter explained governance views that provide a foundation for a democratic system and the idea of a social contract, with emphasis on their relationship with constitutional provisions that guarantee basic service delivery. It also outlines the attitude of South African courts towards service delivery. It showed how the doctrine of separation of powers limits the ability of the courts to compel the executive branch to uphold socio-economic rights enshrined in the Constitution. Subsequent chapters will examine judicial decisions in detail in search of their jurisprudential approach to service delivery in the context of the social contract theory.

CHAPTER 3: STATUTORY FRAMEWORK OF LOCAL GOVERNANCE AND SERVICE DELIVERY

3.1. Introduction

In the context of local governance, service delivery has developed over the years as a means of fulfilling the provisions of sections 1, 7 and 152 of the Constitution.[1] Among others, section 152 requires the local government to "ensure the provision of services to communities in a sustainable manner, promote social and economic development, [and] promote a safe and healthy environment." These provisions indicate that a social contract exists between elected officials and the South African electorate.[2] As I showed in chapter two, the modern understanding of the social contract theory is that state authority is derived from the consent of the people in return for government's provision of basic services.[3] In this chapter, I examine the non-constitutional legal and policy framework of local governance in South Africa, with emphasis on the obligation of municipalities to deliver basic services.[4] This framework includes the Municipal

[1] While section 1 affirms the rule of law, values, and supremacy of the Constitution, section 7 asserts that the Bill of Rights "is a cornerstone of democracy in South Africa."

[2] Section 152. (1) states: The objects of local government are — (a) to provide democratic and accountable government for local communities; (b) to ensure the provision of services to communities in a sustainable manner; (c) to promote social and economic development; (d) to promote a safe and healthy environment; and (e) to encourage the involvement of communities and community organisations in the matters of local government. (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

[3] Taylor, B. B. 'Second Treatise of Social Contract: A comparative Analysis of Locke and Rousseau' (2015) 1(1) *Black and Gold* 1-14 at 4, Royce, M. 'Philosophical perspectives on the social contract theory: Hobbes, Kant and Buchanan revisited: A comparison of historical thought surrounding the philosophical consequences of the social contract and modern public choice theory' (2010) 1(4)*Post Modern Openings* 45-62.

[4] See the National Development Plan: Vision for 2030 – Chapter 13 [hereafter *NDP*, Chapter 13: Building a Capable State, 363-393, 385 available at <https://www.nationalplanningcommission.org.za/assets/Documents/NDP_Chapters/devplan_ch13_0.pdf> (last accessed 2 December 2021). See also Siddle, A. and Koelble, T. A. 'Local government in South Africa: Can the objectives of the developmental state be achieved through the current model of decentralised governance?' (2016) *Swedish International Centre for Local Democracy* Research Report No. 7 <https://icld.se/app/uploads/files/forskningspublikationer/siddle-koelble-icld-report-7.pdf> (accessed 5 November 2021) 1-78.

Structures Act 117 of 1998, the Municipal Systems Act 32 of 2000, the Traditional Leadership and Governance Framework Act 41 of 2003 and the Charter for Public Service in Africa.[5] I focus on how the composition, objectives and responsibilities of municipalities affect service delivery.[6] I will also examine the regulatory framework of the South African Local Government Association, which aims to enhance the image of municipalities and help them to fulfil their developmental role.[7]

Arguably, the efficient delivery of basic services by municipalities is a measure of effective governance.[8] Since the democratic dispensation in 1994, the executive sphere of government has attempted in many ways to deliver basic services.[9] These efforts have met with mixed success at the local government level.[10] Apart from protests by students and government workers, the major causes of protests are often lack or poor access to water, sanitation, electricity, health care services, housing, and employment, as well as general dissatisfaction with political accountability.[11] Undoubtedly, the government's service delivery failures are mainly responsible for violent protests, which are now a part of South African life.[12] These protests, commonly referred to as *toyi-toyi* by the people, question the effectiveness of municipalities as effective platforms for basic service delivery.

[5] Ruiters, G. 'The moving line between state benevolence and control: Municipal indigent programmes in South Africa' (2018) 53(2) *Journal of Asian and African Studies* 169-186.

[6] Bekink, B. *Principles of South African Local Government Law* (LexisNexis, 2017) 67-73. See also section 151 (1) of the Constitution.

[7] *Ibid* at 67-73.

[8] Ruiters, G. 'The moving line between state benevolence and control' (2018) 53(2) *Journal of Asian and African Studies* 169-186.

[9] Tapscott, C. 'South Africa in the Twenty-First Century: Governance Challenges in the Struggle for Social Equity and Economic Growth' (2017) (2)1 *Chinese Political Science Review* 69–84.

[10] Siddle, A. and Koelble, T. A. 'Local government in South Africa: Can the objectives of the developmental state be achieved through the current model of decentralised governance?' (2016) *Swedish International Centre for Local Democracy* Research Report No. 7.

[11] SALGA (2015) *Community Protest: Local Government Perceptions* 8-23.

[12] Masuku, M. and Jili, N. 'Public service delivery in South Africa: The political influence at local government level' (2019) 19 (4) *Journal of Public Affairs* 1-7.

While some authors posit that disputes over the exercise of power by municipalities exacerbates protests,[13] others submit that a municipality's right of governance is subject only to national and provincial legislation, as provided for in the Constitution.[14] This chapter takes a different path by arguing that the social contract theory offers a lens for understanding effective service delivery at the local government level. Its discussion provides a contrast for measuring the constitutional framework of service delivery against other statutory frameworks. Overall, it aims to evaluate the extent to which the social contract is reflected in legislative frameworks and how these frameworks inform service delivery at the local government level.[15]

3.2. Contextual background

Since apartheid was dismantled, South Africa has been undergoing transformation.[16] Arguably, this transformation is slow in local governance because of the entrenched impact of apartheid era discrimination.[17] Institutionally and socially, apartheid separated people on racial lines using a partitioned system of development.[18] Apartheid utilised legislation such as the Group Areas Act of 1957 to institutionalise residential segregation and oversee the compulsory transfer of black Africans to the so called group areas.[19] For example, the segregation saw the apartheid government establish different social amenities for whites and Black/Bantu areas along racial lines.[20] The Immorality Act of 1975 typifies a draconian law used by the apartheid government to discriminate against black people by outlawing and prohibiting mixed

[13] Bekink, B. *Principles of South African Local Government Law* 67-73; Ruiters, G. 'The moving line between state benevolence and control' 169-186.

[14] Seidman, A. and Seidman, R.B. *State and Law in the Development Process: Problem Solving and Institutional Change in the Third World* (New York: St Martin's Press, 1994) 1.

[15] For the purpose of this chapter, municipality and local government are used to mean the same thing.

[16] See section A1 of the *White Paper on Local Government (WPLG 1998)*; Tapscott, C. 'South Africa in the twenty-first century: Governance challenges in the struggle for social equity and economic growth' (2017) (2)1 *Chinese Political Science Review* 69–84.

[17] De Visser, J. 'The political–administrative interface in South African municipalities: Assessing the quality of local democracies' (2010) 5 *Commonwealth Journal of Local Governance* 86–101.

[18] *Ibid* at 86–101.

[19] Group Areas Act 1957 (Act 77 of 1957).

[20] Tapscott, C. 'South Africa in the Twenty-First Century' at 69–84.

marriages.[21] Land distribution was also a tool the apartheid government used to racially discriminate against blacks by only allocating thirteen to fourteen percent of the land to them.[22] Unsurprisingly, municipalities where whites lived were at an advantage in terms of revenue generation.[23] However, the population of white municipalities was small, compared to the areas where black people lived. The municipalities that catered for blacks were unable to deliver basic services such as water, electricity, environmental control, healthcare and many others.[24] This is because the policy of apartheid sought to ensure that revenue and expenditure were directed towards the development of the white minority.[25] In this historical context, service delivery to black areas was negligible. It remains one of the major challenges facing South Africa.[26] This situation is significant in many ways.

Municipalities are crucial in a democratic setting such as South Africa because they are considered the custodians of public resources at the local level.[27] Consequently, they have been tasked with utilising these resources to address the basic needs of local communities such as electricity, water, sanitation, hospitals, schools, refuse removal, and the spatial development of communities.[28] In the context of local government budget and expenditure from 2008 to 2019, Reddy argues that local government funding has not yielded the anticipated returns.[29] He holds that poor governance, inappropriate spatial planning, inadequate social infrastructure and massive service backlogs have emerged as stumbling blocks to poverty reduction and economic growth.[30] Masuku et al submitted that the resultant effect of these constraining factors is that it could undermine the future sustainability of other key

[21] Immorality Act, 1957 (Act 23 of 1957).

[22] van Niekerk *et al*, (2002) 35.

[23] *White Paper on Local Government* (1998) *Section A 1.*

[24] *White Paper on Local Government* (1998) *Section A 1.*

[25] *White Paper on Local Government* (1998) *Section A 1.*

[26] *White Paper on Local Government* (1998) Section A.2 & also Reddy, (1996) 53.

[27] Bekink, B. *Principles of South African Local Government Law* (LexisNexis, 2017) 70-75. See also Reddy P. S. 'Evolving local government in post conflict South Africa: Where to?' (2018) 33(7) *Local Economy* 710-725; *NDP*, Chapter 13: Building a Capable State, 363-393, 385.

[28] Bekink, B. *Principles of South African Local Government Law* 70-75.

[29] Reddy P. S. 'Evolving local government in post conflict South Africa' 710–725; *NDP*, Chapter 13: Building a Capable State, 363-393, 385.

[30] Bekink, B. *Principles of South African Local Government Law* 70-75.

sectors as well.[31] It is worthy to note that lack of service delivery protests against lack of access to water and sanitation and health care services originated during the apartheid era as strategies to express dissatisfaction with poor or total lack of services. Specifically, the overall goal of the protests was to develop community-based structures and social movements to resist the apartheid legacy.[32] These movements of resistance have been carried forward to the democratic South Africa and are, in my opinion, today recognised as political organisations in most cases.[33]

Since service delivery is crucial to inclusive or grassroots governance, it is important to define the context in which it occurs before delving into its statutory framework in South Africa.

3.3. The ambit of local government

Local government may be described as the sphere of government that is closest to communities, or as the lowest tier of the service delivery machinery in a state.[34] Its powers and functions are allocated or supervised by a higher tier of government and exercised within a geographical area.[35] Simply put, local government refers to an administration of geographically organised cities, towns and villages.[36] In South Africa, local government is a distinct sphere of government that derives its powers, obligations and responsibilities from the Constitution and other statutes. Accordingly, the national and provincial governments merely have oversight over local governments.[37] As

[31] Masuku, M. and Jili, N. 'Public service delivery in South Africa: The political influence at local government level' (2019) 19 (4) *Journal of Public Affairs* 1-9; *NDP*, Chapter 13: Building a Capable State, 363-393, 385.

[32] Masuku, M. and Jili, N. 'Public service delivery in South Africa: The political influence at local government level' (2019) 19 (4) *Journal of Public Affairs* 1-7.

[33] *Ibid* at 7.

[34] Koma, S.B. 'The state of local government in South Africa: Issues, trends and options' (2010) 45(1) *Journal of Public Administration* 111-120 at 111.

[35] Reddy, P. S. 'The politics of service delivery in South Africa: The local government sphere in context' (2016) 12(1) *TD: The Journal for Transdisciplinary Research in Southern Africa* 1-8 at 2.

[36] Section 2 of SALGA constitution.

[37] Morudu, H. D. 'Service delivery protests in South African municipalities: An exploration using principal component regression and 2013 data' (2017) 3 (1) Cogent *Social Sciences* 1-14; section 153 of the Constitution on Developmental duties of municipalities: A municipality must (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the

Masuku and Jili pointed out, local government possess original powers as a public organisation authorised to govern the affairs of a given territory.[38]

Even though the word local authority and municipality are used synonymously,[39] local government is not an individual municipality. Rather, it is a collection of municipalities constituting a sphere of government.[40] Reddy submits that "the politicisation of the local bureaucracy was inevitable as the ruling party sought to ensure that the executive leadership of municipalities shared the same political ideology and vision to facilitate local development."[41] This so-called politicisation of local bureaucracy was a deliberate act to amalgamate the activities of traditional authorities with the elected local government functionaries to support service delivery and thereby exact control over municipalities.[42]

3.3.1. Municipalities as local government

Municipalities in South Africa were created for the primary purpose of promoting, protecting, and rendering accountability for service delivery and socioeconomic rights.[43] As far as municipalities are concerned, basic service delivery denotes the provision of social amenities, as well as the promotion of conditions that are necessary for the enjoyment of everyday life.[44] In this respect, there are two primary kinds of services that municipalities deliver.

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community, and to promote the social and economic development of the community; and (b) participate in national and provincial development programmes.

[38] Masuku, M. and Jili, N. 'Public service delivery in South Africa: The political influence at local government level' (2019) 19 (4) *Journal of Public Affairs* 1-7. [stating that "A report published by the South African Local Government Association, in 2007, identified critical issues with regard to council capacity, notably that there is inadequate legal support and advice to their decision making"].

[39] White Paper on Local Government of 1998, Local Government Municipal Systems Act, 2000 (Act 32 of 2000) and Local Government: Municipal Structures Act, 1998 (Act. 117 of 1998).

[40] Morudu, H. D. 'Service delivery protests in South African municipalities: An exploration using principal component regression and 2013 data' (2017) 3 (1) *Cogent Social Sciences* 1-15.

[41] Reddy, P.S. 'The politics of service delivery in South Africa: The local government sphere in context' (2016) 12(1) *TD: The Journal for Transdisciplinary Research in Southern Africa* 1-8 at 2.

[42] Section 2 of SALGA constitution.

[43] See section 151 of the Constitution.

[44] Masuku, M. and Jili, N. 'Public service delivery in South Africa: The political influence at local government level' (2019) 19 (4) *Journal of Public Affairs* 1-7 at 1.

These are tangible and intangible services.[45] Tangible services may be classified as hospitals, roads, schools, water, public housing and public transport, while intangible services include the provision of security and maintenance of public infrastructure such as energy, drainage and sewage systems.[46]

However, the extent to which the services provided by municipalities contribute to poverty alleviation is unclear. Masuku and Jili argued as follows:

> The public service delivery system has been perceived as one of the most important ways of reducing poverty through poverty alleviation programmes. As part of the South African government's cooperative system, key stakeholders in municipalities ought to adopt an integrated approach to public service delivery. An integrated approach to public service delivery demands that local municipalities, together with relevant stakeholders, integrate processes and services to ensure effective and efficient service delivery.[47]

If municipalities work cooperatively with stakeholders such as the national and provincial governments, they can reduce poverty and prevent service delivery protests.[48] As noted above, local government is the sphere of government closest to the people. Arguably, therefore, it exists primarily to ensure service delivery and promotion of socioeconomic rights for people at the grassroots of social life.[49] Because municipalities are the closest to the people, their successes and failures in service delivery are often highlighted as the failure of the national government in general.[50] Ndevu and Muller believe that performance management would be beneficial to municipalities to achieve the following objectives:[51]

- create a supportive environment that promotes the culture of good performance

[45] Reddy, P.S. 'The politics of service delivery in South Africa: The local government sphere in context' (2016) 12(1) *TD: The Journal for Transdisciplinary Research in Southern Africa* 1-8 at 2.

[46] Ruiters, G. 'The moving line between state benevolence and control: Municipal indigent programmes in South Africa' (2018) 53(2) *Journal of Asian and African Studies* 169-186.

[47] Masuku, M. and Jili, N. 'Public service delivery in South Africa: The political influence at local government level' (2019) 19(4) *Journal of Public Affairs* 1-7 at 1.

[48] Section 2 of SALGA constitution.

[49] Ndevu, Z. and Muller, K. A. 'Conceptual Framework for Improving Service Delivery at Local Government in South Africa' (2017) 9(7) *African Journal of Public Affairs* 13-24 at 13-15.

[50] *Ibid* at 15.

[51] *Ibid* at 13-24.

- establish clear performance standards,
- ensure implementation of municipal development strategies,
- provide performance feedback to employees, promote the development of employees through training, counselling and coaching, in order to realise job opportunities,
- improve career development by discussing municipal plans for career advancement and promotion,
- improve communication and relationships by establishing mutual goals, establish a framework for linking remuneration to performance, and
- improve the quality of services rendered by municipalities.[52]

The above submissions are supported by Masuku and Jili, who argue that service delivery will be improved if municipalities apply the above objectives in their governance practices.[53] These objectives underlie the concept of developmental local government. It is therefore necessary to explore this concept and how it relates with the notion of the social contract.

3.3.2. The concept of developmental local government

As a policy idea, developmental local government emerged from the White Paper on Local Government of 9 March 1998. The Paper transformed the constitutional objectives and functions of this sphere of government into a developmental mandate. It described this mandate as "local government [that is] committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives."[54] Arguably, there are five interrelated elements in this description that fit the transformative intent of the Constitution and the notion of social contract. These are (a) commitment (b) consultation (c) collaboration (d) sustainability, and (e) satisfaction. Each element will be briefly discussed below.

[52] Ndevu, Z. and Muller, K. A. 'Conceptual Framework for Improving Service Delivery at Local Government in South Africa' (2017) 9(7) *African Journal of Public Affairs* 13-24 at 15-16.

[53] Masuku, M. and Jili, N. 'Public service delivery in South Africa: The political influence at local government level' (2019) 19 (4) *Journal of Public Affairs* 1-7.

[54] The White Paper on Local Government 38.

a) Commitment

Developmental local government requires municipalities to be committed to the efficient delivery of basic services to their host communities. This means that the public must be invested in both project planning and execution. With high level of public investment in development projects, "local government becomes the vehicle through which citizens work to achieve their vision of the [society] in which they wish to live."[55]

b) Consultation

Commitment to service delivery is demonstrated through meaningful consultations with communities on the best ways to meet their socio-economic needs in a sustainable manner. Consultation must neither be sham nor temporal. Rather, it should involve all relevant stakeholders and continue throughout the life cycle of the concerned development project. It could be formal or informal – such as inviting community leaders to planning meetings or sending municipal officials to attend imbizos and other events hosted by local communities.

c) Collaboration

Ideally, consultation is inseparable from collaboration with community leaders and social groups on the best ways to achieve the provision of basic amenities. As part of collaboration, local government is expected to incorporate the developmental activities of other bodies in its area of operation in order to strengthen synergy and meet desired outcomes.[56] Collaboration could take the forms of recruitment of qualified community members into municipal positions, and accountability to designated representatives, and service of community members in tender boards and post project evaluations.

d) Sustainability

Since the idea of developmental local government envisages continuity, the measures taken to improve the delivery of basic amenities to communities must be sustainable. Obviously, sustainability requires realistic long-term planning. It also requires

[55] De Visser, J. 'Developmental local government in South Africa: Institutional fault lines' (2009) (2) *Commonwealth Journal of Local Governance* 7-25 at 10.

[56] The White Paper on Local Government 38-42.

"development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[57] Sustainability involves an integrated approach to service delivery. As De Visser remarked, "local government is instructed to exercise its powers and functions in a way that has a maximum impact on economic growth and social development of communities."[58]

e) Satisfaction

Finally, the ultimate aim of development projects is to ensure the wellbeing or satisfaction of the people. In addition to the provision of basic amenities, local government is also expected to provide recreational facilities to communities and foster social development by promoting arts and cultures.[59] Other than grievance and feedback mechanisms, public satisfaction may be assessed from the extent to which municipalities encourage local solutions to pressing social problems, as well as the degree in which community members are involved in political leadership.

Developmental local government recognises a movement away from mere representative rule to participatory governance that genuinely involves communities. As Raga and Taylor described it, the term "encapsulates a new mandate, which will be intrinsic to the developmental role local authorities will be required to perform" in the new South Africa.[60] It denotes governance with a citizen-oriented approach, as well as a service delivery style in which decisions are taken with communities in a bottom-up way rather than handed down to them from a top down manner.

Given the movement to developmental local government, the question is how municipalities are empowered to attain their developmental objectives through their structure and funding. I proceed to outline the statutory framework of local government

[57] World Commission on Environment and Development (WCED). *Report of the World Commission on Environment and Development: Our common future* (1987).

[58] De Visser, J. 'Developmental local government in South Africa: Institutional fault lines' (2009) (2) *Commonwealth Journal of Local Governance* 7-25 at 10.

[59] Maserumule, M.H. 'Framework for strengthening the capacity of municipalities in South Africa: A developmental local government perspective' (2008) 43(2) *Journal of Public Administration* 436-451 at 438.

[60] Raga, K. and Taylor, D. 'An overview of the ward committee system: A case study of the Nelson Mandela Metropolitan Municipality' (2005) 24(2) *Politeia* 244-254 at 246.

in South Africa with the aim of showing how it promotes service delivery and reflect the social contract theory.

3.4. Statutory framework of local governance

Local government in South Africa comprises of eight metropolitan municipalities, 44 district municipalities and 226 local municipalities.[61] All of them are focused on providing infrastructure, basic amenities, and growth of local economies.[62] The current structure of local government is traceable to the Local Government Municipal Demarcation Act of 1998, which demarcated the boundaries of municipalities through an independent Municipal Demarcation Board. As outlined in the introduction, the notable statutes governing local government are the Municipal Structures Act 117 of 1998, the Municipal Systems Act 32 of 2000, the Traditional Leadership and Governance Framework Act 41 of 2003, and the Charter for Public Service in Africa.[63]

As a sphere of government, a municipality is neither autonomous from, nor subordinate to the national and provincial governments.[64] It is expected to maintain an open, co-operative, and constructive relationship with both the provincial and national government, working as one component of the broader state structure.[65] This means that the relationship of local government with the national government does not need to go through the provincial government.[66] For example, municipalities can be directly represented on the Financial and Fiscal Commission and the National Council of Provinces. They may also participate in national and provincial development

[61] Section 155(1) of the Constitution; *NDP*, Chapter 13: Building a Capable State, 363-393, 385.

[62] Chapter 1 of the Local Government: Municipal Structures Act, 1998 (Act 117 of 1998). The eight municipalities are namely: Buffalo City Metropolitan Municipality, City of Cape Town Metropolitan Municipality, City of Johannesburg Metropolitan Municipality, City of Tshwane Metropolitan Municipality, City of Ekurhuleni Metropolitan Municipality, eThekwini Metropolitan Municipality, Mangaung Metropolitan Municipality and Nelson Mandela Bay Metropolitan Municipality.

[63] See the *NDP*, Chapter 13: Building a Capable State, 363-393, 385.

See the *NDP*, Chapter 13: Building a Capable State, 363-393, 385.

South African municipalities: Assessing the quality of local democracies', *Commonwealth Journal of Local Governance, Special Issue, March*, 6-28.

[65] De Visser, J. 'The political–administrative interface in South African municipalities: Assessing the quality of local democracies' (2010) 5 *Commonwealth Journal of Local Governance* 86–101; Local Government: Municipal Structures Act, 1998 (Act 117 of 1998) 5-28.

[66] *Ibid*.

programmes such as the spatial development initiatives (SDIS) and provincial growth and development plans.[67]

3.5. Framework of municipalities and the social contract theory

The previous chapters presented a social contract as the protection and promotion of people's welfare by the state in exchange for people's civic loyalty and obligations to government. Seen in this way, municipalities exist primarily to bring governance closer to the people and provide democratic and accountable service.[68] Since a critical duty of municipalities is to ensure the efficient delivery of basic amenities in a sustainable manner, they embody the social contract theory more than the national and provincial spheres of government. In a statutory context, they have the following functions:

a) Promotion of social and economic development
b) Promotion of safe and healthy environment
c) Promotion of inclusive involvement in municipal administration.[69]

The above functions clearly indicate that the crucial developmental role of local government embodies a social pact with the people.[70] In this context, the provision of affordable and efficient basic amenities remains the major responsibility of metropolitan councils.[71] Other key responsibilities of these councils are to provide city wide spatial integration and socially inclusive development.[72]

Ideally, metropolitan councils are expected to ensure equity, social justice, and economic prosperity of communities.[73] Accordingly, they are key players in promoting

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[67] De Visser, J. 'The political–administrative interface in South African municipalities: Assessing the quality of local democracies' (2010) 5 *Commonwealth Journal of Local Governance, Special Issue, March* 86–99.

[68] *Ibid* at 86–101.

[69] Koma, S.B. 'The state of local government in South Africa: Issues, trends and options' (2010) 45(1) *Journal of Public Administration* 111-120.

[70] Waldron, J. 'John Locke: Social contract versus political anthropology' (1989) 51(1) *The Review of politics* 3-28 at 22.

[71] De Visser, J. 'Multilevel government, municipalities and food security' (2019) *Food Security SA Working Paper Series No. 5. DST-NRF Centre of Excellence in Food Security, South Africa* 1-35 at 6.

[72] White Paper on Local Government 1998: 22a.

[73] Tapscott, C. 'South Africa in the twenty-first century: Governance challenges in the struggle for social equity and economic growth' (2017) 2 (1) *Chinese Political Science Review* 69–84.

democracy through ensuring citizen participation in decision-making that responds to their needs.[74] This can, however, be a challenge, given the complex nature of large metropolitan areas and the fact that they are often made up of diverse communities (on a racial and income basis) with different needs and priorities.[75] Metropolitan councils therefore need to be responsive to these different needs.[76] The question is the extent to which South Africa's non-constitutional legal framework enables municipalities to respond to these needs. The following analysis attempts to answer this question.

3.5.1. Municipal Structures Act

Every municipal council has executive powers and duties assigned to it by the Constitution and other statutes.[77] The executive system of a municipality is embedded within the structures in which the municipal council exercises its executive powers and performs its duties.[78] These structures are evident in the Municipal Structures Act, which encourages the executive of local municipalities to work with the people through citizen's participation to identify areas where basic services are lacking and take corrective measures. Arguably, this will reduce service delivery protests.[79]

In line with constitutional demands, the preamble of the Local Government Municipal Structures Act recognises "local government as a distinctive sphere of government, interdependent, and interrelated with national and provincial spheres of government."[80] Importantly, it hints strongly at a social contract theory by affirming that "there is fundamental agreement in our country on a vision of democratic and developmental local government, in which municipalities fulfil their constitutional obligations to ensure sustainable, effective and efficient municipal services [and] promote social and economic development." These provisions imply that local

[74] See the *NDP*, Chapter 13: Building a Capable State, 363-393, 385.

[75] See the *NDP*, Chapter 13: Building a Capable State, 363-393, 385; Bekink, B. *Principles of South African Local Government Law* (LexisNexis, 2017) 80-81.

[76] White Paper on Local Government 1998: 22a.

[77] See the *NDP*, Chapter 13: Building a Capable State, 363-393, 385.

[78] White Paper on Local Government 1998: 22a.

[79] De Visser, J. 'Multilevelg, municipalities and food security' (2019) *Food Security SA Working Paper Series No. 005. DST-NRF Centre of Excellence in Food Security, South Africa*.

[80] Local Government: Municipal Structures Act, 1998 (Act 117 of 1998) as amended.

governance is based on cooperative relations between the local sphere and the national and provincial governments.

Also, the Municipal Structures Act provides for the establishment of municipalities and the division of functions and powers between the different categories of municipalities.[81] Each municipality is required to review the needs of its community and its priorities to meet their needs. It is also expected to initiate processes for ensuring community participation. Reddy, de Visser and de Vos believe that even though the provisions of the Constitution supersede all laws governing municipalities, these laws are nonetheless the primary legal framework for local governance.[82] One may also add that the supremacy of the Constitution strengthens the legitimacy of laws that seek to promote the spirit of the Constitution. In this regard, the transformative spirit of the Constitution feeds into these laws, gives them the same normative authority as the Constitution, and holds them to the same level of public service accountability demanded by the Constitution. Other than the Municipal Structures Act, an example of these laws is the Municipal Systems Act.

3.5.2. Municipal Systems Act

The Local Government Municipal Systems Act (Systems Act) provides for the core principles, framework and procedures to enhance the capacities of municipalities to uplift their communities socially and economically and guarantee affordable access to

[81] Section 8 of the *Municipal Structures Act* classifies the following as Category (a) A municipalities: A municipality with a collective executive system; (b) A municipality with a collective executive system combined with a sub council participatory system; (c) A municipality with a collective executive system combined with a ward participatory system; A municipality with a collective executive system combined with both a sub council and a ward participatory system; (d) A municipality with a mayoral executive system;(e) A municipality with a mayoral executive system combined with a sub council participatory system; (f) A municipality with a mayoral executive system combined with a ward participatory system; and (g) A municipality with a mayoral executive system combined with both a sub council and a ward participatory system.

[82] Reddy, P. S. 'The politics of service delivery in South Africa: The local government sphere in context' (2016) 12(1) *The Journal for transdisciplinary research in Southern Africa* 1-8; De Visser, J. 'Multilevel government, municipalities and food security' (2019) *Food Security SA Working Paper Series No. 005. DST-NRF Centre of Excellence in Food Security, South Africa* 6-18; Brand, D., Freedman, W., and de Vos, P. (eds.) *South African constitutional law in context* (Oxford University Press, 2nd ed. 2015) 331-349.

basic services. The Systems Act focusses on the municipality's ability to provide basic services, without which the health and environmental safety of people would be at risk.[83] The social contract theory is most evident in section 73. It demands, among others, that "a municipality must promote the provisions of the Constitution and –

(a) give priority to the basic needs of the local community

(b) promote the development of the local community; and

(c) ensure that all members of the local community have access to at least the minimum level of basic municipal services.[84]

Generally, the Municipal Systems Act regards municipalities as part of a system of co-operative government.[85] It also clarifies the rights and duties of municipal councils and local communities.[86] Obviously, clarifying the rights and obligations of municipal councils is an important step towards strengthening the social contract at the grassroots level.[87] This contract requires that local governments must prioritise the basic needs of communities.[88] Municipalities should further promote social and economic development in order to empower their communities, thereby creating liveable cities, towns and rural areas.[89]

Considering the abovementioned duties, it would undoubtedly be more beneficial for the national and provincial spheres of government to focus more on supporting municipalities than over-supervising them.[90] Support of municipalities by the national and provincial governments is in keeping with the principle of cooperative

[83] Bekink, B. *Principles of South African local government law* 80-87; Section 3 of the *Municipal Systems Act*.

[84] Section 73 of *Municipal Systems Act*.

[85] Section 3 of *Municipal Systems Act*.

[86] Seidman, A. and Seidman, R. B. *State and law in the development process: Problem solving and institutional change in the third world* (New York: St Martin's Press, 1994) 1-20.

[87] Sections 5-28 of *Municipal Systems Act*.

[88] De Visser, J. 'Multilevel government, municipalities and food security' (2019) *Food Security SA Working Paper Series* 6-18; Brand, D., Freedman, W., and de Vos, P. (eds.) *South African Constitutional Law in Context.*

[89] Section 153(1) of the Constitution; Waldron, J. 'John Locke: Social contract versus political anthropology' (1989) 51(1) *The Review of Politics* 3-28 at 22.

[90] De Visser, J. 'Multilevel government, municipalities and food security' at 7-11.

governance envisioned by the Constitution.[91] It is also in keeping with the spirit of legislation on traditional governance.

3.5.3. The Traditional Leadership and Governance Framework Act

In this respect, the most important statute on traditional governance is the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA). Its preamble states, among others, that "the State recognises the need to provide appropriate support and capacity building to the institution of traditional leadership." Furthermore, the preamble requires "the institution of traditional leadership … [to] promote the principles of co-operative governance in its interaction with all spheres of government and organs of state." Many municipalities in South Africa are located in rural areas that operate under Kings and Chiefs who exercise authority over the people.[92]

In a statutory context, traditional leaders are recognised by the Premier. Once recognised, they act for a principal traditional community, which must, within one year of the recognition, establish a principal traditional council.[93] These traditional councils assist municipalities by pointing them to the right areas where service delivery is needed.[94] Section 73 of the Municipal Structures Act states that a traditional council must co-operate with any relevant ward committee.[95] However, this cooperation is problematic due to South Africa's apartheid history. Under apartheid, laws such as the Local Government Transition Act, 1993 repealed the Black Authorities Act of 1982 which was used as an instrument to disenfranchise, marginalise and control the black population. In this quest for control, local authorities were foot soldiers and agents of the centrally controlled government apparatus.[96] The local government was, thus, an implementing mechanism for the ruthless apartheid force used to control the masses. Oftentimes, traditional authorities were used as agents of this control. Consequently,

[91] See chapter 3 of the Constitution.

[92] Ntsebeza, L. 'Democratization and traditional authorities in the new South Africa' (1999) 19(1) *Comparative Studies of South Asia, Africa and the Middle East* 83-94.

[93] Article 3B (1) of the Traditional Leadership and Governance Framework Act 41 of 2003.

[94] A traditional council must- (a) co-operate with any relevant ward committee established in terms of section 73 of the Local Government: Municipal Structures Act, 1998 (Act 117 of 1998).

[95] A traditional council must- (a) co-operate with any relevant ward committee established in terms of section 73 of the Local Government: Municipal Structures Act, 1998 (Act 117 of 1998).

[96] See the *NDP*, Chapter 13: Building a Capable State, 363 and 385.

municipalities became arenas of struggle, which persist in the new democratic order with adverse effects on service delivery.[97]

As I noted in the contextual background of this study, the development of municipalities depended on the racial group of the inhabitants.[98] During apartheid, traditional leaders exercised governance authority over rural areas, often in collusion with apartheid oppressors.[99] Mojalefa and Koenane observed as follows:

> Traditional leaders had ruled the traditional authorities as their personal fiefdoms for decades. They were not elected, but the son would succeed the father or the uncle, thus inheriting the positions. During the apartheid period they enjoyed many privileges, by virtue of collaborating with the apartheid government in the enforcement of apartheid.[100]

After the introduction of constitutional democracy, rural communities started standing up for their rights with lingering mistrust of traditional leaders, whom many viewed as government puppets.[101] Naturally, traditional leaders and local government officials such as mayors and councillors often clash.[102] While some traditional leaders feel that elected councillors exclude them in matters of governance in their area of authority, some councillors feel that traditional leaders wield too much power. As Mojalefa and Koenane noted regarding the legacy of the past, "[t]raditional leaders occupied a position almost similar to that of a governor, whose authority stretched from judicial functions to social welfare."[103]

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[97] The *NDP*, page 399.

[98] Seidman, A. and Seidman, R. B. *State and law in the development process: problem solving and institutional change in the third world* (New York: St Martin's Press, 1994) 1; The *NDP*, Chapter 13: Building a Capable State, 363 and 393.

[99] *Ibid*.

[100] Mojalefa, L. and Koenane, J. 'The role and significance of traditional leadership in the governance of modern democratic South Africa' (2018) 10(1) *Africa Review* 58-71.

[101] Traditional Leadership and Governance Framework act 41 of 2003, Establishment and recognition of principal traditional councils (1) Once the Premier has recognised a principal traditional community, that principal traditional community must, within one year of the recognition, establish a principal traditional council.

[102] Ntsebeza, L. 'Democratization and traditional authorities in the new South Africa' (1999) 19(1) *Comparative Studies of South Asia, Africa and the Middle East* 83-94.

[103] Mojalefa, L. and Koenane, J. 'The role and significance of traditional leadership in the governance of modern democratic South Africa' (2018) 10(1) *Africa Review* 58-71, Ntsebeza, L. 'Democratization

Furthermore, some councillors feel that traditional leaders have no business in government because they are unelected.[104] Indeed, some of them see the introduction of local governance as a measure to curb the powers of traditional leaders, who had treated their own people unfairly under apartheid.[105] However, these perceptions by traditional leaders that the local governance officials are out to reduce their influence over the geographical areas are bad for service delivery.

During the apartheid era, traditional leaders drew their authority and legitimacy from an unwritten body of local customs and laws such as the Black Local Authorities Act of 1982. Their allegiance to apartheid authorities induced them to oppress their people.[106] Using the policies of direct and indirect rule, apartheid authorities changed the role and influence of traditional leaders to suit their purposes.[107] Soon after the introduction of constitutional democracy in South Africa, the African National Congress led government tried to regulate the role and influence of traditional leadership by limiting some of its powers and responsibilities and sharing it with elected local government officials.[108] Although the Constitution recognises the institution, status and role of traditional leadership according to customary law, a traditional authority that observes a system of customary law functions subject to the Constitution and any applicable legislation. Given the supremacy of the Constitution, this subjection of traditional leadership to legislation implies that traditional leaders operate under municipalities.[109] This argument finds support in the TLGFA.

However, section 8 of the amended TLGFA requires the provincial and national governments to promote partnerships between traditional councils and municipalities. In reality, traditional leaders often do not cooperate with elected councillors and vice

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and traditional authorities in the new South Africa' (1999) 19(1) *Comparative Studies of South Asia, Africa and the Middle East* 83-94.

[104] Mojalefa, L. and Koenane, J. 'The role and significance of traditional leadership in the governance of modern democratic South Africa' 58-71.

[105] Ntsebeza, L. 'Democratization and traditional authorities in the new South Africa' 83-94.

[106] Van Kessel, I. and Oomen, B. ''One chief, one vote': The revival of traditional authorities in post-apartheid South Africa' (1997) 96(385) *African Affairs* 561-585 at 562-563.

[107] See generally Oomen, B.M. *Chiefs in South Africa: Law, power and culture in the post-apartheid era* (Suffolk: James Currey Publishers, 2005).

[108] Section 211-212 of the Constitution.

[109] Section 211 of the Constitution.

versa.[110] Because municipalities create little space for traditional leaders, there is poor consultation. Furthermore, the reduction of traditional leaders' authority by the introduction of constitutional democracy contributes to friction between elected local government officials on the one side and unelected traditional leaders on the other side.[111] The poor cooperation between these local authorities contributed to the adoption of the Charter for Public Service.

3.6. The Public Service Charter of South Africa

The Public Finance Management Act make provisions for the framework for fiscal management for all government departments and public enterprises. Launched in 2013 by the then minister of public service and administration, Lindiwe Sisulu, the Public Service Charter (Charter) is arguably the most important non-statutory instrument for promoting service delivery in South Africa.[112] It regulates the functions of public servants and the state, represented by the Public Service Coordinating Bargaining Council (PSCBC). In specifying its purpose, it defines "the services offered by the State to the citizens of South Africa" and outlines "the service standards that underpin the services offered by the State."[113] Additionally, it registers "the commitments by the State as Employer towards public servants" and the "commitments by public servants towards the citizens."[114]

Furthermore, the Charter is the most direct link of service delivery to the social contract theory. This is evident in its definition section, which states as follows:

> This Service Charter is a social contract, commitment and agreement between the State and public servants. It is a written and signed document which sets out the partners' roles and responsibilities to improve performance, enhance and fast track the delivery of services to improve the lives of our people. It … enables service beneficiaries to understand what they can expect from the State

[110] Mojalefa, L. and Koenane, J. 'The role and significance of traditional leadership in the governance of modern democratic South Africa' (2018) 10 (1) *Africa Review* 58-71.

[111] Ntsebeza, L. 'Democratization and Traditional Authorities in the New South Africa' (1999) 19(1) *Comparative Studies of South Asia, Africa and the Middle East* 83-94.

[112] Objective 1 states, among others: "The Charter seeks to improve service delivery programmes [and] professionalise and encourage excellence in the public service."

[113] See article 1.

[114] Objective 1 states, among others: "The Charter seeks to improve service delivery programmes [and] professionalise and encourage excellence in the public service."

and will form the basis of engagement between government and citizens or organs of civil society.

Even though the Charter appears to be "soft law" – that is a policy or principle that lacks the force of a binding statute – it is nevertheless intended to bind the state and its employees to provide basic services.[115] In the context of municipalities, it mandates them to deliver the services they are obligated to provide in terms of their powers and functions.[116] These services are often referred to as basic services because they are necessary to ensure an acceptable and reasonable quality of life for the people.[117]

Other than statutes and the Charter, there are several organisations that regulate the activities of municipalities. Below, I discuss the most notable organisation.

3.7. South African Local Government Association

Organised local government is a means through which municipalities partake in national and provincial relations in line with section 163 of the Constitution.[118] In furtherance of section 163, the South African Local Government Association (SALGA) was established in 1997.[119] It is a statutory creature, since it was formed in furtherance of the Organized Local Government Act 52 of 1997. It is also a not-for-profit association and juristic person with the power to own property and litigate in its own name.[120] As evident in its constitution, SALGA performs two strategic roles.

The first is to protect and enforce the rights of local governments.[121] The second is to assist local governments to perform their constitutional duties of service delivery within their geographical location, as well as to support and strengthen their capacity.

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[115] Bekink, B. *Principles of South African local government law* (LexisNexis, 2017) 73-87; Ruiters, G. 'The moving line between state benevolence and control: Municipal indigent programmes in South Africa' (2018) 53(2) *Journal of Asian and African Studies* 169-186.

[116] Reddy, P. S. 'The politics of service delivery in South Africa: The local government sphere in context' (2016) *The journal for transdisciplinary research in Southern Africa* 2.

[117] Siddle, A. and Koelble, T.A. 'Local government in South Africa: Can the objectives of the developmental state be achieved through the current model of decentralised governance?' (2016).

[118] Tapscott, C. 'Intergovernmental relations in South Africa: The challenges of cooperative government' (2000) 20(2) *Public Administration and Development* 119-127.

[119] Preamble of SALGA constitution.

[120] Section 2 of the SALGA Constitution.

[121] Section 2 of SALGA constitution.

For example, SALGA declared that the role of SALGA is therefore to be the local government' mouthpiece in national and provincial legislation and to measure the impact of proposed or implemented legislation as it affects it.[122] The above legislation is premised on the fact that local government is the closest sector to the people and needs to be empowered, resourced and capacitated to assume its critical role in delivering quality services."[123]

As a regulatory body, SALGA's annual general meeting reports assist in identifying fault lines. For example, Jili et al' submits that states that "the core mission of SALGA is to build an integrated and sustainable organised local government that bargains with a single entity in provincial, national, regional and intergovernmental relation.[124] Aside representing local government, SALGA also promote and protect the interest of local government at intergovernmental relations structures as it plays it central role of organised local government.[125] As an early warning system, SALGA affords municipalities the opportunity to identify weaknesses and improve their leadership, governance, financial health and reporting.[126]

Significantly, the failure of local government in building effective and sustainable structures for delivering basic services threatens the provincial and national government's ability to achieve their governance mandate.[127] In other words, public expectation regarding the ability of municipalities to deliver basic services is mostly measured by the effectives of their governance. In this context, SALGA's mandate is threatened by poor service delivery. It is therefore prudent for SALGA to represent the interests of local governments and ensure that municipal councillors receive thorough capacity training. As De Visser noted, local government education is not satisfactorily conceptualised in South Africa.[128]

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[122] Section 163 of the Constitution and section 2 of SALGA Constitution.

[123] Masuku, M. and Jili, N. 'Public service delivery in South Africa: The political influence at local government level' (2019) 19(4) *Journal of Public Affairs* 1-6.

[124] *Ibid* at 1-11.

[125] See para 4.1.

[126] SALGA Annual General Report, Non-Financial Census of Municipalities 2017 attest that Local Government is lending a hand in improving the lives of the people "Media Statement for immediate release 05 June 2018" para 1-7.

[127] SALGA (2015) *Community Protest: Local Government Perceptions*, 8-23.

[128] *Ibid*.

3.8. Accountability of local government

Despite the seemingly strong regulatory framework of local governance in South Africa, some commentators question its sufficiency to support service delivery. Reddy submitted that one of the major areas of concern for local communities is the dysfunctional structure of municipalities and their poor interaction with the people.[129] However, the local government often bears the brunt of dissatisfaction with the national and provincial government because it is the closest to the people.[130] Furthermore, municipal authorities and their physical facilities are more visible and accessible to the people than the provincial and national facilities, most of which are located in cities.[131] In any case, there is more public accountability at the local government level than at either the provincial or national government level.[132]

Poor service delivery at the local government level can be attributed to many reasons. These are notably the lack of political and management will to make sound appointments.[133] Municipalities are also accused of not "acting decisively on contentious issues, the failure to pass municipal budgets, the inability to gain qualified audits, and the failure to communicate with local communities and address their needs."[134] There has also been a question mark placed on the quality of local government representation and the perceived accountability of councillors as part of the local citizen interface.[135]

In the past three decades, there have been several interventions by the national and provincial governments to address poor service delivery in local government.[136] The notable ones are interventions at Nelson Mandela Bay Municipality,

[129] Siddle, A. and Koelble, T.A. 'Local government in South Africa: Can the objectives of the developmental state be achieved through the current model of decentralised governance?' (2016) *Swedish International Centre for Local Democracy* Research Report No. 7.

[130] Reddy, P. S. 'The politics of service delivery in South Africa: The local government sphere in context' (2016) 12(1) *TD: The Journal for Transdisciplinary Research in Southern Africa* 1-8 at 2.

[131] Morudu, H.D. 'Service delivery protests in South African municipalities: An exploration using principal component regression and 2013 data' (2017) 3(1) *Cogent Social Sciences* 13-14.

[132] *Ibid* at 13 – 14.

[133] *Ibid* at 13 – 14.

[134] Reddy, P. S. 'The politics of service delivery in South Africa' 5-16.

[135] Siddle, A. and Koelble, T.A. 'Local government in South Africa'.

[136] Reddy, P. S. 'The politics of service delivery in South Africa' 2-4.

Johannesburg Metro and later Tshwane Metro. However, there has not been any substantial improvement in service delivery.[137] This is despite the fact that schedules 4 and 5 of the Constitution clearly specify the functions of municipalities.[138]

It would appear that, since their establishment, municipalities have been discharging their functions with limited funds at their disposal and limited human capital.[139] However, they have not maximised their sources of revenue nor collected all revenues due to them.[140]

Reddy highlighted the following challenges that have impacted negatively on the ability of local governments to meet their obligation to deliver basic service in the post-1994 dispensation, as follows:[141]

- Unfunded mandates, where municipalities are not funded or receive very little funding for services such as housing, library services, tourism, welfare services and support for the Commission.
- Financial viability: the demarcation process has resulted in some municipalities not having an economic base and being financially viable
- They are dependent on grants from other spheres of government.
- Legal compliance: there is a compliance-driven governmental approach as opposed to a service delivery one. Quite often, there are First World standards and Third World competencies, resources and needs. It has been difficult for municipalities to comply with prescripts.

[137] A report stated as follows: "At the meeting, the Select Committee approved the dissolution of the City of Tshwane Metropolitan Municipality by the Gauteng Provincial Government. The Select Committee recommended the approval of the intervention following a two-day inspection visit to Tshwane on the 17 to 18 March, to fully investigate the circumstances under which the Gauteng provincial government invoked section 139(1)(c) of the Constitution on March 4, 2020." See Parliamentary Monitoring Group, Section 139 Intervention: Tshwane Municipality – NCOP Cooperative Governance and Traditional Affairs, Water and Sanitation and Human Settlements available at <https://pmg.org.za/committee-meeting/30077/> (last accessed 3 April 2020).

[138] Reddy, P. S. 'The politics of service delivery in South Africa' 2-3.

[139] Du Plessis, L.M. 'Human capital development in local government and the search for a capable state' (2016) 9(3) *African Journal of Public Affairs* 30-38.

[140] *Ibid* at 30-38.

[141]Reddy, P. S. 'The politics of service delivery in South Africa' 2-6.

- Sound fiscal discipline is not compatible with deficient political leadership. As long as 'cadre deployment' is practiced and municipalities are forced to practice financial discipline, the financial future of municipalities will remain bleak.
- Guiding local economic development to address unemployment and poverty alleviation: there is no money for LED projects and additional work should be channelled to emerging service providers through the supply chain management system
- Establishing an investment-friendly environment: through cheap land, concessionary tariffs and tax holidays

These challenges have been high on the municipal agenda for decades and the efforts of government officials to respond to them has met with limited success.[142] Arguably, government efforts require firm commitment and a certain level of passion by the key role players.[143] For local government to fully meet its obligation in terms of social contract and service delivery, the accountability measures of its statutory framework is crucial.[144] Reflecting on recent trends and developments, Masuku *et al* points out that local government mirrors the larger political and socioeconomic challenges that are shaping South African society.[145] They added that over two decades of policy reform are yet to usher in a new society as envisioned in the Local Government White Paper of 1998. Moreover, it appears that the systems in place for local government funding are insufficient and the functions delegated to it are quite onerous.[146]

However, du Plessis believes that poor funding is not necessarily the cause of poor service delivery because the local sphere has several sources of funding that can

[142] De Visser, J. 'Developmental local government in South Africa: Institutional fault lines' (2009) (2) *Commonwealth Journal of Local Governance* 18, Reddy, P. S. 'Evolving local government in post conflict South Africa: Where to?' (2018) 33(7) *Local Economy* 710–725.

[143] Morudu, H. D. 'Service delivery protests in South African municipalities: An exploration using principal component regression and 2013 data' (2017) 3 (1) Cogent *Social Sciences* 13 – 14.

[144] Du Plessis, L.M. 'Human capital development in local government and the search for a capable state' (2016) 9(3) *African Journal of Public Affairs* 30-38.

[145] Masuku, M. and Jili, N. 'Public service delivery in South Africa: The political influence at local government level' (2019) 19 (4) *Journal of Public Affairs* 7.

[146] *Ibid*.

be tapped.[147] Rather, the challenge is attracting the desired human capital. It has become imperative that municipal functionaries tasked with financial responsibilities are adequately qualified. They must also have the required technical expertise to access funding in the form of grants and subsidies to be able to meet their obligation to deliver basic services.[148] In a similar reasoning, Masuku et al' argued that the politicisation of local government has created a skills challenge, as the necessary skills at the local level are, at best, marginally available, and the political and management will to take firm and decisive action is lacking.[149] They submitted further that the local governance system, given the challenges, is inadequately designed and at best poorly managed and often by people who are accountable to their political principals rather than the constituents below who are at the receiving end of poor service delivery. On his part, de Visser submitted that the big question tends to focus on political will, which to a large extent drives the administration and is an integral part of local governance.[150] While Reddy considers municipal authorities as the engine of local development, he points out that a large percentage of local communities struggle to receive rudimentary services.[151] For most township residents, the most basic forms of service delivery, such as fixing a pavement or clearing garbage from the streets is a distant dream'.[152] This is a matter of concern which has contributed to the dysfunctionality of local government in the past three decades.[153]

This concern partly informs the National Development Plan (NDP). The NDP aims to eliminate poverty and reduce inequality by 2030.[154] According to the NDP, South Africa can realise these goals by drawing on the energies of its people, growing an inclusive economy, enhancing the capacity of the state and promoting leadership

[147] Du Plessis, L.M. 'Human capital development in local government and the search for a capable state' 30-38.

[148] *Ibid*.

[149] Masuku, M. and Jili, N. 'Public service delivery in South Africa: The political influence at local government level' (2019) 19 (4) *Journal of Public Affairs* 1-7.

[150] De Visser, J. 'Developmental local government in South Africa: Institutional fault lines' (2009) (2) *Commonwealth Journal of Local Governance* 18.

[151] Reddy, P. S. 'Evolving local government in post conflict South Africa: Where to?' (2018) 33(7) *Local Economy* 710–725.

[152] *Ibid*.

[153] *Ibid*.

[154] See the *NDP*, Chapter 13: Building a Capable State, 363 and 393.

and partnerships throughout society.[155] The planning and implementation of the NDP should be informed by evidence-based monitoring and evaluation, in which premiers and mayors must be visible.[156] As active champions of the NDP, municipal offices are the catalytic agencies to drive national development.[157] For example, in 2011, the then Minister in the Presidency declared that 'the core' of the *NDP* is a "focus on capabilities; the capabilities of people and of our country and of creating the opportunities for both."[158] Among these capabilities for individuals are education and skills. Accordingly, the *NDP* states as follows: "Between now and 2030, we need to move towards a state that is more capable, more professional and more responsive to the needs of its citizens."[159] With respect to this statement, it is submitted that state responsiveness to the needs of citizens refers to obligations inherent in its social contract with the electorate.

3.9. Conclusion

The arbitrariness and discriminatory governance style of the apartheid regime characterise the construction of contemporary South African society. Accordingly, one of the major aims of the new democratic system was to achieve a transformation in governance based on equality, human dignity, and non-discrimination. Against this backdrop, it is obvious that the Constitution embodies a social contract, which endows all spheres of government, including municipalities, with an obligation to deliver basic amenities to citizens. Thus, since the democratic dispensation in 1994, the spheres of government have attempted in varying ways to deliver basic amenities to the people.

However, these efforts have had a mixed success because municipalities are overburdened by the provincial and national spheres of government. Indeed, service delivery failures have contributed to frequent violent protests in many South African communities. These protests question the effectiveness of municipalities as an effective machinery in service delivery. This is the context in which this chapter examined the statutory framework of local governance, focussing on the Municipal

[155] *Ibid* at 363.

[156] *Ibid* at 363-393, 385, and Foreword to the *NDP* by Trevor Manuel, MP, Minister in the Presidency, on behalf of the National Planning Commission, 11 November 2011.

[157] See the *NDP*, Chapter 13: Building a Capable State, 363-393, 385.

[158] Foreword to the *NDP* by Trevor Manuel.

[159] *Ibid*.

Structures Act 117 of 1998, the Municipal Systems Act 32 of 2000, the Traditional Leadership and Governance Framework Act 41 of 2003 and the Charter for Public Service in Africa.

The chapter argues that the social contract theory offers a lens for understanding effective service delivery at the local government level. Effective service delivery is especially relevant because of the concept of developmental local government, which demands a community participation approach to service delivery.

The chapter finds that the legal and policy framework of local government reflects the social contract theory. However, poor project implementation hinders municipalities from adhering to this social contract. Amongst the many challenges facing the effectiveness of local government in terms of basic service delivery are inadequate funding of municipalities, poor cooperative governance, and lack of proper coordination among members of the executive branch. For example, municipalities struggle to align major aspects of their work with their organisational structure, allocation of existing personnel, review of by-laws, and consolidation of contractual agreements, assets and liabilities. In addition, many municipalities are also faced with financial problems that exacerbate their service delivery efficiency, particularly to the poor and vulnerable members of society.

Furthermore, poor cooperative governance is a major problem in service delivery. Since the introduction of democracy in 1994, local governments have been undergoing major changes and transformations, and traditional leaders still feud with local government officials for power and authority. This is not helpful because it reflects negatively on service delivery. The relationship between councillors and traditional leaders should be addressed and fixed as South Africa continues to navigate its way into a mature democracy that genuinely takes care of its people.

Importantly, local governance does not seem to receive adequate practical empowerment by the South African Local Government Association. Arguably, this poor or limited empowerment has a negative impact on the training and support provided to municipal councillors. Also, there are various challenges facing SALGA in empowering and capacitating municipal councillors through its training programmes which can only be dealt with appropriately if local government is strengthened through credible training programme and seminars. This issue is related to public appointments. The political parties must have a benchmark for qualifications and training for aspirant councillors to contest for local government elections.

Finally, if service delivery in South Africa is to be fully ensured for all citizens, the role of municipalities in the process of social transformation and improvement of the quality of life of South Africans need to be redefined. It is submitted here that the national and provincial governments are over relying on municipalities to deliver basic service without commensurate support and capacity. Support and capacity are especially needed in rural areas, where breaches of contract by contractors and third-party service deliverers are frequent. For example, a SALGA report published in 2007, identified critical issues that impact council capacity such as "inadequate legal support and advice to their decision making."[160] Without the requisite support from the national and provincial spheres of government, the effectiveness of municipalities will be no different from the neglect of rural areas during apartheid.[161]

In conclusion, local government should form part of a more comprehensive and integrated system of governance that should see the three spheres of government work cooperatively to guarantee the delivery of basic amenities to the people.[162] Such cooperation is vital for the notion of developmental local government, since it ensures that the people truly feel that their submission to state authority in terms of the social contract theory is worthwhile.[163] As I stated at the beginning of this chapter, efficient service delivery is a measure of effective governance. Accordingly, improving the efficiency of local governance should be a priority for all organs of the state.

In the next chapter, I shall discuss cooperative and multilevel government in South Africa against the background of the constitutional delineation of functions between the executive spheres of government.

[160] Masuku, M. and Jili, N. 'Public service delivery in South Africa: The political influence at local government level' (2019) 19(4) *Journal of Public Affairs* 1-7.

[161] See the *NDP*, Chapter 13: Building a Capable State, 363-393.

[162] See the *NDP*, Chapter 13: Building a Capable State, 385.

[163] Royce, M. 'Philosophical perspectives on the social contract theory: Hobbes, Kant and Buchanan revisited' (2010) 1(4) *Postmodern Openings* 45-62 at 45.

[163] *Ibid* at 49-50.

CHAPTER 4: COOPERATIVE AND MULTILEVEL GOVERNMENT IN SOUTH AFRICA

4.1. Introduction

By the middle of 2019, the number of service delivery protests in South Africa had "already eclipsed the total for 2016."[1] Arguably, these protests underlie the need for clarity in South Africa's legislative framework on service delivery. This clarity is required by the social contract theory, which demands the state to ensure a decent standard of living, especially for people living on the margins of social life.[2] In this social contract context, section 1 of the 1996 Constitution of South Africa is relevant. It states, among others, that South Africa is one, sovereign, democratic state founded on values of human dignity, equality, and the advancement of freedom.[3] Applying the above values means that failure to provide basic services is tantamount to a violation of human dignity, equality, and human welfare.[4] Indeed, section 7(1) of the Constitution states that "this Bill of Rights is a cornerstone of democracy in South Africa, and it enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom," which "the state must respect, protect, promote and fulfil."[5] This chapter therefore examines the manner in which the

[1] Gous, N. 'Service delivery protests are on the rise this year, warn experts' *Sunday Times* <https://www.timeslive.co.za/news/south-africa/2019-06-11-service-delivery-protests-are-on-the-rise-this-year-warn-experts/> (last accessed 29 December 2019).

[2] Ngcamu, B.S. 'Exploring service delivery protests in post-apartheid South African municipalities: A literature review' (2019) 15(1) *The journal for transdisciplinary research in Southern Africa 1-9 at 1*; Allan, K. and Heese, K. 'Understanding why service delivery protests take place and who is to blame' (2011) *Municipal IQ* 93-114.

[3] Section 1 of the Constitution reads as follows: "The Republic of South Africa is one sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms, (b) Non-racialism and non-sexism, (c) Supremacy of the Constitution and the rule of law, (d) universal adult suffrage, a natural common voters roll, regular elections, and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[4] *Ibid*.

[5] See section 7(2) of the Constitution; Mathenjwa, M. 'Contemporary trends in provincial government supervision of local government in South Africa' (2014) 18(1) *Law, Democracy and Development* 180-201.

Constitution delineates the functions of the various spheres of government, and how this delineation has engaged the interest of constitutional scholars and political scientists since the commencement of the democratic dispensation in South Africa.

The analysis in this chapter focuses on the extent to which the spheres of government cooperate with each other to ensure the delivery of basic services to citizens. Specific emphasis is placed on constitutional provisions that regulate multilevel spheres of government in South Africa. These are notably sections 40, 41, 152, 154 and 156, as well as schedules 4 and 5.[6] The chapter commences with a conceptualisation of cooperative governance. It traces the roots of cooperative government and its evolution, drawing from developments in the United States of America and Germany. Thereafter, the analysis turns to constitutional provisions that regulate the supervision and monitoring of municipalities by the other spheres of government. Here, the chapter looks at practical problems arising from the delineation of functions between government organs. It relies on empirical work done by other scholars.[7] The chapter concludes by identifying the implication of the supervision of municipalities by other spheres of government in the delivery of basic services.

4.2. The concept of cooperative governance

The activities of modern states are increasingly complex, competitive, and constrained by limited budgets.[8] There is also increasing mix-up of legislative powers between national, regional, and local governments. These factors – that is limited budgets, complex governance, and concurrent legislative powers – are complicated by demands for good governance and accountability. Taken together, they make it

[6] de Vos, P. *South African Constitutional Law in Context* (Oxford University Press, 2015) 290 -301; see also section 40, 41, 152, 154,156 and schedule 4 and 5 of the Constitution.

[7] Examples are Mathenjwa, M. 'Contemporary trends in provincial government supervision of local government in South Africa' (2014) 18(1) *Law, Democracy and Development* 178-201; see also Malan, L. 'Intergovernmental relations and co-operative government in South Africa: The ten-year review' (2005) 24(2) *Politeia* 226-243; Tapscott, C. 'Intergovernmental relations in South Africa: The challenges of co-operative government' (2000) 20 (2) *Public Administration and Development* 119-127.

[8] De Villiers, B. 'Intergovernmental relations: The duty to co-operate-a German perspective' (1994) 9(2) *SA Public Law* 430-437.

imperative for the levels of government to function in a complementary manner.[9] This situation informs the concept of cooperative governance.

In a general sense, cooperative governance regards public administration as a partnership between the various spheres of government. Simply put, it seeks to enhance friendly relations among the various organs of the state.[10] Significantly for this dissertation, the overall aim of cooperative governance is to ensure that the various levels of government deliver services to the people in an efficient and sustainable manner. In practical terms, this "implies that sub-national and national jurisdictions have certain political and legal obligations to support and consult one another on matters of common concern, to cooperate and maintain friendly relations."[11] While these obligations may seem obvious, they are not easy to fulfil due to the complexity of modern democracies. For example, where a national government is composed of the dominant party, it may struggle to cooperate with a regional government that is dominated by an opposition party. Also, many national governments are made up of coalitions, which make cooperation between state officials difficult.

Cooperative governance is especially useful in stratified and post-conflict societies. In these types of societies, ethnic, religious, and cultural pluralism make it imperative for government "to ensure public access to decision making, transparency of governmental processes and for creating fully democratic societies."[12] In any case, the root of cooperative governance is significant for its understanding.

4.2.1. The roots of cooperative governance

In modern state systems, cooperative governance was not always prominent. This is due to the practice of federalism, also known as a compound mode of government. Federalism describes a political system in which a national government and regional

[9] De Villiers 'Intergovernmental relations: A constitutional framework' in de Villiers (ed.) *The birth of a Constitution* (Juta, Cape Town, 1994).

[10] *Ibid*.

[11] Edwards, T. 'Cooperative governance in South Africa, with specific reference to the challenges of intergovernmental relations' (2008) 27(1) *Politeia* 65-85 at 64.

[12] De Villiers, B. 'Intergovernmental relations: The duty to co-operate – A German perspective' (1994) 9(2) *SA Public Law* 430-437 at 431.

governments work with certain degrees of autonomy in their functions.[13] It became popular due to the influence of the United States of America, where judicial interpretations of the constitution promoted the idea of dual federalism.[14]

Initially, dual federalism in the United States was conflictual rather than complementary. This is because the federating states did not regard themselves as partners. In fact, dual federalism was used "to describe the uncoordinated coexistence or even hostility between the union and the constituent states."[15] It was only after the Intergovernmental Relations Commission was established that the relationship between the organs of state began to be seen in a different way. From the early 1930s, the scope of governmental powers and responsibilities increased. As they increased, references began to be made to "co-operative" federalism and "intergovernmental" relations.[16] Federalism in America and Europe developed various formal and informal networks to foster co-operation between the different levels of government. These measures laid the foundation for the international practice of enshrining cooperative governance between the national and subnational governments in a supreme constitution. For example, the German Constitution went to great lengths to provide a framework of institutions and procedures for promoting cooperative governance.[17] As seen below, the German model greatly influenced South Africa. But first, I distinguish between cooperative governance and intergovernmental relations.

4.2.2. Cooperative governance versus intergovernmental relations

The term, 'inter-governmental relations,' denotes the relationship between the three spheres of government.[18] It differs from cooperative governance in two main ways. Whereas cooperative governance is a philosophy that guides all the activities of

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[13] Gana, A.T. and Egwu, S.G. (eds.) *Federalism in Africa: The imperative of democratic development Vol. 2* (Africa World Press, 2003).

[14] Elazar, D.J. *The American partnership: Intergovernmental co-operation in the nineteenth-century United States* (University of Chicago Press, 1962) 25.

[15] De Villiers, B. 'Intergovernmental relations: the duty to co-operate-a German perspective' (1994) 9(2) *SA Public Law* at 431.

[16] *Ibid*.

[17] For an account, see Leonardy, U. *Working structures of federalism in Germany: At the crossroads of German and European unification* (Centre for Federal Studies, University of Leicester, 1992).

[18] See section 40(1).

government officials, intergovernmental relations are the practical expressions of this philosophy.[19] Also, cooperative government regards each sphere of governance as distinctive and concerned with a specific function, while intergovernmental relations describe the political, financial, and institutional interactions between the different spheres of government and state officials within each sphere. In this sense, intergovernmental relations express the values of cooperative government and how these values are implemented within institutional contexts.[20]

In contemporary literature, intergovernmental relations are typified in the German concept of *Bundestreue*. As a governance principle, *Bundestreue* denotes a set of unwritten philosophies on which the relationship between the German national and regional governments is founded. The German Constitutional Court has consistently interpreted *Bundestreue* as a demand for Germany's federating units to act in good faith, mutual trust, and the best interest of the nation.[21] As shown in this chapter, the German model strongly influenced the notion of cooperative governance during the negotiations for ending apartheid in South Africa.

4.2.3. Cooperative governance in colonial South Africa

In the 19th century, two forms of government dominated the territory known today as South Africa.[22] The first was a parliamentary system of government that operated in the two British colonies of the Cape and Natal. It was based on the British Westminster model, and made up of a central and local government that functioned under a governor appointed by the British government.[23] The second was a unitary form of government in the Afrikaner republics of the Transvaal and Orange Free State. These regions had less structured local government, with varying de-centralised authority.

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[19] Simeon, R. and Murray, C. 'Multi-sphere governance in South Africa: An interim assessment' (2001) 31(4) *Publius: The Journal of Federalism* 71–72.

[20] Wright, D.S. 'Intergovernmental relations: an analytical overview' (1974) 416(1) *The Annals of the American Academy of Political and Social Science* 1-16.

[21] Mathebula, F.L. 'South African intergovernmental relations: A definitional perspective' (2011) 46(1.1) *Journal of Public Administration* 834-853 at 840.

[22] The simplistic account offered here is inspired by Ross, R., *A concise history of South Africa* (Cambridge University Press, 2008). For another authoritative historical account, see Davenport, T. and Saunders, C. *South Africa: A modern history* (Palgrave Macmillian, 2000, 5th ed.).

[23] Green, L. *History of Local Government in South Africa* (Cape Town: Juta, 1957).

From 1806 to 1961, the British colonialists and the Boer republics grappled for control. The British experimented with various types of government, which were aimed at exerting authority over the "frontier" policies of South African tribes and curbing the challenge to their authority posed by the Afrikaners.[24] Generally, both the British and the Afrikaners sought to limit the threat of rebellion by the native majority population. To achieve their aims, the British looked to the style of intergovernmental relations that they had used during their colonisation of Australia and Canada. However, rising agitations by black Africans and the Afrikaners in the latter part of the 19th century prevented the practice of meaningful cooperative governance.[25] There were also struggles for natural resources such as diamonds and gold in the Transvaal Republic, which culminated in the Second Boer War.[26]

In 1909, a National Convention was held to determine the devolution and decentralisation of political powers, as well as the allocation of economic resources. It culminated in the South African Constitution Act, a document that united the Boer republics and the British colonies into a sovereign state.[27] The Union Act arranged South Africa into four provinces with four councils, four administrators, and a British-approved Governor-General. Following the 1910 elections, an Afrikaner, Louis Botha, emerged as the first prime minister of the Union and the head of the South African Party. This party was a merger of Afrikaner parties that championed cooperation between themselves and persons of British colonial descent.

Following tensions with British sympathisers, a member of the Union Government, General JBM Hertzog, and his supporters broke away from the South African Party in 1914 and formed the National Party. Although the National Party desired political freedom from Britain, it continued to recognise British dominance of

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[24] Barnard, L.S. 'The attempts of the British government to establish a federation in Southern Africa during the second half of the nineteenth century' in Kriek, D.J. (ed) *Federalism the solution? Principles and proposals* (Pretoria: HSRC Publishers, 1992) 1.

[25] Kriek, D.J., Kotzé, D.J., Labuschagne, P. A. H, Mtimkulu, P. and Malley, K.O. *Federalism: The solution: Principles and Proposals* (Pretoria: HSRC Publishers, 1992) 123-124.

[26] The Second Boer War, which is also known as the Anglo-Boer War or the South African War, was fought between the British Empire and the two Boer Republics over the British influence in Southern Africa. It lasted from 1899 to 1902.

[27] Giliomee, H. and Adam, H. *The rise and crisis of Afrikaner power* (Cape Town: David Phillip Publishers, 1979) 114-115.

the Union. However, it insisted on equality between English and Dutch as the two official languages of South Africa. It also continued to champion Afrikaner nationalism. When General Botha died in 1919, the South African Party lost some supporters. Its support for the British in the First World War lost it further political supporters. Most of them joined the National Party, which opposed the Union's participation in the war.[28]

The First World War induced a global economic depression, which caused a massive labour strike in 1922 known as the Rand Rebellion.[29] With labour unrest and dissatisfaction in Jan Smuth's stance on independence from the British Empire, the National Party came to power in the 1924 elections. Its victory was based on coalition with the South African Labour Party, a socialist group that claimed to represent the interests of white workers.[30] James Hertzog became Prime Minister until 1939.[31]

There is something notable about the exercise of power in this political dispensation. The notion of cooperative governance depended on the whim of white minorities rather than the sovereign will of black Africans. Obviously, there was no adherence to a social contract because popular democratic participation was restricted to certain political groups. This was the case even where political leaders swore to uphold inclusive parliamentary democracy.[32] Furthermore, both the South Africa Party and the National Party promoted racial segregation that laid the foundations of apartheid. This foundation was cemented with legislation such as the Natives Land Act of 1913, the Native Affairs Act of 1920, and the Natives Urban Areas Act of 1923.[33] These segregationist laws allocated more than 90 percent of all land in South Africa to whites, established a nationwide system of "Native Reserves" for black South

[28] For a detailed historical discussion of political organisation in this period, see C.F.J. Muller (ed.) *Five hundred years: A history of South Africa* (Pretoria and Cape Town: Academica, 1969).

[29] The Rand Rebellion or the 1922 strike, was an armed uprising led by white miners in March 1922.

[30] Vatcher, W.H. *White Laager: The rise of Afrikaner Nationalism* (New York and London: Frederick Praeger, 1965) 58-75.

[31] See generally Davenport, T. and Saunders, C. *South Africa: A modern history* (Palgrave Macmillian, 2000, 5th ed.) 267-317.

[32] Kruger, D.W. *The making of a nation: A history of the Union of South Africa 1910-1961* (Johannesburg and London: Macmillan, 1969) 213.

[33] Legassick, M. 'Legislation, ideology and economy in post—1948 South Africa' (1974) 1(1) *Journal of Southern African Studies* 9–10.

Africans, and set up residential areas within the urban areas for only black South Africans who worked for white people.[34] These laws watered the ground for apartheid.

4.2.4. Cooperative governance under apartheid

In 1948, the National Party won the general elections using the ideology of separate development for white and black South Africans.[35] This ideology became known as apartheid. Again, cooperative governance existed only between white Afrikaners, British descendants, and those who sympathised with the British Empire.[36] After a whites-only referendum was held in 1960, another constitution was adopted in 1961. It proclaimed South Africa as a Republic consisting of four provinces under a President (previously the Governor-General) and an executive council made of a Prime Minister and a Cabinet.[37] Unlike the current constitutional supremacy, it provided for the supremacy of Parliament and a separation of powers between the executive and legislature. The courts were effectively subject to Parliament.[38] Intergovernmental relations revolved around the Afrikaner National Party and other white minority parties. The participation of the African National Congress, the Pan African Congress, and some Indian and coloured political groups was suppressed or outrightly prohibited.[39] The limited participation of these groups in governance was despite the fact that they constituted over 87% of the South African population.[40]

Several laws were passed to limit black Africans from democratic participation. For example, the Promotion of Bantu Self-Government Act and the Black Homeland Citizenship Act of 1970 abolished the representation of Africans in Parliament and

[34] Augustyn, A. 'South African party' Encyclopaedia Britannica 1 October 2020 <https://www.britannica.com/topic/South-African-Party> (last accessed 17 November 2021).

[35] Dubow, S. *Scientific racism in modern South Africa* (Cambridge: Cambridge University Press, 1995) 246–283.

[36] Giliomee, H. 'The making of the apartheid plan, 1929-1948' (2003) 29(2) *Journal of Southern African Studies* 373-392.

[37] Section 1-3 of the Constitution Act No. 32 of 1961.

[38] Madala, T.H. 'Rule under apartheid and the fledgling democracy in post-apartheid South Africa: The role of the judiciary' (2000) 26 *North Carolina Journal of International Law and Commercial Regulation* 743-766 at 755-756.

[39] Walshe, P. *The rise of African nationalism in South Africa* (Johannesburg: Ad. Donker, 1987) 418-420.

[40] Leach, G. *The Afrikaners. Their last Great Trek* (London: Macmillan, 1989) 33.

recognised tribal "homelands" as "national" homes for black ethnic groups.[41] Even though the various African ethnic groups were supposed to be self-governing territories with executive committees that resembled a state cabinet, they were still overseen by a representative from the white dominated Parliament.[42] In fact, their legislative powers were curtailed by a repugnancy clause in the Bantu Act and were subjected to the colonial Prime Minister, who must assent to legislation. Since Parliament was supreme and access to political and economic power was based on race, cooperative governance was a sham.[43] Given the controlling and exclusionary nature of both colonialism and apartheid, interparty relations in South Africa was mainly conflictual until the end of apartheid in 1994. However, the negotiations that ended apartheid demonstrated a desire for cooperative governance.

4.2.5. Cooperative governance in the transition to democracy

Bilateral negotiations for representative or majoritarian democracy started in the mid-1980s between the African National Congress (ANC) and the National Party. Even though "multi-party talks in the Convention for a Democratic South Africa (CODESA) forum captured the headline," these two parties dominated the negotiations for South Africa's future.[44] The National Party was initially unwilling to accept majority rule by the ANC. Nelson Mandela recognised that negotiations must include majority rule, but also consider "the insistence of whites on structural guarantees that majority rule will not mean domination of the white minority by blacks."[45] On 2 February 1990, President F. W. de Klerk of the National Party released Mandela from jail and officially recognised the ANC and the South African Communist Party as political parties. The next three years involved political negotiations by the representatives of the National

[41] Act No. 46 of 1959.

[42] Cloete, J.N. *Central, provincial and municipal institutions of South Africa* (Pretoria: Van Schaick, 1988) 143.

[43] Boulle, L.J. *South Africa and the consociational option" A constitutional analysis* (Johannesburg: Juta, 1984) 128-132.

[44] Rantete, J. and Giliomee, H. 'Transition to democracy through transaction? Bilateral negotiations between the ANC and NP in South Africa' (1992) 91(365) *African Affairs* 515-542 at 516.

[45] Mandela, N. *The struggle is my life: His speeches and writings brought together with historical documents and accounts of Mandela in prison by fellow-prisoners* (International Defence and Aid Fund for Southern Africa, 1986) 207.

Party, the ANC, and the Inkatha Freedom Party, who participated sporadically under the leadership of Chief Buthelezi.

The negotiations to end apartheid focussed on certain key demands. These are the release of all political prisoners, the repeal of repressive laws, the lifting of bans and restrictions on organisations and movement, and the termination of the state of emergency, which had served as a pretext for security forces to be deployed in the townships.[46] Generally, the negotiators sought "to promote good governance, ensure a better quality of life and a common citizenship through cooperation."[47] To realise these aims, the drafters of the Interim Constitution drew from the German model of federalism. They were confronted with the choice to adopt a democracy founded on federalism or unitary government.[48]

The federalists argued that each level of government should be given 'watertight' powers and functions that could only be eroded by the Constitutional Court. However, the unitarists posited that provincial and local governments should be completely subordinate to the national government, with their exercise of powers subjected to oversight by the national government.[49] The federalists won. The negotiators of the new order opted for democratic federalism. They adopted a constitutional framework for locally elected provincial governments, which they endowed with significant fiscal responsibilities.[50]

4.2.6. Cooperative governance in the democratic era

After several years of negotiations, South Africa finally adopted a democratic model of government that is founded on a supreme document known as the Interim or 1993 Constitution. Shortly, after, it was replaced by the 1996 Constitution, which seeks to

[46] Rantete, J. and Giliomee, H. 'Transition to democracy through transaction?: Bilateral negotiations between the ANC and NP in South Africa' (1992) 91(365) *African Affairs* 515-542 at 519.

[47] Reddy, P.S. 'Intergovernmental relations in South Africa' (2001) 20(1) *Politeia* 21-39 at 23.

[48] Waldmeir, Patti. *Anatomy of a miracle: The end of apartheid and the birth of the new South Africa* (New York: Norton, 1997) 79.

[49] De Villiers, B. 'Intergovernmental relations: the duty to co-operate-a German perspective' (1994) 9(2) *SA Public Law* 430-437 at 430.

[50] Inman, R.P. and Rubinfeld, D.L. 'Federalism and the democratic transition: lessons from South Africa' (2005) 95(2) *American Economic Review* 39-43 at 39.

enhance cooperative governance within the different levels of government.[51] By using the word 'sphere,' rather than 'tier,' it emphasises a new, complementary relationship between the levels of government in order to promote efficiency in service delivery.[52]

The Constitution regulates the boundaries between the different levels of government, with all of them mandated to respect the autonomy of one another.[53] In other words, one level of government must not erode or encroach on the authority of a lower level of government under the guise of exercising some form of supervisory powers.[54] In this regard, Reddy asserted as follows:

> It has to be emphasised that the term `sphere' is indicative to a greater or lesser degree of a shift from horizontal to vertical divisions of governmental power, ie, a vision of non hierarchical government in which sphere has equivalent status, is selfreliant (sic), inviolable and processes the constitutional flexibility to define and express its unique character. The characteristics highlighted does have consider able implications for local government, namely it can resist attempts by national or provincial government to encroach on its territory, and it cannot be abolished. By the same token there cannot be any interference in local government institutions, structures, powers and functions. In the final analysis, there is greater independence in decisionmaking (sic) and ultimately in the implementation of policy.[55]

Overall, the objective of cooperative governance in the democratic era is to ensure efficiency in the delivery of basic services.[56]

4.3. Cooperative governance in the 1996 Constitution

Section 40 of the Constitution requires each sphere to maintain loyalty to the Constitution and the electorate, to respect the constitutional status, institutions, powers

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[51] The 1996 Constitution is an improvement on the Interim Constitution of 1993. See Levy, N. and Tapscott, C. *Intergovernmental relations in South Africa* (Cape Town: IDASA, 2001) 2.

[52] de Vos, P. *South African constitutional law in context* (Oxford University Press, 2015) 290 -301.

[53] *Ibid*.

[54] Section 41 (1) (*a*) and (*d*) of the Constitution.

[55] Reddy, P.S., Intergovernmental relations in South Africa' (2001) 20(1) *Politeia* 21-39 at 24, citing Pimstone, G. 'The constitutional basis of local government in South Africa' (1998) *Occasional Paper of the Konrad Adenauer Foundation* 5.

[56] de Vos, P. *South African constitutional law in context* 290-301.

and functions of government in the other spheres, to limit itself to only the powers and functions conferred on it in terms of the Constitution, and to avoid exercising functions in a manner that encroaches on the functions of another sphere. Notably, cooperative governance does not entitle the provincial government to become unnecessarily involved in activities that are substantially or totally within the jurisdiction of municipalities.[57] Instead, it requires provincial governments to act as remedial mechanisms for addressing failures in the functioning of local governments.[58] In chapter three, it demands intergovernmental support, whilst simultaneously placing restraints on the exercise of supervisory powers for purposes of protecting the autonomy of the local government from being usurped by the other spheres of government.[59] Thus, chapter 3 of the Constitution would be violated if the spheres of government exercise their supervisory powers in a manner that impinges on the autonomy of the local government.[60]

Significantly, the 1996 Constitution contains provisions that prohibit discriminatory practices in people's access to basic services. The Constitution makes these provisions based on principles of equality, human dignity, and non-discrimination.[61] The full liberties and freedoms that are expressed in the constitutional principles and referred to in the *Certification* judgment have become established values in South African jurisprudence. They also demonstrate the willingness of courts to protect fundamental human rights.[62]

[57] Mathenjwa, M. 'Contemporary trends in provincial government supervision of local government in South Africa' (2014) 18(1) *Law, democracy and development* 178-201 at 180.

[58] *Ibid*.

[59] The White Paper on Local Government 9 March (1998) 1-8.

[60] Freedman, W. 'The legislative authority of the local sphere of government to conserve and protect the environment: A critical analysis of *Le Sueur v eThekwini Municipality [2013] ZAKZPHC 6*' (2014) 17 (1) *Potchefstroom Electronic Law Journal* 567-594.

[61] See section 9 and 10 of the Constitution.

[62] *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10), BCLR 1253 (CC), (6 September 1996) [49]. The method the drafters of the CPs adopted in order to give content to the Bill of Rights was to refer to "all universally accepted fundamental rights, freedoms and civil liberties". There are two components to this: "fundamental rights, freedoms and civil liberties" and "universally accepted" See also Mailula, D.T. 'Revised reader for constitutional law, department of public, constitutional and international law' para 10, 26 & 30.

Significantly, the Constitution forbids a situation where a person's access to basic services is based solely on their ability to afford such services. Therefore, financial affordability should not be a key determinant in the state's obligation to provide amenities such as electricity, water, and healthcare. Every individual should have equal opportunities to obtain these services, irrespective of their social status. Thus, access to basic service delivery in the Constitution is framed in a non-discriminatory manner that conforms to the universal right to equality and human dignity. As noted by Cooper regarding the right to water, a joint interpretation of the Constitution and relevant legislation reveals that access to basic services such as sufficient water is framed "within a rights based approach."[63]

Although the Constitution provides for access to basic services, the exercise of this right is subject to a limitation clause.[64] However, due to the varying financial status of citizens, people with enormous purchasing power are able to afford and thus better exercise their choices of accessing basic services from private organisations. For instance, wealthy people can access private healthcare facilities and private schools, which are generally better equipped to meet their needs, in comparison with the poor, who must depend on public services that are often inadequate.[65]

4.3.1. Cooperative governance and right to service delivery

Sections 26(1), 27(1) and 29(1) of the Constitution provide that the right to basic service delivery is a socio-economic right that must be afforded the full protection of the law. The inclusion of this right in the Constitution has been influenced by international human rights law. The desire by the international community to protect the vulnerable and promote universal access to basic service delivery led to the enactment of the *Universal Declaration of Human Rights* (UDHR). This treaty was adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot in Paris. It arose directly from the horrible experiences of the Second World War, and represents the first global expression of rights to which all human beings are

[63] Cooper, N.J. 'After *Mazibuko*: Exploring the responses of communities excluded from South Africa's water experiment' (2017) 61(1) *Journal of African Law* 57-81 at 65.

[64] See section 36 of the Constitution.

[65] Section 9, 10 and 36 of the Constitution. See also *Soobramooney v Minister of Health* para 1.

inherently entitled.[66] As a member of the international community, South Africa has ratified the UDHR and incorporated it into its Constitution. In interpreting section 27 (1) concerning the right of access to health care services, the Constitutional Court held in the *Certification* judgment that "the method the drafters of the [constitutional principles] adopted to give content to the bill of rights was to refer to 'all universally accepted fundamental rights, freedoms and civil liberties.'"[67]

Despite the constitutional provisions that promote the right to basic amenities, as well as other international instruments incorporated therein to support these provisions, a large number of South African households are still without access to basic services. A good example is the right to health. As Harris and others put it, South Africa's history still influences access to health care services, thereby resulting in inequities and distortions.[68] In concurrence with this view, previous studies in South Africa confirm that poor, uninsured, black African and rural groups still experience an inequitable access to basic services.[69] On an average, rural women and children bear the greatest burden of limited access to basic services.[70] In most cases, they have to travel long distances that are exacerbated by poor road infrastructures and non-existent public transport system to access basic services.[71] Thus, it can be argued that poor or limited access to basic services has been disastrous for the South African population. For example, Tsenoli emphasised the impact of flooding on the population

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[66] '*Universal Declaration of Human Rights* adopted by the United Nations General Assembly (1948)' <https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf> (last accessed 16 February 2019).

[67] See Certification of the Constitution of the Republic of South Africa para 49.

[68] Harris, B. et al 'Inequities in access to health care in South Africa' (2011) 32 *Journal of Public Health Policy* 2.

[69] *Ibid* at 2, Gilson, L. and McIntyre, D. 'Post-apartheid challenges: Household access and use of health cared in South Africa' (2007) 37(4) *International Journal of Health Services* 673-691. See also Coovadia, H., Jewkes, R., Barron, P., Sanders, D. and McIntyre, D. 'The health and health system of South Africa: Historical roots of current public health challenges' (2009) 374 *Lancet* 817.

[70] Goudge, J., Russell, S., Gilson, L., Gumede, T., Tollman, S., and Mills, A. 'Illness-related impoverishment in rural South Africa: Why does social protection work for some households but not others?' (2009) 21 *Journal of International Development* 236.

[71] Visagie, S. and Schneider, M. 'Implementation of the principles of primary health care in a rural area of South Africa' (2014) 6(1) *African Journal of Primary Health Care and Family Medicine* 1-10 at 2.

in a discussion paper.[72] The impact of government's failure to build the necessary capacity described in the discussion paper violates the social contract theory.

4.3.2. Constitutional delineation of cooperative governance

The Constitution states that "the three spheres of government are distinctive, interdependent and interrelated."[73] Local government is a sphere of government in its own right, and is no longer an implementing arm of the national or provincial government. Although the three spheres of government are autonomous, they exist in a unitary South Africa, meaning that they have to work together on decision-making and co-ordinate budgets, policies and activities, particularly for those functions that cut across the spheres.[74]

Co-operative governance means that the three spheres of government should work together to provide citizens with a comprehensive package of services.[75] This is why local government is represented in the National Council of the Provinces and other important institutions like the Financial and Fiscal Commission and the Budget Council. The South African Local Government Association SALGA is the official representative of local government.[76] SALGA is made up of nine provincial associations. for the purposes of cooperation, local municipalities are required to join their provincial association. Most executive elections and decisions on policies and programmes happen at provincial or national general meetings.[77]

4.3.3. The spheres of governance

[72] Tsenoli, S. 'Flood disaster management; Local Government Municipal Systems Amendment Bill: Departmental briefing' Parliamentary Monitoring Group 25 January 2011; available at <https://pmg.org.za/committee-meeting/12475/> (last accessed 20 November 2021).

[73] *Ibid*.

[74] Green Paper on Local Government issued by the Ministry for Provincial Affairs and Constitutional Development (October 1997) 18.

[75] *Ibid*.

[76] *Ibid*.

[77] Koma, S.B. 'The state of local government in South Africa: Issues, trends and options' (2010) 45(1) *Journal of Public Administration* 111-120.

The phrase, 'spheres of government' captures the idea that the national, provincial and local government are distinctive and autonomous.[78] This is an important change from the previous order, where "levels" of government were arranged in a hierarchical order, with the national level on top, and the local level at the bottom. In the new system, the Constitution grants each sphere the powers to define and express its own unique character.[79] Arguably, the intent of the Constitution is for the three spheres of government to work in a cooperative manner to enhance service delivery.

The sphere of government that is closest to the people is the municipality, which forms part of local government. According to section 152(1) of the Constitution, the objectives of local government are as follows:

(a) to provide democratic and accountable government for local communities;

(b) to ensure the provision of services to communities in a sustainable manner;

(c) to promote social and economic development;

(d) to promote a safe and healthy environment; and

(e) to encourage the involvement of communities and community organisations in matters of local governance.[80]

Section 152(2) further states that a municipality must strive, within its financial and administrative capacity, to achieve the objectives set out in subsection one above.[81] A contradiction may be evident in the aforementioned subsections and the constitutional approach, which regards service delivery as a shared obligation amongst the different levels of government.[82] Although the Constitution stipulates that the responsibility for service delivery rests on the spheres of government, the municipalities seem to be overburdened with the obligations set out in section 152(1) and (2) of the Constitution.

4.4. Monitoring of municipalities

Section 139 of the Constitution authorises the national government to intervene in a municipality that has failed to fulfil an executive obligation in terms of the Constitution

[78] Green Paper on Local Government 1997 at 18-20.

[79] *Ibid*.

[80] *Ibid*.

[81] Section 152(2) of the Constitution.

[82] Section 40-41 of the Constitution.

or other legislation. It then proceeds to stipulate the conditions under which this intervention can occur. However, the section does not specify who determines when a municipality has failed to fulfil an executive obligation in terms of a written law. From the wording of section 155(6) of the Constitution, it appears it is the same provincial government that has this duty. The section requires it to establish municipalities in a manner that is consistent with legislation enacted in terms of sections 155(2) and 155(3) of the Constitution. Importantly, it requires the national government to use legislative and other measures to ensure the monitoring and support of local government. The question is whether a combined reading of these sections implies that the provincial government has power to supervise the local government.

In the *First Certification Judgment*, the Constitutional Court defined the word "supervision" within the context of intervention in the affairs of local government, as follows: "Supervision is utilised alongside 'intervene' to designate the power of one level of government to intrude on the functional terrain of another".[83] Arguably, section 139 did not intend the provincial government to assume supervisory powers over municipalities. Significantly, this section used to be titled "Provincial Supervision of Local Government" before it was amended to "Provincial Intervention in Local Government" in 2003.[84] This amendment is in recognition of the autonomy of local government within the constitutional principle of cooperative governance.

In practice, section 139 has been used as an excuse by the provincial government to supervise local government. For example, in *City of Cape Town v Premier of the Western Cape & Others,* the Constitutional Court explained the power of the provincial government in relation to municipalities.[85] The court held that 'this power is limited to merely keeping the local government under review'.[86] The provincial and/or other spheres of government are therefore not empowered to control the affairs of the local government.[87] Their monitoring powers, in pursuit of co-operative

[83] *In re: Certification of the Constitution of the Republic of South Africa 1996*, 1996 (10) BCLR 1253 (CC) para 370.

[84] See section 4 of the Constitution Eleventh Amendment Act of 2003.

[85] *City of Cape Town v Premier of the Western Cape and Others* 2008 (6) SA 345 (C) 25 & 48.

[86] *Ibid*.

[87] *Ibid.*

governance, is limited to measuring or testing, at intervals, the statutory compliance of local governments with their executive obligations.[88]

According to de Vos, the current constitutional status of the local government is "radically different from what it was prior to the transition to democracy in 1994."[89] Before 1994, municipalities were at the bottom of a hierarchy of law-making powers.[90] This is because they derived their powers from provincial ordinances, which, in turn, derived their powers from legislation passed by Parliament. Accordingly, the municipality is no longer an agency that merely exercises powers delegated to it.[91]

4.4.1. Constitutional powers of municipalities

A municipality has executive authority in respect of: (a) local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and (b) any other matter assigned to it by national or provincial legislation.[92] A municipality may make and administer by-laws for the effective administration of matters which it has the right to administer.[93] A municipality also has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.[94] A careful examination of these sections shows that there is a legislative distinction between three types of powers.

The first type is powers that are derived directly from the Constitution, which may be referred to as "original powers."[95] The second is powers that are assigned to municipalities in terms of national or provincial legislation referred to as assigned powers.[96] The third type is powers which are reasonably necessary for or incidental to, the effective performance of a municipality's functions and may be referred to as incidental powers.[97] The ability of the national government to intervene in local

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[88] *City of Cape Town v Premier of the Western Cape and Others* 2008 (6) SA 345 (C) 25 & 48.

[89] de Vos, P. *South African constitutional law in context* (Oxford University Press, 2015) 291.

[90] *Ibid*.

[91] *Ibid*.

[92] Section 156(1) of the Constitution.

[93] Section 156(2) of the Constitution.

[94] de Vos, P. *South African constitutional law in context* 290 -301.

[95] *Ibid* at 299.

[96] *Ibid* at 298.

[97] Section 156 of the Constitution.

government may be regarded as a disguised form of supervising the local government, in that it is supposed to be carried out against the background of a constitutional principle of cooperative governance.[98]

The Constitution provides specifically for three instances when the provincial government may interfere in the operation of the local government. The first is to provide for the functioning of the latter by legislative and other measures.[99] The second is to oversee the effective performance by municipalities of their powers in respect of the matters listed in Schedules 4 and 5 of the Constitution, as provided for in section 156(1) of the Constitution.[100] The third is to intervene directly when "a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation."[101] Thus, the Constitution only authorises intervention in local government where a municipality has failed its legislative obligations.

4.4.2. Other sources of municipal powers

The Constitution provides for statutory laws as another source of power for provincial governments to monitor local governments. This may be referred to as the secondary source of local government power.[102] An example is the Municipal Systems Act 32 of 2000. Under this Act, the Constitution empowers the Member of the Executive Council responsible for local government (MEC) to take action where a municipality fails to perform its duties, or where maladministration occurs.[103] Section 106 of the Municipal Systems Act provides: 'If a MEC has reason to believe that a municipality in the province cannot or does not fulfil a statutory obligation binding on that municipality, or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province, the MEC must:

(a) by written notice to the municipality, request the municipal council or municipal manager to provide the MEC (a member of the Provincial Council) with information required in the notice; or

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[98] Mathenjwa, M. 'Contemporary trends in provincial government supervision of local government in South Africa' (2014) 18(1) *Law, Democracy and Development* 182.

[99] Section 155(7) of the Constitution.

[100] de Vos, P. *South African constitutional law in context* (Oxford University Press, 2015) 290 -301.

[101] Section 139 of the Constitution.

[102] De Visser, J. *Developmental Local Government: A case study of South Africa* (2005) 169.

[103] Section 139 (1)(*a*) of the Constitution.

(b) if the MEC considers it necessary, designate a person or persons to investigate the matter.'[104]

It should however be noted that section 106 of the Municipal Systems Act does not give the MEC unlimited powers to demand information from municipalities. The MEC responsible for local governments is only required to act when he or she has a reason to believe that a municipality is failing to fulfil a statutory obligation which is binding on that municipality, or he or she believes that other wrongs had occurred or are occurring within the municipality.[105] The Municipal Finance Management Act (MFMA) is another national legislation governing the powers of provincial governments to monitor local governments.[106] The Act provides that the provincial treasury is required to monitor a municipality's compliance with the Act. Thus, in exercising its monitoring powers, the provincial government is required to adhere to the principles of co-operative government and the prescripts stipulated by the Constitution and legislation.

4.5. Constitutional approach to supervision of municipalities

According to de Vos, the Constitution confers legislative and executive powers on local governments and also recognises them as the weakest of the three spheres of government. He further holds that the Constitution provides that the manner local governments exercise their legislative and executive powers must be supervised by national and provincial spheres of governments. According to de Vos, supervisory powers over the local government are the power to monitor local governments, support local governments, regulate local governments, and intervene in local governments.[107] Of these, the most powerful is intervention.

Although the power of intervention goes to the core of local government autonomy, it is necessary for effective oversight.[108] Notably, intervention is not confined to a single sphere of government.[109] The national government, for example,

[104] Section 106 of the Municipal Finance Management Act 56 of 2003.

[105] de Vos, P. *South African constitutional law in context* (Oxford University Press, 2015) 294.

[106] The Municipal Finance Management Act 56 of 2003.

[107] de Vos, P. *South African constitutional law in context* 301.

[108] De Visser, J. *Developmental Local Government: A case study of South Africa* (Antwerp: Intersentia, 2005) 170.

[109] *Ibid*.

may intervene in a provincial administration when the province is either unable to, or does not, fulfil an executive obligation in terms of either the Constitution or other legislation.[110] In the same way, both the national and the provincial governments may intervene in local governments.

4.5.1. Intervention of provincial spheres in municipal powers

In *Le Sueur v eThekwini Municipality,* the court stated that the Constitution provides for three situations in which a provincial government may intervene in a local government. The first is when a municipality is unable to, or fails to fulfil an executive obligation in terms of either the Constitution or legislation.[111] The second is when the municipality is either unable to, or does not, fulfil a legal obligation to approve a budget or any revenue raising measures necessary to give effect to the budget.[112] Here, the failure by a municipality to adopt either a budget or any revenue raising measures deemed necessary to give effect to the budget must persist to the first day of the new budget year.[113] Thirdly, a provincial government may intervene where 'a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments.'[114] In other words, the jurisdiction of the provincial government over the municipality is only activated when there is a financial inadequacy in the municipal government to the extent that it is unable to fulfil its obligations.

In addition to the aforementioned grounds of intervention, the Municipal Finance Management Act elaborates on interventions relating to serious financial problems. It provides only for a situation where the failure to fulfil an executive obligation resulted in serious financial problems, or when such financial problems are the cause of a failure to fulfil an obligation.[115]

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[110] See *MEC KwaZulu-Natal for Local Government, Housing and Traditional Affairs v Yengwa* (unreported case no. 4462/2007) [26 November 2008] at para 12.

[111] *Le Sueur v eThekwini Municipality* [2013] ZAKZPHC 6 (30 January 2013).

[112] *Ibid*.

[113] *Ibid*.

[114] Section 106(1) of the Municipal Systems Act 32 of 2000.

[115] The Municipal Finance Management Act 56 of 2003.

4.5.2. Disputes concerning municipalities

Several cases concern the monitoring and intervention components of local government supervision in South Africa. Supervision is examined in the Utrecht Local Municipality, Imbabazane Local Municipality, Abaqulusi Local Municipality,[116] UMvoti Local Municipality and UMgungundlovu District Municipality.[117] In the Western Cape, the trends are discussed regarding the supervision of the Overberg District Municipality and the Langeberg Local Municipality by the provincial government of the Western Cape. In the Eastern Cape, the supervision of Mnquma Local Municipality by the provincial government of the Eastern Cape is examined. These case studies assist in explaining the trends in provincial supervision of local government in South Africa. For the objectives of this thesis, a surface explanation is needed to show how over-supervision has been interpreted by the courts.

Section 139(1) reads in parts: *"When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including — (c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step*.[118] However, acting in a manner that excludes support where a municipality may have shown signs of distress will not be in the interest of the people.[119] The case was about the provincial administration seeking to dissolve the municipality.[120] The North West Provincial Executive Council (Province), purportedly acting in terms of section 139(1)(c) of the Constitution, dissolved the applicant (Municipality) on 3 September 2014 and appointed the seventh

[116] *KwaZulu-Natal Department of Local Government and Traditional Affairs Report of the Commission of Enquiry into the Abaqulusi Municipality in terms of section 139 of the Constitution and section 106 of the Local Government Municipal Systems Act* (September 2005) 102.

[117] *Minister of Local Government, Housing and Traditional Affairs (KwaZulu Natal) v Umiambo Trading 29 CC and Others* 2008 (1) SA 396 (SCA) 25.

[118] Section 39 of the Constitution.

[119] *Ngaka Modiri Molema District Municipality v Chairperson North West Provincial Executive Committee & Others* (CCT 186/14) [2014] ZACC 31, 2014 (18) SA, 2.

[120] *KwaZulu-Natal Department of Local Government and Traditional Affairs Report of the Commission of Enquiry into the Abaqulusi Municipality in terms of section 139 of the Constitution and section 106 of the Local Government Municipal Systems Act* (September 2005) 102.

respondent, Mr Nair, as administrator.[121] The Municipality then approached the North West High Court, Mahikeng (High Court) for two kinds of relief.[122]

In Part A of its notice of motion, the Municipality sought temporary relief to prevent the administrator from interfering in the Municipality's affairs and for a suspension of the decision to dissolve it (temporary interdict application), pending finalisation of the relief sought in Part B. In Part B, the Municipality sought the review and setting aside of the decision to dissolve it (review application).[123] It sought to justify this direct appeal and access to the Court on the ground of urgency. Though the court held that The North West Provincial Executive Council (Province), purportedly acting in terms of section 139(1)(c) of the Constitution, dissolved the applicant (Municipality) on 3 September 2014 and appointed the seventh respondent, Mr Nair, as administrator. The Municipality then approached the North West High Court, Mahikeng (High Court) for two kinds of relief. In Part A of its notice of motion, the Municipality sought temporary relief to prevent the administrator from interfering in the Municipality's affairs, and for a suspension of the decision to dissolve it.[124] The application was brought as a matter of urgency. The court summarised the case in the following words: Municipalities are the face of government to the communities they are supposed to serve. If they fail in their executive obligation to provide services to the people, and if exceptional circumstances warrant it, the Constitution provides that the provincial executive may step in to dissolve the municipal council and appoint an administrator. That situation provides the background to this application.[125]

Generally, the provincial sphere has the power to place a municipality under administration. However, this should be used as a measure of last sort. This is because reliance on the power of over intervention could be abused by political players in favour of their political parties, and this will be counterproductive to service delivery. Furthermore, the need to place a municipality under administration should lie in ensuring the immediate provision of basic sanitation, water and other services, rather

[121] *Ibid*.

[122] *Ibid*.

[123] *Ibid*.

[124] *Ngaka Modiri Molema District Municipality v Chairperson North West Provincial Executive Committee & Others* (CCT 186/14) [2014] ZACC 31, 2014 (18) SA, 1.

[125] *Ngaka Modiri Molema District Municipality v Chairperson North West Provincial Executive Committee & Others* (CCT 186/14) [2014] ZACC 31, 2014 (18) SA, 1

than in restoring the status of municipal councillors.[126] The above case illustrates the high-handedness of the other spheres of government and their neglect of support that adversely affects service delivery to the people.

4.6. Cooperative governance and basic service delivery

The delivery of basic services by the state is practically synonymous with socioeconomic rights. Arguably, service delivery is closely linked to the social contract theory. In turn, this theory resonates with the philosophical concept of Ubuntu, which denotes humanness, respect, and dignity. Remarking on Ubuntu, Sachs J stated:

> PIE [The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998] expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves … The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern. The inherited injustices at the macro level will inevitably make it difficult for the courts to ensure immediate present-day equity at the micro level. The judiciary cannot of itself correct all the systemic unfairness to be found in our society. Yet, it can at least soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails.[127]

The idea of justiciability in the Bill of Rights is that decisions affecting basic rights and liberties should be reviewed by an institution outside of the political sphere, namely, the judiciary.[128] Attempts to make social, economic, and cultural rights as part of the

[126] *Ibid* at 4.

[127] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) 2005 (1) SA 217 paras 37-38.

[128] de Vos, P. *South African constitutional law in context* (Oxford University Press, 2015) 685.

Bill of Rights are usually met with objections that these particular rights are not suited to judicial enforcement.[129] It is argued that the judiciary lacks the democratic legitimacy necessary to decide the essential political question of how to apportion public resources amongst competing claims and amongst individuals, groups, and communities in society.[130] It is usually the responsibility of democratically elected representative branches of the state, such as parliament, to engage in particular practices or imposing particular duties or conditions on groups and individuals.[131] This is a distant thought distinct from a situation in which the judiciary has the power to order branches of state to distribute or spend public resources in a particular manner.

4.7. Legislative and policy approaches to service delivery

The adoption of laws and policies to enhance the realisation of socioeconomic rights is an important component of government's obligation to provide basic services.[132] This view is recognised even by the CESCR who affirms the indispensability of legislation in combating discrimination in realising the right to basic services.[133] The adoption of a comprehensive legislative, policy and programmatic framework is therefore indispensable in laying a proper foundation for the full and progressive realisation of the right to basic services. However, this framework has not been sufficient to enhance the realisation of the right to basic services in South Africa.[134]

[129] Currie, I. and De Waal, J. *The Bill of Rights Handbook* 6th ed (Cape Town: Juta, 2013) 72-82.

[130] *Ibid*.

[131] *Ibid* at 565-567.

[132] Alston, P. and Quinn, G. 'The nature and scope of state parties' obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) *Human Rights Quarterly* 156-229 at 156.

[133] CESCR General Comment No. 20, para 11, 37,39 and 40, where the Committee emphasises that the adoption of specific legislation is an indispensable measure for eliminating and prohibiting both formal and informal discrimination, be it in public or private sphere. See also General Comment No.16, para 41, where CESCR reiterates that the failure by the State to implement and monitor effects of laws, policies and programmes aimed at the prohibition of discrimination in access to socio-economic rights is a violation of the Covenant.

[134] In principle 78, the Limburg principle concurs with this view by stating that States should not only report on relevant legislative measures put in place to realise rights under the ICESCR, but must also specify judicial, administrative procedures and other measures they have adopted for enforcing these rights and the practices under those remedies and procedures.

For example, some serious challenges face the implementation of legislative measures put in place by the government to provide quality health care services. Subordinate laws and regulations to give effect to the implementation of some of the provisions of these legislations or regulations are still outstanding. The overall effect is that the implementation of some of the laws and policies adopted by the government has been very slow, and consequently result in very little translation of the right to basic services in the lives of the people in South Africa.

4.7.1. Cooperative governance in practice

Oftentimes, the Constitution's elaborate provisions on cooperative governance do not work in practice due to their non-implementation by officials. In this regard, scholars such as Alston and Quinn have contended that the adoption of legislation on its own will not adequately discharge relevant state obligations.[135] Writing in connection with the ICESCR, they argue that what is required to enforce socioeconomic rights is to make the Convention's provisions effective in law and in fact.[136] Pieterse contended that the legislature and the executive must urgently endeavour to correct the challenges associated with the implementation of legislation in South Africa, should they consider the right to have access to basic services a pipeline dream for all South Africans.[137] Affirming the inadequacy of legislative measures, the representative of France, Mr Cassin, at the drafting of the ICESCR stated that legislative texts might prove inadequate when it comes to reforms, or indeed, upheavals that are sometimes necessary to implement certain socioeconomic rights, which had not yet been recognised for reason that a number of diverse measures had to be adopted involving changes in the country's economic and social equilibrium.[138] It would be deceiving to let one think that a legal provision was all that was required to implement certain

[135] Alston, P. and Quinn, G. 'The nature and scope of state parties' obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) *Human Rights Quarterly* 156-229 at 169.

[136] *Ibid*.

[137] Pieterse, M. 'Legislative and executive translation of the right to have access to health care services' (2010) 14 *Law, Democracy and Development* 1-25.

[138] Alston, P. and Quinn, G. 'The nature and scope of state parties' obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) *Human Rights Quarterly* 156-229 at 168.

promises. In reality, what is needed is the transformation of the entire social structure through series of legislative and other executive measures.[139]

Dowell-Jones decried the over reliance on legal and judicial remedies to enforce service delivery.[140] The main point in her argument is that resources are critical in the realisation of socio-economic rights, and unless measures are put in place to generate the necessary resources, the full realisation of socio-economic rights will remain a mirage.[141] She is therefore of the opinion that measures have to be put in place by the state to enhance macro-economic stability, which would lead to a generation of the resources required to realise socioeconomic rights.[142] Examples of these macro-economic measures include the creation of a sustainable, non-inflationary growth path capable of generating resources to implement positive obligations on socio-economic rights.[143] The United Nations Post-2015 development agenda also acknowledges this fact by stating that continuous and sustainable economic growth is not only a prerequisite for employment generation but also provide countries with the fiscal power to address critical social issues such as access to health care services sanitation and the right to safe drinking water.[144] To this end, the South African government needs to adopt robust macro-economic policies to achieve a strong and inclusive economic growth in order to progressively realise socio-economic rights for the people.

In concurrence with a holistic approach to service delivery, Dowell-Jones decried the over reliance on legislative and judicial measures.[145] In her opinion, a realistic understanding of the obligations entrenched in article 2(1) of the ICESCR must, as a necessity, involve a discussion of the macro-economic measures that states must put in place to enhance the realisation of socio-economic rights: a task

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[139] *Ibid*.

[140] Dowell-Jones, M. *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the economic deficits* (Leiden/Boston: Martinus Nijhoff Publishers, 2004) 40-43.

[141] *Ibid* at 40-43.

[142] *Ibid*.

[143] *Ibid*.

[144] UN System Task Team on the Post-2015 UN Development Agenda; Macroeconomic Stability and Inclusive Growth and Employment (May 2012) 3-5.

[145] Dowell-Jones, M. *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the economic deficits* (Martinus Nijhoff Publishers, 2004) 40-43.

which has so far not been undertaken due to lack of technical, administrative or financial means.[146] Although she made this assertion in the context of the ICESCR, her opinion is also relevant to South Africa both in terms of national provisions and as a signatory to the Convention.[147]

Accordingly, other measures are necessary to supplement the adoption of legislation and policies to enforce socio-economic rights. These include the provision of adequate remedies. Currie and De Waal contend that the appropriate remedy for the infringement of socio-economic rights is in most cases the declaration of the infringing law and conduct as invalid.[148] In their opinion, where access to an existing socio-economic right is being threatened or has been affected, an interdict can be granted by the Court to prohibit the threatened conduct or restore access to that particular socio-economic right.[149]

4.7.2. Management of non-cooperative governance

What happens when the spheres of government fail to cooperate in their provision of basic amenities? In South Africa, courts are vested with the power to apply appropriate remedies by virtue of section 38 and section 172 of the Constitution. These provisions permit the issuance of an order which identifies the violation of a constitutional right and then define reforms and remedies that must be implemented while affording the responsible state agency or organ the opportunity to choose the means of compliance with the said order.[150] In particular, section 38 provides judicial remedies to individuals, groups and public interest organisations for denial, infringements or violations of human rights in the Bill of Rights.[151] Available remedies include an injunction, order for compensation, judicial review, conservatory order, declaration of rights under

[146] *Ibid*.

[147] South Africa has on 18 January 2015 ratified the ICESCR and was due to enter into force on 12 April 2015. See the United Nations Depository Notification Reference C.N.232015. TREATIES-IV.3 <www.seri-sa.org/images /ICESCRp_CN_23_2015-Eng.pdf> (last accessed 22 October 2015).

[148] Currie, I. and De Waal, J. *The Bill of Rights handbook* (6th ed Juta, 2013) 594.

[149] *Ibid*.

[150] Section 38 & 172 of the Constitution.

[151] Section 38 of the Constitution. See also Currie, I. and De Waal, J. *The Bill of Rights handbook* (6th ed Juta, 2013) 595.

section 38 of the Constitution and a declaration of invalidity of the infringing law.[152] As shown in chapter five, the Court has enforced positive obligations relating to socio-economic rights in many cases. The high number of these cases indicate that the promotion of service delivery should be strengthened through the creation of appropriate monitoring institutions, as well as the adoption of administrative, financial, educational and social measures. In this regard, the South African Human Rights Commission is mandated to monitor and assess the progressive realisation of socio-economic rights guaranteed by the Constitution.[153]

Monitoring service delivery involves assessing whether government policies and programmes comply with socio-economic rights obligations and whether adequate money is being spent to realise these rights.[154] It further involves determining whether money spent to realise socio-economic rights actually lead to appropriate outcomes.[155] In this regard, South Africa has a vibrant civil society, a wide range of organisations and social movements, which are involved in monitoring the progressive realisation of socio-economic rights. This includes institutions such as the South African Human Rights Commission, which has the constitutional mandate to monitor the observance of human rights principles enshrined in the Constitution.[156]

Other institutions include the Studies in Poverty and Inequality Institute, a not-for-profit based in Johannesburg, the Office of the Public Protector, the Centre for Applied Legal Studies at the University of Witwatersrand, the Treatment Action Campaign, a HIV/AIDS activist organisation, and the Budget and Expenditure Monitoring Forum, among others. These organisations work to support transformational policies and hold the government accountable on the delivery of basic services enshrined in the Constitution. In doing so, they have utilised various tools and approaches ranging from litigation, research, campaign and picketing to monitor

[152] Section 38 of the Constitution.

[153] Section 184 of the Constitution.

[154] Dawson, H. and McLaren, D. 'A framework for monitoring and evaluating the progressive realisation of socio-economic rights in South Africa' (2015) *Studies in Poverty and Inequality Institute* 1-20 at 7; available online: <https://spii.org.za/wp-content/uploads/2018/02/SPII-A-Framework-for-Monitoring-the-Progressive-Realisation-of-SERs-....pdf> (last accessed 20 October 2021).

[155] *Ibid* at 7.

[156] *Ibid* at 8.

initiatives employed by state organs and non-state entities to promote, fulfil and respect socio-economic rights.[157]

4.8. Conclusion

This chapter examined the delineation of functions between the national, provincial and municipal government in the context of cooperative governance and service delivery. It described cooperative governance as a partnership between the various organs of the state, which seeks to enhance friendly relations among them with the aim of ensuring the efficient provision of basic amenities to citizens. In the colonial and apartheid eras, the notion of cooperative governance was not prominent because access to governance was restricted to white minorities. Due to this restricted democratic space, the majority of black South Africans were barred from governance. Furthermore, the dominant white political parties of those eras promoted racist laws and policies that negated popular sovereignty and the concept of social contract.

In the 1990s, the notion of cooperative governance began acquiring prominence with the opening up of the political space to all South Africans. Indeed, it improved during the intense negotiations to end apartheid. Cooperation was especially evident in the multi-party talks of the CODESA. These talks forced politicians to embrace universalist values of equality, human dignity, and non-discrimination, which are the major platforms of social cooperation. Following the democratic dispensation that began formally in 1994, cooperative governance and social contract became important values in the obligations of the South African state towards its citizens.

In the above context, this chapter construes cooperative governance as crucial for the state's realisation of basic service delivery in South Africa. This argument has been affirmed in court decisions and international human rights instruments to which South Africa is a signatory. However, despite the constitutional protections in sections 1, 7, 9, 26, 27 and 29, basic services still evade poor South Africans, and inequities remain with regard to their accessibility.

The chapter argued that the municipality is not an agent or subordinate entity to the national and provincial spheres of government, but rather an independent sphere with its own constitutional powers. Although the Constitution provides for the

[157] Dawson, H. and McLaren, D. 'A framework for monitoring and evaluating the progressive realisation of socio-economic rights in South Africa' (2015) 8.

national and provincial spheres of government to supervise municipalities, this supervision is meant to be exercised in a cooperative manner that enhances service delivery. However, a cooperation lacuna is evident in sections 40-41, 150, 154 and 156, and Schedule 4 and 5, in that a balance is missing in the supervisory-complementary relationship.[158] Furthermore, section 152(2) appears to overburden municipalities with responsibilities.[159] In this regard, Mathenjwa stated that all spheres should coordinate their affairs in such a way that they fill up the deficiencies in other spheres of government, which aligns with section 40 & 41 of the Constitution.[160]

The chapter found a close link between cooperative governance and the social contract, in that the state's obligation to provide basic services is shared among the spheres of government. The nature of this obligation implies that human dignity, equality and the advancement of freedoms of the people is breached whenever the spheres of government do not work cooperatively. Support for this position is drawn from case law, as well as section 7(1) of the Constitution, which affirms that the Bill of Rights is a cornerstone of democracy in South Africa. In the context of section 27 of the Constitution, the state must take concrete and comprehensive action to reduce the structural problems plaguing cooperative governance and adopt appropriate measures to ensure basic service delivery to the most vulnerable and marginalised people in South Africa.

The chapter's findings resonate with most South African studies, which reveal that access to basic services requires a comprehensive approach to overhaul the status quo, which is denying the poorest people access to basic services.[161] Basic services should not be available only to the wealthy at the expense of the poor, who constitute the majority of South Africans. The spheres of governance must cooperate with one another by capacitating and supporting municipalities through its programmes to make basic services accessible to all members of our society. In doing so, the people will be constitutionally protected in respect of their rights under the bill of rights of the Constitution, and the transformative agenda of the Constitution will be

[158] Mathenjwa, M. 'Contemporary trends in provincial government supervision of local government in South Africa' (2014) 18(1) *Law, Democracy and Development* 178-201.

[159] *Ibid*.

[160] *Ibid*.

[161] Harris, B. et al 'Inequities in access to health care in South Africa' (2011) 32(1) *Journal of Public Health Policy* S102–S123 at S118-S119.

achieved by giving effect to the principle of cooperative government. The national government is therefore called upon to focus on support to municipalities and reduce over supervision and monitoring.

CHAPTER 5: JUDICIAL APPROACH TO BASIC SERVICE DELIVERY

5.1. Introduction

This chapter examines the extent to which the South African judiciary recognises the notion of social contract in the 1996 Constitution. This examination is conducted in the context of the Constitution's socio-economic rights provisions, which seek to ensure equitable access to basic amenities for everyone in South Africa. The reason for this enquiry is self-evident. In modern democracies, the constitution defines the perimeters of power, the rights, and the responsibilities of the government and the governed. As Galston and Mounk remarked about the United States of America independence declaration, "governments are instituted among men, deriving their just powers from the consent of the governed".[1] In South Africa, the Constitution is the supreme law of the Republic; any law or conduct that is inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[2] The Constitution contains the widely known democratic principle of separation of powers, which divides governmental functions between the executive (Cabinet), the legislature (Parliament) and the judiciary (courts).[3] In the context of this principle, the powers of each government branch require monitoring by the other branches to ensure that roles, responsibilities, and obligations meet constitutional tenets. This chapter argues that the judiciary should interpret the socio-economic rights in the Constitution with the spirit of a social contract between citizens and the government. As shown below, such an interpretative mindset is crucial to the provision of basic amenities in South Africa.

Long before the end of apartheid, a large number of people in South Africa lack(ed) access to basic services. As observers have noted, South Africa's history of inequality dictates who gets access to basic services.[4] Indeed, studies confirm that poor, uninsured, African communities still experience varying inequitable access to

[1] Galston, W. and Mounk, Y. 'The populist challenge to liberal democracy' (2018) 29(2) *Journal of Democracy* 5-18 at 9.

[2] See section 2 of the Constitution.

[3] *Ibid* at sections 40 and 41; Labuschagne, P. 'The doctrine of separation of powers and its application in South Africa' (2004) 23(3) *Politeia* 84-102.

[4] Harris, B. et al 'Inequities in access to health care in South Africa' (2011) 32(1) Journal of Public Health Policy S102–S123 *at* 103.

basic services.[5] Moreover, a good number of people in South Africa suffer from poor nutrition, which may result in death as a result of limited access to decent healthcare facilities.[6] On an average, rural women and children bear the greatest burden of poor access to basic services due to high transportation costs and low income status.[7] In most cases, they have to travel long distances that are exacerbated by poor road networks and public transport system before they can access the nearest healthcare facilities.[8] Therefore, it can justifiably be argued that lack of affordable and accessible to basic services is disastrous to the majority of rural population in South Africa.

Significantly, the Constitution does not link the provision of basic services to their affordability by citizens. This implies that people's ability to pay for electricity, water, sanitation, and healthcare, etc, should not determine their access to basic services. However, in practice, this situation is clearly different, because those who routinely access social amenities have enormous purchasing power. Also, they often exercise their power in private organisations that are equipped with more qualified personnel, who are well placed to meet their needs, unlike the impoverished masses that must depend on public services.[9]

Furthermore, the constitutional protection of socio-economic rights in South Africa supports the argument of this dissertation that basic service delivery is a social contract. Unlike other African countries, South Africa's Bill of Rights contains all the "categories of human rights that are ordinarily included in most international human

[5] Ataguba, J.E. 'The impact of financing health services on income inequality in an unequal society: The case of South Africa' (2021) 19 *Applied Health Economics and Health Policy* 721–733; Gilson, L. and McIntyre, D. 'Post-apartheid challenges: Household access and use of health care in South Africa' (2007) 37(4) *International Journal of Health Services* 673-691.

[6] Coovadia, H., Jewkes, R., Barron, P., Sanders, D. and McIntyre, D. 'The health and health system of South Africa. Historical Roots of current public health challenges' (2009) *Lancet* 374 (9692) 817–834 at 817.

[7] Goudge, J., Russell, S., Gilson, L., Gumede, T., Tollman, S. and Mills, A. 'Illness-related impoverishment in rural South Africa: Why does social protection work for some households but not others?' (2009) 21(2) *Journal of International Development* 231-251.

[8] Visagie, S. and Schneider, M. 'Implementation of the principles of primary health care in a rural area of South Africa' (2014) 6(1) *African Journal of Primary Health Care and Family Medicine* 1-10 at 2.

[9] Section 9 and 36 of the Constitution. See also *Soobramooney v Minister of Health* para 1.

rights instruments."[10] These include the generally accepted civil and political rights, as well as the divisive social, economic and cultural rights that are also referred to as second and third generation rights. During the negotiation process that ushered in the current democratic dispensation, the inclusion of these rights in the Constitution was not opposed in principle. Only the ambit of their justiciability was controversial.[11] However, the Constitutional Court settled this controversy in the *First Certification Judgment*. It ruled that even though socio-economic rights are not unanimously accepted by the international community as fundamental human rights, they "are, at least to some extent justiciable; and at the very minimum can be negatively protected from invasion."[12]

Finally, the wording of the Constitution indicates that access to basic services is a fundamental right that must be afforded the full protection of the law. Section 7(2) of the Constitution mandates the state to respect, protect, promote and fulfil all the socio-economic rights in the Bill of Rights. As Coomans noted, section 7(2) imposes dual duties on the state.[13] On the one hand, it is required to take positive action to implement socioeconomic rights. On the other hand, it is enjoined to refrain from any action that could limit the full realisation of these rights. The framing of section 7(2) questions the approach of the Constitutional Court to the enforcement of socioeconomic rights, especially its notion of meaningful engagement. First used as a remedy in the Occupiers of Olivia Road case, in which the City of Johannesburg sought to evict over 400 occupiers from unsafe buildings,[14] it denotes reasonable engagement with the majority of the population in the decision-making processes of government and in government's provision of basic services.[15] As shown in this

[10] Mubangizi, J.C. 'The Constitutional Protection of Socio-Economic Rights in selected African countries: a comparative evaluation' (2006) 2(1) *African Journal of Legal Studies* 1-19 at 3.

[11] Devenish, G. *A Commentary on the South African Bill of Rights* (Butterworths: London 1999) 358.

[12] *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* (1996) 1996 (4) SA 744 (CC) para 78.

[13] Coomans, F. 'Reviewing implementation of social and economic rights: An assessment of the "reasonableness" test as developed by the South African Constitutional Court' (2005) 65 *Heidelberg Journal of International Law* 167-196 at 167.

[14] *Occupiers of 51Olivia Road and Others v City of Johannesburg and Others* 2008 5 BCLR 475 (CC).

[15] Ngang, C.C. 'Judicial enforcement of socio-economic rights in South Africa and the separation of powers objection: The obligation to take other measures' (2014) 14(2) *African Human Rights Law Journal* 660-662.

chapter, the courts have used meaningful engagement and progressive realisation of socioeconomic rights to avoid holding the executive sphere of government to account for efficient service delivery. This argument sets the background for this chapter's examination of the judicial approach to basic service delivery in South Africa. this examination is preceded with a discussion of the basis for judicial involvement in the enforcement of service delivery.

5.2. Basis of judicial intervention

The courts have been called upon many times to consider whether in formulating and implementing its policies, the state has given effect to its constitutional obligations.[16] If the courts hold in any given case that the state has failed to meet its obligation to deliver basic services, the courts are obliged by the Constitution to hold the state accountable.[17] In accordance with their constitutional role to review the actions of the other branches, the courts have demonstrated willingness to adjudicate claims arising from socio-economic rights.[18] However, for the reasons below, they need to do more.

Chapter 2 of this dissertation established that modern constitutional democracies operate on the principle of a social contract between the electorate, on the one hand, and the government, on the other hand. According to Thomas Hobbes, "individuals have good reason to renounce their unlimited natural rights to act in pursuit of their self-interest in return for a guarantee of security and safety by the sovereign."[19] Similarly, Bilchitz identified three models for representing the relationship between citizens and government. "The first is 'citizen as customer'; the second is 'citizen as a party to a social contract'; the final is 'citizen as friend/community.'" Conceptualising this relationship, he noted that South Africa is a 'developmental state,' and that "one central component of such a state is an active involvement in developmental

[16] *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1075 para 99.

[17] *Ibid* at para 99.

[18] 7th Report on Economic and Social Rights, South African Human Rights Commission, 2006-2009, 10.

[19] Springborg, P. *The Cambridge companion to Hobbes's Leviathan Cambridge Collections Online* (Cambridge University Press, 2007) 122-124.

processes and service delivery."[20] There is no better way to enhance development than the fulfilment of socio-economic rights. In line with this argument, the constitutional provision for enforceable socio-economic rights, as well as provisions for checks on the exercise of governmental power, demands that an independent judiciary should enforce the promotion of socio-economic rights by the executive.[21] Indeed, the protection of these rights is no less important than the right to liberty, freedom of religion, and the preservation of property rights.[22]

Although a social contract is not specifically stated in the Constitution, it may be construed from a combined reading of sections 26-27, 38 and 172 that the judiciary is obliged to ensure that the executive branch of government is serious about the provision of basic amenities.[23] In practical terms, these amenities usually concern good roads, electricity, access to healthcare services, clean water, affordable housing, sanitation, and provision of a clean and safe environment. As this chapter will show, judges have invoked their powers of judicial review to protect the right to basic amenities. For example, in the *Dladla* case, the Constitutional Court of South Africa interpreted the right of access to housing in a way that reinforces other human rights such as the right to dignity, equality, and freedom.[24] This interpretation recognises the transformative nature of socio-economic rights adjudication.

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[20] Bilchitz, D. 'Citizenship and community: exploring the right to receive basic municipal services in Joseph' (2010) 3(1) *Constitutional Court Review* 45 -46 at 45.

[21] 165 (1) of the Constitution states: The judicial authority of the Republic is vested in the courts. (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. (3) No person or organ of state may interfere with the functioning of the courts. (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

[22] Liebenberg, S. *Socio-economic rights: Adjudication under a transformative constitution* (Juta and Company, 2010) 4-15.

[23] Section 27. (1) states: "Everyone has the right to have access to— (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance." Section 27(2) of requires government to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of socioeconomic rights.

[24] *Dladla v City of Johannesburg* (Centre for Applied Legal Studies and another as amici curiae) 2018 2 BCLR 119 (CC) pars 47–51.

5.3. Socio-economic rights and transformative adjudication

In most scholarly writings, the 1996 Constitution is portrayed as a transformative document. This is not just because of its language; it is also because of its provisions on justiciable socio-economic rights.[25] Arguably, the transformative approach calls for the interpretation of socio-economic rights in a manner that meets the minimum essentials for a dignified life. In this sense, a transformative approach resembles the concept of the minimum core.

5.3.1. The concept of the minimum core

The concept of the minimum core obligation to rights requires governments to ensure that their citizens enjoy at least essential levels of protection in their economic, social, and cultural rights.[26] This requirement is irrespective of the state's level of available resources.[27] The concept was developed in 1990 by the United Nations Committee on Economic, Social and Cultural Rights (CESCR), the body of independent experts that monitors the implementation of the International Covenant on Economic, Social and Cultural Rights by signatory states.[28] As the Committee stated, "the satisfaction of, at the very least, minimum essential levels of each of the [socio-economic] rights is incumbent upon every State party."

The concept of the minimum core operates on two principles: (a) It seeks "a common legal standard" among state parties. (b) It gives states "the latitude to implement rights over time, depending upon the availability of necessary resources, rather than requiring them to guarantee [all] rights immediately."[29] Throughout this chapter, I argue that South African courts should adopt the minimum core approach in

[25] Liebenberg, S. 'The interpretation of socio-economic rights' in Woolman S & Bishop M (eds.) *Constitutional law of South Africa* (Juta & Co. Ltd, 2006) 2.

[26] *Ibid* at 2.

[27] Limburg Principles, principle 25, which provides that "States Parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all."

[28] United Nations Committee on Economic, Social and Cultural Rights, General Comment No 3 The nature of States Parties obligations, (1990) (article 2 para 1 of the Covenant) UN Doc 12/14/1990.

[29] Young, K.G. 'The minimum core of economic and social rights: a concept in search of content' (2008) 33 *Yale Journal of International Law* 113-174 at 121.

order to enforce service delivery. This argument contrasts with the progressive approach preferred by judges.

5.3.2. Progressive realisation of rights

In simple terms, progressive realisation of rights recognises that the ability of states to provide socioeconomic rights is dependent on the availability of economic resources, and therefore is progressive. However, it is a risky approach, since resources fluctuate. Indeed, the CESCR has remarked that progressive realisation must not lead to retrogressive measures.[30] The principle of non-retrogression requires states to promote socioeconomic rights beyond constitutional provisions, but to maintain that extension once it is made. This principle has been criticised as "an extremely crude and unsatisfactory yardstick for measuring compliance with progressive achievement of the Covenant."[31] It has been argued that the principle creates a legal duty to avoid moving backwards rather than moving forward, which progressive realisation implies.[32] However, the principle could divert attention from the goal-oriented nature of progressive realisation, which is to move as expeditiously and effectively as possible towards realising socio-economic rights.[33]

In essence, the progressive realisation obligation goes further than achieving the minimum essential elements of the socio-economic rights and encompasses an obligation for a state to ensure the widest possible enjoyment of these rights on a progressive basis.[34] This requirement is irrespective of resource constraints.[35] The fact that the full realisation of most economic, social and cultural rights can be achieved only progressively does not alter the nature of the legal obligation of the state, which requires that certain steps be taken immediately to address the basic needs of the

[30] Chenwi L *'Unpacking "Progressive Realisation*", its relation to resources, minimum core and reasonableness and some methodological consideration for assessing compliance' (2013) (6)3 *De Jure* 744-746.

[31] Mary Dowell-Jones (2004) *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the economic deficits* 52.

[32] Mary Dowell-Jones (2004) 52.

[33] CESCR General Comment No. 3 para 9; General Comment No. 13, para 45; General Comment 14, para 32

[34] Chenwi L (2013) 744.

[35] *Ibid* at 743.

people. Accordingly, the burden is on the state to demonstrate that it is making measurable progress towards the full realisation of the rights in question.

The dual nature of the obligation of progressive realisation was previously recognised in the Limburg Principles of 1988.[36] All state parties have an obligation to begin immediately to take steps towards full realisation of the rights in the ICESCR.[37] It is further stipulated that some obligations under the Covenant require immediate and full implementation by state parties.[38] As mentioned above, while the ICESCR provides for progressive realisation, it also imposes on states parties various obligations which are of immediate effect. The immediate obligations of states parties under the Covenant include the obligation to guarantee that socio-economic rights will be exercised without discrimination and the obligation to take deliberate, concrete and targeted steps towards the full realisation of these rights.[39]

5.3.3. Transformative approach to socioeconomic rights

Orago's model for the realisation of socio-economic rights is useful for understanding transformative adjudication based on judicial embrace of the minimum core.[40] He submitted as follows:

> In undertaking the first stage of the analysis, which basically involves the interpretation and development of the meaning, nature, content and extent of the right in question, and the assessment of whether the offending legislation impairs or limits the defined content of the rights, the SACC has used an approach based on the text, the context and the foundational values. It involves the analysis of the right's text in context, which entails a consideration of the historical background of both the constitution and of the right; the reasons for its inclusion as a constitutional right; the concepts enshrined in the right, and their legal elaboration under national, international and comparative law; the

[36] Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights.

[37] Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights para 16.

[38] Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights para 22.

[39] CESCR General Comment No. 2: Non-discrimination in Economic, Social and Cultural Rights (article 2(2) of the ICESCR) 2 July 2009 E/C.12/GC/20, para 7.

[40] Orago, N.W. 'Limitation of socio-economic rights in the 2010 Kenyan Constitution: A proposal for the adoption of a proportionality approach in the judicial adjudication of the socio-economic rights disputes' (2013) 5 *Potchefstroom Electronic Law Journal* 170-219.

> other constitutional provisions, particularly other rights entrenched in the Bill of Rights; and, the foundational values. This stage entails the analysis of the internal demarcations/qualification of rights and their circumscription of the scope of right.[41]

Orago's approach is principled, purposive, and progressive, since it aims at developing the normative content of socio-economic rights. The development of the content of socio-economic rights can be undertaken by political institutions of the State, with the mandatory and active participation of all sectors of the society.[42] It is submitted here that the content, as developed by political institutions, can and should be subjected to improvement by the courts in the adjudication of disputes affecting socio-economic rights. As Orago noted, the advantage of judicial monitoring of the political branches and the active participation of the population in the deliberative process is to ensure that the meaning, content and scope of socio-economic rights are not frozen.[43] Rather, they should remain fluid to allow their evolution to meet societal changes as well as new forms of injustices.

The second part of Orago's model suggests that courts should adopt an expansive reasonableness approach to assess the State's legislative, policy and programmatic frameworks in order to ensure access to socio-economic rights.[44] Thus, courts should enquire whether the implementation framework for socio-economic rights adopted by the State provides for minimum levels of essential services to cater for the socio-economic needs of the most vulnerable and marginalised groups of people in the society.[45] It is further submitted that if the implementation framework fails to provide these minimum essential elements needed in any particular circumstances, then courts should, in the absence of any countervailing reasons, hold the measure or framework to be unreasonable. But if the court is satisfied that the implementation framework sufficiently promotes the minimum content of a right, it should then rely on the framework set as a reasonableness benchmark.[46]

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[41] *Ibid* at 198.

[42] *Ibid* at 195.

[43] *Ibid* at 181.

[44] *Ibid* at 209.

[45] *Ibid* at 170.

[46] An example is the Constitutional Court in *Grootboom* (para 87). See Wilson S "Breaking the tie: Eviction from private land, homelessness and a new normality" (2009) 126(2) *South African Law Journal* 270- 290 at 274-275.

The dilemma for the judiciary in South Africa (and elsewhere in the continent) is that in many cases, it is faced with disputes that require it to intrude on the principle of separation of powers by questioning the actions of the executive and legislature.[47] Accordingly, this chapter proceeds to examine the judicial attitude to the enforceability of socio-economic rights, arguing that these rights are a measure for the efficiency of service delivery in South Africa.

5.4. Judicial attitude to socio-economic rights

In the first *Certification* judgment, the Constitutional Court discussed the different kinds of socio-economic rights, the problems associated with their judicial enforcement and some of their accompanying arguments. The court affirmed that the inclusion of socio-economic rights in the Constitution may result in courts making orders that have direct implications on budgetary matters, which is outside the powers of the judiciary. However, as Pieterse observed, even when a court enforces civil and political rights such as equality, freedom of speech, and the right to a fair trial, its orders often have budgetary implications.[48]

There are two main views about the judicial attitude to socio-economic rights in South Africa. These two views can be described as the separation of powers approach and the polycentricism approach.[49] Polycentrism describes the context and outcome of adjudication, which concern a potentially vast number of interested parties in a complex and unpredictable manner.[50] Usually, a court resolves disputes between two or more parties, all of whom do their best to represent their own interests. It finds in favour of one party and against the other by applying general principles or rules of law.[51] The type of situation where the resolution of disputes gives rise to polycentric issues is where an individual winner claims victory over the loser in a manner that

[47] See, for example, Durojaye, E. (ed.) *Litigating the right to health in Africa: Challenges and prospects* (Routledge, 2016).

[48] Pieterse, M. 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20(3) *South African Journal on Human Rights* 383-417.

[49] Currie, I. and De Waal, J. *The Bill of Rights handbook* (6th ed Juta & Co. Ltd, 2013) 566.

[50] Scott, C. and Macklem, P. 'Constitutional ropes of sand or justiciable guarantees? social rights in a new South African constitution' (1992) 141 *University of Pennsylvania Law Review* 1-148 at 24.

[51] Pieterse, M. 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20(3) *South African Journal on Human Rights* 383-417 at 392.

compels others to comply with the court's decision.[52] Since budgets are limited and there are many *prima facie* valid ways to distribute resources, decisions that direct the realisation of socio-economic rights are regarded as 'preponderantly polycentric.'[53] Such litigation should preferably be reconciliatory in a manner that brings the litigants together in the hope that the issues brought against each other is resolved in a manner where all the parties emerge as victors. The polycentric enquiry entails the co-ordination of mutually interacting variables. A change in one variable will produce changes in all the others.[54] A classic example of a polycentric task is example of assignment of players in a football team to their positions. A shift of position by one of the players may have repercussions on the task being performed by other players in the team. Such tasks are not amenable to being performed by adjudication in a court of law but rather in a manner that brings about reconciliation.[55]

On the other hand, the separation of powers view holds that because socio-economic rights are claims by individuals and groups over their right to service delivery by the government, it requires the courts to direct the way in which the government distributes the state's resources.[56] As seen below, there are some views that the ability to compel a branch of government to perform a function goes beyond the scope of the power of the judiciary,[57] while others feel that courts tend to defer to the separation of powers principle.[58]

5.4.1. Socio-economic rights and separation of powers

Should the judiciary violate the legislative and executive domains in furtherance of socio-economic rights? The courts have a history of interfering in the domain of the executive, and there are arguments in favour and against their interference. Without the courts, the executive would do as it pleases. Accordingly, the judiciary is needed

[52] Currie, I. and De Waal, J. *The Bill of Rights handbook* 566.

[53] Ngwena C. 'Right of access to antiretroviral therapy to prevent mother-to-child transmission of HIV: An application of Section 27 of the Constitution (2003) 18(1) *South African Public Law* 83-102.

[54] Currie, I. and De Waal, J. *The Bill of Rights handbook* 566.

[55] *Ibid*.

[56] *Ibid*.

[57] *Ibid*.

[58] Mbazira, C. 'Appropriate, just and equitable relief in socio-economic rights litigation: The tension between corrective and distributive forms of justice' (2008) 125(1) *South African Law Journal* 71-94.

as a mechanism to protect and promote the socioeconomic rights.[59] By promoting these rights, judges also ensure that the social contract between government and the people is enforced.

Although the courts are constitutionally empowered to act as a check and balance, they have endured criticisms from the executive branch, and sometimes from other quarters of the society, where some people believe that unelected judges should not have the power to question the actions of the elected arms of government. The aforesaid can be illustrated in *Soobramooney*'s case, being a leading decision not just on the right to access health care services, but also a case in which the entire Bill of Rights was brought into question in relation to the enforcement of socio-economic rights such as the right to housing and the right to water.[60]

The duty of the court is to interpret the laws enacted by the legislature, while the executive enforces these laws for the benefit of citizens in general. Prior to 1994, parliament needed only to follow due process in enacting laws, and once the process was concluded, the courts could only interpret these laws in the form in which they were enacted.[61] Parliament was supreme, and any law it enacted could not be questioned as long as it complied with due process. However, since the advent of the new constitutional era in South Africa, the powers of parliament have been limited. The new constitutional era dictates that the court is empowered to strike out laws which are unconstitutional. Accordingly, any law passed in parliament must be consistent with the provisions of the Constitution.[62]

The new powers bestowed on the court means that the court can probe how the executive carries out its functions. However, even with the new dispensation, courts are reluctant to exercise a supervisory authority over the executive in respect

[59] Ngang, C.C. 'Judicial enforcement of socio-economic rights in South Africa and the separation of powers objection: The obligation to take other measures' (2014) 14(2) *African Human Rights Law Journal* 660-662.

[60] *Soobramoney v Minister of Health.*

[61] Currie, I. and De Waal, J. *The Bill of Rights Handbook* (2013) 2-3.

[62] See Section 2 of the South African Constitution. It states that: "*This Constitution is the supreme law or the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."*

of the enforcement of socio-economic rights.[63] The attitude of the courts appears to be rooted in the need to preserve the boundaries of separation of powers among other reasons such as the argument that the courts are ill-suited to adjudicate socio-economic rights because the litigation of these rights is polycentric.[64]

The courts have categorically stated that the right to interpret the laws enacted by parliament does not include the right to direct and make decisions that will breach the principle of separation of powers. For instance, the courts have tended to defer to the executive branch of government with regard to issues on budgetary allocation.[65] This view was also affirmed by the Constitutional Court during its certification of the draft text of the 1996 Constitution, when it acknowledged that although socio-economic rights are justiciable, their inclusion in the Constitution would have direct financial and budgetary implications.[66] It is therefore evident from the foregoing that judicial interference in the enforcement of socio-economic rights might distort the doctrine of separation of powers. Therefore, in order to uphold the aforesaid doctrine, the courts have exercised caution in their approach to the issue.[67]

On the one hand, it is argued that judicial encroachment on the state's obligation to enforce socio-economic rights might distort the functioning of the doctrine of separation of powers and lead to serious financial implications. On the other hand, some scholars contend that financial and budgetary implications should not be used as a bar to the enforcement of socio-economic rights.[68] Bilchitz, for example, argues that it will only be 'reasonable' for the court, as the primary authority responsible for the conclusive interpretation of the Bill of Rights, to decide such cases when they come before it.[69] He argues further that such avoidance amounts to an abrogation of its role

[63] Bohler-Muller, N. et al. 'Life after judgment: The Nokotyana case re-examined' (2018) 36(1) *Journal of Contemporary African Studies* 143-159.

[64] Davis, D., Halton, C. and Haysom, N. *Fundamental rights in the Constitution: Commentary and cases* (Cape Town: Juta, 1997).

[65] Mbazira, C. *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (Pretoria University Law Press, 2009) 208.

[66] Olivier, M. 'Constitutional perspectives on the enforcement of socio-economic rights: Recent South African experiences' (2002) 33(1) *Victoria University of Wellington Law Review* 117-152 at 133.

[67] *Ibid* at 133.

[68] *Ibid* at 133.

[69] Bilchitz, D. 'Citizenship and community: Exploring the right to receive basic municipal services in Joseph' (2010) 3(1) *Constitutional Court Review* 45-78 at 51.

by the court.[70] Thus, it is important for the courts to step in and enforce these rights as mandated by the Constitution in those instances where the executive and legislative branches of government have ignored their constitutional obligations.[71] As a branch of government, the judiciary has a duty to enforce the inherent social contract in the Constitution between the electorate and their elected representatives.

In any case, it is worthwhile to examine arguments in favour and against courts' interference.[72] Without the courts using their constitutional powers of checks and balances, the executive will do whatever it pleases with regards to access to basic services, which underpins socio-economic rights.[73] If there were no mechanisms available to curtail and check the state's actions, the people may be at the mercy of government inaction or adverse actions regarding basic services.[74] Generally, there are those who believe that unelected judges should not have the power to question the actions of elected representatives in the legislative and executive branches of government.[75] Even judges outside the Constitutional Court share this view. This is evident in the *Soobramoney's* case,[76] where the High Court in Pietermaritzburg failed to order the government to provide the applicant with life-saving dialysis.[77] The court reasoned that the separation of powers doctrine prevents one branch of government from usurping the powers of another branch. According to it, the duties of the courts are to interpret the laws enacted by the legislature, while the executive enforces these

[70] *Ibid* 45 at 52.

[71] Mbazira, C. *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (Pretoria University Law Press, 2009) 235.

[72] Sewpersadh, P. and Mubangizi, J.C. 'Judicial review of administrative and executive decisions: Overreach, activism or pragmatism?' (2017) 21(1) *Law, Democracy and Development* 201-220.

[73] Labuschagne, P. 'The doctrine of separation of powers and its application in South Africa' (2004) 23(3) *Politeia* 84-102.

[74] Ngang, C.C. 'Judicial enforcement of socio-economic rights in South Africa and the separation of powers objection: The obligation to take other measures' (2014) 14(2) *African Human Rights Law Journal* 655-680 at 660-662.

[75] Waldron, J. 'The core of the case against judicial review' (2006) 115(6) *Yale Law Journal* 1346-1407, Friedman, B. 'The birth of an academic obsession: The history of the counter majoritarian difficulty, part five' (2002) 112(2) *Yale Law* Journal 153-260.

[76] *Soobramoney v Minister of Health para* 29.

[77] *Ibid* at para 30.

laws for the benefit of the society. Combrinck J cited the English case of *R (B)* v *Cambridge Health Authority* as follows:[78]

> I have no doubt that in a perfect world any treatment which a patient, or a patient's family, sought would be provided if doctors were willing to give it, no matter how much it cost, particularly when a life was potentially at stake. It would however, in my view, be shutting one's eyes to the real world if the court were to proceed on the basis that we do live in such a world. It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like; they cannot provide all the treatments they would like; they cannot purchase all the extremely expensive medical equipment they would like; they cannot carry out all the research they would like; they cannot build all the hospitals and specialist units they would like. Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make.[79]

It is worth recalling the South African practice prior to 1994. Then, Parliament needed only to follow due process in enacting laws. Once that was done, the courts had no choice than to interpret these laws in the form in which they were enacted by the legislature.[80] Currie *et al* submitted that "it was not possible to declare an Act of parliament invalid because it violated human rights. Moreover, the three South African constitutions that preceded the interim Constitution were, in most respects, little different from ordinary Acts of Parliament."[81] They did not have supreme status and Parliament was free to amend them by ordinary procedures.[82] Thus, an Act of Parliament was supreme and any law that was enacted by it could not be questioned at all if it complied with the due process of enacting laws. However, since the introduction of the new constitutional dispensation in South Africa, the powers of

[78] *R* (*B*) *v Cambridge Health Authority* [1995] EWCA Civ 43.

[79] *Soobramoney* case at para 31.

[80] Currie, I. and De Waal, J. *The Bill of Rights handbook* (6th ed Juta & Co, 2013) 566.

[81] *Ibid* at 3.

[82] *Ibid*.

parliament have been limited by making the Constitution the supreme law instead of parliament.[83] This is significant for judicial promotion of socio-economic rights.

The new democratic dispensation is based on "constitutionalism, the rule of law, democracy and accountability, separation of powers and checks and balance, co-operative government and devolution of powers".[84] Unlike previous constitutions, the courts are statutorily empowered to strike out laws which are unconstitutional. This implies that any law that is passed by parliament must be consistent with the provisions of the Constitution or risk being struck down by the courts.[85] The new duty that has been vested on the courts mean that the courts can now enquire more deeply into the laws passed by parliament and can also enquire how the executive carries out its obligation to deliver basic services. Arguably, this duty lessens the separation of powers argument, especially in the light of South Africa's history.

Butt argues that "the unprecedented scale of public participation," which accompanied the transition to democracy, along with the "fundamentally transformative" nature of South Africa's Constitution, indicate the existence of a "social contract of transformative constitutionalism."[86] Christiansen showed how purposive interpretation and creative use of the Constitution's transformative language can advance justice.[87] Since the Constitution is clear on its expectations from government officials, there is a strong case for the idea of a binding social contract that demands judicial enforcement of socioeconomic claims. This argument finds support in theories of justice. For example, some scholars have argued that socioeconomic or distributive

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[83] *Tlouamma and Others v Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa* and Another (A 3236/15) [2015] ZAWCHC 140; 2016 (1) SA 534 (WCC); [2016] 1 All SA 235 (WCC); 2016 (2) BCLR 242 (WCC) (7 October 2015) at para 18.

[84] Currie, I. and De Waal, J. *The Bill of Rights handbook* 7.

[85] Section 2 of the South African Constitution. It states that: "*This Constitution is the supreme law or the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."*

[86] Butt, D. 'Transformative constitutionalism and socio-economic rights: Courts and the making of public policy and the social contract revisited' (2008) *Centre for Socio-Legal Studies* 1-12 at 2; available at <https://www.fljs.org/transformative-constitutionalism-and-socio-economic-rights-0> (last accessed 19 December 2021).

[87] Christiansen, E.C. 'Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice' (2009) 13 *Journal of Gender, Race and Justice* 575-614 at 577.

equality is “a necessary implication of the foundational moral commitments of a theory of justice.”[88]

Regrettably, despite the transformative tone of the Constitution, courts are still reluctant to exercise significant supervisory authority over the executive in respect of the enforcement of socio-economic rights. Other than budgetary implications, this reluctance appears to be rooted in the desire of judges to preserve the boundaries of powers, which they hide under the justification that the courts are ill-suited to adjudicate socio-economic rights.[89] The courts have categorically stated that the right to interpret the laws enacted by the parliament does not include the right to direct executive decisions that will breach the principle of separation of powers.[90] For example, the courts have been very careful not to overly disturb the executive branch of government with regard to issues of budgetary allocation.[91] This situation has been present even in the early days of democracy when judges handed down several judgments like Makwanyane, which were hailed for their transformational outlooks.[92]

Judicial deference to the exercise of executive power was affirmed by the Constitutional Court in its certification of the draft text of the 1996 Constitution. In its judgement, the Court acknowledged that although socio-economic rights are justiciable, their inclusion in the Constitution would have serious oversight and budgetary implications.[93] It is evident from the Court’s reasoning that judicial interference to ensure the delivery of basic services might distort the doctrine of separation of powers.

Finally, while it is accepted that judicial intervention in the executive’s obligation to deliver basic services might distort the doctrine of separation of powers and produce serious financial implications, it is also sensible that these drawbacks should not be used as a bar for the justiciability of socio-economic rights. This is because similar

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[88] Blake, M. and Risse, M. ‘Two models of equality and responsibility’ (2008) 38 (2) *Canadian Journal of Philosophy* 165–199 at 167.

[89] *Tlouamma and Others v Mbethe* case at para 20.

[90] Currie, I. & De Waal, J*. The Bill of Rights handbook* (5th Edition, 2005) 8.

[91] Mbazira, C. *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (Pretoria University Law Press, 2009) 208.

[92] *State* v *Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391.

[93] Olivier, M. ‘Constitutional perspectives on the enforcement of socio-economic rights: Recent South African experiences’’ (2002) 33(1) Victoria *University of Wellington Law Review* 117-152 at 133.

arguments could be made in respect of civil and political rights.[94] Thus, it is important for the judiciary to step in and ensure that these rights are enforced as mandated by the Constitution in those instances where the executive and legislative branches of government ignore their constitutional obligations to the people.[95] This argument is especially relevant to the minimum core approach to the justiciability of socio-economic rights, where judicial intervention is needed to secure the most basic needs needed for survival by the most vulnerable and impoverished members of society.

5.5. Judicial attitude to the minimum core concept

Drawing from the work of the Committee on Economic, Social and Cultural Rights, Diala identified three elements that underlie the notion of minimum core obligations.[96] Firstly, "the concerned government policy must be reasonable or realistic. Second, it must be measurable or assessable. Finally, it must be sustainable."[97] The manner these elements feature in South Africa's constitutional adjudication is unclear. Although this is mainly due to the varying contexts of the individual cases, the judicial attitude converges on the thorny issue of what constitutes 'reasonableness' of the measures taken by the State within its available resources. In what follows, I examine this issue, starting with one of the earliest and foundational judgments on the subject.[98]

5.5.1. Certification Judgment

The end of apartheid was like a rebirth for South Africa's governance system. There was need for new democratic institutions, especially judicial and legislative structures. Accordingly, one of the first major tasks for political leaders was to form a government of national unity and articulate a constitution to guide the nation pending the election of people's representatives. This was achieved on 27 April 1994 with a temporary

[94] Olivier, M. 'Constitutional Perspectives on the Enforcement of Socio-Economic Rights: Recent South African Experiences' (2002) 33(1) Victoria *University of Wellington Law Review* 117-152 at 133.

[95] Mbazira, C. *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (Pretoria University Law Press, 2009) 235.

[96] Diala, A.C. 'Lessons from South Africa in judicial power and minority protection' (2011) 1 *Madonna University Law Journal* 164-187 at 186.

[97] *Ibid* at 186.

[98] Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (CCT37/96) [1996] ZACC 24; 1997 (2) SA 97 (4 December 1996).

document known as the 1993 Interim Constitution. The Interim Constitution was designed by the negotiating parties as a bridge between the old order and the new order. Eventually, a Constitutional Assembly (CA) made up of all political parties adopted a new constitution in 1996. Two things are notable about this constitutional process.

Firstly, Schedule 4 of the Interim Constitution required the new constitutional text to comply with a set of Constitutional Principles [CPs] that were adopted by the negotiating parties. Secondly, the Interim Constitution subjected the legal force of the new text to a validation process by the Constitutional Court. This subjection to judicial scrutiny was to ensure that all the provisions of the new law complied with the Constitutional Principles. As shown shortly, some of these principles primarily concern the justiciability of socio-economic rights and the separation of powers between the branches of government.

Generally, the Certification Judgment comprises of eight chapters focussing on themes under various subheadings. It explained the background of the Court's unique certification exercise, its methodology for executing its task, and the specific themes that inform the certification exercise. In sum, these themes concern the provisions in the Bill of Rights, the separation of powers between the executive, legislature and judiciary, the independence of the judiciary, the relationship between the national, provincial and local governments, the position of traditional leadership and customary law, and the functions and independence of democratic monitors.[99] The ensuing discussion focusses on socio-economic rights and separation of powers only.

Sections 26, 27, and 29 of the new text provide for the rights of access to housing, health care, sufficient food and water, social security and basic education. Section 28 accords these rights specifically to children, along with other demands that promote the best interest of the child principle. The inclusion of these rights in sections 26-29 became the subject of objections during the hearing on the ground that they are socio-economic rights. The first objection to their inclusion was that they are not universally accepted fundamental rights.[100] The second objection was that their inclusion is inconsistent with the separation of powers doctrine because the judiciary would intervene in the functions of the legislature and executive. As it was argued,

[99] These monitors are known as chapter nine institutions of the state.

[100] Certification of the Constitution of the Republic of South Africa para 76.

judicial enforcement of socio-economic rights would result in the courts micromanaging the government, including on delicate issues such as budgetary allocation. In considering these arguments, the Court stated:[101]

> It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred 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.

The Court ruled that objections to the inclusion of socio-economic rights in the new text cannot be sustained because the constitutional principles allow the Constitutional Assembly to supplement the universally justiciable civil and political rights with other rights that are not universally justiciable. However, the Court stopped short of affirming the notion of a minimum core in socio-economic rights litigation. The closest it came to this affirmation is the statement that "at the very minimum, socio-economic rights can be negatively protected from improper invasion."[102] This statement needs to be contextualised within the constitutional right to dignity, as well as international human rights instruments applicable to South Africa.

The enforcement of socio-economic rights is seldom carried through by the State, which usually hides behind a lack of resources and the principle of separation of powers as reasons for not complying with these rights.[103] Of the numerous court cases that illuminate the normative content of the right to basic services in South Africa, the Grootboom case is prominent. Its analysis below shows the judicial attitude to availability of resources and respect for the principle of separation of powers.

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[101] *Ibid* at para 77.

[102] *Ibid* at para 78.

[103] Mbazira, C. *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (Pretoria University Law Press, 2009) 202.

5.5.2. Grootboom case

The applicants in Grootboom were a poor community of 390 adults and 510 children who lived in a slum in Wallacedene.[104] Unhappy with their miserable living conditions, they illegally occupied a land allocated for a low-cost housing development. When they were evicted from there, they occupied a sports field and a nearby community hall. Later, they applied to the High Court under section 26 of the Constitution to order the State to provide them with adequate basic shelter pending when they would secure permanent accommodation. The High Court rejected their request, but indirectly granted it under section 28 by ordering the State to provide their children (and accompanying parents) with the 'bare minimum' shelter.[105] The court interpreted this bare minimum as the provision of tents and potable water. On appeals by the State to the Constitutional Court, the issue turned on the 'reasonableness' of the measures taken by the State to fulfil its obligations under section 26 of the Constitution. In reaching its decision, the Court, per Yacoob J, acknowledged the role of the judiciary in guaranteeing the fulfilment of socio-economic rights:

> I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.[106]

However, the Court refused to adopt the concept of the minimum core, opting instead for the reasonableness yardstick. It ruled that the term "progressive realisation" implies that it was contemplated that the right to housing could not be realised immediately. However, it conceded that since the goal of the Constitution is that the basic needs of everyone should be effectively met, "the requirement of progressive realisation means

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[104] *Government of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

[105] In doing this, it adopted the approach of the Committee on Economic, Social and Cultural Rights (ESCR Committee) in relation to the International Covenant on Economic, Social and Cultural Rights. The ESCR Committee had defined the substance of the right to adequate housing by reference to its 'minimum core.' *See* ECOSOC Committee General Comment No. 3, para 10.

[106] *Government of the Republic of South Africa v Grootboom,* para 94.

that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time."[107] Ultimately, the Court used the language of reasonableness to achieve what the minimum core concept would have achieved.[108] In regard, a commentator observed as follows:

> In determining reasonableness, the Court held that the existing programme was inadequate since it failed to cater for homeless and desperately poor communities such as the respondents. It therefore declared that government had breached its obligation to devise and implement within its available resources, a ''comprehensive and coordinated programme'' to realise progressively the right of access to adequate housing.[109]

The Court's reasons for rejecting the minimum core centred on the difficulty of determining the minimum contents of rights and the fact that societal needs are diverse and people are differently situated. Importantly, it considered its own lack of institutional competence to make such decisions without raising democratic concerns.[110] This last consideration questions the meaning of "progressive realisation" from a South African constitutional perspective.

Arguably, the manner courts treat the progressive realisation of rights by the State ought to be founded on the interrelatedness of human rights. In this regard, the 1993 World Conference on Human Rights in Vienna is relevant. The conference declared, among others, that "All human rights are universal, indivisible, interdependent and interrelated." An argument can be made that if the government is not meeting certain elements of the reasonableness test, it could be assumed that it is not working towards the progressive realisation of the right in question. In other words, the reasonableness test is a key marker of the minimum core concept, as evident in the *Treatment Action Campaign* case.[111]

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[107] *Ibid* at para 45.

[108] Chenwi, L. 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46(3) *De Jure* 742-769 at 747.

[109] Diala, A.C. 'Lessons from South Africa in judicial power and minority protection' (2011) 1 *Madonna University Law Journal* 164-187 citing para 99.

[110] *Government of the Republic of South Africa v Grootboom & Others* para 32-33.

[111] *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC).

5.5.3. Treatment Action Campaign case

Here, a non-profit organisation questioned the constitutionality of the State's programme on mother to child transmission (MTCT) of HIV. This programme started in July 2000 with the administration of an anti-retroviral drug called Nevirapine in two selected sites in each province. After its initial pilot phase of two years, the state aimed to extend it to other public facilities through a national policy developed in the pilot phase. However, State doctors outside the pilot sites could not access Nevirapine. The High Court ordered the State to extend its MTCT programme by making Nevirapine available to all HIV positive pregnant women whenever it is medically recommended. It also ordered the State to develop a comprehensive national programme on the prevention or reduction of MTCT of HIV.

The State appealed, arguing that the decision violated the doctrine of separation of powers. In response, the TAC argued that government's policy was irrational for two reasons. Firstly, it discriminated against women who could not travel to the pilot research sites. Secondly, Nevirapine was offered free (for five years) by drug companies and had been approved as safe by relevant health agencies. The Constitutional Court unanimously rejected the appeal. It acknowledged that "although the legislature and executive are the primary formulators of policy, courts can 'make orders that have an impact on policy' in furtherance of constitutional values of life and dignity."[112] The Court ordered the State to remove its restrictions on Nevirapine and to facilitate its availability and use in public hospitals whenever it is medically prescribed. In its words: "The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that affect the poor in our society [and] guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness".[113]

The Court's order for the State to move beyond legislative measures by enacting well-reasoned policies and programmes indicates a progressive approach to socio-economic rights enforcement. Similarly, the requirement that these policies and

[112] Diala, A.C. 'Courts and transformative constitutionalism: Insights from South Africa' in Sterett, M. and Walker, L. (eds.) *Research Handbook on Law and Courts* (Edward Elgar, 2019) 95-104, citing para 98 of the judgement.

[113] *Ibid* at para 36.

programmes should meet short, medium, and long-term needs reflects the progressive approach. However, scholars believe that reasonableness is context-specific.

For example, Pejan and others argued that progressive realisation and reasonableness of programmes remain difficult issues for the courts in their interpretation of socio-economic rights.[114] Within the context of access to basic services, the factors that should be considered to determine what is reasonable will require a contextual inquiry, taking into consideration needs, available resources, and social and political will.[115] Nevertheless, it is submitted here that the relationship between progressive realisation and reasonableness offers a valuable framework for the interpretation of access to basic services. Further, it provides a framework to guide those who evaluate the implementation of socioeconomic rights.[116]

The reasonableness test also featured prominently in the *Soobramoney* case, as discussed below.[117]

5.5.4. Soobramoney v Minister of Health case

This case concerned an old, unemployed diabetic patient, whose kidneys failed due to heart problems. In fact, he was in the final stages of chronic renal failure and his life could be prolonged only by means of regular renal dialysis. He had sought treatment from the renal unit of a state facility in Durban known as Addington Hospital. It could not help him. Due to limited resources, it operated a policy of admitting only patients with a chance of being cured within a short period, including patients with chronic renal failure who are eligible for a kidney transplant. Mr Soobramoney was not eligible because of his bad heart. In any case, the hospital only had the capacity to provide dialysis treatment to a limited number of patients. Indeed, evidence was led that the renal unit's 20 dialysis machines were not a true reflection of reality, as some were in poor condition. "Each treatment took four hours, and a further two hours had to be

[114] Pejan, R., Du Toit, D. and Pollard, S. 'Using progressive realization and reasonableness to evaluate implementation lags in the South African water management reform process' in (Kidd, M., Feris, L., Murombo, T. & Iza, A. eds.) *Water and the law: Towards sustainability* (Edward Elgar, 2014) 305-330.

[115] *Ibid* at 328.

[116] *Ibid* at 305–330.

[117] *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).

allowed for the cleaning of a machine, before it could be used again for another treatment."[118] The appellant's application at the Durban High Court to compel Addington Hospital to provide him with the required treatment was dismissed. He appealed to the Constitutional Court.

The Constitutional Court differentiated the right not to be refused emergency medical treatment from the right to treatment for chronic conditions. In sum, it found that dialysis treatment of two to three times a week was not an emergency situation that demanded immediate remedial action. By implication, it was unreasonable for the treatment of terminal illnesses to be prioritised over other forms of preventative health care in the face of serious budgetary constraints. Significantly, the Court held that the responsibility for making "agonising" policy decisions on health budgets lay with political organs and medical authorities.[119] So long as these decisions are rational and taken in good faith, the Court would be slow to interfere. In this regard, Chaskalson P stated as follows:

> If section 27(3) were to be construed in accordance with the appellant's contention, it would make it substantially more difficult for the State to fulfil its primary responsibility under section 27(1) and (2) to provide health care services to "everyone" within its available resources. It would also have the consequence of prioritising the treatment of terminal illnesses over other forms of medical care and would reduce the resources available to the State for purposes such as preventative health care and medical treatment for persons suffering from illnesses or bodily infirmities which are not life threatening. In my view, much clearer language than that used in section 27(3) would be required to justify such a conclusion.[120]

An important point to note from the decision in *Soobramoney* is that the court acknowledges the necessity of rationing basic services as an unavoidable reality of limited resources.[121] Sachs J observed: "In all the open and democratic societies based upon dignity, freedom and equality with which I am familiar, the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible

[118] *Ibid* at para 10.

[119] *Ibid* at para 57-58.

[120] *Ibid* at para 19.

[121] See Section 27(2) & 39 of the Constitution. See also NHI Note 5, (2010) 1.

with, a human rights approach to health care".[122] Rationing appears to be permitted by the Constitution, which prescribes the role of the executive as follows: "The state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of the rights in the Bill of Rights."[123] On the meaning of the right to life in the context of life-prolonging healthcare services, Sachs J stated:

> However, the right to life may come to be defined in South Africa, there is in reality no meaningful way in which it can constitutionally be extended to encompass the right indefinitely to evade death. As Stevens J put it: 'dying is part of life, its completion rather than its opposite.' We can, however, influence the manner in which we come to terms with our mortality. It is precisely here, where scarce artificial life-prolonging resources have to be called upon, that tragic medical choices have to be made.[124]

From Sachs J's judgement, the right of a person in a vegetative state to be maintained indefinitely with scarce health equipment is untenable. However, the Soobramoney case raises the issue of assisted death through the withdrawal of life support. In certain circumstances, such action amounts to criminal conduct because euthanasia is not permitted by law.[125] The hard question is how, in a country with shortage of healthcare personnel, one can justify keeping a patient "alive" when the nursing staff and hospital equipment is required for other patients who have a good chance of recovery. At present, it appears that an answer to the question of euthanasia lies somewhere between the fact that the right to life does not include the right to indefinitely evade death and the moral convictions of society upon which issues of reasonableness and service delivery depend.

Ever since the *Grootboom* and *Soobramoney* cases, the Constitutional Court has consistently refused to apply the minimum core concept. Even when it is presented with an opportunity to expand its reasonableness approach, it fails to take it. Two judgements further illustrate its attitude in this regard.

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[122] *Ibid* at para 52.

[123] Sections 26 and 28(1)(c). see also de Vos, P. et al (2015) 684.

[124] *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997) para 57.

[125] Milton, J. *South African Criminal Law and Procedure* (Juta& Co Ltd, 2008) 321.

5.5.5. Mazibuko v City of Johannesburg

This case is the first to request the Constitutional Court to interpret section 27(1)(b) of the Constitution concerning the right of access to sufficient water.[126] The applicants were five residents of Phiri in Soweto, who were very poor people living in separate households. There were two major issues in dispute. The first is whether the City's policy of supplying only 6 kilolitres of free water per month to every accountholder in the city (the Free Basic Water policy) conflicts with section 27 of the Constitution and/or section 11 of the Water Services Act. The second issue is the lawfulness of the pre-paid water meters installed by the City of Johannesburg in Phiri. In early 2014, (eighteen months before the case), the City had piloted Operation Gcin'amanzi in Phiri to address the severe problem of water losses and non-payment for water services in Soweto. This project involved re-laying old water pipes and installing pre-paid meters to reduce wastage of water and charge consumers for any use of water in excess of their free 6 kilolitre per household monthly allowance. For the purposes of this dissertation, the issue was whether 6 kilolitres of free water per month (a little over 25 litres per day) for every household (irrespective of the number of its inhabitants) satisfies the minimum core of the right of access to water in section 27 of the Constitution.

The applicants succeeded in the South Gauteng High Court, which found that the Free Basic Water policy and the installation of pre-paid water meters in Phiri was unreasonable and unfair respectively. It ordered the City to provide 50 litres of free basic water daily to the applicants and "similarly placed" residents of Phiri. The Supreme Court of Appeal amended this order to 42 litres of water per day, holding that this quantity is "sufficient water" within the meaning of the Constitution. It ordered the City to reformulate its policy accordingly.

At the Constitutional Court, the City provided a detailed account of how Operation Gcin'amanzi was adopted and implemented, especially its consultative processes with the concerned communities. Also, it explained the review processes of its Free Basic Water policy, including the provision of assistance to alleviate the levies for other municipal services such as electricity, refuse removal, and sanitation. The Constitutional Court held that the Free Basic Water policy satisfied the concept of

[126] *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC).

progressive realisation obligation placed on the state by section 27 of the Constitution. in rejecting the minimum core concept, it ruled that it was inappropriate for the High Court and the Supreme Court of Appeal to give a quantified content to what constitutes "sufficient water" because it is a matter best addressed by the state.[127] Since the City had exceeded the national government stipulation of 25 litres per person daily, it ruled that its Free Basic Water policy is reasonable.

Significantly, the Constitutional Court went to great lengths to distinguish its decision from the reasonableness precedent it established in the Grootboom and Treatment Action Campaign cases. In its own words, "The orders made in these two cases illustrate the Court's institutional respect for the policy-making function of the two other arms of government. [In both] the Court did not seek to draft policy or to determine its content."[128]

However, it appears that the Constitutional Court seeks to avoid interfering in executive decisions, unless such interference is completely unavoidable. As evident in the *Nokotyana* case, it deliberately ignored an opportunity to adopt its reasonableness test.

5.5.6. Nokotyana v Ekurhuleni Municipality

Here, the applicants, led by Mr Nokotyana, belonged to the Harry Gwala Informal Settlement (Settlement) located near the Wattville Township in Gauteng Province.[129] On behalf of residents of the Settlement, they requested the South Gauteng High Court to order the Ekurhuleni Municipality to provide them with sanitation and lighting until a decision is taken by the Member of the Executive Council for Local Government and Housing for Gauteng on whether the Settlement would be upgraded to a formal township. In August 2006, the Municipality had submitted a proposal for its upgrading. However, due to bureaucratic bottlenecks, a final decision had not yet been taken. Specifically, the applicants asked the Municipality to install (1) communal water taps, (2) temporary sanitation facilities, (3) refuse removal facilitation, and (4) high-mast lighting in key areas. The Municipality had offered them one chemical toilet per ten

[127] *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC) para 60-61.

[128] *Ibid* at para 65.

[129] *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* 2009 ZACC 33; 2010 (4) BCLR 312 (CC).

families to replace their pit latrines. The applicants rejected this, demanding instead for "ventilated improved pit latrines" ("VIP" latrines) per household.[130]

Acting on the Municipality's agreement to provide taps and refuse removal services, the High Court ordered it to provide those services. However, it refused to grant the order for sanitation services and high-mast lighting. At the Constitutional Court, the applicants argued that the Municipality had failed to ensure their right of access to adequate housing under section 26 of the Constitution and the National Housing Code. They claimed that the minimum core of the right to basic sanitation and lighting is one VIP latrine per one or two households, as well as high-mast lighting per street. During trial, the state undertook to help the Municipality to provide one chemical toilet per four households in the Settlement.

In a unanimous judgment delivered by Van der Westhuizen J, the Constitutional Court rejected the minimum core argument as unclear and inappropriate. It upheld the High Court's finding that Chapters 12 and 13 of the National Housing Code were inapplicable, as they concern only emergency situations and upgraded townships. Significantly, it failed to examine the reasonableness of the Municipality's new policy, holding that it was inappropriate to do so because the case had changed fundamentally in the course of the appeal. Without expanding the standard that it laid down in the Grootboom case, it also refused to order the Municipality to accept provincial and national government assistance to improve the lives of the applicants. This is because such an order would not be just and equitable, since the state lacks the resources to assist hundreds of other informal settlements who are in a similar situation as the applicants.

Scholars such as Chenwi have criticised the reasonableness approach, arguing that the minimum core concept should be regarded as an aspect of the progressive realisation of socio-economic rights.[131] Notwithstanding criticisms of its approach to socio-economic rights, there is general acknowledgement of the important role of the Constitutional Court in ensuring that the obligation to provide basic services is

[130] The court noted the irony of the VIP acronym in the introductory segment of the judgement.

[131] Chenwi, L. 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46(3) *De Jure* 742-769 at 747 and 754.

effectively discharged by the state for the benefit of the people. In this regard, Fuo et al' observed:

> While the criticism regarding the minimum core of socio-economic rights has to date mostly been directed at the reasoning and methodology of the judicial arm of government, a potential alternative seems to have been downplayed. The Constitution in essence makes it the primary responsibility of the legislature and executive (not the judiciary) to give concrete content to the socio-economic rights in the Bill of Rights.[132]

The insistence of judges on using the reasonableness approach may be contrasted with the judicial approach to socio-economic rights in Latin America. The remainder of this chapter analyses the significance of the Latin American style for the enforcement of socio-economic rights in South Africa.

5.6. Lessons from Latin America

Latin America has gained notoriety for the enforcement of socio-economic rights that affect the delivery of basic services by the state.[133] Accordingly, there are several advantages in comparing the judicial approach to socio-economic rights in South Africa and this region.

Firstly, the constitutions of South Africa and Latin America emerged from lengthy struggles against repressive and violent regimes. Indeed, in the 1970s, the form of dictatorship in most of the countries in Latin America was so brutal that judges were practically caged.[134] Significantly, socio-economic rights remained in constitutions during authoritarian regimes. For example, article 19 of the Chilean Constitution of 1980 recognised the rights to education, health, work, clean environment, social security, and labour unions. Arguably, the culture of rights enabled Latin American democracies to emerge stronger from authoritarian rule. Currently, "nearly all the countries are democratic, and the region is experiencing the most stable

[132] Fuo, O. and Du Plessis, A. 'In the face of judicial deference: Taking the "minimum core" of socio-economic rights to the local government sphere' (2015) *19 Law, Democracy and Development* 1-28.

[133] See, generally, *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* Armin von Bogdandy et al., eds. (New York: Oxford University Press, 2017).

[134] Hammergren, L., *Envisioning reform: Conceptual and practical obstacles to improving judicial performance in Latin America* (Pennsylvania State University Press, 2007).

and sustained period of democracy in its history."[135] Indeed, the constitutions of Venezuela, Ecuador, and Bolivia have expanded socio-economic rights to include new rights such as environmental and indigenous rights.[136]

Secondly, almost all Latin American constitutions contain elaborate provisions on socio-economic rights. As Jung and others argued, the constitutions in this region contain more justiciable socio-economic rights than any other region of the world.[137] Interestingly, this trend dates to the early twentieth century. For example, the Mexican constitution of 1917 is one of the first constitutions in the world to include socio-economic rights.[138] Their constitutional entrenchment is irrespective of the type of political ideology that underpins their system of governance. Unlike South Africa whose liberal economic system is relatively recent, countries such as Guatemala, Costa Rica, and Colombia have long based their constitutional inclusion of socio-economic rights on liberal reformist movements. Although initially restricted, these rights are now largely as justiciable as they are in South Africa. For example, judges in Colombia have acquired a reputation for granting many petitioners the individual remedies they request against the state.[139] This is notwithstanding the fact that article 86 of the 1991 Constitution of Colombia limits the individual complaint mechanism ('tutela') to "fundamental rights" without defining these rights and whether their mode of enforcement extends to socio-economic rights.[140] Like South Africa, also, Latin

[135] Brinks, D.M. and Forbath, W. 'Social and economic rights in Latin America: Constitutional Courts and the prospects for pro-poor interventions' (2010) 89(7) *Texas Law Review* 1943-1955 at 1948, citing Mainwaring, S., Brinks, D. and Pérez-Liñán, A. 'Classifying political regimes in Latin America'(2004) 1945,in *Regimes and democracy in Latin America: Theories and methods* (Oxford University Press Oxford ,2007) 123-160.

[136] King, P. 'Neo-Bolivarian Constitutional Design' in Denis J. Galligan and Mila Versteeg (eds) *Social and political foundations of Constitutions* (New York: Cambridge University Press, 2013) 366-397.

[137] Jung, C., Hirschl, R. and Rosevear, E. 'Economic and social rights in national constitutions' (2014) 62(4) *American Journal of Comparative Law* 1043-1094.

[138] Andrew, N. and Cleven, N. 'Some social aspects of the Mexican Constitution of 1917' (1921) 4(3) *The Hispanic American Historical Review* 474-485.

[139] Landau, D. 'The Colombian model of structural socio-economic rights remedies: Lessons from and for comparative experience' in Cantillo, A.L., Valdivieso-León, C. and García-Jaramillo, S. (eds.) *Constitutionalism: Old dilemmas, new insights* (Oxford University Press, 2021) 258-276.

[140] Conversely, article 20 of the 1980 Constitution of Chile expressly excluded socioeconomic rights from the scope of individual complaints. For analysis, see Tushnet, M. 'State action, social welfare

American constitutions contain constitutional values that purport to promote democracy.

Thirdly, the legal systems of Latin America operate in developmental political economies. Like South Africa, countries such as Argentina, Brazil, Chile, Mexico, Peru, and Venezuela have experienced sporadic bursts of development, during which their economies expanded. However, they later shrunk due to corruption, fiscal crises, and general political upheaval that produces social instability.[141] Also, these legal systems are anchored on constitutional supremacy. In this sense, they share with South Africa a long-standing tradition of judicial review. For example, all Brazilian judges and tribunals can exercise judicial review. The Federal Supreme Court plays a very special role, not only as the last court of appeal in the hierarchy of the nation but also as a constitutional court. Both concrete and abstract review are within the jurisdiction of the Supreme Court.[142] These provisions are similar to section 172 of the South African Constitution, which provides for the powers of courts in constitutional matters.

5.7. Judicial attitude to the minimum core in Latin America

Like South Africa, Latin American countries generally draw the traditional distinction between first generation rights (that is civil and political) and socio-economic rights. This is largely due to the influence of the American Convention on Human Rights and its accompanying Protocol.[143] Article 26 of this Convention states as follows:

> The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the

rights, and the judicial role: Some comparative observations' (2002) 3(2) *Chicago Journal of International Law* 435-454.

[141] Hill, T.H. 'Introduction to law and economic development in Latin America: A comparative approach to legal reform' (2008) 83(1) *Chicago-Kent Law Review* 3-24.

[142] See Article 103-A of the Constitution Federative of the Republic of Brazil 2010.

[143] American Convention on Human Rights, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969) and Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador), OAS Treaty Series No. 69 (1988).

Organization of American States as amended by the Protocol of Buenos Aires.[144]

Initially, the jurisprudence of the Inter-American Court on Human Rights rigidly distinguished between first generation rights and socio-economic rights.[145] Later, it began to enforce socio-economic rights indirectly by linking them to first generation rights, or the so-called 'fundamental human rights.' For example, the right to pension grants was indirectly protected through the right to property and right to judicial remedies.[146] Similarly, the right to health was protected through the right to personal integrity.[147] Colombia is an example of how useful the Latin American approach to the minimum core is for South African courts.

5.7.1. The Colombian model

In Colombia, anyone is allowed to challenge any law at any time using an individual complaint mechanism known as the 'tutela.' This system is notable for its minimal administrative hurdles.[148] Here, the process for filing petitions and resolving these petitions are fast and informal.[149] For example, petitions may be filled in any court and need not be drafted by lawyers.[150] The ease of the tutela has enabled its highest court – the Constitutional Court of Colombia – to become "one of the most activist and creative in the world in enforcing socio-economic rights."[151] Its attitude to socio-

[144] For an overview, see Moyn, S. *Not Enough: Human Rights in an Unequal World* (Cambridge, MA: Harvard University Press, 2018).

[145] Landau, D. 'Judicial role and the limits of constitutional convergence in Latin America' in Dixon R & Ginsburg T (eds.) *Comparative Constitutional Law in Latin America* (, (Northampton, MA: Edward Elgar Press 2017) 227-242.

[146] Case of the "Five Pensioners" v. Peru, Inter-American Court of Human Rights, Feb. 28, 2003.

[147] Case of Suarez Peralta v Ecuador, Inter-American Court of Human Rights, May 21, 2013.

[148] Cepeda-Espinosa, M.J. 'Judicial activism in a violent context: The origin, role, and impact of the Colombian Constitutional Court' (2004) 3 *Washington University Global Studies Law Review* 529-700 at 555-556.

[149] Article 86 of the Constitution of Colombia states that 'In no case may more than 10 days elapse between the filing of the writ of protection and its resolution.'

[150] Cepeda-Espinosa, M.J. 'Judicial activism in a violent context' at 552-554.

[151] Landau, D. 'The promise of a minimum core approach: The Colombian model for judicial review of austerity measures' in Nolan, A. (ed.) *Economic and Social Rights after the global financial crisis* (Cambridge University Press, 2014) 9.

economic rights enforcement is all the more remarkable because of how the 1991 Constitution of Colombia distinguishes between first generation rights and socio-economic rights.

The drafters of the Colombian Constitution confined the tutela to civil and political rights, and placed them in a chapter labelled 'fundamental rights.' They placed socio-economic rights in a separate chapter labelled 'economic, social, and cultural rights.' To show that socio-economic rights were not meant to be claimable, article 85 of the Constitution excludes them from the list of rights capable of "immediate application." Some scholars believe these rights were regarded as "directive principles" by constitutional drafters.[152] Irrespective of the shaky status of the tutela on socio-economic rights, Colombia's apex court found a creative way to apply the tutela to these rights. It called it 'a vital minimum.' In order to understand how a vital minimum resembles the concept of the minimum core, it is necessary to contextualise it with the notion of progressive realisation of rights.

5.7.2. Progressive realisation and a vital minimum

It is worth restating that unlike the executive and legislature, the judiciary has a unique set of functions centred on interpreting laws and checking the powers of the other branches of government. This dual mandate makes the "progressive realisation" standard very challenging. In this regard, Orago observed as follows:

> The CESCR has further elaborated in General Comment Number 19, in relation to social security, the criteria that it will use when considering the justifiability of retrogressive measures. The criteria include the reasonableness of the action; comprehensive examination and consideration of alternatives to the retrogressive action; the genuine participation of the affected groups in decision-making; the long-term adverse impact of the action and whether or not it deprives access to the minimum essential levels of rights; and the presence of independent national review.[153]

[152] *Ibid* at 270.

[153] Orago, N.W. 'Limitation of Socio- Economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of a Proportionality Approach in the Judicial Adjudication of the Socio-Economic Rights Disputes' (2013) 5 *Potchefstroom Electronic Law Journal* 186.

Generally, “the concept recognises that the full realisation of socio-economic rights would not generally be achieved in a short period of time. The obligation on states therefore is ‘to move as expeditiously and effectively as possible’ towards full realisation.”[154]

However, some constitutional rights such as the right to be protected from arbitrary evictions [section 26(3)], children’s socio-economic rights [section 28] and the socio-economic rights of detained persons [section 35], are not subjected to the progressive realisation standard. Thus, these types of socio-economic rights are immediately realisable because the state has no latitude in fulfilling them. The issue is how it treats its obligations in the rights in which it has flexibility to act. This is where the Colombian notion of a vital minimum is useful for South African judges.

Long before the Vienna Declaration and Programme of Action proclaimed the interconnectedness of human rights, Colombian judges had adopted a “connectivity doctrine, [under which] socio-economic rights could be fundamental rights enforceable by tutela whenever they were connected to other rights like the right to life and human dignity.”[155] By so doing, it rejects the argument of progressive realisation of rights in accordance with available resources. This is because it places the state under an immediate obligation to provide basic services that are vital for survival, irrespective of its limited resources. Thus, it assumes that the state has enough resources to provide a minimum level of basic services.

Notably, the Constitution of Colombia came into force in 1991. At that time, the concept of the minimum core had not caught on, having just been articulated a few months earlier. In 1992, the Colombian Constitutional Court adopted the vital minimum idea by drawing from the (first generation) rights to life and human dignity, the purposive nature of law, and the inclusion of socio-economic rights in the Constitution, even if these rights were not intended by constitutional drafters to be justiciable.[156] The right to a vital minimum provides a right to the minimum level of satisfaction of

[154] Chenwi, L. ‘Unpacking “progressive realisation”, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance’ (2013) 46 (3) *De Jure* 742-769 at 744.

[155] *Ibid* at 745.

[156] Landau, D. ‘The promise of a minimum core approach: The Colombian model for judicial review of austerity measures’ in Nolan, A. (ed.) *Economic and Social Rights after the global financial crisis* (Cambridge University Press, 2014) 9.

basic services that will enable a person to live a dignified life. As the Court stated, it ensures that citizens will have "the most elemental material conditions without which a person is at risk of perishing."[157] In this sense, the vital minimum doctrine serves the same role as the minimum core concept. But their meanings are somewhat different.

Whereas the vital minimum doctrine is an independent right to a minimum level of existence, the concept of minimum core is essentially an interpretive approach used to understand claims on state resources such as housing, electricity, water, and health care. Notably, the vital minimum doctrine arose within a constitution that lacked clear justiciability or enforcement of socio-economic rights. Thus, by making these rights directly enforceable by judges whenever citizens fall below the threshold needed for a dignified life, Colombia's apex court succeeded in creating justiciability where justiciability would not have existed. This is a remarkable lesson for South Africa, whose constitution contains fully claimable socio-economic rights that are only restricted by the availability of state resources.

The judicial approach in Colombia shows that South Africa's Constitutional Court misuses the minimum core. From the case law, the Court seems to think that adopting the minimum core will force it to define the content of rights. But it does not need to define rights. It merely needs to force government programmes to prioritise the provision of basic services. Thus, the minimum core can be used in the Colombian way as a prioritisation tool rather than a measure of the content of rights.[158]

In the foregoing context, one wonders why decisions of the Colombian judiciary do not incite accusations of judicial activism. It is therefore useful to briefly examine how Latin American judges navigate the separation of powers problem.

5.8. Latin American approach to separation of powers

Latin America courts are not immune from accusations of judicial activism.[159] Three features seem to mark their approach to the separation of powers principle. Firstly, judges encourage collaboration between the judicial and political branches of power,

[157] Colombian Constitution T-458 of 1997, § 23; C-776 of 2003, § 4.5.3.3.2, cited in Nolan *ibid* at 270.

[158] Bilchitz, D. *Poverty and Fundamental rights: The justification and importance of socio-economic rights* (New York: Oxford University Press, 2007) 208.

[159] Rodríguez-Garavito, C. 'Constitutions in action: The impact of judicial activism on socioeconomic rights in Latin America' in Cesar Garavito (ed.) *Law and Society in Latin America* (London: Routledge, 2014) 124-152.

as well as widespread deliberation on issues of socio-economic rights.[160] During this process, they weigh the judicial mechanisms that will guarantee effective compliance with their judgments by the political branches.

Secondly, the enforcement of socio-economic rights in Latin America is generally based on individual complaint mechanisms.[161] The grant of an individual remedy appears to be a relatively easy way to avoid undue encroachment on the powers of the political branches. This is because individual remedies simply invalidate offensive legislation, without requiring the implementation of major structural changes that have budgetary implications.[162] Also, individual remedies promote democratic deliberation or "dialogic activism."[163] In this sense, their use is similar to the remedy in *Mazibuko* v *City of Johannesburg* case, where the Constitutional Court refused to give a quantified content to what constitutes "sufficient water." Importantly, the use of the individual complaint mechanism in Latin America is not limited to state actors, as non-state actors are also liable for violations of socio-economic rights.[164]

Finally, in the course of enforcing socio-economic rights that threaten the separation of powers principle, Colombian judges rely on the constitutional principle of a social state of law, as articulated in the 1991 Constitution. Article 1 states that "Colombia is a social state of law … decentralised and with autonomy for its territorial entities, democratic, participatory and pluralistic, founded on respect for human dignity, work and the solidarity of the people." In 1992, its Constitutional Court ruled that the social state of law is a basic constitutional principle that requires the

[160] Abramovich, V.E. 'Courses of action in economics, social and cultural rights: Instruments and allies' (2005) 2(2) *SUR - International Journal on Human Rights* 181-216 at 196-205.

[161] Brewer-Carias, A.R. *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (Cambridge University Press, 2009) 240-43.

[162] Landau, D. 'Socioeconomic rights and majoritarian courts in Latin America' in (Crawford, C. and Maldonado, D.B. eds.) *Constitutionalism in the Americas* (Edward Elgar Publishing, 2018) 188-214.

[163] Dixon, R. 'Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited' (2007) 5(3) *International Journal of Constitutional Law* 391-418 at 393; Yepes, R.U. and Sajo, A. 'Should courts enforce social rights? The experience of the Colombian Constitutional Court' in Coomans, F. (ed.) *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerp: Intersentia-Maastricht Centre for Human Rights, 2006) 355-388 at 355 and 386.

[164] *Ibid* at 295.

government to ensure that social welfare is protected.[165] In 2012, it ruled that the concept of 'fiscal sustainability' [similar to South Africa's reasonableness test] is 'subordinate' to the social state of law.[166] The implication of these rulings is that constitutional principles are vastly superior to the doctrine of separation of powers. So, how do remedies compare in South Africa and Latin America?

5.9. Socio-economic remedies in South Africa and Latin America

In South African constitutional jurisprudence, the courts are vested with the power to apply appropriate remedies by virtue of sections 38 and 172 of the Constitution.[167] In so doing, they have the power to demand reforms that must be implemented, while affording the responsible violator the opportunity to choose the most effective means of compliance with their order.[168] In section 38 of the Constitution, the judiciary is mandated to grant remedies to individuals, communities, and public interest organisations whenever breaches of human rights are established.[169] Such remedies include injunctions, compensation and conservatory orders, declarations of invalidity, and declarations of rights in accordance with section 38 of the Constitution.[170] However, in the context of service delivery, establishing appropriate and effective remedies against the breach of socio-economic rights is a very big challenge.[171]

In the case of *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*, a case relating to the right of access to adequate housing,[172] the Court issued an interim order in which the parties were mandated to engage with each other meaningfully and report back to the Court.[173] This decision seemingly introduced the

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[165] Landau, D. 'The promise of a minimum core approach' at 272, citing the Court's ruling that the social state of law principle 'has an importance without precedent in the context of Colombian constitutionalism.'

[166] *Ibid* at 274.

[167] Section 38 and 172 of the Constitution.

[168] See section 38 & 172 of the Constitution.

[169] Currie, I. and De Waal, J. *The Bill of Rights handbook* (6th ed Juta & Co, 2013) 595.

[170] Section 38 of the Constitution.

[171] Chenwi, L. 'A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road and others v City of Johannesburg and Others'* (2009) 2 *Constitutional Court Review 371-394* at 371.

[172] *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* 2008 5 BCLR 475 (CC).

[173] *Ibid* at para 5.

notion of meaningful engagement into the established notion of reasonableness of the state's progressive realisation of rights. However, meaningful engagement is an ambitious lens for assessing the state's commitment to service delivery. On the face of it, meaningful engagement appears to promote the right of participation of the poor in governance, while, at the same time "embracing other democratic principles such as transparency and accountability."[174] However, As Chenwi and Tissington argued, meaningful engagement differs from consultation and mediation in some key respects.[175] This is because "consultation is usually a condition precedent to … a procedural step necessary to make a decision. … Engagement on the other hand, refers to a process of constant interchange between citizens and the state in the design and implementation of a socio-economic programme affecting a particular community or group of people."[176] It thus appears that the notion of meaningful engagement denotes participatory governance. Given the enduring nature of the apartheid culture of poor consultation, constant interchange between citizens and the state is an unrealistic lens for measuring state commitment to service delivery. For one, citizens are often ill-informed about participatory governance. Secondly, it is difficult to assess the genuineness of participatory governance. Finally, the local government suffers from poor democratic culture. As scholars have noted, "community influence on local government between elections is more likely to be greater in those municipalities which take decisions in inclusive and transparent ways."[177]

Furthermore, the courts have employed a structural interdict to enforce a positive obligation. In *Grootboom v Oostenberg,* the court applied an extensive use of the structural interdict to enforce a positive obligation.[178] Here, the High Court found that the conditions under which the squatters had been living was a violation of the

[174] Chenwi, L. "Meaningful engagement' in the realisation of socio-economic rights: The South African experience' (2011) 26(1) *Southern African Public Law* 128-156 at 130.

[175] Chenwi, L. and Tissington, K. 'Engaging meaningfully with government on socio-economic rights: A focus on the right to housing' (2010) *Community Law Centre University of the Western Cape* 4-271 at 10.

[176] Chenwi, L. "Meaningful engagement' in the realisation of socio-economic rights: The South African experience' (2011) 26(1) *Southern African Public Law* 128-156 at 130.

[177] Barichievy, K., Piper, L. and Parker, B. 'Assessing 'participatory governance' in local government: A case-study of two South African cities' (2005) 24(3) *Politeia* 370-393 at 372.

[178] *Grootboom and Others v Oostenberg Municipality* and Others 2000 (3) BCLR 277 (C).

rights of children in terms of section 28(1)(c). Accordingly, the court granted an order declaring that the children were entitled to be provided with shelter in terms of section 28 of the Constitution, and that their parents were entitled to be accommodated with the children. The court further directed the state to provide accommodation to the squatters and to report the implementation of the court's order.[179]

On appeal, however, the Constitutional Court held that the High Court's interpretation of section 28(1)(c) was incorrect as this provision did not impose an obligation on the state to provide shelter to the respondents.[180] In this circumstance, the Constitutional Court held that, it was 'necessary and appropriate' to award a declaratory order.[181] Contrastingly, in the *Treatment Action Campaign* case, the Constitutional Court outlined its remedial options in the area of socio-economic rights but did not grant a structural interdict. As justification, it stated that there was no ground to believe that the government would not respect the court's order.[182]

As pointed out by Currie and De Waal, since the *Treatment Action Campaign* case, courts have increasingly used structural remedies to enforce positive obligations in respect of socio-economic rights.[183] Even with its willingness to utilise the structural interdict remedy, Mbazira argues that the Constitutional Court has conceptualised structural interdict to be used only as a last resort, as the court has been sceptical about this remedy in socio-economic cases.[184] The reasons include its reluctance to be dragged into protracted litigation, and its desire for implementation of its orders and maintenance of the boundaries of separation of powers. However, some scholars are of the view that it is important for the court to develop an effective remedy in respect of the adjudication of socio-economic cases as these cases have to do mostly with the

[179] *Ibid* at 26-27.

[180] *Government of the Republic of South Africa and Others v Grootboom and Others* para 94-96.

[181] *Ibid* at para 96.

[182] Currie, I. and De Waal, J. *The Bill of Rights handbook* (6th ed Juta, 2013) 580. See also De Vos et al (2015) 596. See also *Minister of Health and Others v Treatment Action Case and Others* para 21.

[183] *Ibid* 597.

[184] Mbazira, C. *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (Pretoria University Law Press, 2009) 206.

poor who often lack access to basic services.[185] In doing so, the transformative agenda of the Constitution will be achieved.

From the discussion so far, South African courts are reluctant to employ their constitutional powers fully in socio-economic rights complaints. Generally, their orders have been measured, moderate in impact, and unduly deferential to the political branches. This tendency may be contrasted with the grant of remedies in Latin America. In many states in this region, judges find creative ways around the enforceability of socio-economic rights. In Argentina, judges have handed down radical decisions with monitoring mechanisms and budgetary impact. These range from decisions on prison overcrowding,[186] healthcare, and environmental degradation.[187] In Costa Rica, the Constitutional Court made AIDS drugs readily available after upholding a right to state-funded medical care in the 1990s.[188] As shown earlier, the Constitutional Court of Colombia is notable for issuing structural remedies that confront the political branches. Rodríguez-Garavito described these remedies as products of proceedings that:

> (1) affect a large number of people who allege a violation of their rights, either directly or through organizations that litigate the cause; (2) implicate multiple government agencies found to be responsible for pervasive public policy failures that contribute to such rights violations; and (3) involve structural injunctive remedies, i.e., enforcement orders whereby courts instruct various government agencies to take coordinated actions to protect the entire affected population and not just the specific complainants in the case.[189]

[185] Chenwi, L. 'A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road and others v City of Johannesburg and Others 2'* (2009) *Constitutional Court Review* 372.

[186] Rodríguez-Garavito, C. 'Beyond the courtroom: The impact of judicial activism on socioeconomic rights in Latin America' (2010) 89 *Texas Law Review* 1669-1698 at 1670.

[187] *Ibid* citing C.C., abril 28, 1998, Sentencia T-153/98 <http://www.corteconstitucional.gov.co/ relatoria/1998/ T-153-98.htm> (last accessed 2 December 2021)

[188] Wilson, B.M. 'Changing Dynamics: The Political Impact of Costa Rica's Constitutional Court' in Sieder, R., Schjolden, L. and Angell, A. (eds.) *The judicialization of politics in Latin America* (Springer, 2006).

[189] Rodríguez-Garavito, C. 'Beyond the courtroom: the impact of judicial activism on socioeconomic rights in Latin America' (2010) 89 *Texas Law Review* 1669-1698.

Examples of socio-economic decisions issued by Colombian courts include orders to reduce prison overcrowding, findings of noncompliance with the state's obligations to provide social security,[190] and orders of protection for human rights defenders.[191] There are also several consolidated judgments. An example is a ruling in favour of twenty-two petitions against systemic failures in the health care system.[192] Another example is a January 2004 ruling, which merged the tutelas of 1,150 families that were displaced by the Colombian civil war.[193] These families were a tiny fraction of about five million displaced people. From the evidence, it was obvious that the state lacked any serious and coordinated policy for rendering emergency aid to the displaced persons. It even lacked reliable information on their conditions. Furthermore, the budget it dedicated to resettling displaced persons was grossly inadequate. In a far-ranging ruling, the Court declared that forced displacement amounted to an "unconstitutional state of affairs," which it blamed on systemic failures in state action.[194] Accordingly, it "ordered a series of structural measures that … spawned a lengthy implementation and follow-up process" that went on for several years.[195]

Significantly, both South Africa and Latin American societies are characterised by deep economic and political inequalities. Since politics and economics are often intertwined, compelling the South African state to deliver basic services is problematic. However, the legal practitioners and civil rights organisations who litigate access to

[190] *Ibid*, citing C.C., febrero 2, 2000, Sentencia SU-090/00 <http://www.corteconstitucional.gov.co/relatoria/2000/SU090-00.htm>; C.C., julio 27, 1999, Sentencia T-535/99 available at http://www.corteconstitucional.gov.co/relatoria/1999/T-535-99.htm; C.C., marzo 5, 1998, Sentencia T-068/98 (slip op. at 1–2), available at http://www.corteconstitucional.gov.co/relatoria/1998/T-068-98.htm; C.C., noviembre 6, 1997, Sentencia SU-559/97, (slip op. at 1–2), available at http://www.corteconstitucional.gov.co/relatoria/1997/SU559-97.htm.

[191] *Ibid*, citing C.C., octubre 20, 1998, Sentencia T-590/98 <http://www.corteconstitucional.gov.co/relatoria/1998/T-590-98.htm>.

[192] *Ibid*, citing C.C., julio 31, 2008, Sentencia T-760/08 <http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm> at paras 9-10.

[193] Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04; analysed in Rodríguez-Garavito, C. 'Beyond the courtroom: The impact of judicial activism on socioeconomic rights in Latin America' (2010) 89 *Texas Law Review* 1669-1698.

[194] Ibid at 1670, citing paras 80-81 of the judgment.

[195] *Ibid*.

basic services primarily face a difficulty in justiciability. The idea of justiciability in the Bill of Rights is that decisions affecting basic services and fundamental rights should be reviewed by the judiciary, an institution outside the political sphere.[196] Compared to Latin America, South African judges dislike structural orders. In the *Grootboom* case, for example, the High Court had granted a structural order entitling the children of the applicants to be provided with shelter in terms of section 28 of the Constitution.[197] However, on appeal, the Constitutional Court rejected the interpretation of the High Court, opting instead to award a declaratory order for reasonable steps to be taken to remedy shortcomings in the state's housing policies.[198] This chapter will therefore end by comparing the reasonableness test with the minimum core concept.

5.10. Minimum core versus reasonableness test

The reasonableness test differs from the concept of the minimum core in one key aspect. As Chowdhury noted, "The minimum core standard aims to confer minimum legal content for ESCR. Its main inquiry centres on whether the State is meeting minimum essential levels of a particular right. Reasonableness, on the other hand, guides the review of whether the State is taking reasonable steps to meet its obligations under a particular right."[199] In this sense, the reasonableness test falls short of the social contract theory, which is implied in the constitutional obligation of judges to hold the state to account for the delivery of basic amenities. Rather, it is a dialogic tool that aims at maintaining harmony with the political branches.

For example, in the *Occupiers of 51 Olivia Road* case, the Constitutional Court issued an interim order in which the parties were ordered to "engage with each other meaningfully" and report back to the Court.[200] This order indicates an excessive

[196] De Vos P et al (2015) 685. See also Currie, I. and De Waal, J. *The Bill of Rights handbook* (6th ed Juta & Co, 2013) 72-82.

[197] *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277(C).

[198] *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 para 99; Currie, I. and De Waal, J. *The Bill of Rights handbook* 596.

[199] Chowdhury, J. 'Unpacking the minimum core and reasonableness standards' in (Dugard, J., Porter, B., Ikawa, D. and Chenwi, L. eds) *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Cheltenham, UK: Edward Elgar Publishing, 2020) 251-274 at 252.

[200] *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* Para 5.

deference to the political branches. In the *Grootboom* case, the High Court found that the conditions under which the squatters had been living violated section 28(1)(c) of the Constitution regarding the rights of children. Accordingly, it granted an order declaring that the applicant's children were entitled to be provided with shelter along with their parents. It further directed the state to report to the court its implementation of the order.[201] Rather than uphold this order, the Constitutional Court overruled the High Court's interpretation of section 28(1)(c), holding that it did not impose an obligation on the state to provide shelter to the parents of the children, as this will put the applicants into a preferential position *vis-à-vis* similarly situated people that fall outside the litigation.[202] It held that in the circumstances, it was "necessary and appropriate" to award a mere declaratory order.[203] In the *TAC* case, it also failed to grant a structural interdict.[204]

Since the *TAC* case, courts have embraced the use of structural remedies to enforce socio-economic rights.[205] However, the Constitutional Court considers these remedies as a weapon of last resort due to its desire to respect the principle of separation of powers, avoid protracted litigation, and have its orders implemented by the executive branch of government.[206] Nevertheless, it is important for judges to be activist, since deprivations of basic services mostly concern the poor, who lack political influence.[207] Only robust enforcement of socio-economic rights will actualise the transformative intent of the Constitution and fulfil its inherent social contract between the state and the people.

5.11. Conclusion

[201] *Grootboom v Oostenberg Municipality* 26-27.

[202] *Government of the Republic of South Africa and Others v Grootboom and Others* para 94-96.

[203] *Government of the Republic of South Africa and Others v Grootboom and Others,* para 96.

[204] Currie and De Waal (2013) Currie, I. and De Waal, J. *The Bill of Rights handbook* (6th ed Juta, 2013) 580. See also de Vos *et al* (2015) 596; *TAC* at para 21.

[205] *Ibid* at 597.

[206] Mbazira, C. *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (Pretoria University Law Press, 2009) 206.

[207] Chenwi, L. 'A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road and others v City of Johannesburg and Others'* (2009) 2 *Constitutional Court Review* 371-394 at 372.

The historical injustices of apartheid make access to basic services very limited for majority of black Africans, who make up the bulk of the population.[208] Unsurprisingly, South Africa's transformative constitution makes access to basic services a crucial human right. Its constitutional status is supported by international instruments ratified by South Africa. Significantly, the enforcement of basic services in South Africa centres on the justiciability of socio-economic rights. These are notably rights of access to affordable water, healthcare, shelter or housing, sanitation, and education. Although these rights are framed as obligations for the government, most of them are subject to progressive realisation by the state. Against this background, this chapter set out to analyse the judicial approach to socio-economic rights enforcement in South Africa. To realise its objective, it analysed key judgments of the Constitutional Court and drew lessons from the judicial practice in Latin America. Below are the summary findings of the chapter.

5.11.1. Judicial enforcement of socio-economic rights

The concept of judicial review is well known as a vital aspect of good governance in democratic societies. When executing judicial review in constitutional matters, the courts are mandated to declare invalid any law or conduct that is inconsistent with the Constitution to the extent of its inconsistency. They are further mandated to make any order that is just and equitable under the circumstances.[209] Accordingly, the duty of the judiciary under the 1996 Constitution is not just to interpret the laws made by Parliament. Its duties also extend to the manner policies and projects are implemented by the executive branch of government. Accordingly, the courts are vested with powers to grant appropriate remedies in relation to people's access to basic services. In addition to these powers, the courts are empowered to develop any effective remedy that will uphold the values of the Constitution.[210] Indeed, it is common cause in the literature that judicial intervention in the enforcement of socio-economic rights is a crucial way to promote access to basic services and good governance generally.

[208] Harris, B. et al 'Inequities in access to health care in South Africa' (2011) 32(1) *Journal of Public Health Policy* S102-S123 at S119.

[209] Section 38 of the Constitution.

[210] Currie, I. and De Waal, J. *The Bill of Rights handbook* (6th ed Juta, 2013) 594.

In the judicial enforcement of socio-economic rights, the concept of the minimum core is important. Usually, the state uses the argument of limited resources to defend its inability to provide certain services. This argument was successfully deployed in most of the cases analysed here. These include the *Grootboom*, *Soobramoney*, *Treatment Action Campaign*, *Mazibuko*, and *Nokotyana* v *Ekurhuleni Municipality* cases. However, the state should be compelled to realise the delivery of basic amenities by requiring it to create or provide conditions necessary for people to enjoy essentialist levels of decent livelihood. As the jurisprudence from Latin America shows, it is necessary for the state to address urgently a minimum level of any impugned socio-economic right, while recognising that other elements of the right must be realised over time.[211] Thus, the minimum core concept prevents the state from hiding behind the excuse of resource constraint to justify its failure to fulfil a particular socio-economic right.

However, the South African Constitutional Court has consistently refused to adopt the minimum core. Instead, it pays undue adherence to the separation of powers doctrine.[212] In essence, the Court regards the minimum core as indeterminate, beyond the scope of judicial review, and a matter of policy assessment that is best left for the political branches to resolve. Rather than use the minimum core, it prefers a reasonableness approach, which it regards as more democratic because it leaves room for dialogue with the political branches of government.[213] Also, the Court appears to avoid issuing remedies that would compel the executive organs to make structural policy changes that affect a large number of people.

In line with the social contract theory, South African judges should adopt the minimum core approach to socio-economic rights enforcement. This approach is best

[211] Van der Berg, S. 'Ensuring proportionate state resource allocation in socioeconomic-rights cases' (2017) 134(3) *South African Law Journal* 576-615; A capabilities approach to the adjudication of the right to a basic education in South Africa' (2017) 18(4) *Journal of Human Development and Capabilities* 497–516.

[212] Ngang, C.C. 'Judicial enforcement of socio-economic rights in South Africa and the separation of powers objection: The obligation to take other measures' (2014) 14(2) *African Human Rights Law Journal* 655-680.

[213] Steinberg, C. 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123(2) *South African Law Journal* 264–284 at 274–276.

suited for realising the transformative intent of the Constitution, which is evident in how the Constitution's drafters empowered citizens to enforce socio-economic rights.

5.11.2. Best practices from Latin America

Unlike the attitude of the Constitutional Court, courts in Brazil, Colombia, Argentina, and other Latin American countries have, in varying forms, used the minimum core concept to enforce socio-economic rights for underprivileged people. For example, judges in Colombia have granted numerous individual remedies against the state, under an individual constitutional complaint mechanism known as the tutela. The tutela system is notable for its minimal administrative hurdles and its fast dispensation of justice. Importantly, Colombian judges have used the concepts of connectivity and vital minimum to enforce socio-economic rights. Both concepts recognise that civil and political rights like the right to life and human dignity, whose enforceability is unrestrained in the tutela system, are inseparably connected to socio-economic rights. Accordingly, the state must ensure that its policies and practical programmes are implemented in such a way that people's dignity and welfare are promoted through their access to the basic services necessary to sustain human life.

Admittedly, the Constitutional Court of South Africa has taken commendable steps to ensure people's access to basic services by granting individual remedies.[214] Generally, however, judicial efforts to enforce socio-economic rights pale into insignificance when they are compared with the alarming level of wealth disparity in South Africa.[215] The reality is that millions of people cannot afford the high cost of litigation involved in the enforcement of socio-economic rights. This is why many of the successful litigation involving basic service delivery in the last three decades have been championed by rights advocates. In this regard, the South African Human Rights Commission could be mandated to assist litigants to hold the state to account.[216]

Finally, judgements should explain in detail why state officials must make basic services accessible to the most vulnerable members of society. Well-reasoned

[214] Currie, I. and De Waal, J. *The Bill of Rights handbook* (6th ed Juta, 2013) 594.

[215] Mlaba, K. '5 Shocking facts that show why South Africa is the 'most unequal country in the world' 27 November 2020 <https://www.globalcitizen.org/en/content/facts-why-south-africa-most-unequal-country-oxfam/> (last accessed 19 August 2021).

[216] Section 184 of the Constitution.

judgments will ensure that judges' orders are respected by the political branches without undue perceptions that the separation of powers principle is violated. Ultimately, the right of access to basic services must be religiously respected to prevent people from taking the law into their own hands. This is because the flipside of the social contract theory is revolution such as the civil unrest that was witnessed in the Gauteng and KwaZulu Natal provinces in July 2021.[217]

[217] Cotterill, J. 'South Africa counts the cost of its worst unrest since apartheid' *Financial Times* 25 July 2021 <https://www.ft.com/content/1b0badcd-2f81-42c8-ae09-796475540ccc> (last accessed 19 August 2021).

CHAPTER 6: ENFORCEMENT CHALLENGES OF SERVICE DELIVERY IN SOUTH AFRICA

6.1 Introduction

The concept of social contract emerged in response to the benefits of organised government over the destructive nature of anarchy. Therefore, it views government as not only a useful voluntary association, but also one that is based on corresponding rights and duties. As shown in previous chapters, a core duty on the part of government is the provision of basic services. Nearly 30 years after the end of apartheid, most of the electoral promises of decent housing, access to water, healthcare, electricity, sanitation, and education are yet to be fulfilled for majority of people living outside cities and towns. This chapter therefore examines the enforcement challenges faced by the three spheres of government in delivering basic services in South Africa. Since service delivery is a core part of government's pact with citizens, the chapter argues that effective service delivery is measurable by the level of public satisfaction with municipal services.[1]

However, the provision of municipal services is subject to notorious enforcement challenges.[2] These include corruption, mismanagement, poor planning, limited resources, unqualified personnel, insufficient community people participation, and lack of transparency.[3] A particularly complex barrier to service delivery is lack of sufficient community participation due to variance in the nature of functioning of the local sphere of governance.[4] Aklilu et al' attributes this variance to the demographic compositions of many municipalities, indicated that the key challenges to effective

[1] Andersson, N., Matthis, J., Paredes, S. and Ngxowa, N. 'Social audit of provincial health services: Building the community voice into planning in South Africa' (2004) 18(4) *Journal of Interprofessional Care* 381-390.

[2] Heller, P. 'Moving the State: The politics of democratic decentralization in Kerala, South Africa, and Porto Alegre' (2001) 29(1) *Politics and Society* 131-163.

[3] De Visser, J. 'The political–administrative interface in South African municipalities: Assessing the quality of local democracies' (2010) 5 *Commonwealth Journal of Local Governance* 86–101 at 87*;* Fourie, D. and Poggenpoel, W. 'Public sector inefficiencies: Are we addressing the root causes?' (2017) 31(3) *South African journal of accounting research* 169-180.

[4] Andersson, N., Matthis, J., Paredes, S. and Ngxowa, N. 'Social audit of provincial health services' (2004) 18(4) *Journal of Interprofessional Care* 381-390 at 387.

public participation within the IDP (integrated development plans) include lack of a culture of public participation, lack of information, inadequate skills for public participation, population diversity, negative attitudes ad perception towards public participation and the costs of public participation. Aklilu also posited that effective service delivery requires enhanced education and (re)training of municipal staff.[5] Since enforcement challenges have high negative implications for service delivery, the community's needs are quite specific and often best addressed through detailed impact analysis by municipal authorities in partnership with provincial and national officials and consultation with host community through community participation.

It follows from the foregoing argument that research on the state of public infrastructure, efficiency of municipalities, and protests related to service delivery, provide a reliable assessment yardstick for the aims of this chapter. Accordingly, the chapter relies on qualitative data published by research institutes, government agencies, and international organisations since 1996 when the Constitution became operative. In keeping with recent developments, it probes the impact of unforeseen events such as the coronavirus pandemic on service delivery. Generally, the chapter seeks to contribute to the debate on how spheres of governance could overcome service delivery challenges for the benefit of the masses. This contribution is potentially valuable for the reasons below.

Firstly, the national, provincial and local levels of government have legislative and executive authority in their own spheres, and are defined in the Constitution as distinctive, interdependent, and interrelated and the spheres of governance are mandated to observe the principles of cooperative government.[6] However, the spheres of government have been experiencing multiple challenges in service delivery, which manifest in the form of sporadic protests.[7] Specifically, many protests occur at the local government level where service delivery is most needed.[8] These

[5] Aklilu, A., Belete, A. and Moyo, T. 'Analysing community participation in the municipal integrated development planning process in Limpopo Province, South Africa' (2014) 5(25) *Mediterranean Journal of Social Sciences* 257-262 at 258.

[6] See section 40(1) and (2) of the Constitution of the Republic of South Africa, 1996.

[7] Atkinson, D. 'Taking to the streets: Has developmental local government failed in South Africa' in Buhlungu, S., Daniel, J., Southall, R. and Lutchman J. (eds.) *State of the Nation: South Africa 2007* (Cape Town: Human Sciences Research Council Press) 53-77 at 54.

[8] *Ibid* at 55.

protests have been linked, amongst others, to unemployment, lack of water and sanitation services, lack of access to housing, and lack of access to health care.[9] Recently, the Covid-19 pandemic prompted the government to amend the National Disaster Management Act 57 of 2002.[10] The disaster management Act and other measures to combat the pandemic have resulted in a peculiar service delivery scenario, where funds meant for the creation of jobs and provision of utilities such as electricity, education, water, and sewage have been diverted to cater for health emergencies.[11] Indeed, there have been allegations of rampant corruption involving Covid-19 tenders.[12]

Secondly, support from senior leadership at the provincial and national spheres of government is necessary to enhance a coordinated approach to service delivery.[13] The violent nature of service delivery protests in South Africa hampers government's ability to provide basic amenities due to the destruction of public infrastructure by protesters.[14] For example, lack of access to water sparked violent protests in the King Cetshwayo District Municipality of KwaZulu-Natal on 6 July 2020, leading to arson attacks affecting motorists travelling between Empangeni, Eshowe, Mthonjaneni,

[9] Atkinson, D. 'Taking to the streets: Has developmental local government failed in South Africa' (2007) 56.

[10] World Health Organization, Novel coronavirus (COVID-19) Situation Report No. 22 of 2020; available at <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200211-sitrep-22-ncov.pdf?sfvrsn=fb6d49b1_2> (last accessed 3 September 2020).

[11] *Ibid*.

[12] WHO Emergency Committee. Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (COVID-19), Geneva: WHO, 2020 <https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(COVID-19)> (last accessed September 31 2020) 2.

[13] Pullano, G., Pinotti, F., Valdano, E., et al 'Novel coronavirus (2019-nCoV) early-stage importation risk to Europe' Euro Surveillance January 2020 <https://doi.org/10.2807/1560-7917.ES.2020.25.4.2000057> (last accessed 26 November 2021).

[14] Matiwane, Z., writing for the TimesLIVE 22 September 2020 reported*: "Four years of frustration over the lack of water and electricity for a northern KwaZulu-Natal community reached a climax this week … On Tuesday, residents blocked the R33 and began to dig up the road. They said they were tired of raising the same concerns with the Msinga local municipality and the Umzimyathi district municipality." See also* Atkinson, D. 'Taking to the streets: Has developmental local government failed in South Africa'*,* in Buhlungu, S. (ed.) *State of the Nation: South Africa (2007) 50–67 at 63.*

Nkwaleni, Gingindlovu and Nkandla in Kwazulu Natal.[15] Similarly, violent service delivery protests have led to the destruction of several schools countrywide. A notable example is the case of *Vuwani* in Limpopo.[16] Indeed, there have been service delivery protests against ESKOM, education, access to health care services, water, and sanitation services.[17]

Akinboade *et al* offered some reasons for service delivery protests. The primary reason is people's dissatisfaction with municipal services, especially in informal settlements.[18] Quoting Fox and Meyer, they define service delivery as the provision of public activities, benefits or satisfactions to the citizens.[19] Services delivery relates to both the provision of tangible public goods and intangible services.[20]

It is in this broad context of dissatisfaction with basic municipal services that this chapter begins with poor community-based participation as a challenge to service delivery in South Africa.

6.2. Citizen-based participation and service delivery

While the manner municipalities engage with communities in South Africa has a relatively short history, there is a much longer history of engagement on which one can draw lessons. [21] As far as participatory governance is concerned, the relationship between municipalities and communities presents a complicated set of enforcement

[15] Singh, O. 'Truck torched and roads blocked as KZN protests over water intensify' 6 July 2020 <https://www.timeslive.co.za/news/south-africa/2020-07-06-truck-torched-and-roads-blocked-as-kzn-protests-over-water-intensify/> (last accessed 2 September 2020).

[16] Nkuna, V.M., and Shai, K.B. 'An exploration of the 2016 violent protests in Vuwani, Limpopo province of South Africa' (2018) 98(3-4) *Man in India* 425-436 at 426.

[17] Khambule, I., Nomdo, A., and Siswana, B., 'Burning capabilities: The social cost of violent and destructive service delivery protests in South Africa' (2019) 8(1) *Ubuntu: Journal of Conflict and Social Transformation* 51-70 at 60.

[18] Akinboade, O.A., Mokwena, M.P. and Kinfack, E.C. 'Understanding citizens' participation in service delivery protests in South Africa's Sedibeng district municipality' (2013) 40(5) *International Journal of social economics* 458-478 at 472.

[19] *Ibid* at 461.

[20] *Ibid* at 461.

[21] London, L., 'What is a human-rights based approach to health and does it matter?' (2008) 10(1) *Health and Human Rights* 65-80 at 72.

challenges.[22] Citizen-based people's participation (CBPP) or Community based participation as Heller terms it has emerged as an important measure of the transparency and accountability of municipalities.[23] This section considers CBPP in the context of a wider set of enforcement challenges such as limited budgets, mismanagement, unqualified personnel, and lack of information.[24]

Aklilu et al' recommended that local municipalities should focus on: encouraging the establishment of voluntary community associations, and ensuring the proper functionality of ward committee in mobilising and exchanging information. Aklilu et al' added that ensuring the inclusion of disadvantaged and marginalised groups in development processes; building the institutional capacity; and developing sense of ownership within communities regarding municipal on-going and completed projects, will make the community feel included in governance.[25] In my opinion, Aklilu et al' recommendation is persuasive as it has the potential to bring the local government and community together and thereby give the community a sense of participation in the decision process of the services that they receive.

A variety of financial mechanisms have been established at the national level to enhance CBPP. An example is the Municipal Finance Management Act 56 of 2003.[26] It seeks to secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government, and to establish treasury norms and standards.[27] These financial mechanisms are complimented by a range of other multilateral arrangements for enhanced access to basic services at the national sphere.[28] Van Rooyen submitted that:

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[22] Heller, P. 'Moving the State: The politics of democratic decentralization in Kerala, South Africa, and Porto Alegre' (2001) 29(1) *Politics and Society* 131-163 at 147.

[23] *Ibid* at 147.

[24] Mathekga, R. and Buccus, I. 'The challenge of local government structure in South Africa: Securing community participation' (2006) 2(1) *Critical dialogue Public Participation in Review: IDASA* 11–16 at 11.

[25] Aklilu, A., Belete, A. and Moyo, T. 'Analysing community participation in the municipal integrated development planning process in Limpopo Province, South Africa' (2014) 5(25) *Mediterranean Journal of Social Sciences* 257-262 at 261.

[26] Municipal Finance Management Act 56 of 2003, at 2.

[27] *Ibid* at 2.

[28] Mathekga, R. and Buccus, I. 'The challenge of local government structure in South Africa: Securing community participation' (2006) 2(1) *Critical Dialogue – Public Participation in Review* 11–16 at 15.

> While municipal integrated development planning-processes are unfolding and local economic development-projects are being launched, local communities should be afforded the opportunity to participate in processes to articulate their expectations and to prioritize their needs. This would in effect necessitate a process of comprehensive engagement with local stakeholders and where divergent opinions, needs and expectations exist, some form of negotiation should be entered into.[29]

CBPP is important because the monitoring of planning and fiscal policies focuses largely on the local sphere of government, which is closest to the people.[30] The emphasis on the local sphere stems from a number of sources. Firstly, it reflects the prevailing opinion that municipalities are the face of governance in terms of basic services. Accordingly, they are best placed to ensure public participation in governance, which has proved very challenging since the transition to democracy.[31] Secondly, service delivery challenges are felt more locally. Accordingly, planning and monitoring require sound community-based approaches to ameliorate challenges and comply with the Constitution, international norms, and best practices.[32]

Akinboade asserts that CBPP is crucial for planning, since local, provincial, and national actors must work cohesively for effective service delivery.[33] Planning occurs in two distinct models. The first model is strategic planning processes, which, though important, is not unique to the local sphere of governance.[34] At the municipal level,

[29] Van Rooyen, E.J. 'A new approach to managing community participation and stakeholder negotiation in South African Local Government' (2003) 6(1) *South African journal of economic and management sciences* 126-141 at 127.

[30] McEwan, C. 'Bringing government to the people: Women, local governance and community participation in South Africa' (2003) 34(4) *Geoforum* 469-481.

[31] Booysen, S. 'Public participation in democratic South Africa: From popular mobilization to structured co-optation and protest' (2009) 28(1) *Politeia* 1-27 at 2.

[32] Van Rooyen, E.J. 'A new approach to managing community participation and stakeholder negotiation' 126-141 at 127.

[33] Akinboade, O.A., Mokwena, M.P. and Kinfack, E.C. 'Understanding citizens' participation in service delivery protests in South Africa's Sedibeng district municipality' (2013) 40(5) *International Journal of Social Economics* 458-478 at 461.

[34] *Ibid* at 458.

such strategic planning fosters community satisfaction in government projects,[35] aspirational goals and connection to place, and definition of pathways to achieve these goals to give people a sense of belonging.[36] The second model is feedback to the community or "follow-up" with community engagement,[37] which is focused on giving the community a sense of belonging, facilitate social cohesion, and generally ensure acceptable living standards.[38] Although these two types of planning are quite different in practice, and in many cases may be managed by different sections with cost implications, both are important to overcoming enforcement challenges faced in basic service delivery. If adhered to, both will contribute to achieving the national development agenda and satisfy government's social contract with the electorate.[39]

In many instances, local governments are responsible for managing CBPP related to service delivery.[40] In this regard, local institutions have three critical roles.[41] Firstly, they structure responses to local impacts. Secondly, they mediate between individual and collective responses to challenges at any given municipal geo-political zone.[42] Thirdly, they govern the delivery of resources to facilitate basic service delivery

[35] Mafini, C. and Meyer, D.F. 'Satisfaction with life amongst the urban poor: Empirical results from South Africa' (2016) 5 *Acta Universitatis Danubius. Œconomica* 33-50; Windapo, A.O. and Cloete, A. 'Briefing practice and client satisfaction: a case study of the public health infrastructure sector in South Africa' (2017) 35(1/2) *Facilities* 116-134.

[36] Giovannini, E. 'Statistics and Politics in a Knowledge Society' (2008) 86(2) *Social Indicators Research* 177–200 at 189.

[37] Akinboade, O.A., Mokwena, M.P. and Kinfack, E.C. 'Understanding citizens' participation in service delivery protests' 458-478 at 461.

[38] Khaile, F.T., Roman, N.V. and Davids, G.J. 'The role of local government in promoting a sense of belonging as an aspect of social cohesion: A document analysis' (2021) 10(1) *African Journal of Governance and Development* 8-33.

[39] Sisk, T. *Democratization in South Africa: The elusive social contract* (Princeton University Press, 2017) 4-29 at 7.

[40] Mubangizi, J.C. 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' (2006) 2(1) *African Journal of Legal Studies* 1-19 at 6.

[41] Mattes, R., Bratton, M. and Davids, Y.D. 'Poverty, survival and democracy in Southern Africa' CSSR Working Paper No. 27 (Centre for Social Science Research: University of Cape Town, 2002) 1-87 at 5.

[42] Aklilu, A., Belete, A. & Moyo, T. 'Analysing Community Participation in the Municipal Integrated Development Planning Process in Limpopo Province, South Africa' (2014) 5(25) *Mediterranean Journal of Social Sciences* 257-262 at 259.

to the people who desperately need it.[43] It appears that proper implementation of these roles would contribute to significant reductions in service delivery dissatisfaction. As shown in the next section, this is evident in critiques of the benefit of community-based participation to planning and service delivery.

6.2.1. Critiques of citizen-based participation

Several challenges linked to citizen-based participation in development are recognised as stumbling blocks in basic service delivery, Beresford submitted that the ironies of participation, which has so far largely passed without serious comment, is that while its conceptualisation and practice are ostensibly centrally concerned with involving and including the people, in its owns modern usage, it has generally tended to be abstracted and treated in isolation.[44] CBPP has long focussed on 'place-based' service delivery management, drawing attention to the unique suite of characteristics that constitute a problem context for planning and engagement with people at the grassroot level.[45] Various advantages and disadvantages of this type of planning have been recognized, and they are relevant to current debates on basic service delivery.

Due to its focus on location and derivation, CBPP has been recognized as more sensitive to service delivery challenges. Essentially, local communities are thought to be more familiar with their own developmental challenges, and thus better able to inform an appropriate planning process.[46] On the basis of local 'ownership' of developmental challenges, CBPP is thought to lead to more legitimate processes than top-down planning, which tends to isolate some stakeholders due to external

[43] Lomahoza, K. 'Monitoring the right to health care in South Africa: An analysis of the policy gaps, resource allocation and health outcomes' (2013) *Studies in Poverty and Inequality Institute on the Progressive Realisation of Socio-Economic Rights* 1-16 at 13 <http://spii.org.za/wp-content/uploads/2018/02/Policy-brief-2_Monitoring-rights_Healthcare.pdf >

[44] Beresford, P. 'Participation and social policy: transformation, liberation or regulation?' in Sykes, R., Bochel, C. and Ellison, N. (eds.) *Social Policy Review 14: Developments and debates: 2001-2002* (Bristol: Policy Press, 2002) 265- 290 at 265.

[45] Akinboade, O.A., Mokwena, M.P. and Kinfack, E.C. 'Understanding citizens' participation in service delivery protests in South Africa's Sedibeng district municipality' (2013) 40(5) *International Journal of Social Economics* 458-478 at 461.

[46] Andersson, N., Matthis, J., Paredes, S. and Ngxowa, N. 'Social audit of provincial health services: Building the community voice into planning in South Africa' (2004) 18(4) *Journal of Interprofessional Care* 381-390 at 384.

interests.[47] In principle, community involvement is a measure of more sensitive and legitimate processes, which leads to more effective outcomes and results.[48] Although the notion of locally sensitive place-based planning is sound in principle, it presents multiple enforcement challenges in practice.[49]

The first of these challenges is that, even for discrete and localized communities, the range of stakeholder interests is highly heterogeneous and does not lend itself to consensus.[50] The challenges in reaching consensus are not limited to defining desired outcomes and results.[51] Indeed, a major barrier to local access to basic services delivery has been lack of agreement between community leaders and members over how problems should be resolved.[52] For example, during the Federation Internationale de Football Association (FIFA) World Cup, which was hosted in South Africa from June to July 2010, poor communities were excluded in commercialisation activities.[53]

Another major challenge with CBPP seems to be overly simplistic notions of community. Naïve conceptions of community imply a homogenous, spatially fixed social group that shares a consciousness of being interrelated.[54] Yet, the practical experience observed by planning theorists emphasise that a multiplicity of communities exist, differentiated and frequently divided by factors including but not

[47] *Ibid* at 389.

[48] Mine, Y. 'How nations resurge: Overcoming historical inequality in South Africa' in Tsunekawa, K. and Todo, Y. (eds.) *Emerging states at crossroads* (Singapore: Springer Open, 2019) 187-208 at 200.

[49] *Ibid* at 200.

[50] Andersson, N., Matthis, J., Paredes, S. and Ngxowa, N. 'Social audit of provincial health services' 381-390 at 384.

[51] Blakely, E.J. and Leigh, N.G. *Planning local economic development: Theory and practices* 5th ed. (Thousand Oaks, California: Sage Publications, 2013) 40.

[52] Mattes, R., Bratton, M. and Davids, Y.D. 'Poverty, survival and democracy in Southern Africa' CSSR Working Paper No. 27 (Centre for Social Science Research: University of Cape Town, 2002) 1-87 at 80.

[53] Mkhondo, R. 'On the 10th anniversary of the 2010 FIFA World Cup, football still awakens strong feelings of solidarity' News 24 10 June 2020 <https://www.news24.com/news24/columnists/rich_mkhondo/opinion-on-the-10th-anniversary-of-the-2010-fifa-world-cup-football-still-awakens-strong-feelings-of-solidarity-20200610> (last accessed 20 October 2021).

[54] Aklilu, A., Belete, A. and Moyo, T. 'Analysing Community Participation in the Municipal Integrated Development Planning Process in Limpopo Province, South Africa' (2014) 5(25) *Mediterranean Journal of Social Sciences* 257-262 at 261.

limited to gender, race, tribe, ethnicity, class, and age.[55] This complexity poses multiple enforcement challenges to service delivery, in terms of what basic service means for different groups, who benefits from agreed methods of service delivery, and above all, how to define legitimate access to basic services.

Finally, the integration of local, objective knowledge with scientific knowledge of basic service delivery is rarely achieved due to differences in competing knowledge. Indeed, CBPP has been criticized for the tendency of parochial thinking to dominate the planning process, with the possibility that strategies which seem appropriate at one scale may have harmful effects at other scales of operation.[56] The potential for parochial thinking needs particular attention in access to basic services, because what may be considered reasonable application for one community may have negative effects for other communities.[57] Van Rooyen stated the following as an enforcement challenge facing the implementation of community based participation:[58]

> It is not implied that in absolutely all cases, actual negotiations, as one would expect in a bargaining forum-context, would be undertaken. This may become cumbersome and render municipalities ineffective. What, however, is necessary, is a process where communities are informed and made aware of – and even educated – on the basics of what developmental local government could afford them; that they are stakeholders in municipal affairs in one way or the other; and the fact that in reality, resource constraints are prevailing and therefore in most cases, projects and resources allocation are approved on the basis of priority.

Van Rooyen's recommendation should be taken in serious light, given his emphasis on citizens as stakeholders in municipal affairs. There is also the fact that in reality, resource constraints are prevailing and therefore in most cases, projects and

[55] *Ibid* at 267.

[56] Deegan, H. 'A critical examination of the democratic transition in South Africa: The question of public participation' (2002) 40(1) *Commonwealth and Comparative Politics* 43-60.

[57] Van Rooyen, E.J. 'A new approach to managing community participation and stakeholder negotiation in South African Local Government' (2003) 6(1) *South African journal of economic and management sciences* 126-141 at 127.

[58] Van Rooyen, E.J. 'A new approach to managing community participation and stakeholder negotiation in South African Local Government' (2003) 6 (1) *South African journal of economic and management sciences* 126-141 at 127.

resources allocation are approved on the basis of priority. This is a challenge to meaningful community participation.[59] Accordingly, the local governance should be encouraged to create enabling environment that will be transparent, responsive and inclusive in its dealings with municipalities.

With respect to sectional interests and reasonable application, the lines are often blurred by the high rates of corruption and mismanagement in the South African public service. These twin problems are discussed in the next section.

6.3. Corruption and mismanagement

Corruption has been identified as a major factor for the poor state of service delivery in South Africa.[60] Corruption is especially rife amongst African National Congress employees and elected officials in the three spheres of government.[61] In this respect, Serfontein and de Waal observed that corruption is problematic primarily because resources that are meant to achieve socio-economic and developmental objectives are, often times than not, diverted to the benefit of few corrupt elites thereby undermining the developmental goals of these nations.[62] Van Rooyen submitted that the poor in South Africa started a rebellion against service delivery mainly because of endemic corruption.[63] In affirmation, Alexander is of the opinion that while basic service delivery challenges triggers protests, the underlying causes are corruption.[64] Corruption manifests in mismanagement of state resources and deployment of nonqualified personnel by the spheres of governance, which leads to lack of access

[59] *Ibid* at 130.

[60] Tooley, R. and Mahoai, K. 'The impact of corruption on service delivery in South Africa' (2007) 42(3) *Journal of public Administration* 366-373, Lodge, T. 'Political corruption in South Africa' (1998) 97 (387) *African Affairs* 157-187 at 157.

[61] Beall, J., Gelb, S. and Hassim, S. 'Fragile stability: State and society in democratic South Africa' (2005) 31(4) *Journal of Southern African Studies* 681–700.

[62] Serfontein, E., de Waal, E., 'The corruption bogey in South Africa: Is public education safe?' (2015) 35(1) *South African Journal of Education* 1-12.

[63] Van Rooyen, E.J. 'A New Approach to Managing Community Participation and Stakeholder Negotiation in South African Local Government' (2003) 6(1) *South African journal of economic and management sciences* 126-141 at 127.

[64] Alexander, P. 'Rebellion of the poor: South Africa's service delivery protests – A preliminary analysis' (2010) 37(123) *Review of African Political Economy* 26-38 at 34.

to jobs, power supply, housing, healthcare, education, and other social infrastructure needed for decent standard of life.[65]

Increased lack of service delivery, poverty and inequality in South Africa's informal settlements was cited by Freedom of Expression Institute and the Centre for Sociological Research as the main reasons for numerous protests in South Africa.[66] Furthermore, public events offer opportunities for corrupt officials to loot public funds, for example, the procurement processes for personal protective equipment to combat the coronavirus pandemic are plagued with numerous allegations of corruption. In October 2020, law enforcement agencies announced their investigation of over ten billion Rand coronavirus spending across South Africa.[67] The complaints of fraudulent awards of tenders for personal protective equipment were so many that the word "Covid-Preneurship" has captured public imagination.[68] Covid related corruption caused the establishment of task forces and commissions of enquiry. For example, the Fusion Centre was established in 2020 to pool law enforcement and intelligence information and resources towards the investigation of fraud and corruption in the procurement of COVID-related goods and services.[69] So far, the Special Investigating Unit has concluded investigations into 164 contracts worth over Rand 3.5 billion. Elsewhere, the National Prosecuting Authority is prosecuting several top officials of the state power utility company, Eskom, on several charges related to the embezzlement or mismanagement of multi-million Rand contracts.[70]

[65] Bhre, E. 'How to ignore corruption: Reporting the shortcomings of development in South Africa' (2005) 46(1) *Current Anthropology* 107-120.

[66] Thompson, L. and Nleya, N. 'Passivity or protest? Understanding the dimensions of mobilization on rights to services in Khayelitsha, Cape Town' in Coelho, V.S.P. and Von Lieres, B. (eds.) *Mobilizing for democracy: Citizen action and the politics of public participation* (London: Zed Books, 2010) 223-242.

[67] BusinessTech 'R10.5 billion under investigation for 'Covidpreneur' looting in South Africa' 20 October 2020<https://businesstech.co.za/news/government/442058/r10-5-billion-under-investigation-for-covidpreneur-looting-in-south-africa/> (last accessed 26 February 2021).

[68] Agbedahin, K. '"Covid-Preneurship" and the imperative return to Ubuntu' (2021) 33(1) *Peace Review* 80-87.

[69] See the Anti-Corruption website of the South African government at https://www.gov.za/anti-corruption (last accessed 25 November 2021).

[70] *Ibid*.

Corruption and mismanagement have led to rising costs of electricity, water, healthcare services, sanitation, and other basic services.[71] Bond believes that these rising costs contribute to service delivery protests.[72] Narsiah attributed corrupt practices to South Africa's implementation of neoliberal policies such as its Growth, Employment, and Redistribution (GEAR) five-year plan, which focused on privatisation of state-owned enterprises and removal of exchange controls.[73] The fall outs of these policies include the forced removals of informal dwellers, construction of structures like stadiums on impoverished neighbourhoods, and gentrification of inner-city access by low-income informal traders.[74]

6.3.1. Effects of corruption

In a study conducted by Matebesi et al' in the Eastern Cape and the Northern Cape provinces, they found that corruption hampered the provision of quality houses by municipal officials.[75] In another area, the community tried to force the mayor to resign due to allegations of corruption.[76] Given the huge sums budgeted for public infrastructure since the end of apartheid, South Africa should have made considerable progress in the provision of basic services. Regrettably, this is not the case. *McLennan* attributed the lack of service delivery to corruption and financial mismanagement which have left many informal settlements without access to water, sanitation, electricity, and other essential infrastructure.[77] Many protests about service delivery are sparked by the failure of municipalities to provide basic services such as clean

[71] BusinessTech 'R10.5 billion under investigation for 'Covidpreneur' looting in South Africa' 20 October 2020 <https://businesstech.co.za/news/government/442058/r10-5-billion-under-investigation-for-covidpreneur-looting-in-south-africa/> (last accessed 26 February 2021).

[72] Bond, P. 'South Africa's bubble meets boiling urban social protest' (2010) 62(2) *Monthly Review* 17-28.

[73] Narsiah, S. 'Neoliberalism and privatisation in South Africa' (2002) 57 (1) *GeoJournal* 3-13.

[74] Visser, G. 'Gentrification in South African Cities' in Knight, J. and Rogerson, C.M (eds.) *The geography of South Africa* (Germany: Springer International Publishing, 2019) 195-202.

[75] Matebesi, S. and Botes, L. 'Party identification and service delivery protests in the Eastern Cape and Northern Cape, South Africa' (2017) 21(2) *African Sociological Review/Revue Africaine de Sociologie* 81–99 at 86.

[76] *Ibid* at 91.

[77] McLennan, A. and Munslow, B. *The politics of service delivery* (Wits University Press, 2009) 1-23 at 9.

toilet buckets.[78] Indeed, many people at informal settlements lacked adequate sanitation since the late nineties and therefore the higher the number of people the higher the numbers of service delivery protest.[79]

In their desktop analysis, Mathekga *et al* are of the view that the frequency of protests about service delivery between 2005 and 2017 resulted from endemic corruption.[80] As stated, Serfontein and de Waal linked corruption to the rising trend of protests to be violent and disruptive to the economy and investment.[81] After empirically assessing the delivery of basic services in highly concentrated areas, Mphehle found a relationship between corruption and mismanagement.[82] It is therefore obvious that corruption constitutes a formidable enforcement obstacle to efficient service delivery in South Africa.[83]

6.3.2. Effects of mismanagement

Morudu's exploratory study in Kwazulu Natal, Gauteng, and North West provinces between 2009 and 2010 discovered high levels of dissatisfaction by 180 randomly sampled consumers of municipal services.[84] Another study found that the consumers of municipal services were dissatisfied with the deployment of unskilled, unqualified, and inexperienced cadres to municipal management positions.[85] There were also complaints about excessive accumulation and display of wealth by a few corrupt

[78] *Ibid* at 11.

[79] Morudu, H.D. 'Service delivery protests in South African municipalities: An exploration using principal component regression and 2013 data' (2017) 3(1) *Cogent Social Sciences* 1-15 at 13.

[80] Mathekga, R. and Buccus, I. 'The challenge of local government structure in South Africa: Securing community participation' (2006) 2(1) *Critical dialogue Public Participation in Review: IDASA* 11–16 at 16.

[81] Serfontein, E. and de Waal, E. 'The corruption bogey in South Africa: Is public education safe?' (2015) 35(1) *South African Journal of Education* 1-12 at 2.

[82] Mpehle, Z. 'Are service delivery protests justifiable in the democratic South Africa?' (2012) 47(1) *Journal of Public Administration* 213–27.

[83] Mathekga, R. and Buccus, I. 'The challenge of local government structure in South Africa' 11–16 at 11.

[84] Morudu, H.D. 'Service delivery protests in South African municipalities: An exploration using principal component regression and 2013 data' (2017) 3(1) *Cogent Social Sciences* 1-15.

[85] Alexander, P. 'Rebellion of the poor: South Africa's service delivery protests – A preliminary analysis' (2010) 37(123) *Review of African Political Economy* 25–40 at 30.

individuals through the tender system. And also, Nleya et al' are of the view that given the allegation that often features in protests, that ward councillors are not visible in the communities they serve; it was surprising to find that higher levels of contact with the ward councillor were associated with higher protest.[86] In this respect, undue centralisation of funding and absentee councillors and lack of proper systems of revenue accountability by municipalities results in inadequate revenue, which has been noted as a primary service delivery challenge.[87]

Breakfast draws a connection between national security and economic development.[88] In order to deal with the harmful impact of mismanagement on service delivery, he suggested that the security agencies, notably the departments of Defence, Intelligence, Security and Police, should develop a 'national security strategy' to ensure the stability and economic survival of South Africa.[89] It is therefore likely that lack of access to basic services could destabilise law and order in South Africa.[90]

6.4. Poor transparency

Originally, the social contract theory sought to avoid anarchy in social life, which was driven by unchecked individual self-interest.[91] Since it is generally understood as a pact between social groups and the state regarding their rights and obligations towards each other, transparent governance is crucial to the social contract.[92] Despite South Africa's liberal Constitution, this element of the social contract is weak. Poor

[86] Nleya, N., Thompson, L., Tapscott, C. et al 'Reconsidering the origins of protest in South Africa: Some lessons from Cape Town and Pietermaritzburg' (2011) 41(1) *Africanus* 14–29.

[87] Matebesi, S. and Botes, L. 'Party identification and service delivery protests in the Eastern Cape and Northern Cape, South Africa' (2017) 21(2) *African Sociological Review/Revue Africaine de Sociologie* 81–99.

[88] Breakfast, N., Bradshaw, G. and Nomarwayi, T. 'Violent service delivery protests in post-apartheid South Africa, 1994–2017 a conflict resolution perspective' (2019) 11(1) *African Journal of Public Affairs* 106–126 at 107.

[89] *Ibid* 106-126 at 111.

[90] Hough, M. 'Violent protest at local government level in South Africa: Revolutionary potential?' (2008) 36(1) *Scientia Militaria: South African Journal of Military Studies* 1-13 at 7.

[91] Loewe, M., Zintl, T. and Houdret, A. 'The social contract as a tool of analysis: Introduction to the special issue on 'Framing the evolution of new social contracts in Middle Eastern and North African countries' (2021) 145 *World Development* 1-16 at 3.

[92] *Ibid* at 5.

transparency pertaining to basic service delivery is evident in the paucity of data on the operations of eThekwini Municipality.[93] Govinder is of the view that digital municipal governance will provide the opportunity to ensure efficacy and transparency consecutively.[94] The problem of poor transparency is particularly encountered in the activities of government officials at the local sphere of governance.[95] Thus, the degree of openness required by the people under their pact with government to provide basic services is very limited. As shown below, there appears to be a disconnection in the activities of politicians, municipal town planners, and municipal managers regarding basic services.

6.5. Limited resources and overregulation

Limited resources and budget cuts are a world-wide problem in almost all spheres of life. Predictably, a recognised enforcement challenge that hampers the ability of the local sphere of government to deliver basic services is what Andersson refers to as economically disadvantaged people, who often are also socially isolated, and perceive public institutions as distant, unaccountable and corrupt.[96] In part, this challenge originates from the wide range of activities they engage in, especially those they are saddled with by the provincial and national spheres. As shown below, it is also attributed to the limited institutional autonomy of municipalities.[97]

Significantly, corruption and mismanagement in state owned enterprises compounds the enforcement challenge of limited resources. Municipal authorities are frequently tasked with managing provincial and national infrastructure, in addition to local infrastructure. However, their ability to plan and execute projects is dependent

[93] Govender, N. and Reddy, P.S 'Effectiveness of governance towards digitalisation at eThekwini Metropolitan Municipality in KwaZulu-Natal province, South Africa' (2019) 7 (1) *Public Service Delivery & Performance Review* 2-9 at 2.

[94] *Ibid* at 4.

[95] *Ibid* at 3.

[96] Andersson, N., Matthis, J., Paredes, S. and Ngxowa, N. 'Social audit of provincial health services: Building the community voice into planning in South Africa' (2004) 18(4) *Journal of Interprofessional Care* 381-390 at 384.

[97] Nkuna, V.M., and Shai, K.B. 'An exploration of the 2016 violent protests in Vuwani, Limpopo province of South Africa' (2018) 98(3-4) *Man in India* 425-436 at 434.

on the institutional environment in which they operate.[98] This environment is largely influenced by the provincial and national spheres of governance, who behave like the proverbial 'big brother'.[99] Indeed, in many cases, the constitutional powers of municipal authorities are usurped by the national and provincial governments in the guise of supervision.[100]

Also, in many cases, municipalities are seen by the provincial and national spheres of government as their delegated agents on whom they dump operational inconveniences.[101] In this respect, the over reliance of the national and provincial governments on municipalities is counterproductive because municipalities are closest to the people. As such, budget constraints could hamper long term planning and perpetuate short-term technical fixes to address enforcement challenges affecting people's access to basic services.[102]

6.6. Accountability and oversight

The provincial and national spheres of governance have legislative responsibility to incorporate efficient service delivery into their planning.[103] For planning to positively impact basic services such as electricity, water, sanitation, and access to health care services, planning policies and processes relating to the local sphere of government must be updated.[104] This argument was echoed by de Visser in his discussion of the rise of service delivery protests at the local level of governance.

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[98] Alexander, P. 'Rebellion of the poor: South Africa's service delivery protests – A preliminary analysis' (2010) 37(123) *Review of African Political Economy* 25–40 at 30.

[99] *Ibid* at 30.

[100] Fuo, O. 'Intrusion into the autonomy of South African local government: Advancing the minority judgment in the Merafong City case' (2017) 50 (2) *De Jure Law Journal* 324-345.

[101] *Ibid* at 327.

[102] Andersson, N., Matthis, J., Paredes, S. and Ngxowa, N. 'Social audit of provincial health services: Building the community voice into planning in South Africa' (2004) 385.

[103] Oldfield, S. 'Participatory mechanisms and community politics: building consensus and conflict' in (Van Donk, M., Swilling, M., Pieterse, E. and Parnell, S. eds.) *Consolidating developmental local government. Lessons from the South African experience* (Cape Town: Juta and Co., 2008) 19.

[104] Alexander, P., Runciman, C. and Ngwane, T. 'Media briefing-community protests 2004–2013: Some research findings' (2013) *Social Change Research Unit, University of Johannesburg* 1-18 at 15; available at <https://issafrica.s3.amazonaws.com/site/uploads/Public-violence-13March2014-Peter-Alexander.pdf> (last accessed 26 November 2021).

Poor accountability and oversight are compounded by corruption. For example, in September 2019, the MEC of Cooperative Governance and Traditional Affairs, Lebogang Malie, appointed a Committee of Inquiry to investigate the state of affairs of eleven municipalities in Gauteng.[105] The findings identified twelve areas of concern relating to poor leadership, lack of transparency, and non-competitive procurement processes. These concerns are so serious that in certain municipalities, officials themselves engaged in theft of electricity cables every week to ensure that they could claim funds for emergency procurement.[106] Apparently, emergency procurement allows for accelerated processes, which enables officials to circumvent due procedures for procurement.[107]

Accountability and oversight are especially crucial in the procurement sector, which is supposed to operate in accordance with section 217 of the Constitution. The section requires "an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation" that contracts for goods or services to do so in a fair, equitable, transparent, competitive and cost-effective manner.[108] If implemented correctly, accountability and oversight are tools that could be used to improve the efficiency of service delivery in South Africa.

Efforts to improve the delivery of basic services and mitigate the challenges associated with local governance are reflected in a range of initiatives. For example, the Department of Public Works (DPW) is an effective part of government's response to the triple challenge of poverty, unemployment, and inequality through projects such as construction of drainages, water pipelines, and low-cost bridges over rivers. Community development workers (CDWs) serve as a link between communities and

[105] Nemakonde, V. 'Municipality 'steals cables every week to ensure emergency procurement' <https://citizen.co.za/news/south-africa/government/2456194/municipality-steals-cables-every-week-to-ensure-emergency-procurement/> (last accessed 23 March 2021).

[106] *Ibid*.

[107] *Ibid*.

[108] Chapter 13: Finance 113 (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for— (a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented. [Sub-s. (3) substituted by s. 6 of the Constitution Seventh Amendment Act of 2001.]

many government services and programmes. Located within communities, these CDWs assist citizens by helping them to access services such as health, welfare, housing, agriculture, economic activity, education and training, and employment opportunities.[109] At the institutional level, efforts to mitigate the challenges associated with local governance have largely targeted the lack of knowledge and information in programme implementation.[110] For example, the national government has invested in inter-ministerial bodies such as the Public Service Commission (PSC). The PSC is mandated to, amongst others, investigate, monitor, and evaluate the organisation and administration of public service. This mandate also entails the evaluation of achievements, or lack thereof, of government programmes. The PSC also has an obligation to promote measures that would ensure effective and efficient performance within the public service, and to promote the values and principles of public administration set out in the Constitution.

6.7. Political interests

Service delivery is a product of politics. As submitted earlier, and in terms of practice, the local government is the closest branch of government to communities. It is there that majority of basic services activities are processed, most sanitation and waste are managed, and the health of the population is monitored.[111] However this proximity presents unique challenges, since municipalities are not agents of the provincial and national branches. Rather, they are an equal branch with constitutional powers designated in terms of section 156 of the Constitution.[112] The political nature of governance means that all decisions, including the delivery of basic services, are

[109] Raga, K., Taylor, J.D. and Gogi, A. 'Community development workers (CDWs): A case study of the Bitou Local Municipality' (2012) 8(2) D: The Journal for Transdisciplinary Research in Southern Africa' 235-251.

[110] The South African Government adopted a National Infrastructure Plan in 2012. With the plan we aim to transform our economic landscape while simultaneously creating significant numbers of new jobs, and strengthen the delivery of basic services. The plan also supports the integration of African economies, 2012, 1-3 Cameron, R. (1999),1-27 at 3.

[111] Masuku, M. and Jili, N. 'Public service delivery in South Africa: The political influence at local government level' (2019) 19(4) *Journal of Public Affairs* 1-7.

[112] Section 156 of the Constitution.

affected by vested interests and competing policy preferences.[113] In this context, there is a tendency by provincial and national officials to respond to service delivery challenges through the lens of their own political interests.[114] As noted by de Visser, this tendency implies that decision making passes through a variety of bodies ranging from junior staff to senior executives and elected representatives.[115] However, since the setting of goals and allocation of adequate resources is strongly tied to the portfolios of elected officials, the support, or lack of it, from provincial and national political leadership can enable or stifle service delivery at the local sphere of government.[116] Therefore, service delivery could become unduly bureaucratic.

In some ways, bureaucratic bottlenecks in the local sphere of governance is evident in problems raised by the COVID 19 pandemic.[117] The pandemic has worsened service delivery by diverting resources, limiting access to information, and promoting corruption, especially in the award of tenders. It has demonstrated that a coordinated approach to service delivery between the national, provincial, and municipal spheres of government is necessary to ensure that South Africa meets its social contract to citizens.

6.8. Institutional challenges

In response to the operational constraints of municipalities in service delivery, the South African Local Government Association (SALGA) has recognised the importance of lobbying. The Intergovernmental Relations Framework Act 13 of 2005 establishes a framework for the national government, provincial governments, and local governments to promote and facilitate cooperative relations. Furthermore, it provides mechanisms and procedures to facilitate the settlement of intergovernmental disputes

[113] Khambule, I., Nomdo, A. and Siswana, B. 'Burning capabilities: The social cost of violent and destructive service delivery protests in South Africa' (2019) 8(1) *Ubuntu: Journal of Conflict and Social Transformation* 51-70 at 54.

[114] *Ibid* at 61.

[115] De Visser, J. 'The political–administrative interface in South African municipalities: Assessing the quality of local democracies' (2010) 5 *Commonwealth Journal of Local Governance* 86–101 at 87.

[116] *Ibid* at 95.

[117] Coronavirus disease 2019 (COVID-19) Situation Report – 82 Data as received by WHO from national authorities by 10:00 CET, 11 April (2020), 1-13.

and matters connected therewith. There appears to be two forms of institutional challenges against service delivery in South Africa.

The first is challenges that stem from the internal operations of municipalities.[118] In this context, Koelble and LiPuma argue that institutional shortcomings range from inconsistent "national policy towards rural and urban development," to poor "financial controls and competencies, and a lack of skills affecting local officials."[119] Khambule et al' noted that an acute internal challenge to service delivery is "too much politicization of the public sector, [and] interference between politicians and administrators into each other's affairs."[120] This challenge stems from a historical legacy of perceiving basic services as a political issue rather than a social security issue. The local sphere of government needs to recognise that service delivery is part of government's social contract with the governed.

The second type of institutional challenge to service delivery is poor cooperation from the national and provincial spheres of government. This challenge also manifests as political interference in municipal affairs by national ministers and members of the executive council of provincial governments.[121] Since service delivery is an interdependent and interrelated obligation between the three spheres of governance, wilful lack of cooperation is a breach of constitutional duties and obligations to the people.[122] This argument is particularly relevant for local governments, where service delivery is mostly needed and accessed by the majority of rural dwellers. Municipalities therefore need the cooperation of the national and provincial spheres to ensure that service delivery is enhanced.[123] Certain features of local government make this cooperation vital.

Firstly, the local sphere of government is charged with a range of roles and responsibilities, which have evolved over time with the evolution of the democratic

[118] De Visser, J. 'The political–administrative interface in South African municipalities' 86-101 at 87.

[119] Koelble, T.A. and LiPuma, E. 'Institutional obstacles to service delivery in South Africa' (2010) 36(3) *Social Dynamics* 565-589 at 565.

[120] Khambule, I., Nomdo, A. and Siswana, B. 'Burning capabilities: The social cost of violent and destructive service delivery protests in South Africa' (2019) 52.

[121] Nengwekhulu, R.H. 'Public service delivery challenges facing the South African public service' (2009) 44(2) *Journal of public administration* 341-363.

[122] See section 40(1) of the Constitution.

[123] See section 154(1) of the Constitution.

governance system in South Africa.[124] Some of their functions are regulatory in nature, particularly those associated with the approval of building plans, redevelopment, and other residential and commercial modifications to the community landscape.[125] This regulatory authority influences spatial planning at municipal levels and business activities, including e-commerce generally. Thus, it is a core element of local government risk management.[126] The local sphere of government is also responsible for providing a diverse array of non-regulatory services such as storm water management, community education, public health services, fire prevention, recreation, taxation, and enforcing statutory regulations on behalf of the national and provincial governments.[127] These other responsibilities have important implications for basic service delivery, since the manner in which they are pursued varies among municipal councils depending on their size, geography, assets, and modus operandi.[128] The legislative mandates of cooperative governance codified in sections 151, 152 and 156 of the Constitution must therefore be complied with to ensure that government meets its obligations of service delivery.[129] If the above constitutional provisions are not complied with, then the principles of social contract in the preamble of the Constitution will remain elusive in practice.[130]

Secondly, the diversity of responsibilities in providing basic amenities demands a cooperative approach to service delivery.[131] The local sphere of government shares responsibilities with the national and provincial spheres. As such, the social contract theory implies a state moral 'duty-of-care' on each sphere to ensure that

[124] Section 41(1)(h) of the Constitution requires the spheres of government to co-operate with one another in mutual trust and good faith.

[125] See section 152(2) of the Constitution.

[126] Bizana, N., Naude, M.J. and Ambe, I.M. 'Supply chain management as a contributing factor to local government service delivery in South Africa' (2015) 12(1) *Journal of Contemporary Management* 664-683.

[127] Mattes, R., Bratton, M. and Davids, Y.D. 'Poverty, survival and democracy in Southern Africa' CSSR Working Paper No. 27 (Centre for Social Science Research: University of Cape Town, 2002) 28.

[128] *Ibid*.

[129] See section 151, 152 and 156 of the Constitution.

[130] Bassett, C. 'The Demise of the Social Contract in South Africa' (2004) 38 *South Africa Journal on Human Rights* 543-557 at 544.

[131] De Visser, J. 'The political–administrative interface in South African municipalities: Assessing the quality of local democracies' (2010) 5 *Commonwealth Journal of Local Governance* 86–101 at 96.

developmental decisions do not create conflicts in implementation.[132] Significantly, the local sphere of government bears the brunt of accusations of poor service delivery, especially during protests. Yet, the provincial and national spheres prefer supervision to support.[133] For example, out of the five service delivery strategies reviewed by de Visser, Koelble, Khambule and Alexander, poor cooperation was central to the underlying causes for the violent protests. But this underlying cause flew under the radar, as attention focussed on lack of urban planning, poor access to food, water, sanitation, health care, and environmental degradation that resulted in floods.[134]

Finally, the local sphere of government is the centre of a complex web of subsidiary legislation that encourages over-monitoring by the national and provincial governments.[135] For instance, the Municipal Structures Act, which is the principal legislation governing local governments, affirms that "the Constitution establishes local government as a distinctive sphere of government, interdependent, and interrelated with national and provincial spheres of government."[136] This statement alludes to the fact that a broad range of overlapping legislation further define the role of municipalities with respect to specific aspects of governance such as planning, natural resources management, and provision of basic amenities.[137] In many instances, the attitude of the national and provincial governments does not reflect the fact that the local sphere of government has original constitutional powers that should not be usurped in the guise of supervision.[138]

In sum, over-monitoring affects the legal mandate of municipalities to function as independent branches of government.[139] The practice of municipalities acting as

[132] Hickey, S. 'The politics of social protection: what do we get from a 'social contract' approach?' (2011) 32 (4) *Canadian Journal of Development Studies* 2-26 at 11.

[133] Khambule, I., Nomdo, A. and Siswana, B. 'Burning capabilities: The social cost of violent and destructive service delivery protests in South Africa' (2019) 61.

[134] Cameron, R. *Democratisation of South African local government: A tale of three cities* (Pretoria: Van Schaik, 1994) 1-23 at 10.

[135] See section 40, 154 and 156 of the Constitution.

[136] Preamble one of the Act.

[137] Binns, T. and Nel, E. 'Devolving development: Integrated development planning and developmental local government in post-apartheid South Africa' (2002) 36(8) *Regional studies* 921-932.

[138] Section 41(1) of the Constitution titled 'Principles of co-operative government and intergovernmental relations.'

[139] Section 154 of the Constitution.

the servants of the provincial and national spheres of government is typical of the burden placed on the local sphere of governance. As Akinboade *et al* explained, local authorities have few incentives for proactive service delivery because they have no room to manoeuvre and take decisions quickly when opportunities arise or threat of protest emerges.[140] Thus, the national and provincial spheres should engage collegially with municipalities to establish institutional arrangements for policies and practices that improve the delivery of basic services.

6.9. Political will in service delivery

Although the enforcement challenges discussed in this chapter are formidable barriers to efficient service delivery, political will also plays a significant role in the extent to which the state provides basic amenities. Accordingly, it is useful to examine South Africa's first report to the United Nations Committee on Economic, Social and Cultural Rights in 2018, the observations and recommendations of the Committee, and South Africa's response in 2021 concerning its progress.

On 12 January 2015, South Africa acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR). This decision aimed to strengthen its protection and promotion of socio-economic rights. On 25 April 2017, it submitted its Initial Report on the progress it has made since its accession to the ICESCR. Paragraph two of the report acknowledged that the South African Constitution "is one of the few constitutions in the world that contains a wide range of justiciable socio-economic rights." This acknowledgement implies that the state is legally obliged to uphold the ICESCR.

Furthermore, the report stated that the attainment of socio-economic rights forms a vital part of national planning. In its words, "government policies are geared to give expression to the provisions of … the National Development Plan (NDP), which was developed and launched in 2013, to offer a long-term perspective to eliminate

[140] Akinboade, O.A., Mokwena, M.P. and Kinfack, E.C. 'Understanding citizens' participation in service delivery protests in South Africa's Sedibeng district municipality' (2013) 40(5) *International Journal of Social Economics* 458-478 at 472. See also Akinboade, O.A., Kinfack, E.C. and Mokwena, M.P. 'An analysis of citizen satisfaction with public service delivery in the Sedibeng district municipality of South Africa' (2012) 39(3) *International Journal of Social Economics* 182-199.

poverty and reduce inequality by 2030."[141] The NDP contains 14 outcomes or goals.[142] These are the improvement and promotion of decent employment through inclusive growth; skilled and capable workforce; efficient, competitive and responsive economic infrastructure; protection and enhancement of environmental assets and natural resources, and promotion of vibrant, equitable, and sustainable rural communities that contribute to food security. Other goals are sustainable human settlements; improved quality of household life; efficient local government; efficient and development-oriented public service; comprehensive, responsive and sustainable social protection system; building a diverse, socially cohesive society with a common national identity, and the creation of a better South Africa. The Report outlined various measures taken by the state to achieve these goals.

However, the Report admitted that inequality remains a serious challenge for South Africa. For example, in the review period, White-headed households earned income that is roughly 4.5 times more than the income earned by black, African-headed households, and three times larger than the average national income.[143] Citing the National Planning Commission's Diagnostic Report of June 2011, it identified poor public-private partnerships and failure to implement socioeconomic policies as the primary reasons for slow progress in efficient service delivery. The reasons it gave include low employment rates, high levels of corruption, inefficient public health system, poor quality of school education for black people, poor infrastructure, a divided society, and an unsustainably resource intensive economy.[144]

On 1–3 October 2018, the Committee examined South Africa's report at its 64th session, which held from 24 September to 12 October 2018 in Geneva. On 29 November 2018, it sent its 'concluding observations' to South Africa, in which it addressed its concerns and made recommendations for improving the promotion of socioeconomic rights. It identified three priority areas for urgent action. The first is the

[141] Committee on Economic, Social and Cultural Rights "Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights – Initial reports of States parties: South Africa" available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/ZAF/1&Lang=en (last accessed 18 December 2021) para 8.

[142] *Ibid* at para 23.

[143] *Ibid* at paras 12-15.

[144] *Ibid* at 20-21.

provision of a composite index on cost of living and access to social assistance for people who are aged between 18 and 59 years. The second is increment in social grants to orphaned and abandoned children, along with prioritising the adoption of the Social Assistance Amendment Bill. The third is the promotion of access to education for undocumented migrant, refugee, and asylum-seeking children.

In May 2021, South Africa submitted a four-page follow-up report explaining its progress on the Committee's recommendations. On recommendation number one, it reported that its consumer price index (CPI) is sufficient to act as a composite index on cost of living in South Africa. On number two, it stated that it is furthering "policy work", producing a "discussion paper," and holding dialogues on how to provide social assistance for people between 18 and 59 who have little or no income. Furthermore, it reported that it had passed the Social Assistance Amendment Act 16 of 2020, which grants the social development minister the power to prescribe additional funds for the payment of social grants, subject to consent from the finance minister. The state submitted that the Act enables government to provide a higher-valued Child Support Grant to relatives who care for orphaned children. On recommendation three, the state declared its progress in ensuring access to basic education for undocumented, migrant, and refugee children. It cited a high court judgement that invalidated regulations and policies that impede access to education for these children. It also cited a government circular that asks public schools to abide by this judgment.

In response to South Africa's follow up report, several civil society organisations "raised concerns regarding South Africa's inadequate or regressive actions."[145] These organisations are notably the Studies in Poverty and Inequality Institute, the South African Human Rights Commission, the Institute for Economic Justice, SECTION 27, the Centre for Child Law, the Children's Institute, Lawyers for Human Rights, the Legal Resources Centre and the Equal Education Law Centre. They complained about the unsuitability of the consumer price index, reckless cuts to social spending, lack of budget for implementing the Social Assistance Amendment Act, and denial of access to education to learners based on their documentation status. These complaints

[145] Ampofo-Anti, OY; Proudlock, P.; Hansungule, Z.; Khumalo, L.; Harding, M. and Isaacs, G. 'UN shines spotlight on South Africa's lack of progress on socioeconomic and cultural issues' *Daily Maverick* 14 October 2021 <https://www.dailymaverick.co.za/article/2021-10-14-un-shines-spotlight-on-south-africas-lack-of-progress-on-socioeconomic-and-cultural-issues/> (last accessed 18 December 2021).

question the state's commitment to improved service delivery in South Africa through the protection and promotion of socioeconomic rights.

After reviewing South Africa's follow-up report, the Committee issued a written response on 10 November 2021. It declared that South Africa is making "insufficient progress" on all the areas recommended by the Committee.[146] By not promoting the concerned socioeconomic rights, it is failing to protect the poorest and most vulnerable people in the country and failing to fulfil its social contract with the people.

6.10. Conclusion

In an era of unprecedented economic, political, social, and technological changes, efficient service delivery has emerged as a serious developmental challenge in the global South. It is particularly problematic in South Africa because of two notable factors. The first is the Constitution's indirect reference to a social contract between government and the electorate. As argued in chapter two of this dissertation, the social contract theory imposes an obligation on government to ensure the welfare of its citizens. This obligation is made imperative by the need to redress the historical injustices of the apartheid legacy in South Africa. The second factor is how the supervisory oversight of local governments sits uncomfortably with cooperative governance between municipalities, the provincial government, and the national government. The complicated manner in which the legal framework places municipalities under the supervision of the national and provincial governments creates a legislative paradox that affects service delivery. This is the context in which this chapter analysed empirical literature on the enforcement challenges faced by public officials in their delivery of basic services in South Africa.

The chapter relied on qualitative data published by research institutes, government agencies, and international organisations published in the post-apartheid era. It finds that the most prominent challenges to service delivery are corruption, unqualified service personnel, lack of transparency, and poor planning, budget management, and grassroots participation.

[146] This response is available on the website of the Committee on Economic, Social and Cultural Rights at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fFUL%2fZAF%2f47179&Lang=en> (last accessed 18 December 2021).

There is insufficient community-based participation in service delivery in South Africa. The literature overwhelmingly shows that municipalities are the face of public service delivery. Their status is unsurprising, given that the delivery of basic services is felt more in villages, townships, and informal settlements. Accordingly, poor community participation in strategic planning and implementation contributes to poor service delivery. A similar result obtains for poor community participation in monitoring and feedback. Poor community participation encourages corruption, as citizens lack the opportunity to prevent and check abuses by public officials.

Corruption manifests in mismanagement of state resources and deployment of nonqualified personnel in project execution. In turn, this leads to lack of access to jobs, power supply, housing, healthcare, education, and other social infrastructure. Thus, service delivery protests constitute a rebellion against the non-consultation of communities, as well as a reaction against endemic corruption. In this context, social contract, poor transparency, and inefficient service delivery are interconnected. Since social contract is understood as a pact between citizens and the state regarding their rights and obligations, transparent governance is crucial to service delivery.

Finally, service delivery is a product of politics. The political nature of governance implies that the delivery of basic services is affected by the vested interests and competing policy preferences of politicians. This situation is compounded by the paradox of supervision and cooperative governance. Indeed, there appears to be undue political interference in municipal affairs by national ministers and members of the executive council of provincial governments. The vested political interests that underlie this interference makes service delivery unduly bureaucratic. However, contrary to the perception of many public officials, municipalities are not agents of the provincial and national branches. Rather, they are an equal branch of government with constitutional powers. Accordingly, their relationship with other branches requires careful management.

Finally, there is lack of political will to implement South Africa's international obligations to fulfil socioeconomic rights. This is evident in the criticisms from civil society groups of South Africa's reports to the UN Committee on Economic, Social and Cultural Rights. It is also evident in the Committee's feedback on these reports.

In conclusion, institutional mechanisms need to be strengthened to ensure that public officials perform their service delivery duties in as altruistic a manner as possible. This will enable them to overcome the bureaucratic bottlenecks that are

usually associated with governmental functions. Generally, strong institutional mechanisms will enable public officials to comply with the Constitution, norms of good governance, and best practices on service delivery.

CHAPTER 7: CONCLUSION AND RECOMMENDATIONS

7.1. Introduction

The onset of democratic governance in South Africa after many decades of repressive rule aimed to heal the deeply discriminatory divisions of the apartheid past and establish a society based on equity, dignity, and social justice.[1] Accordingly, the 1996 Constitution laid the foundations for a democratic and open government that is based on the will of the people. As evident in its preamble, it tried to champion transformation in the socioeconomic condition of South Africans.[2] For example, it expresses the need for government to "improve the quality of life of all citizens and free the potential of each person."[3] Accordingly, it provides for enforceable socioeconomic rights to ensure that the dignity and access to basic amenities of everyone are promoted and protected.[4] Against the background of South Africa's history of injustice, therefore, this dissertation has argued that governance is a social contract, whose performance is measured by how the state provides basic amenities to citizens. Two elements make up this argument.

Firstly, the social contract theory only works in situations of cooperative governance between the spheres of government. If the legislature, executive, and judiciary are unable to work cooperatively, governance cannot be effective. Similarly, if the national, provincial, and local governments are unable to work cooperatively, the delivery of basic services is hampered. This argument finds support in the

[1] See section 7 of the Constitution of South Africa.

[2] Diala, A.C. 'Courts and transformative constitutionalism: Insights from South Africa' in Sterett, S.M. and Walker, L. (eds.) *Research Handbook on Law and Courts* (Edward Elgar Publishing, 2019) 95-104.

[3] Adopt this Constitution as the supreme law of the republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of the people and every citizens is equally protected by law; improve the quality of life of all citizen and free the potential of each person; and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

[4] Coomans, F. 'Reviewing implementation of social and economic rights: An assessment of the "reasonableness" test as developed by the South African Constitutional Court' (2005) 65 *Max-Planck fur auslandisches offentliches Recht und Volkerrecht* 167-169.

Constitution's imposition of cooperative governance in chapter three.[5] It also finds support in the delineation of governmental functions in sections 155(7) and 156(1), and Part B of the Constitution's Fourth Schedule.[6]

Secondly, the social contract theory subjects the legitimacy of government to its ability to provide basic services to its citizens. The Constitution's use of the word "we" in its preamble denotes the "South African people." Furthermore, the statement "improve the quality of life of all citizens and free the potential of each person" affirms the existence of a governance pact between the people and their elected representatives. Public office holders are elected or appointed to represent the interests of the electorate, thereby giving rise to an obligation by the state to provide basic services to promote the socio-economic rights of the people. Accordingly, it was the intention of the framers of the Constitution to fulfil a constitutional social contract and ensure the effective delivery of basic amenities to South Africans.

In the foregoing context, the failure of any sphere of government to ensure basic service delivery is a breach of the principle of social contract embodied in the Constitution. Among the basic rights in the Constitution are access to water, sanitation, education, housing, safe environment, and health care services. This is the background against which this study has examined the legal framework of service delivery in South Africa and the enforcement challenges encountered by public officials who provide basic services.

The study primarily sought to explore the interface of basic service delivery and the social contract theory in the context of South Africa's legal framework. This objective is expressed with the following central research question: In what ways do South Africa's legal framework provide for service delivery in the context of the social contract theory? In turn, this question was explored with the following sub-questions:

g) How does the 1996 Constitution reflect the social contract theory in the context of basic service delivery?

[5] Chapter three defines government as constituted of the national, provincial and local spheres, which are "distinctive, interdependent and interrelated." It requires all spheres of government to adhere to the principles in the chapter and conduct their activities within its parameters.

[6] In the preamble of the Constitution of South Africa, it states that "We, the people of South Africa, recognise the injustices of our pasts; honour those who suffered for justice and freedom in our land; respect those have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity."

h) What is the constitutional framework of governance in South Africa?
i) What is the attitude of judges to the enforcement of socio-economic rights?
j) What lessons can South Africa draw from other countries on service delivery?
k) What are the major enforcement challenges of effective service delivery in South Africa?
l) In what ways can the delivery of basic services be improved in South Africa?

To answer its research questions, the study utilised literature (desktop) review of scholarly writings, civil society reports, and South African and international human rights instruments. Relevant laws and policy frameworks such as the Constitution, the Municipal Structures Act (1998), the Municipal Systems Act (2000), and the Intergovernmental Relations Framework Act (2005) were examined and contrasted with the work of scholars who have investigated the effectiveness of service delivery in South Africa. Throughout, the study was guided by the implications of the social contract theory for service delivery. What follows this introduction is a summary of the study's findings, as well as suggested legislative and policy recommendations.

7.2. Summary of chapters

7.2.1. Chapter one

Chapter one provided a background to the entire study and explained the current state of basic service delivery in South Africa. It argued that the delivery of basic amenities finds its foundation in section 27(1)(a)(b)(c) of the Constitution. This section clearly states that all citizens have rights to basic services, including access to water, food, healthcare, education, and safe environment. It also stipulates the duty of the state to render social assistance to those who cannot provide basic amenities for themselves due to ill-health or unemployment.[7] The Constitution states further that any law inconsistent with its provisions is invalid, and the obligation imposed on it must be

[7] Section 27: Health care, food, water and social security (1) Everyone has the right to have access to— (a) healthcare services, including reproductive healthcare; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

fulfilled.[8] Accordingly, the chapter concluded that the failure to create an environment that is capable of allowing and assisting people to enjoy a good life and reach their full potential is a violation of the principle of social contract inherent in the Constitution.

7.2.2. Chapter two

This chapter addressed the first probe of the central research question in this study. It presented the social contract theory as the corner stone of modern states and democratic forms of government. It examined the nature and scope of the state's obligation to provide basic services, with emphasis on the theory of social contract and the 1996 Constitution. Its examination is conducted on the premise that the framing of the Constitution denotes a social contract between government and South Africans. The chapter examined historical perspectives on constitutional democracy and theories of government, especially the views of governance that provide a foundation for the idea of the social contract.[9] It also examined the ways in which the theory of social contract can be interpreted to assess government's provision of basic amenities to South Africans. Notably, the conflict theory of governance was applicable during the apartheid era, whereas the current system of governance fits John Locke's contractarian view of governance. It emphasises how the drafting process of the South African Constitution aimed at redressing historical injustices through efficient delivery of basic services. The chapter highlights the need for the constitution-making process to be carried out in such a way that citizens are invested in the resultant document and therefore better placed to hold state officials responsible for any breach of the Constitution.[10] Public investment in the constitution-making process is important in view of the problems and challenges experienced in South Africa regarding governance, basic service delivery, and enthronement of the rule of law.

7.2.3. Chapter three

[8] Section 2 of Constitution of South Africa (hereinafter referred to as the Constitution) Supremacy of Constitution this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

[9] Strauss, D. 'The idea of a 'Just State' (*Rechtsstaat*) (with reference to a unique feature of the Constitution of the Republic of South Africa)' (2015) 34 (3) *South African Journal of Philosophy* 279 - 288 at 284.

[10] Tienda, M. 'Demography and the social contract' (2002) 39 (4) *Demography* 587-616 at 587.

This chapter examined the non-constitutional legal and policy framework of local governance in South Africa, with specific focus on the obligation of municipalities to deliver basic amenities. This framework includes the Municipal Structures Act 117 of 1998, the Municipal Systems Act 32 of 2000, the Traditional Leadership and Governance Framework Act 41 of 2003 and the Charter for Public Service in Africa.[11] The chapter probed how the composition, objectives, and responsibilities of municipalities affect service delivery, as well as the regulatory framework of the South African Local Government Association, whose function is to enhance the operations of municipalities and help them to fulfil their developmental mandate. The chapter argued that the social contract theory provides a standard for understanding and measuring effective service delivery at the local government level. Although the non-constitutional statutory framework of local government reflects the social contract theory, non-cooperative governance and poor implementation of programmes hinder municipalities from adhering to their obligations to the people. This situation hinders efficient service delivery. An example is poor cooperation between municipal officials and traditional leaders. Even though local governments have been undergoing major changes since the introduction of democracy in 1994, traditional leaders still feud with the local government officials for power and authority. The chapter concludes that the national and provincial governments over rely on municipalities to deliver basic service without commensurate support and capacity.

7.2.4. Chapter four

This chapter sought to answer the second probe of the study's research question: What is the constitutional framework of cooperative governance in South Africa? To provide an answer to this question, it examined how the Constitution delineates the functions of the various spheres of government, and the extent to which these spheres cooperate to ensure the delivery of basic services to citizens. It described co-operative governance as complementary relationship between the different levels of government. The evolution of cooperative governance in South Africa shows it is of recent origin, since both the colonial and apartheid regimes favoured racist and exclusionary policies that hindered cooperative governance. A poor culture of

[11] Ruiters, G. 'The moving line between state benevolence and control: Municipal indigent programmes in South Africa' (2018) 53(2) *Journal of Asian and African Studies* 169-186.

cooperative governance influenced the negotiation process of democracy in the early nineties. Arguably, the drafters of the Interim Constitution and its successor struggled to incorporate cooperative governance. For example, whereas the Interim Constitution arranged the spheres of government in a hierarchical order, with the national level on top, and the local level at the bottom, the 1996 Constitution grants each sphere of government liberty to define and express its own unique character. Even though section 40(1) of the 1996 Constitution creates boundaries between the different spheres of government by mandating them to respect the autonomy of each other, it also demands linkage in governmental functions. Accordingly, the chapter argued that the local government is an autonomous sphere of government, rather than the servant of the national or provincial government. It criticises excessive monitoring of municipalities by the other spheres of government,[12] showing how it defeats the transformative agenda of the Constitution.

7.2.5 Chapter five

Here, the study turned to the extent to which the South African judiciary recognises the notion of social contract by scrutinising how judges enforce socio-economic rights. The analysis sought to answer sub-questions three and four of the central research question of this dissertation. Accordingly, it examined key judgments of the Constitutional Court and contrasted them with the judicial style in Latin America. Unlike Latin American judges who rely heavily on the concept of the minimum core in their enforcement of socio-economic rights, South African judges defer to the state's argument of limited resources as a defence for its inability to provide some basic amenities. This argument was successfully deployed in most of the judgements analysed in this chapter, such as the *Grootboom*, *Soobramoney*, *Treatment Action Campaign*, *Mazibuko*, and *Nokotyana* v *Ekurhuleni Municipality* cases. Indeed, the Constitutional Court has consistently refused to adopt the minimum core, regarding it as indeterminate, beyond the scope of judicial review, and less suitable than a 'reasonableness approach.' This approach assesses the fairness and seriousness of state policies on socio-economic rights, as well as the progressive steps taken by the state to achieve these policies. Significantly, the Constitutional Court regards the

[12] An example is the discussion of *City of Cape Town v Premier of the Western Cape and Others* 2008 (6) SA 345 (C) 25 & 48.

reasonableness approach as more democratic because it leaves room for dialogue with the political branches of government.

The Constitutional Court's attitude to the enforcement of socio-economic rights is in stark contrast to the attitude of judges in Brazil, Colombia, Argentina, and other Latin American countries. Here, judges have used the minimum core concept to enforce socio-economic rights for underprivileged people. For example, Colombian judges have used the concepts of connectivity and vital minimum to enforce socio-economic rights. Both concepts recognise that civil and political rights like the right to life and human dignity are inseparably connected to socio-economic rights. Accordingly, the state must ensure that its policies and practical programmes are implemented in such a way that people's dignity and welfare are promoted through their access to the basic services necessary to sustain human life. Colombian judges have granted numerous individual remedies against the state through a constitutional complaint mechanism known as the tutela. The tutela is remarkable for its minimal administrative hurdles and its quick dispensation of justice. Since the tutela system recognises the full enforceability of civil and political rights, judges use the connectivity and vital minimum notions to compel the state to provide basic amenities to Colombians. Accordingly, the chapter argues that the social contract theory requires South African judges to adopt the minimum core approach to socio-economic rights enforcement as the best option for realising the transformative intent of the Constitution. As the jurisprudence from Latin America shows, the minimum core concept prevents the state from hiding behind the excuse of limited resources to justify its failure to fulfil a particular socio-economic right.

7.2.6 Chapter six

This chapter sought to answer the fifth sub-question of the study's central research question by examining the enforcement challenges faced by the three spheres of government in their delivery of basic services to South Africans. These challenges include corruption, maladministration, limited resources, unqualified personnel, poor planning, lack of transparency, and limited grassroots participation. Since the provision of basic amenities is the basis of government's social contract with citizens, the chapter argues that effective service delivery is measurable by the level of public satisfaction with municipal services. It further argues that the state of public infrastructure, the efficiency of municipalities, and protests related to basic amenities,

all provide reliable assessment yardsticks for measuring the efficiency of service delivery. The chapter finds that corruption, weak political will, bureaucratic bottlenecks, mismanagement of state resources, weak cooperative governance, and insufficient community-based participation, hinder service delivery in South Africa. These challenges manifest in South Africa's failure to meet its treaty obligations to the Committee on Economic, Social and Cultural Rights, as evident in the responses of the Committee and civil society to its reports. Although the national, provincial, and local levels of government are defined in the Constitution as distinctive, interdependent, and interrelated, this does not translate to independence in practice. By showing how these challenges contribute to high rates of unemployment, lack of water and sanitation services, lack of access to housing, and limited access to health care services, this chapter contributes to the debate on how the spheres of governance could overcome service delivery challenges in order to fulfil their social contract with citizens. Its findings on these enforcement challenges offer several illuminating perspectives on policy and project programming that are expanded in the following recommendations.

7.3. Policy recommendations

The world is experiencing socio-economic changes at an unprecedented pace. A decent knowledge of legal history will show that some of the ideas of governance we accept today would have been deemed treasonable a few centuries ago. The fast pace of social changes explains why states are increasingly pledging to provide basic amenities in their constitutions. Usually, they do this by incorporating socio-economic rights, and endowing them with varying degrees of enforceability by the courts. However, the efficient provision of basic amenities remains a problematic issue in the global South. This is especially the case in South Africa, where the income gap is one of the widest in the world and a vast majority of the population wallow in poverty. Accordingly, the policy recommendations below are offered as potential measures to improve the state's provision of basic amenities.

7.3.1. Social contract as governance principle

This dissertation proposes that all state officials should execute their duties on the basis of a social contract with citizens and the state. As argued in chapter two of this dissertation, the social contract theory imposes an obligation on government to ensure

the welfare of its citizens. In South Africa, this obligation is made imperative by the need to redress the historical injustices of the apartheid legacy. Since the social contract emphasises the consent of the people as the basis of political legitimacy and authority, there is a need for the constitution making process to be carried out in such a way that broad sectors of society are so invested in the resultant document that they will hold state officials accountable for any breach of their social contract. If the public is well-invested in accountability, the process of social transformation and improvement of the quality of life of South Africans will be enhanced.

Significantly, article 3 of the Service Charter affirms this idea. It states: "This Service Charter is a social contract, commitment and agreement between the State and public servants. It … will form the basis of engagement between government and citizens or organs of civil society." In line with this recognition, every managerial public official involved in service delivery should not only sign the Service Charter but also rigorously held to his or her performance agreements. This is because a "properly implemented performance management and development system provides a firm foundation for effective service delivery."[13] At the moment, performance management is not given serious attention in South Africa.[14] Given the importance of service delivery, there is no reason why the oath of office in Schedule 3 of the Constitution should be reserved for only the President, Ministers, their deputies, premiers, judges, legislators, and members of provincial executive councils. Senior public officials engaged in the delivery of basic amenities should be compelled to take them.

7.3.2. Cooperative governance

Service delivery in South Africa needs a systematically coordinated approach. Significantly, the constitutional principle of cooperative governance demands support to the local government from the senior leadership of the provincial and national spheres of government. Accordingly, if service delivery is to be realistically available to all citizens, the burden on municipalities to provide basic amenities should be lowered through proper implementation of cooperative government. It appears that the national and provincial governments are over relying on municipalities to deliver basic

[13] Mello, D.M. 'Performance management and development system in the South African public service: A critical review' (2015) 50 (3.1) *Journal of Public Administration* 688-699.

[14] *Ibid* at 689 and 698.

amenities without commensurate support and capacity. Support and capacity are especially needed in rural areas, where breaches of contract by contractors and third-party service deliverers are common. Such support should be devoid of undue politicisation, which is an endemic problem for the administrative officials in charge of rural municipalities.[15] Without the requisite support from the national and provincial spheres of government, the effectiveness of municipalities will be no different from the neglect of black, rural areas during apartheid.[16]

Furthermore, the local government should form the fulcrum of a comprehensive system of cooperative governance aimed at effective delivery of basic services to the people.[17] This cooperation is vital for the people to truly feel that their submission to state authority in terms of the social contract theory is worthwhile. Afterall, efficient service delivery is a measure of effective governance. Accordingly, changing the landscape of local governance should be a key priority for the state.

7.3.3. Monitoring versus supervision of local government

There is need for legislative clarity in the relationship between the local government and provincial government. This is because the supervisory oversight of local government in sections 139 and 155(6) of the Constitution sits uncomfortably with the constitutional principle of cooperative governance between the local, provincial, and national governments. These sections of the Constitution do not entitle the provincial government to be involved in areas that are primarily or totally within the jurisdiction of local government. Instead, they require provincial governments to act as a remedial mechanism for addressing any failure in the functioning of local governments.

The unclear manner in which the legislative framework allows the provincial government to control the operations of municipalities creates a legislative paradox that affects service delivery. By allowing the provincial government to establish municipalities, the Constitution did not intend for the provincial government to stifle the autonomy of local government under the guise of supervisory functions. Significantly, section 139 of the Constitution used to be titled “Provincial Supervision of Local

[15] Masuku, M. and Jili, N. ‘Public service delivery in South Africa: The political influence at local government level’ (2019) 19 (4) *Journal of Public Affairs* 1-7 at 7.

[16] See the *NDP*, Chapter 13: Building a Capable State, 363-393.

[17] *Ibid* at 385.

Government." In recognition of the autonomy of local government, the section was amended to "Provincial Intervention in Local Government."[18] This amendment demonstrates that the local government is not the servant of the provincial government. The other levels of government are therefore advised to focus on support to municipalities and reduce their over supervision and monitoring tendencies.

To simplify the relationship between provincial governments and municipalities, a caveat should be added to section 139 of the Constitution, as follows: "Provided that nothing in this section shall be construed to mean that the provincial government has a supervisory power over a municipality." Furthermore, the word 'monitoring' should be removed from section 155(6), so that it will read: "Each provincial government must … (a) provide for the support of local government in the province."

7.3.4. Enforcement of socio-economic rights

It is notable that the state has been accused of failing to fulfil its constitutional obligations to realise access to sufficient food, water, healthcare services, and basic education. For example, the 2021 Medium-Term Budget Policy Statement "has been roundly criticised by civil society organisations for being anti-poor."[19] As chapter six concluded, the executive branch of government fails to fulfil its obligation to ensure efficient service delivery. Here is how a report in the Daily Maverick summarised South Africa's second feedback from the Committee on Economic, Social and Cultural Rights: "This latest criticism from a UN treaty body of SA's human rights record, and the apparent lack of political will to address poverty and inequality, should be taken seriously by the executive and legislature, and eventually by the courts as well."[20] To realise the transformative purpose of the Constitution, therefore, judges should adopt the minimum core approach to the enforcement of socio-economic rights. This is because basic services should not be available only to the wealthy at the expense of the poor, who constitute the majority of South Africans. Although the Constitutional Court has granted some individual remedies that promote people's access to basic

[18] See section 4 of the Constitution Eleventh Amendment Act of 2003.

[19] Heywood, M. 'UN Committee unhappy with South Africa's progress on socioeconomic rights — again' *Daily Maverick* 16 November 2021 <https://www.dailymaverick.co.za/article/2021-11-16-un-committee-unhappy-with-south-africas-progress-on-socioeconomic-rights-again/> (last accessed 18 December 2021).

[20] *Ibid*.

services, these judgments do not match the high level of wealth disparity in South Africa. The reality is that millions of people cannot afford the high cost of litigation involved in the enforcement of socio-economic rights. Obviously, many of the successful lawsuits involving basic service delivery in the last three decades have been championed by rights advocacy campaigners.

Furthermore, judicial and legislative policymakers should reform the system of litigating socio-economic rights by drawing best practices from the tutela system of Latin American countries. For example, Colombian judges have granted numerous individual remedies against the state through this constitutional complaint mechanism. The tutela is remarkable for its minimal administrative hurdles and its quick dispensation of justice. Since it recognises the interconnectedness of civil and political rights, judges use the connectivity and vital minimum notions to compel the state to provide basic amenities to Colombians. In South Africa, socioeconomic remedies may be realised in ways similar to the tutela system through the adoption of simplified administrative, financial, and procedural means of filing complaints. Specifically, lawmakers should consider the establishment of specialist courts, whose procedures could be modelled after the land and small claims courts. Such courts will enable litigants to seek remedies without the cost-intensive involvement of legal practitioners. It will also smoothen people's access to judicial remedies for violations of their socio-economic rights.

7.3.5. Anti-corruption strategies

The recommendations in this sub-section are made as a response to the endemic nature of corruption in South Africa.[21] Arguably, corruption poses the greatest threat to efficient service delivery in South Africa. This argument finds support in the adoption of the National Anti-Corruption Strategy in December 2020.[22] The second paragraph of the executive summary of this document is very telling. It states, among others:

> Corruption has become endemic in South Africa. It undermines democracy and impacts negatively on service delivery, human and socio-economic

[21] In 2020, South Africa's ranking of 44/100 in Transparency International's Corruption Perception Index was reported as a marginal improvement.

[22] 'National Anti-Corruption Strategy 2020-2030' of December 2020; available at <https://www.gov.za/sites/default/files/gcis_document/202105/national-anti-corruption-strategy-2020-2030.pdf> (last accessed 25 November 2021).

> development, job creation and public trust in government, as well as investor confidence in the country. Corruption manifests in all spheres of society and occurs in the public sector and in the private sector. Corruption, having permeated key institutions in both the public and private sector, poses a threat to national security, undermines the rule of law and institutions vital to ensuring the centrality of the state as a protector and promoter of the rights of its citizens.

The effects of corruption are evident in violent service delivery protests. They are also evident in the recent collapse of some state-owned enterprises and the financial distress of others such as Eskom, South African Airways, LMT Products, and SA Express. Accordingly, this dissertation proposes four broad strategies to combat corruption in South Africa.

The first is widespread public awareness campaigns on broadcast media and the inclusion of corruption related courses in the school curricula. This awareness campaign could be conducted with an anti-corruption tool kit modelled on the comprehensive definition of corruption in the United Nations' Anti-Corruption Toolkit. It should demonstrate how corruption hampers the ability of the state to provide basic amenities. The teaching of anti-corruption values should also involve the teaching of corruption and good governance as a first-year module in universities.

The second anti-corruption strategy proposed here is punitive punishment for officials convicted of corrupt conduct. The shameful disclosures that were revealed in the Zondo Commission (State Capture Inquiry) demonstrate the need for a tough stance on the looting of state resources. It is proposed that section 4 of the Prevention and Combatting of Corrupt Activities Act should be amended to incorporate tougher penalties for public officials, company directors, and managers who are convicted of corrupt conduct.[23] Because of their influential position in society, this category of persons should be handed a minimum prison sentence of ten years and forced to forfeit the proceeds of their corruption. Individuals who are convicted of embezzling any sum above five million Rand should be sentenced to an additional five years imprisonment per one million in excess of this threshold. Sentencing for multiple counts of embezzlement must not carry the option of a fine and, as a general rule, should not be allowed to run concurrently. In addition, such convictions should be a

[23] Prevention and Combatting of Corrupt Activities Act No. 12 of 2004.

permanent bar to the holding of public office by the convict. Since judges are not immune from corruption, these measures will deter them from imposing lenient sentences. The measures suggested here will also demonstrate the state's determination to combat the scourge of corruption.

The third anti-corruption strategy proposed by the dissertation is the strengthening of the enforcement mechanisms of laws that regulate corruption. The laws that would benefit from strengthened outcomes include the Public Audit Act, the Public Administration Management Act, the Executive Ethics Act, the Public Finance Management Act, the Municipal Finance Management Act, and the Independent Police Investigative Directorate Act. Also, the prosecutorial independence of officers of the National Prosecuting Authority (NPA) need to be legislatively strengthened to ensure that cases of embezzlement are diligently prosecuted without undue political interference.

The reform of the National Prosecuting Authority Act 32 of 1998 should aim to improve the welfare of officers of the NPA and ensure their political neutrality. Finally, the enforcement of the outcomes of bodies that combat corruption will enhance service delivery. These bodies include the Judicial Services Commission, the Standing Committee on Public Accounts, the Public Service Commission, the Office of the Public Protector, the Auditor-General, the Independent Police Investigative Directorate, the Office of Standards and Compliance, and the Independent Regulatory Board for Auditors. Enhancing the decisions of these bodies will be a clear demonstration of intent to combat the threat that corruption poses to service delivery in South Africa. It is regrettable that as at the end of 2021, members of the National Anti-Corruption Advisory Council were yet to be appointed. This Council could have supported the 'Fusion Centre' set up in 2020 to combat corrupt tenders.[24] It comprises of the Financial Intelligence Centre, the Independent Police Investigative Directorate, the National Prosecuting Authority, the Special Investigating Unit, the State Security Agency, the South African Revenue Service, and the Directorate for Priority Crime Investigation popularly known as the Hawks.

[24] Plessis, C. 'SA Government to establish 'fusion centre' to deal with corruption' *Daily Maverick* 7 August 2020 <https://www.dailymaverick.co.za/article/2020-08-07-sa-government-to-establish-fusion-centre-to-deal-with-corruption/> (last accessed 25 November 2021).

The final anti-corruption strategy proposed here is institutional measures. These include strengthening financial management compliance by government agencies, the protection and reward of whistle-blowers, compulsory asset declarations by public officials, and regular lifestyle audits of top government executives. Other measures are mandatory reporting of corruption by citizens, enhanced training of investigators, and public-private-international partnerships to combat corruption.

7.3.6. Improvement of budgets and qualified personnel

Budget constraint is a formidable challenge to the ability of the state to provide basic amenities to its citizens. Significantly, South Africa faces the triple obstacles of poverty, unemployment, and inequality. To combat these obstacles, therefore, the state should 'ring-fence' the budgets of critical departments that provide essential services like water, electricity, and health. The ring-fencing of sectors such as health, education, and social welfare will ensure that their department budgets are not subjected to the worrying cuts that plague government agencies. This is because budget cuts hamper long term planning and restrict the state's ability to provide basic services.

Furthermore, the process of hiring public officials must follow due process to ensure that only qualified officials are hired. Chapter six clearly showed how poorly qualified personnel negatively affects service delivery. It is suggested that candidates for councillorship and mayoral offices should undergo a competency test to ensure that they are qualified to handle their aspired portfolios. Also, municipal officials should undergo regular skill capacity trainings. Emphasis should be placed on trainings that are related to digital information and communication technology. The fourth industrial revolution has led to increased reliance on technology to solve social problems. Digital information training will also help officials to guard against loss of critical data through cyber-attacks. For example, several key departments such as the South African National Space Agency, the Department of Justice and Correctional Services, and the state port operator, Transnet, were hit by a ransomware attack in 2021.[25] It is crucial

[25] Toyana, M. 'Cyber bandits target South Africa: Department of Justice, Space Agency hit by ransomware attacks' Business Maverick 9 September 2021 <https://www.dailymaverick.co.za/article/2021-09-09-cyber-bandits-target-south-africa-department-of-justice-space-agency-hit-by-ransomware-attacks/> (last accessed 20 November 2021).

to train this category of officials because municipalities are the face of service delivery for the vast majority of people in South Africa.

7.3.7. Participatory planning

It is practically impossible for a developmental state to make progress without sound planning. Accordingly, government should take long-term planning more seriously by adopting a people-based participation approach. Poor community participation in planning encourages corruption because it robs citizens of the opportunity to prevent, monitor, and stop fraudulent behaviour by public officials.

It is worth noting that the National Developmental Plan (NDP) aims to eliminate poverty and reduce inequality by 2030.[26] According to the plan, South Africa can realise these goals by drawing on the energies of its people, growing an inclusive economy, building capabilities, enhancing the capacity of the state, and promoting leadership and partnerships throughout society.[27] The goals of the NDP speak to the importance of planning in service delivery.

Furthermore, planning and implementation should be informed by evidence-based monitoring and evaluation.[28] In partnership with the South African Local Government Association, the President and Deputy President of the Republic should champion strategic planning and ensure that premiers and mayors are visible and active promoters of the NDP. In fact, premises of premiers and mayors should be the fulcrum of planning and implementation at provincial and municipal levels.[29]

7.3.8. Institutional mechanisms on transparency and accountability

Institutional mechanisms of performance appraisal should be improved to ensure that public officials perform their duties as selflessly as possible. For example, tender boards must ensure that government departments follow the procedures laid down by relevant laws such as the Preferential Procurement Policy Framework Act and the Public Finance Management Act.[30] Similarly, government mechanisms such as

[26] See the *NDP*, Chapter 13: Building a Capable State, 363 and 393.

[27] *Ibid* at 363.

[28] See the *NDP*, Chapter 13: Building a Capable State, 363-393, 385.

[29] *Ibid*.

[30] Preferential Procurement Policy Framework Act (Act no 5 of 2000); Public Finance Management Act (Act 1 of 1999 as amended by Act 296 of 1999.

auditing, budgeting, project implementation and reports should be enhanced to encourage transparency and accountability in the provision of basic amenities. Transparent governance is crucial to service delivery because social contract is a pact between citizens and the state regarding their respective rights and obligations.

As part of measures to improve transparency, the tendency of national ministers and members of the executive council of provincial governments to pursue their own political interests must be curbed with effective use of the Promotion of Access to Information Act.[31] To reduce the highly bureaucratic nature of requests under the Act, the payment of fees (article 54 of the Act) should be removed for requests to access public records on service delivery. In summary, strong institutional mechanisms will enable public officials to comply with the Constitution, norms of good governance, and best practices on service delivery.

7.4. Closing remarks and further research

The human rights movement, which emerged after the end of the Second World War, has created international consensus on the close link between human development and access to basic amenities. As a report commissioned by the United Nations Children's Fund noted in its preface: "There is a general consensus that basic social services are the building blocks for human development. Indeed, they are now accepted as fundamental human rights."[32] Accordingly, it is imperative for the state to provide basic amenities against the background of a social contract with its citizens.

Given the spate of service delivery protests in South Africa, further research is needed on the relationship between developmental local government and a struggle approach to human rights. A struggle approach to human rights asserts that socio-economic rights and legitimate struggle are two sides of the same coin because the provision of socio-economic rights is the primary purpose of governance.[33] Relying on the social contract between the state and the electorate, it explains struggle as the progenitor of human rights. In this sense, the gross abuse of human rights is a license

[31] Promotion of Access to Information Act No. 2 of 2000.

[32] Mehrotra, S., Vandermoortele, J. and Delamonica, E. 'Basic services for all? Public spending and the social dimensions of poverty' (UNICEF: Innocenti Research Centre, 2000).

[33] Heyns, C. 'A struggle approach to human rights,' in Soeteman, A. (ed) *Pluralism and law* (Dordrecht: Springer, 2001) 171-190.

for civil disobedience. The struggle approach to human rights helps to shed light on why violent service delivery protests have been rising in South Africa over the last two decades. Since municipalities are the face of service delivery, it also sheds light on the concept of developmental local government.

According to the white paper on local government, developmental local government means a local government that is committed to "work with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives."[34] Since its emergence as a governance notion at the turn of the new millennium, it has split opinion on cooperative governance, especially the ability of the provincial government to interfere in the activities of municipalities. This is because developmental local government requires municipalities to extend their ability to provide infrastructure, adopt fundamental changes to their governance apparatus, and implement new financial management systems within intergovernmental cooperation.[35]

The need for further research on the nexus between developmental local government and a struggle approach to human rights is made imperative by section 153 of the Constitution. This section demands that "a municipality must structure and manage its administration, budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community." If the local government is made to bear the burden of development, then the hierarchical division of governmental powers must be revisited. It makes little sense for the other spheres of government to enjoy a vastly superior status in the legal framework, while the bulk of service delivery is undertaken by the local government.

[34] The White Paper on Local Government of 9 March 1998.

[35] De Visser, J. 'Developmental local government in South Africa: Institutional fault lines' (2009) 2 *Commonwealth Journal of Local Governance* 7-25.

REFERENCES

Case Law

Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 10 (6 September 1996).

*City of Cape Town v Premier of the Western Cape and Others 2*008 (6) SA 345 (CC).

De Lange v Smuts No and Others (CCT26/97) [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (28 May 1998).

Dladla v City of Johannesburg (Centre for Applied Legal Studies and another as amici curiae) 2018 2 BCLR 119 (CC) pars 47–51.

Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Republic of South Africa 1996 (First Certification judgment) 1996 (4) SA 744 (CC) [13].

Government of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC).

Grootboom and Others v Oostenberg Municipality and Others 2000 (3) BCLR 277 (C).

Le Sueur v eThekwini Municipality [2013] ZAKZPHC 6 (30 January 2013).

Mazibuko & Others v City of Johannesburg & Others 2010 (4) SA 1 (CC).

MEC KwaZulu-Natal for Local Government, Housing and Traditional Affairs v Yengwa (unreported case no. 4462/2007) [26 November 2008] at para 12.

Minister of Health v Treatment Action Campaign 2002 (5) SA 721 (CC).
Minister of Local Government, Housing and Traditional Affairs (KwaZulu Natal) v Umiambo Trading 29 CC and Others 2008 (1) SA 396 (SCA) 25.

Mnquma Local Municipality & Another v Premier of the Eastern Cape others (231/2009) [2009] ZAECBHC 14 (5 August 2009).

Ngaka Modiri Molema District Municipality v Chairperson North West Provincial Executive Committee & Others (CCT 186/14) [2014] ZACC 31, 2014 (18) SA, 2.

Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others 2009 ZACC 33; 2010 (4) BCLR 312 (CC).

Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others 2008 5 BCLR 475 (CC).

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) 2005 (1) SA 217 paras 37-38.

R (B) v Cambridge Health Authority [1995] EWCA Civ 43.

S v Dodo (CCT 1/01) [2001] ZACC 16; 2001 (3) SA 382 BCLR 423 (CC) (5 April 2001).

Soobramoney v Minister of Health (Kwazulu-Natal) (CCT32/97) [1997] 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).

South African Association of Personal Injury Lawyers v Health and Others (CCT27/00) [2000] ZACC 22; 2001 (1) BCLR 77 (28 November 2000).

Suarez Peralta v Ecuador, Inter-American Court of Human Rights, May 21, 2013.

The "Five Pensioners" v. Peru, Inter-American Court of Human Rights, Feb. 28, 2003.

Tlouamma and Others v Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa and Another (A 3236/15) [2015] ZAWCHC 140; 2016 (1) SA 534 (WCC); [2016] 1 All SA 235 (WCC) (7 October 2015).

Books and chapters

Arato, A. *The adventures of constituent power: Beyond revolutions* (Cambridge: Cambridge University Press, 2017).

Arrighi, G. *The long twentieth century: Money, power, and the origins of our times* (Verso, 2010, 1st edition 1994).

Atkinson, D. 'Taking to the streets: Has developmental local government failed in South Africa' in Buhlungu, S., Daniel, J., Southall, R. and Lutchman J. (editors) *State of the Nation: South Africa* (Cape Town: Human Sciences Research Council Press, 2007) 53-77.

Bakunin, M.A., Bakunin, M. and Michael, B. *Bakunin: Statism and Anarchy* (Cambridge University Press, 1990).

Barnard, L.S. 'The attempts of the British government to establish a federation in Southern Africa during the second half of the nineteenth century' in Kriek, D.J. (editor) *Federalism the solution? Principles and proposals* (Pretoria: HSRC Publishers, 1992).

Barnett, R.E. *Restoring the lost constitution* (Princeton University Press, 2013).

Baron de Montesquieu, C.D.S. *The spirit of laws* Vol. 2 (Trans. By T. Nugent) (Colonial Press, 1900).

Bekink, B. *Principles of South African Local Government Law* (LexisNexis, 2017).

Beresford, P. 'Participation and social policy: transformation, liberation or regulation?' in Sykes, R., Bochel, C. and Ellison, N. (editors) *Social Policy Review 14: Developments and debates: 2001-2002* (Bristol: Policy Press, 2002) 265- 290.

Bertram, C. *Routledge philosophy guidebook to Rousseau and the social contract* (Routledge: London and New York, 2004).

Bilchitz, D. *Poverty and Fundamental rights: The justification and importance of socio-economic rights* (New York: Oxford University Press, 2007).

Bitel, L.M. and Lifshitz, F. editors. *Gender and Christianity in Medieval Europe: New perspectives* (University of Pennsylvania Press, 2008).

Blakely, E.J. and Leigh, N.G. *Planning local economic development: Theory and practices* 5th edition. (Thousand Oaks, California: Sage Publications, 2013).

Boucher, D. and Kelly, P. *The social contract from Hobbes to Rawls* (Routledge, 2003).

Boulle, L.J. *South Africa and the Consociational Option; A constitutional analysis* (Johannesburg: Juta and Company Limited, 1984).

Brand, D., Freedman, W., and de Vos, P. (editors) *South African Constitutional Law in Context* (Oxford University Press, 2nd edition, 2015).

Brewer-Carias, A.R. *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (Cambridge University Press, 2009).

Bulmer, W.E. *What is a constitution? Principles and concepts* (Stockholm: International Institute for Democracy and Electoral Assistance, 2014).

C.F.J. Muller (editor.) *Five Hundred Years: A History of South Africa* (Pretoria and Cape Town: Academica, 1969).

Carstens, P. and Pearmain, D. *Foundation Principles of South African Medical Law* (LexisNexis, 2007).

Chowdhury, J. 'Unpacking the minimum core and reasonableness standards' in Jackie Dugard, J., Porter, B., Ikawa, D. and Chenwi, L. (editors) *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Cheltenham: Edward Elgar Publishing, 2020) 251-274.

Cloete, J.N. *Central, Provincial and Municipal institutions of South Africa* (Pretoria: Van Schaick, 1988).

Currie, I. and De Waal, J. *The Bill of Rights handbook* (Juta & Company Limited, 2013 6th edition).

D'Agostino, F. *Free public reason: Making it up as we go* (Oxford University Press, 1996).

Davenport, T. and Saunders, C. *South Africa: A modern history* 5th (edition.) (Palgrave Macmillian, 2000).

Davis, D., Halton, C. and Haysom, N. *Fundamental rights in the Constitution: Commentary and cases* (Cape Town: Juta and Company Limited, 1997).

Davis, S.R. *The ANC's war against apartheid: Umkhonto We Sizwe and the liberation of South Africa* (Indiana University Press, 2018).

De Villiers 'Intergovernmental relations: A constitutional framework' in de Villiers (ed.) *The birth of a Constitution* (Cape Town: Juta and Company Limited 1994).

De Visser, J. *Developmental Local Government: A case study of South Africa* (Antwerp: Intersentia, 2005).

de Vos, P. *South African Constitutional Law in Context* (Oxford University Press, 2015).

Dereck, B. 'Philosophical kingship and enlightened despotism' in Goldie, M. & Wokler, R. *The Cambridge history of eighteenth-century political thought* (Cambridge University Press, 2006) 495-524.

Devenish, G. A. *Commentary on the South African Bill of Rights* (Butterworths: London 1999).

Diala, A.C. 'Courts and transformative constitutionalism: Insights from South Africa' in Sterett, M. and Walker, L. (editors.) *Research Handbook on Law and Courts* (Edward Elgar, 2019) 95-104.

Dowell-Jones, M. *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic deficits* (Leiden/Boston: Martinus Nijhoff Publishers, 2004).

Dubow, S. *Scientific Racism in Modern South Africa* (Cambridge: Cambridge University Press, 1995).

Durojaye, E. (editor) *Litigating the right to health in Africa: Challenges and prospects* (Routledge, 2016).

Elazar, D.J. *The American partnership: Intergovernmental co-operation in the nineteenth-century United States* (University of Chicago Press, 1962).

Fowkes, J. *Building the constitution: The practice of constitutional interpretation in post-apartheid South Africa* (Cambridge University Press, 2016).

Freeman, S. *Justice and the social contract* (Oxford: Oxford University Press, 2007).

Gana, A.T. and Egwu, S.G. (editors.) *Federalism in Africa: The imperative of democratic development* Vol. 2 (Africa World Press, 2003).

Gauthier, D. 'Why Contractarianism?' in Vallentyne, P. (ed.) *Contractarianism and Rational Choice* (Cambridge: Cambridge University Press, 1991) 15–30.

Giliomee, H. and Adam, H. *The rise and crisis of Afrikaner power* (Cape Town: David Phillip Publishers, 1979).

Gill, G. *The nature and development of the modern state* (1st edition) (Palgrave Macmillan, 2016).

Glick, L.B. *Abraham's heirs: Jews and Christians in medieval Europe* (Syracuse University Press, 1999).

Green, L. *History of Local Government in South Africa* (Cape Town: Juta & Company Limited, 1957).

Hammergren, L. *Envisioning reform: Conceptual and practical obstacles to improving judicial performance in Latin America* (Pennsylvania State University Press, 2007).

Hampton, J. *Hobbes and the social contract tradition* (Cambridge University Press, 1988).

Hardin, R. *Indeterminacy and society* (Princeton: Princeton University Press, 2003).

Heyns C. 'A struggle approach to human rights' in Soeteman, A. (ed.) *Pluralism and law* (Dordrecht: Springer, 2001) 171-190.

Hobbes, T. *Leviathan* (London: Penguin Books, 1981).

Hobhouse, L.T. *Liberalism* (Oxford University Press, 1964).

Hume, D. 'Of the original contract,' in Hume, D. (editors.) *Essays: Moral, political, literary* volume 1 (Longmans, Green, and Company, 1907).

Kant, I. *Metaphysical elements of justice* 2nd (edition.) (John Ladd, trans.) (Indianapolis: Hackett, 1999).

King, P. 'Neo-Bolivarian Constitutional Design' in Denis J. Galligan and Mila Versteeg (eds.) *Social and Political Foundations of Constitutions* (New York: Cambridge University Press, 2013) 366-397.

Kriek, D.J., Kotzé, D.J., Labuschagne, P. A. H, Mtimkulu, P. and Malley, K.O. *Federalism: The solution: Principles and Proposals* (Pretoria: HSRC Publishers, 1992).

Kruger, D.W. *The making of a nation: A history of the Union of South Africa 1910-1961* (Johannesburg and London: Macmillan, 1969).

Landau, D. 'Judicial Role and the Limits of Constitutional Convergence in Latin America' in Rosalind Dixon and Tom Ginsburg (editors.) *Comparative Constitutional Law in Latin America* (Northampton: Edward Elgar Press, 2017) 227-242.

Landau, D. 'Socioeconomic rights and majoritarian courts in Latin America' in Colin Crawford and Daniel Bonilla Maldonado (editors.) *Constitutionalism in the Americas* (Edward Elgar Publishing, 2018) 188–214.

Landau, D. 'The Colombian model of structural socio-economic rights remedies: lessons from and for comparative experience' in Cantillo, A.L., Valdivieso-León, C. and García-Jaramillo, S. (editors.) *Constitutionalism: Old dilemmas, new insights* (Oxford University Press, 2021) 258-276.

Landau, D. 'The promise of a minimum core approach: The Colombian model for judicial review of austerity measures' in Nolan, A. (editor.) *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press, 2014) 9.

Leach, G. *The Afrikaners. Their last Great Trek* (London: Macmillan, 1989).

Leonardy, U. *Working structures of federalism in Germany: At the crossroads of German and European unification* (Centre for Federal Studies, University of Leicester, 1992).

Lerner, H. *Making constitutions in deeply divided societies* (Cambridge: Cambridge University Press, 2011).

Liebenberg, S. 'The interpretation of socio-economic rights' in Woolman, S. & Bishop M. (eds.) *Constitutional law of South Africa* (Juta & Company Limited, 2006) 2.

Liebenberg, S. *Socio-economic rights: Adjudication under a transformative constitution* (Juta & Company Limited, 2010).

Maharaj, M. *The ANC and South Africa's Negotiated Transition to Democracy and Peace* (Berlin: Berghof-Forschungszentrum für Konstruktive Konfliktbearbeitung, 2008).

Mandela, N. *The struggle is my life: His speeches and writings brought together with historical documents and accounts of Mandela in prison by fellow-prisoners* (International Defence and Aid Fund for Southern Africa, 1986).

Marx, K. and Engels, F. *The Communist Manifesto* (Translated by Samuel Moore 1967) (London: Penguin Books, 1848).

Mbazira, C. *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (Pretoria University Law Press, 2009).

McLean, K*. Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (Pretoria University Law Press,2009).

McLennan, A. and Munslow, B. *The politics of service delivery* (Wits University Press, 2009).

Mills, C. *The racial contract* (Ithaca and London: Cornell University Press, 1997).
Milton, J. *South African Criminal Law and Procedure* (Juta & Company Limited, 2008).

Mine, Y. 'How nations resurge: Overcoming historical inequality in South Africa' in Tsunekawa, K. and Todo, Y. (eds.) *Emerging states at crossroads* (Singapore: Springer Open, 2019) 187-208.

Moyn, S. *Not Enough: Human Rights in an Unequal World* (Cambridge, MA: Harvard University Press, 2018).

Oldfield, S. 'Participatory mechanisms and community politics: building consensus and conflict' in Van Donk, M., Swilling, M., Pieterse, E. and Parnell, S. (editors.) *Consolidating developmental local government. Lessons from the South African experience* (Cape Town: Juta & Company Limited, 2008) 19.
Oomen, B.M. *Chiefs in South Africa: Law, power and culture in the post-apartheid era* (Suffolk: James Currey Publishers, 2005).

Palmer, I., Moodley, N. and Parnell, S. *Building a capable state: Service delivery in post-apartheid South Africa* (Zed Books Ltd., 2017).

Pejan, R., Du Toit, D. and Pollard, S. 'Using progressive realization and reasonableness to evaluate implementation lags in the South African water management reform process' in Kidd, M., Feris, L., Murombo, T. & Iza, A. (editors.) *Water and the law: Towards sustainability* (Edward Elgar, 2014) 305-330.

Porter, A.N. *European imperialism*, *1860-1914* (Palgrave Macmillan, 1994).

Rawls, J. A *theory of justice* (Cambridge, MA: Harvard University Press, 1971).

Rodríguez-Garavito, C. 'Constitutions in action: the impact of judicial activism on socioeconomic rights in Latin America' in Cesar Garavito (ed.) *Law and Society in Latin America* (London: Routledge, 2014) 124-152.

Ross, R. *A concise history of South Africa* (Cambridge University Press, 2008).

Rousseau, J.J. and Cole, G.D.H. *The social contract, or, principles of political right* (University of Virginia Library, 2001).

Rousseau, J.J. *The major political writings of Jean-Jacques Rousseau: The two "discourses" and the "social contract"* in John T. Scott (editor.) (University of Chicago Press, 2012).

Rousseau, J.J. *The social contract and the first and second discourses* in Dunn, S. (editor.) with contributions from May, G., Bellah, R., Bromwich, D., O'Brien, C. (Yale University Press, 2002).

Sadurski, W. 'Problems of Justification: Social contract and intuition' in *Giving desert its due: Social justice and legal theory* Vol. 2 (Dordrecht: D. Reidel Publishing Company, 1985) 57-76.

Seidman, A. and Seidman, R. B. *State and Law in the Development Process: Problem Solving and Institutional Change in the Third World* (New York: St Martin's Press, 1994).

Sisk, T. *Democratization in South Africa: The elusive social contract.* Vol. 4838. (Princeton University Press, 2017).

Sloss, D. *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press,2009).

Springborg, P. *The Cambridge companion to Hobbes's Leviathan Cambridge Collections Online* (Cambridge University Press, 2007).

Thompson, L. and Nleya, N. 'Passivity or protest? Understanding the dimensions of mobilization on rights to services in Khayelitsha, Cape Town' in Coelho, V.S.P. and Von Lieres, B. (eds.) *Mobilizing for democracy: Citizen action and the politics of public participation* (London: Zed Books, 2010) 223-242.

Vatcher, W.H. *White Laager: The Rise of Afrikaner Nationalism* (New York and London: Frederick Praeger, 1965).

Visser, G. 'Gentrification in South African Cities' in Knight, J. and Rogerson, C.M (editors.) *The geography of South Africa* (Germany: Springer International Publishing, 2019) 195-202.

Walshe, P. *The Rise of African nationalism in South Africa* (Johannesburg: Ad. Donker, 1987).

Wilson, B.M. 'Changing Dynamics: The Political Impact of Costa Rica's Constitutional Court' in Sieder, R., Schjolden, L. and Angell, A. (eds.) *The judicialization of politics in Latin America* (Springer, 2006).

Woolf, A. *Systems of Government Democracy* (Evans Brothers, 2009).

Yepes, R.U. and Sajo, A. ‘Should courts enforce social rights? The experience of the Colombian Constitutional Court’ in Fons Coomans (editor.) *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerp: Intersentia-Maastricht Centre for Human Rights, 2006) 355-388.

Zuckert, M.P. *Natural rights and the new republicanism* (Princeton University Press, 2011).

Journal articles

Abioye, F.T. ‘Constitution-making, legitimacy and rule of law: a comparative analysis’ (2011) 44(1) *Comparative and International Law Journal of Southern Africa* 59-79.

Abramovich, V.E. ‘Courses of Action in Economics, Social and Cultural Rights: Instruments and Allies’ (2005) 2(2) SUR - *International Journal on Human Rights* 181-216.

Adams, R. ‘South Africa's social contract: The Economic Freedom Fighters and the rise of a new constituent power?’ (2018) *Acta Academica* 102-121.

Adhikari, M. ‘God made the white man, God made the black man: Popular racial stereotyping of coloured people in Apartheid South Africa’ (2006) 56(1) *South African Historical Journal* 149-1950.

Agbedahin, K. ‘“Covid-Preneurship” and the imperative return to Ubuntu’ (2021) 33 (1) *Peace Review* 80-87.

Akinbade, O.A, Mokwena, M.P.and Kinfack, E.C. ‘Understanding citizens’ participation in service delivery protests in South Africa’s Sedibeng district municipality’ (2013) 40 (5) *International Journal of Social Economics* 458-478.

Aklilu, A., Belete, A. & Moyo, T. ‘Analysing Community Participation in the Municipal Integrated Development Planning Process in Limpopo Province, South Africa’ (2014) 5 (25) *Mediterranean Journal of Social Sciences* 257-262.

Alexander, P. ‘Rebellion of the poor: South Africa’s service delivery protests – A preliminary analysis’ (2010) 37 (123) *Review of African Political Economy* 26-38.

Allan, K. and Heese, K. ‘Understanding why service delivery protests take place and who is to blame’ (2011) *Municipal IQ* 93-114.

Alston, P. and Quinn, G. ‘The Nature and Scope of State Parties Obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987) 9 *Human Rights Quarterly* 156.

Andersson, N., Matthis, J., Paredes, S. and Ngxowa, N. ‘Social audit of provincial health services: Building the community voice into planning in South Africa’ (2004) 18 (4) *Journal of Interprofessional Care* 381-390.

Andrew, N.and Cleven, N.‘Some social aspects of the Mexican Constitution of 1917’ (1921) 4 (3) *The Hispanic American Historical Review* 474-485.

Ataguba, J.E. ‘The impact of financing health services on income inequality in an unequal society: The case of South Africa’ (2021) 19 *Applied Health Economics and Health Policy* 721–733.

Barichievy, K., Piper, L. and Parker, B. ‘Assessing 'participatory governance' in local government: A case-study of two South African cities’ (2005) 24 (3) *Politeia* 370-393.

Bassett, C. ‘The Demise of the Social Contract in South Africa’ (2004) 38 South *African Journal on Human Rights* 543-557.

Beall, J., Gelb, S. and Hassim, S. ‘Fragile stability: State and society in democratic South Africa’ (2005) 31(4) *Journal of Southern African Studies* 681–700.

Bellamy, R. and Castiglione, D. ‘Building the Union: The nature of sovereignty in the political architecture of Europe’ (1997) 16(4) *Law and philosophy* 421-445.

Berg-Schlosser, D. ‘Indicators of democracy and good governance as measures of the quality of democracy in Africa: A critical appraisal’ (2004) 39(3) *Acta Politica* 248-278.

Bhre, E. ‘How to ignore corruption: Reporting the shortcomings of development in South Africa’ (2005) 46 (1) *Current Anthropology* 107-120.

Bilchitz, D. ‘Citizenship and community: exploring the right to receive basic municipal services in Joseph’ (2010) 3(1) *Constitutional Court Review* 45-78.

Binns, T. and Nel, E. ‘Devolving development: Integrated development planning and developmental local government in post-apartheid South Africa’ (2002) 36 (8) *Regional studies* 921-932.

Bizana, N., Naude, M.J. and Ambe, I.M. ‘Supply chain management as a contributing factor to local government service delivery in South Africa’ (2015) 12 (1) *Journal of Contemporary Management* 664-683.

Blake, M. and Risse, M. ‘Two models of equality and responsibility’ (2008) 38 (2) *Canadian Journal of Philosophy* 165–199.

Bohler-Muller, N. et al. ‘Life after judgment: the Nokotyana case re-examined’ (2018) 36(1) *Journal of Contemporary African Studies* 143-159.

Bond, P. ‘South Africa’s bubble meets boiling urban social protest’ (2010) 62 (2) *Monthly Review* 17-28.

Booth, D. ‘Hitting Apartheid for Six? The Politics of the South African Sports Boycott (2003) 38(3) *Journal of Contemporary History* 477-493.

Booysen, S. ‘Public participation in democratic South Africa: From popular mobilization to structured co-optation and protest’ (2009) 28 (1) *Politeia* 1-27.

Breakfast, N., Bradshaw, G. and Nomarwayi, T. 'Violent service delivery protests in post-apartheid South Africa, 1994–2017 a conflict resolution perspective' (2019) 11 (1) *African Journal of Public Affairs* 106–126.

Brinks, D.M. and Forbath, W. 'Social and economic rights in Latin America: Constitutional Courts and the prospects for pro-poor interventions' (2010) 89 *Texas Law Review* 1943-1955.

Burgess, G. 'The Divine Right of Kings Reconsidered' (1992) 107(425) *The English Historical Review* 841.

Cepeda-Espinosa, M.J. 'Judicial activism in a violent context: The origin, role, and impact of the Colombian Constitutional Court' (2004) 3 *Washington University Global Studies Law Review* 529-700.

Chambers, S. 'Contract or conversation? Theoretical lessons from the Canadian constitutional crisis' (1998) 26(1) *Politics and Society* 143-172.

Cheibub, J.A., Ghandi J. and Vreeland, J.R. 'Democracy and dictatorship revisited' (2010) 143 *Public Choice* 67-101.

Chenwi, L. 'A new approach to remedies in socio-economic rights adjudication: Occupiers of 51 Olivia Road and others v City of Johannesburg and Others 2' (2009) 2 *Constitutional Court Review* 371.

Chenwi, L. 'Unpacking "Progressive Realisation", its relation to resources, minimum core and reasonableness and some methodological consideration for assessing compliance' (2013) (6) 3 *De Jure* 744-746.

Chenwi, L. "Meaningful engagement' in the realisation of socio-economic rights: The South African experience' (2011) 26 (1) *Southern African Public Law* 128-156.

Chenwi, L. and Tissington, K. 'Engaging meaningfully with government on socio-economic rights: A focus on the right to housing' (2010) *Community Law Centre University of the Western Cape* 4-271.

Coomans, F. 'Reviewing implementation of social and economic rights: An assessment of the "reasonableness" test as developed by the South African Constitutional Court' (2005) 65 *Heidelberg Journal of International Law* 167-196.

Cooper, N.J. 'After Mazibuko: Exploring the responses of communities excluded from South Africa's water experiment' (2017) 61(1) *Journal of African Law* 57-81.

Coovadia, H., Jewkes, R., Barron, P., Sanders, D. and McIntyre, D. 'The health and health system of South Africa. Historical Roots of current public health challenges' (2009) 374 (9692) *Lancet* 817-834.

Christiansen, E.C. 'Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice' (2009) 13 *Journal of Gender, Race and Justice* 575-614.

Croxton, D. 'The Peace of Westphalia of 1648 and the origins of sovereignty' (1999) 21(3) *International History Review* 569-591.

Dawson, H. and McLaren, D. 'A framework for monitoring and evaluating the progressive realisation of socio-economic rights in South Africa' (2015) *Studies in Poverty and Inequality Institute* 5-21.

De Villiers, B. 'Intergovernmental relations: the duty to co-operate-a German perspective' (1994) 9(2) *SA Public Law* 430-437.

De Visser, J. 'Developmental local government in South Africa: Institutional fault lines' (2009) (2) *Commonwealth Journal of Local Governance* 7-25.

De Visser, J. 'Multilevel Government, Municipalities and Food Security' (2019) 5 *DST-NRF Centre of Excellence in Food Security, South Africa* 1-35.

De Visser, J. ‘The political–administrative interface in South African municipalities: Assessing the quality of local democracies’ (2010) 5 *Commonwealth Journal of Local Governance* 86–101.

Deegan, H. ‘A critical examination of the democratic transition in South Africa: The question of public participation’ (2002) 40 (1) *Commonwealth and Comparative Politics* 43-60.

Devarajan, S. and Lanchovichina, E. ‘A broken social contract, not high inequality, led to the Arab Spring’ (2018) 64 *Review of Income and Wealth* 5-25.

Diala, A.C. ‘Lessons from South Africa in judicial power and minority protection’ (2011) 1 *Madonna University Law Journal* 164-187.

Dienstag, J.F. ‘Between history and nature: Social contract theory in Locke and the founders’ (1996) 58(4) *The Journal of Politics* 985-1009.

Dixon, R. ‘Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited’ (2007) 5(3) *International Journal of Constitutional Law* 391-418.

Du Plessis, L.M. ‘Human capital development in local government and the search for a capable state’ (2016) 9(3) *African Journal of Public Affairs* 30-38.

Du Plessis, W. ‘Legal mechanisms for cooperative governance in South Africa: Successes and failures’ (2008) 23(1) *SA Public Law* 87-110.

Edwards, T. ‘Cooperative governance in South Africa, with specific reference to the challenges of intergovernmental relations’ (2008) 27(1) *Politeia* 65-85.

Evers, W.M. ‘Social contract: A critique’ (1977) 1(3) *Journal of Libertarian Studies* 185-194.

Fourie, D. and Poggenpoel, W. 'Public sector inefficiencies: Are we addressing the root causes?' (2017) 31 (3) *South African journal of accounting research* 169-180.

Fraser-Moleketi, G. 'Towards a common understanding of corruption in Africa' (2009) 24(3) *Public Policy and Administration* 331-338.

Freedman, W. 'The legislative authority of the local sphere of government to conserve and protect the environment: A critical analysis of Le Sueur v eThekwini Municipality [2013] ZAKZPHC 6' (2014) 17 (1) *Potchefstroom Electronic Law Journal* 567-594.

Friedman, B. 'The birth of an academic obsession: The history of the counter majoritarian difficulty, part five' (2002) 112(2) *Yale Law Journal* 153-260.

Fuo, O. 'Intrusion into the autonomy of South African local government: Advancing the minority judgment in the Merafong City case' (2017) 50 (2) *De Jure Law Journal* 324-345.

Fuo, O. and Du Plessis, A. 'In the face of judicial deference: Taking the "minimum core" of socio-economic rights to the local government sphere' (2015) 19 *Law, Democracy and Development* 1-28.

Galston, W. and Mounk, Y. 'The populist challenge to liberal democracy' (2018) *Journal of Democracy* 5-18.

Giliomee, H. 'The making of the apartheid plan, 1929-1948' (2003) 29(2) *Journal of Southern African Studies* 373-392.

Gilson, L. and McIntyre, D. 'Post-apartheid challenges: Household access and use of health cared in South Africa' (2007) 37(4) *International Journal of Health Services* 673-691.

Giovannini, E. 'Statistics and Politics in a Knowledge Society' (2008) 86 (2) *Social Indicators Research* 177–200.

Goudge, J., Russell, S., Gilson, L., Gumede, T., Tollman, S. and Mills, A. 'Illness-related impoverishment in rural South Africa: Why does social protection work for some households but not others?' (2009) 21 *Journal of International Development* 231-251.

Govender, N. and Reddy, P.S 'Effectiveness of governance towards digitalisation at eThekwini Metropolitan Municipality in KwaZulu-Natal province, South Africa' (2019) 7 (1) *Public Service Delivery & Performance Review* 2-9.

Grindle, M.S. 'Good governance, RIP: A critique and an alternative' (2017) 30(1) *Governance* 17-22.

Harris, B. et al 'Inequities in access to health care in South Africa' (2011) 32 *Journal of Public Health Policy* 2.

Heller, P. 'Moving the State: The politics of democratic decentralization in Kerala, South Africa, and Porto Alegre' (2001) 29 (1) *Politics and Society* 131-163.

Herbst, J. 'Prospects for elite-driven democracy in South Africa' (1997) 112(4) *Political Science Quarterly* 595-615.

Heymans, C. and Lipietz, B. 'Corruption and development: Some Perspectives' (1999) 40 *Institute for Security Studies Monograph Series* 1-60.

Hickey, S. 'The politics of social protection: what do we get from a 'social contract 'approach?'' (2011) 32 (4) *Canadian Journal of Development Studies* 426-438.

Hill, T.H. 'Introduction to law and economic development in Latin America: A comparative approach to legal reform' (2008) 83 (1) *Chicago-Kent Law Review* 3-24.

Hough, M. 'Violent protest at local government level in South Africa: Revolutionary potential?' (2008) 36 (1) *Scientia Militaria: South African Journal of Military Studies* 6-7.

Hutchinson, T. 'The doctrinal method: Incorporating interdisciplinary methods in reforming the law' (2015) 8 *Erasmus Law Review* 130-138.

Inman, R.P. and Rubinfeld, D.L. 'Federalism and the democratic transition: lessons from South Africa' (2005) 95(2) *American Economic Review* 39-43.

Joseph, S. 'Democratic good governance: New agenda for change' (2001) 36(12) *Economic and Political Weekly* 1011-1014.

Jung, C., Hirschl, R. and Rosevear, E. 'Economic and social rights in national constitutions' (2014) 62 (4) *American Journal of Comparative Law* 1043-1094.

Kanyane, M. 'Exploring challenges of municipal service delivery in South Africa (1994-2013)' (2014) 2(1) *Africa's Public Service Delivery & Performance Review* 90-110.

Kenosi, L. 'Good governance, service delivery and records: the African tragedy' (2011) 44 *Journal of the South African Society of Archivists* 19-25.

Khaile, F.T., Roman, N.V. and Davids, G.J. 'The role of local government in promoting a sense of belonging as an aspect of social cohesion: A document analysis' (2021) 10 (1) *African Journal of Governance and Development* 8-33.

Khambule, I., Nomdo, A. and Siswana, B. 'Burning Capabilities: The Social Cost of Violent and Destructive Service Delivery Protests in South Africa' (2019) 8 (1) *Ubuntu: Journal of Conflict and Social Transformation* 51-70.

Koelble, T.A. and LiPuma, E. 'Institutional obstacles to service delivery in South Africa' (2010) 36 (3) *Social Dynamics* 565-589.

Kolakowski, L. 'Marxism and Human Rights' (1983) 112(4) *Daedalus* 81-92.

Koma, S.B. 'The state of local government in South Africa: Issues, trends and options' (2010) 45 (1) *Journal of Public Administration* 111-120.

Labuschagne, P. ‘The doctrine of separation of powers and its application in South Africa’ (2004) 23(3) *Politeia* 84-102.

Legassick, M. ‘Legislation, Ideology and Economy in post—1948 South Africa’ (1974) 1 (1) *Journal of Southern African Studies* 9–10.

Lodge, T. ‘Political corruption in South Africa’ (1998) 97 (387) *African Affairs* 157-187.

Loewe, M., Zintl, T. and Houdret, A. ‘The social contract as a tool of analysis: Introduction to the special issue on “Framing the evolution of new social contracts in Middle Eastern and North African countries’” (2021) 145 *World Development* 1-16.

Lomahoza, K. ‘Monitoring the right to health care in South Africa: An analysis of the policy gaps, resource allocation and health outcomes’ (2013) *Studies in Poverty and Inequality Institute on the Progressive Realisation of Socio-Economic Rights* 1-16.

London, L., ‘What is a human-rights based approach to health and does it matter?’ (2008) 10 (1) *Health and Human* Rights 65-80.

Madala, T.H. ‘Rule under apartheid and the fledgling democracy in post-apartheid South Africa: The role of the judiciary’ (2000) 26 *North Carolina Journal of International Law and Commercial Regulation* 743-766.

Mafini, C. and Meyer, D.F. ‘Satisfaction with life amongst the urban poor: Empirical results from South Africa’ (2016) 5 *Acta Universitatis Danubius. Œconomica* 33-50.

Malan, L. ‘Intergovernmental Relations and Co-operative Government in South Africa: The Ten-Year Review’ (2005) 24 (2) *Politeia* 226-243.

Maserumule, M.H. ‘Framework for strengthening the capacity of municipalities in South Africa: A developmental local government perspective’ (2008) 43(2) *Journal of Public Administration* 436-451.

Masiya, T., Davids, Y.D. and Mangai, M.S. 'Assessing service delivery: Public perception of municipal service delivery in South Africa' (2019) 14(2) *Theoretical and Empirical Researches in Urban Management* 20-40.

Masuku, M. and Jili, N. 'Public service delivery in South Africa: The political influence at local government level' (2019) 19 (4) *Journal of Public Affairs* 1-7.

Matebesi, S. and Botes, L. 'Party identification and service delivery protests in the Eastern Cape and Northern Cape, South Africa' (2017) 21(2) *African Sociological Review/Revue Africaine de Sociologie* 81–99.

Mathebula, F.L. 'South African intergovernmental relations: A definitional perspective' (2011) 46(1.1) *Journal of Public Administration* 834-853.

Mathekga, R. and Buccus, I. 'The challenge of local government structure in South Africa: Securing community participation' (2006) 2 (1) *Critical dialogue Public Participation in Review: IDASA* 11–16.

Mathenjwa, M. 'Contemporary trends in provincial government supervision of local government in South Africa' (2014) 18(1) *Law, Democracy and Development* 178-201.

Mattes, R.B. 'South Africa: democracy without the people?' (2002) 13(1) *Journal of Democracy* 22-36.

Maylam, P. 'The Rise and Decline of Urban Apartheid in South Africa' (1990) 89 (354) *African Affairs* 57-84.

Mbazira, C. 'Appropriate, just and equitable relief in socio-economic rights litigation: the tension between corrective and distributive forms of justice' (2008) 125(1) *South African Law Journal* 71-94.

McEwan, C. 'Bringing government to the people: Women, local governance and community participation in South Africa' (2003) 34 (4) *Geoforum* 469-481.

Mcloughlin, C. ‘When does service delivery improves the legitimacy of a fragile or conflict affected state?’ (2015) 28(3) *Governance: An international Journal of Policy, Administration and Institutions* 341-356.

Mello, D.M. ‘Performance management and development system in the South African public service: A critical review’ (2015) 50(3.1) *Journal of Public Administration* 688-699.

Mitlin, D. ‘With and beyond the state – co-production as a route to political influence, power and transformation for grassroots organizations’ (2008) 20(2) *Environment and Urbanisation* 339-360.

Mogale, T.M. ‘Developmental local government and decentralised service delivery in the democratic South Africa’ (2003) *Governance in the new South Africa* 215-243.

Mojalefa, L. and Koenane, J. ‘The role and significance of traditional leadership in the governance of modern democratic South Africa’ (2018) 10(1) *Africa Review* 58-71.

Moll, T. ‘Did the Apartheid economy fail?’ (1991) 17(2) *Journal of Southern African Studies* 271-291.

Mooler, V. ‘Quality of life in South Africa: Post-apartheid trends’ (1998) 43 *Social Indicators Research* 27-68.

Morudu, H. D. ‘Service delivery protests in South African municipalities: An exploration using principal component regression and 2013 data’ (2017) 3 (1) *Cogent Social Sciences* 1-14.

Mpehle, Z. ‘Are service delivery protests justifiable in the democratic South Africa?’ (2012) 47 (1) *Journal of Public Administration* 213–27.

Mubangizi, B.C. ‘Improving public service delivery in the new South Africa: some reflections’ (2005) 40(si-3) *Journal of Public Administration* 633-648.

Mubangizi, J.C. 'The Constitutional Protection of Socio-Economic Rights in selected African countries: a comparative evaluation' (2006) 2 (1) *African Journal of Legal Studies* 1-19.

Mutyambizi, C., Mokhele, T., Ndinda, C. and Hongoro, C. 'Access to and satisfaction with basic services in informal settlements: Results from a baseline assessment survey' (2020) 17(12) *International Journal of Environmental Research and Public Health* 4400.

Naidoo, G. 'The critical need for ethical leadership to curb corruption and promote good governance in the South African public sector' (2012) 47(3) *Journal of Public Administration* 656-683.

Nanda, V.P. 'The "good governance" concept revisited' (2006) 603 (1) *The ANNALS of the American academy of political and social science* 269-283.

Narsiah, S. 'Neoliberalism and privatisation in South Africa' (2002) 57 (1) *GeoJournal* 3-13.

Nattrass, N. and Seekings, J. 'Democracy and distribution in highly unequal economies: the case of South Africa' (2001) 39(3) *Journal of Modern African Studies* 471-498.

Ndevu, Z. and Muller, K. A. 'Conceptual Framework for Improving Service Delivery at Local Government in South Africa' (2017) 9 (7) African Journal of Public Affairs 13-24.

Ndinda, C., Uzodike, O. and Winaar, L. 'Equality of access to sanitation in South Africa' (2013) 43 *Africanus* 96–114.

Ndinga-Kanga, M., van der Merwe, H. and Hartford, D. 'Forging a resilient social contract in South Africa: states and societies sustaining peace in the post-apartheid era' (2020) 14(1) *Journal of Intervention and Statebuilding* 22-41.

Nengwekhulu, R.H. 'Public service delivery challenges facing the South African public service' (2009) 44 (2) *Journal of public administration* 341-363.

Ngang, C.C. 'Judicial enforcement of socio-economic rights in South Africa and the separation of powers objection: The obligation to take other measures' (2014) *African Human Rights Law Journal* 660-662.

Ngcamu, B.S. 'Exploring service delivery protests in post-apartheid South African municipalities: A literature review' (2019) 15(1) *The Journal for Transdisciplinary Research in Southern Africa* 643.

Ngwena C. 'Right of Access to Antiretroviral Therapy to Prevent Mother-to-Child Transmission of HIV: An Application of Section 27 of the Constitution' (2003) 18(1) *South African Public Law* 83-102.

Nkomo, S. 'Public Service Delivery in South Africa: Councillors and Citizens Critical Links in overcoming persistent Inequities' (2017) 42 *Afrobarometer Policy Paper* 1-14.

Nkuna, V.M., and Shai, K.B. 'An exploration of the 2016 violent protests in Vuwani, Limpopo province of South Africa' (2018) 98 (3-4) *Man in India* 425-436.

Nleya, N. 'Linking service delivery and protest in South Africa: An exploration of evidence from Khayelitsha' (2011) 41(1) *Africanus* 3-13.

Nleya, N., Thompson, L., Tapscott, C. et al 'Reconsidering the origins of protest in South Africa: Some lessons from Cape Town and Pietermaritzburg' (2011) 41 (1) *Africanus* 14–29.

Ntsebeza, L.'Democratization and Traditional Authorities in the New South Africa' (1999) 19(1) *Comparative Studies of South Asia, Africa and the Middle East* 83-94.

Olivier, M. 'Constitutional Perspectives on the Enforcement of Socio-Economic Rights: Recent South African Experiences' (2002) 33 *Victoria University of Wellington Law Review* 133.

Orago, N.W. ‘Limitation of Socio- Economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of a Proportionality Approach in the Judicial Adjudication of the Socio-Economic Rights Disputes’ (2013) 5 *Potchefstroom Electronic Law Journal* 170-219.

Pariente, W. ‘Urbanization in sub-Saharan Africa and the challenge of access to basic services’ (2017) 83(1) *Journal of Demographic Economics* 31-39.

Pieterse, M. ‘Coming to terms with judicial enforcement of socio-economic rights’ (2004) 20(3) *South African Journal on Human Rights* 383-417.

Pieterse, M. ‘Legislative and executive translation of the right to have access to health care services’ (2010) 14 *Law, Democracy and Development* 1-25.

Pillay, S. ‘Corruption–the challenge to good governance: A South African perspective’ (2004) 17(7) *International Journal of Public Sector Management* 586-605.

Pimstone, G. ‘The Constitutional Basis of Local Government in South Africa’ (1998) *Occasional Paper of the Konrad Adenauer Foundation* 5.

Piper, L. ‘Book review: Building a Capable State: Service Delivery in Post-Apartheid South Africa’ (2019) 56(9) *Urban Studies* 1920-1922.

QadirMushtaq, A. and Afzal, M. ‘Arab Spring: Its causes and consequences’ (2017) 30(1) *Journal of the Punjab University Historical Society* 1-10.

Raga, K. and Taylor, D. ‘An overview of the ward committee system: A case study of the Nelson Mandela Metropolitan Municipality’ (2005) 24(2) *Politeia* 244-254.

Raga, K., Taylor, D. and Gogi, A. ‘Community development workers (CDWs): A case study of the Bitou Local Municipality’ (2012) 8 (2) *TD: The Journal for Transdisciplinary Research in Southern Africa’* 235-251.

Rantete, J. and Giliomee, H. ‘Transition to democracy through transaction?: Bilateral negotiations between the ANC and NP in South Africa’ (1992) 91(365) *African Affairs* 515-542.

Rawls, J. ‘Justice as farness’ (1958) 67(2) *The Philosophical Review* 167.

Reddy, P. S. ‘Evolving local government in post conflict South Africa: Where to?’ (2018) 33(7) *Local Economy* 710–725.

Reddy, P. S. ‘The politics of service delivery in South Africa: The local government sphere in context’ (2016) 12(1) *TD: The Journal for Transdisciplinary Research in Southern Africa* 1-8.

Reddy, P.S. ‘Intergovernmental relations in South Africa’ (2001) 20(1) *Politeia* 21-39.

Rodríguez-Garavito, C. ‘Beyond the courtroom: The impact of judicial activism on socioeconomic rights in Latin America’ (2010) 89 *Texas Law Review* 1669-1698.

Rosenfeld, M. ‘Contract and justice: The relation between classical contract law and social contract theory’ (1985) 70 *Iowa Law Review* 769-900.

Rothbard, M.N. ‘Society without a State’ (1978) 19 *NOMOS: American Society for Political and Legal Philosophy* 191-207.

Royce, M. ‘Philosophical perspectives on the social contract theory: Hobbes, Kant and Buchanan revisited: A comparison of historical thought surrounding the philosophical consequences of the social contract and modern public choice theory’ (2010) 1(4) *Post Modern Openings* 45-62.

Ruiters, G. ‘The moving line between state benevolence and control: Municipal indigent programmes in South Africa’ (2018) 53(2) *Journal of Asian and African Studies* 169-186.

Sachs, A. ‘The future of Roman Dutch Law in a non-racial democratic South Africa: Some preliminary observation’ (1992) 1 *Social and Legal Status* 217-227.

Salih, K.E.O. ‘The roots and causes of the 2011 Arab uprisings’ (2013) 35(2) *Arab Studies Quarterly* 184-206.

Sarkin, J. ‘The drafting of South Africa's final constitution from a human-rights perspective’ 1999 47(1) *The American Journal of Comparative Law* 67-87.

Scott, C. and Macklem, P. ‘Constitutional ropes of sand or justiciable guarantees? social rights in a new South African constitution' (1992) 141 *University of Pennsylvania Law Review* 1-148.

Selby, J. ‘Oil and water: The contrasting anatomies of resource conflicts’ (2005) 40(2) *Government and opposition* 200-224.

Serfontein, E., de Waal, E., ‘The corruption bogey in South Africa: Is public education safe?’ (2015) 35 (1) *South African Journal of Education* 1-12.

Sewpersadh, P. and Mubangizi, J.C. ‘Judicial review of administrative and executive decisions: Overreach, activism or pragmatism?’ (2017) 21(1) *Law, Democracy and Development 201*-220.

Simeon, R. and Murray, C. ‘Multi-sphere governance in South Africa: An interim assessment’ (2001) 31(4) *Publius: The Journal of Federalism* 71–72.

Sithole, S. and Mathonsi, S. ‘Local governance service delivery issues during Apartheid and Post-Apartheid South Africa’ (2015) *Africa’s Public Service Delivery and Performance Review* 5-30.

Steinberg, C. ‘Can Reasonableness Protect the Poor?A Review of South Africa’s Socio-Economic Rights Jurisprudence’ (2006) 123 *South African Law Journal* 264–284.

Steiner, H. ‘The natural right to the means of production’ (1950) 27(106) *Philosophical Quarterly* 41.

Strauss, D. ‘The idea of a ‘Just State’ (Rechtsstaat) (with reference to a unique feature of the Constitution of the Republic of South Africa)’ (2015) 34 (3) *South African Journal of Philosophy* 279 -288.

Sulkunen, P. ‘Re-inventing the Social Contract’ (2007) 50(3) *Acta Sociologica 325-333*.

Tapscott, C. ‘Intergovernmental Relations in South Africa: The Challenges of Co-operative Government’ (2000) 20(2) *Public Administration and Development* 119-127.

Tapscott, C. ‘South Africa in the Twenty-First Century: Governance Challenges in the Struggle for Social Equity and Economic Growth’ (2017) (2)1 *Chinese Political Science Review* 69–84.

Tate, T.W. ‘The social contract in America, 1774-1787: Revolutionary theory as a conservative instrument’ (1965) 22(3) *The William and Mary Quarterly: A Magazine of Early American History* 376-391.

Taylor, B. B. ‘Second Treatise of Social Contract: A comparative Analysis of Locke and Rousseau’ (2015) 1 *Black and Gold* 1-7.

Tienda, M. ‘Demography and the social contract’ (2002) 39 (4) *Demography* 587-616.

Tooley, R. and Mahoai, K. ‘The impact of corruption on service delivery in South Africa’ (2007) 42 (3) *Journal of public Administration* 366-373.

Tusnet, M. ‘The issue of state action/ horizontal effect in comparative constitutional law’ (2003) 1(1) *International Journal of Constitutional Law* 79-98.

Van der Berg, S. ‘Ensuring proportionate state resource allocation in socioeconomic-rights cases’ (2017) 134 (3) *South African Law Journal* 576-615.

Van der Berg, S. 'A capabilities approach to the adjudication of the right to a basic education in South Africa' (2017) 18 (4) *Journal of Human Development and Capabilities* 497–516.

Van Kessel, I. and Oomen, B. ''One chief, one vote': The revival of traditional authorities in post-apartheid South Africa' (1997) 96(385) *African Affairs* 561-585.

Van Rooyen, E.J. 'A New Approach to Managing Community Participation and Stakeholder Negotiation in South African Local Government' (2003) 6 (1) *South African journal of economic and management sciences* 126-141.

Visagie, S. and Schneider, M. 'Implementation of the principles of primary health care in a rural area of South Africa' (2014) 6 (1) *African Journal of Primary Health Care and Family Medicine* 1-10.

Waldron, J. 'John Locke: Social Contract versus Political Anthropology' (1989) 51(1) *The Review of Politics* 3-28.

Waldron, J. 'The core of the case against judicial review' (2006) 115(6*) Yale Law Journal* 1346-1407.

Waldron, J. 'Theoretical foundation of liberalism' (1950) 37(147) *The Philosophical Quarterly* 127–150.

Weber, E.T. 'Social contract theory – Old and new' (2009) 7(2) *Review Journal of Political Philosophy* 1-23.

Wilson S "Breaking the tie: Eviction from private land, homelessness and a new normality" (2009) *South African Law Journal* 270-290.

Windapo, A.O. and Cloete, A. 'Briefing practice and client satisfaction: a case study of the public health infrastructure sector in South Africa' (2017) 35 (1/2) *Facilities* 116-134.

Wright, D.S. 'Intergovernmental relations: an analytical overview' (1974) 416(1) *The Annals of the American Academy of Political and Social Science* 1-16.

Yarros, V.S. 'Philosophical anarchism: Its rise, decline and eclipse' (1936) 41(4) *The American Journal of Sociology* 470-483.

Young, K.G. 'The minimum core of economic and social rights: a concept in search of content' (2008) 33 *Yale Journal of International Law* 113-174.

Yung, C. and Shapiro, I. 'South Africa's negotiated transition: Democracy, Opposition and the new Constitutional order' (1995) 23(3) *Politics & Society* 270.

Reports, blogs and internet sources

'A history of apartheid in South Africa South' African History online 6 May 2016 <https://www.sahistory.org.za/article/history-apartheid-south-africa> (last accessed 6 April 2019).

Alexander, P., Runciman, C. and Ngwane, T. 'Media Briefing Community Protests 2004-2013: Some Research Findings' Social Change Research Unit, University of Johannesburg 12 February 2013 <https://issafrica.s3.amazonaws.com/site/uploads/Public-violence-13March2014-Peter-Alexander.pdf > (last accessed 26 November 2021) 1-18 at 15.

'Anti-Corruption website of the South African government' < https://www.gov.za/anti-corruption> (last accessed 25 November 2021).

Augustyn, A. 'South African Party' Britannica Encyclopedia Britannica 1 October 2020 <https://www.britannica.com/topic/South-African-Party> (last accessed 17 November 2021).

BusinessTech 'R10.5 billion under investigation for 'Covidpreneur' looting in South Africa' BusinessTech 20 October 2020 <https://businesstech.co.za/news/government/442058/r10-5-billion-under-

investigation-for-covidpreneur-looting-in-south-africa/> (last accessed 26 February 2021).

Butt, D. 'Courts and the making of public policy and the social contract revisited – Transformative constitutionalism and socio-economic rights' (11 June 2008) *Report of a lecture by the Chief Justice of South Africa, Oxford Centre for Socio-Legal Studies* <https://www.fljs.org/transformative-constitutionalism-and-socio-economic-rights-0> (last accessed 19 December 2021) 1-12.

Centre for Development and Enterprise 'Overcoming the Triple Challenge: A Report to the High-Level Parliamentary Committee from the Centre for Development and Enterprise – Draft Report' <www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_WG1_CDE_Draft_Report_response_to_committees_comments_24.4.17.pdf> (last accessed 2 September 2021).

Chen, Le., Dean, J., Frant, J. and Kumar, R. 'What does service delivery really mean?' World Policy Blog <https://worldpolicy.org/2014/05/13/what-does-service-delivery-really-mean/> (last accessed 9 January 2019).

'Constitution is a social contract – Gordhan' News 24 4 April 2016 <https://www.news24.com/SouthAfrica/News/constitution-is-a-social-contract-gordhan-20160404> (last accessed 13 October 2021).

Convention for a democratic South Africa (CODESA) <https://www.sahistory.org.za/article/convention-democratic-south-africa-codesa > (last accessed 4 February 2019).

Cotterill, J. 'South Africa counts the cost of its worst unrest since apartheid' Financial Times 25 July 2021 <https://www.ft.com/content/1b0badcd-2f81-42c8-ae09-796475540ccc> (last accessed 19 August 2021).

D'Agostino, F., Gaus, G. and Thrasher, J. 'Contemporary Approaches to the Social Contract' in Zalta, E.N. (ed.) The Stanford Encyclopaedia of Philosophy (Winter 2021

Edition) <https://plato.stanford.edu/archives/win2021/entries/contractarianism-contemporary/> (last accessed 12 September 2021).

Davids, N. 'Inequality in South Africa is a 'ticking timebomb' UCT News 21 May 2021 <https://www.news.uct.ac.za/article/-2021-05-21-inequality-in-south-africa-is-a-ticking-timebomb> (last accessed 2 September 2021).

Dawson, H. and McLaren, D. 'A framework for monitoring and evaluating the progressive realisation of socio-economic rights in South Africa' Studies in Poverty and Inequality Institute February 2015 <https://spii.org.za/wp-content/uploads/2018/02/SPII-A-Framework-for-Monitoring-the-Progressive-Realisation-of-SERs-....pdf> (last accessed 20 October 2021).

Department of Cooperative Governance and Traditional Affairs <https://nationalgovernment.co.za/units/view/10/department-of-cooperative-governance-dcog > (last accessed on 13 October 2021).

Friend, C. 'Social contract theory' The Internet Encyclopaedia of Philosophy 2006 <https://iep.utm.edu/soc-cont/> (last accessed 18 October 2021).

Gous, N. 'Service delivery protests are on the rise this year, warn experts' Sunday Times 11 June 2019 < https://www.timeslive.co.za/news/south-africa/2019-06-11-service-delivery-protests-are-on-the-rise-this-year-warn-experts/ > (last accessed 29 December 2019).

Hirsch, A. 'How compromises and mistakes made in the Mandela era hobbled South Africa's economy' The Conversation 23 December 2015 <https://theconversation.com/how-compromises-and-mistakes-made-in-the-mandela-era-hobbled-south-africas-economy-52156> (last accessed 21 July 2019).

KwaZulu-Natal Department of Local Government and Traditional Affairs, Report of the Commission of Enquiry into the Abaqulusi Municipality in terms of section 139 of the Constitution and section 106 of the Local Government Municipal Systems Act (September 2005) 102.

Mattes, R., Bratton, M. and Davids, Y.D. 'Poverty, survival and democracy in Southern Africa' CSSR Working Paper No. 27 (Centre for Social Science Research: University of Cape Town, 2002) 1-87 at 5.

Mehrotra, S., Vandermoortele, J. and Delamonica, E. 'Basic Services for All? Public Spending and the Social Dimensions of Poverty' report by (UNICEF: Innocenti Research Centre, 2000).

Mkhondo, R. 'On the 10th anniversary of the 2010 FIFA World Cup, football still awakens strong feelings of solidarity' News 24 10 June 2020 <https://www.news24.com/news24/columnists/rich_mkhondo/opinion-on-the-10th-anniversary-of-the-2010-fifa-world-cup-football-still-awakens-strong-feelings-of-solidarity-20200610> (last accessed 20 October 2021).

Mlaba, K. '5 Shocking facts that show why South Africa is the 'most unequal country in the world' 27 November 2020 <https://www.globalcitizen.org/en/content/facts-why-south-africa-most-unequal-country-oxfam/> (last accessed 19 August 2021).

'National Anti-Corruption Strategy 2020-2030' December 2020; <https://www.gov.za/sites/default/files/gcis_document/202105/national-anti-corruption-strategy-2020-2030.pdf> (last accessed 25 November 2021).

National Development Plan: Vision for 2030 – Chapter 13 <https://www.nationalplanningcommission.org.za/assets/Documents/NDP_Chapters/devplan_ch13_0.pdf>.

National Health Insurance 'Rationing as a response to supply side constraints' NHI Note 5 (11 May 2017) <https://hasa.co.za/article/rationing-as-a-response-to-supply-side-constraints/> (last accessed 19 December 2021).

Neidleman, J. 'The social contract theory in global context' E-International Relations 9 October 2012 <http://www.e-ir.info/2012/10/09/the-social-contract-theory-in-a-global-context> (last accessed 19 October 2021).

Nemakonde, V. ‘ Municipality ‘steals cables every week to ensure emergency procurement’ The Citizen 16 March 2021 <https://citizen.co.za/news/south-africa/government/2456194/municipality-steals-cables-every-week-to-ensure-emergency-procurement/ > (last accessed 23 March 2021).

Novel Coronavirus(2019-nCoV) Situation Report – 22’ WHO 11 February 2020 <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200211-sitrep-22-ncov.pdf?sfvrsn=fb6d49b1_2 > (last accessed 3 September 2020).

Oosthuizen, M. ‘Why South Africa can’t deliver on the social contract set out in its constitution’ The Conversation 21 November 2016 <https://theconversation.com/why-south-africa-cant-deliver-on-the-social-contract-set-out-in-its-constitution-69119> (last accessed 19 October 2021).

Original text of The Unanimous Declaration of the Thirteen United States of America’ 4 July 1776 <https://www.archives.gov/founding-docs/declaration-transcript> (last accessed 19 October 2021).

Pullano, G., Pinotti, F., Valdano, E.,et al ‘Novel coronavirus (2019-nCoV) early-stage importation risk to Europe’ Euro Surveillance January 2020 <https://doi.org/10.2807/1560-7917.ES.2020.25.4.2000057> (last accessed 26 November 2021).

Section 139 Intervention: Tshwane Municipality’ Parliamentary Monitoring Group 18 March 2020 < https://pmg.org.za/committee-meeting/30077/ > (last accessed 3 April 2020).

Siddle, A. and Koelble, T. A. ‘Local government in South Africa: Can the objectives of the developmental state be achieved through the current model of decentralised governance?’ (2016) Swedish International Centre for Local Democracy Research Report No. 7 < https://icld.se/app/uploads/files/forskningspublikationer/siddle-koelble-icld-report-7.pdf > (last accessed 5 November 2021) 1-78.

Singh, O. ‘Truck torched and roads blocked as KZN protests over water intensify’ 6 July 2020 <https://www.timeslive.co.za/news/south-africa/2020-07-06-truck-torched-and-roads-blocked-as-kzn-protests-over-water-intensify/> (last accessed 2 September 2020).

‘The state of basic service delivery in South Africa: In-depth analysis of the Community Survey 2016 data’ Report No. 03-01-22 Statistics South Africa 2016 <https://www.statssa.gov.za/publications/Report%2003-01-22/Report%2003-01-222016.pdf> (last accessed 1 November 2021).

Toyana, M. ‘Cyber bandits target South Africa: Department of Justice, Space Agency hit by ransomware attacks’ Business Maverick 9 September 2021 <https://www.dailymaverick.co.za/article/2021-09-09-cyber-bandits-target-south-africa-department-of-justice-space-agency-hit-by-ransomware-attacks/> (last accessed 20 November 2021).

Tsenoli, S. ‘Flood Disaster Management; Local Government Municipal Systems Amendment Bill: Departmental briefing’ Parliamentary Monitoring Group 25 January 2011 <https://pmg.org.za/committee-meeting/12475/> (last accessed 20 November 2021).

United Nations Depository Notification Reference C.N.232015. TREATIES-IV.3 <www.seri-sa.org/images /ICESCRp_CN_23_2015-Eng.pdf> (last accessed 22 October 2015).

United Nations Economic and Social Commission for Asia and the Pacific 2006 ‘What is good governance?’ <http://www.unescap.org/huset/gg/governance.htm> (last accessed 12 October 2021).

Universal Declaration of Human Rights adopted by the United Nations General Assembly (1948)’ <https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf> (last accessed 16 February 2019).

Waluchow, W. ‘Constitutionalism’ in Zalta, E.N. (ed.) The Stanford Encyclopaedia of Philosophy 2012 <http://plato.stanford.edu/archives/win2012/entries/constitutionalism/> (last accessed 11 September 2021).

Webster, M. <https://www.merriam-webster.com/dictionary/constitution> (last accessed 17 January 2019).

Legislation and policies

Constitution of the Republic of South Africa, 1996.

Constitution the Republic of South Africa Act No. 32 of 1961.

Green Paper on Local Government issued by the Ministry for Provincial Affairs and Constitutional Development October 1997 18.

Immorality Act number 23 of 1957.

Local Government Municipal Systems Act 32 of 2000.

Local Government: Municipal Structures Act 117 of 1998.

Municipal Finance Management Act 56 of 2003.

Preferential Procurement Policy Framework Act 5 of 2000.

Prevention and Combatting of Corrupt Activities Act 12 of 2004.
Promotion of Access to Information Act 2 of 2000.

Public Finance Management Act 1 of 1999 as amended by Act 296 of 1999.
The Municipal Finance Management Act 56 of 2003.

The White Paper on Local Government 9 March 1998.

Traditional Leadership and Governance Framework Act 41 of 2003

Treaties and international instruments

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador), OAS Treaty Series No. 69 (1988).

American Convention on Human Rights, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969).

International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966 (entered into force on 23 March 1976).

Vienna Declaration and Programme of Action, endorsed by the United Nations General Assembly Resolution 48/121 on 20 December 1993.

United Nations General Assembly Resolution, adopted on 25 September 2015 in Washington, DC, United States of America.

Resolutions of international organisations

CESCR General Comment No.2: Non-discrimination in Economic, Social and Cultural Rights (article 2(2) of the ICESCR) 2 July 2009 E/C.12/GC/20, para 7.

Coronavirus disease 2019 (COVID-19) Situation Report – 82 Data as received by WHO from national authorities by 10:00 CET, 11 April (2020), 1-13.

UN System Task Team on the Post-2015 UN Development Agenda; Macroeconomic Stability and Inclusive Growth and Employment (May 2012) 3-5.

United Nations Committee on Economic, Social and Cultural Rights, General Comment No 3 The nature of States Parties obligations, (1990) (article 2 para 1 of the Covenant) UN Doc 12/14/1990.

World Commission on Environment and Development (WCED). Report of the World Commission on Environment and Development: Our common future (1987).

World Health Organization, Novel coronavirus (COVID-19) Situation Report No. 22 of 2020.