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Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa's Transformation

JACKIE DUGARD*

Abstract

In this article I draw on John Dugard's criticism of apartheid judges to initiate a discussion of the role and functioning of judges in the post-apartheid era. Using John's critique of the limits of judicial interpretation in an illegitimate order, I extend the analysis to review the record of the Constitutional Court in adjudicating socioeconomic rights cases post-1994. In doing so I propose a radical interpretation of the Court's role in society and an activist functioning of judges in South Africa's constitutional democracy. I conclude that, notwithstanding the momentous changes in the South African legal order since 1994, John's critique of the judiciary retains much value and applicability today.

Key words

constitutional democracy; judicial activism; role and functioning of courts; separation of powers; socioeconomic rights; South Africa

1. Introduction

> [O]ne truth needs to be vigorously recognised: the contribution of John Dugard and the small coterie of young and vigorous academics whom he attracted, in chiselling away at the very foundations of orthodox jurisprudential perspectives in South Africa and in restructuring the moral and jurisprudential values of generations of lawyers who began to permeate the practice and teaching of the law, has been among the most crucial, the most profound and the most decisive even if not the most visible of the influences which have impacted and which will continue to impact on the structure of our legal universe.[1]

In the acknowledgements of his seminal critique of the apartheid legal order in 1978, John Dugard wrote, '[My] children, Jacqueline and Justin, are too young to appreciate the subject-matter of the book, but it is written in the interests of a better society for them.'[2] As one of his children, in 2007 I write in a profoundly better society in which civil and political freedoms are extended to everyone and in which I can live with my partner, Itumeleng, without fear of being prosecuted for contravening

* Senior Researcher, Centre for Applied Legal Studies (CALS), University of the Witwatersrand.

1. Excerpt from a speech given by the former South African Chief Justice, Ishmael Mahomed, at a farewell function for John held at the University of the Witwatersrand in 1998, cited in A. Du Plessis, 'John Dugard's Magisterial Accomplishments Rewarded with a Raw Deal', (2006) 6 (10) *Without Prejudice: The Law Magazine* 30, at 31.
2. J. Dugard, *Human Rights and the South African Legal Order* (1978), xvi.

the Group Areas Act,[3] the Immorality Act,[4] or, potentially, the Prohibition of Mixed Marriages Act.[5] More directly on the subject of this article, I am able to criticize the judiciary without being investigated for contempt of court, as John was on several occasions.

Not cowed by the risk of prosecution, John was one of the few scholars brave enough to criticize judges for their failure to use the law creatively to craft socially just rulings and remedies and their failure to find room for the 'judicial advancement of human rights in the interstices of the apartheid legal order'.[6] It is this work that I would like to focus on, as I think it continues to resonate in contemporary South Africa.

By exposing judges for their 'unnecessary subordination' to both the legislature and the executive, which he ascribed to 'vulgar positivism',[7] John initiated several important debates about the functioning of judges under an illegitimate order. One of these debates, a dialogue with another legal academic, Raymond Wacks, famously became known as the Wacks–Dugard debate[8] and is used in jurisprudence classes to delineate arguments about the limits of judicial activism under apartheid.[9] John's determined jurisprudential analysis earned him the title of 'South Africa's foremost academic critic of the apartheid legal order'.[10]

It is not my aim to dwell on the debate about whether the generalized failure of apartheid judges to creatively find progressive spaces in the legal system – what John has referred to as the 'pathology'[11] of the judiciary and the South African legal order – was governed by the judiciary's allegiance to legal positivism or other similar forces.[12] The positivist label, although relevant under apartheid, no longer

3. Act 36 of 1966. The Group Areas Act consolidated several prior laws and became the statutory basis for residential segregation, regulating the ownership and occupation of land based on race, as determined by the system of racial classification in the Population Registration Act 30 of 1950.
4. Act 23 of 1957. The Immorality Act made it an offence for a white person to have any sort of sexual intercourse or to cohabit with a black person.
5. Act 55 of 1949. The Prohibition of Mixed Marriages Act prohibited marriages between whites and non-whites.
6. J. Dugard, 'Should Judges Resign? – A Reply to Professor Wacks', (1984) 101 *South African Law Journal* 286, at 291.
7. J. Dugard, 'Some Realism about the Judicial Process and Positivism – A Reply', (1981) 98 *South African Law Journal* 372, at 374.
8. The Wacks–Dugard debate comprised a dialogue between John and another legal academic, Professor Raymond Wacks, about the potential for moral judges to manoeuvre in an unjust legal order such as apartheid. In the first article – R. Wacks, 'Judges and Injustice', (1984) 101 *South African Law Journal* 266 – Wacks argued that moral judges should resign because by remaining on the bench they were legitimizing the illegitimate system. In his reply – Dugard, *supra* note 6 – John disputed Wacks's contention that there was no space for progressive interpretation and adjudication by judges. Advancing a natural-law approach, John urged judges to 'legitimately select those principles, precedents or authorities from our liberal Roman-Dutch heritage which best advance equality and liberty' rather than to resign (at 286).
9. See, e.g., C. Roederer and D. Moellendorf, *Jurisprudence* (2004), 74–6, in which, in their chapter on 'Legal Positivism' under a sub-heading, 'The South African debate', the authors outline the Wacks–Dugard debate (this is the prescribed textbook for jurisprudence students in the school of law at the University of the Witwatersrand).
10. D. Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998), 57.
11. Dugard, *supra* note 7, at 373.
12. I refer here to the argument that legal formalism, rather than positivism, accounted for the South African judiciary's stance. While not wishing to reopen the positivist–formalist debate – in large part due to the fact that I view jurisprudential conservatism to be the real underlying force – like John, I do find the positivist label more useful than the formalist one. As outlined by John (ibid., at 386), there is evidence of very 'elliptical',

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has real meaning in a constitutional order and it is of limited value to this article. Instead, I concentrate on what I take to be the central import of John's work: an examination of the role of judges in society and an analysis of the opportunities for progressiveness in their functioning. In doing so, I conclude that, both then and now, judges have not assumed an activist role in society. I suggest that, perhaps all along, but certainly in the post-apartheid era, the most likely factor behind this general failing is jurisprudential conservatism.

I first engage with John's writings on the apartheid judiciary, and then extend his work to continue the Dugard tradition of criticizing the role and functioning of the judiciary, albeit in a post-apartheid constitutional democracy. Whereas John wrote about adjudication in a racially divided South Africa in which civil and political rights were constantly violated, I write in a socioeconomically divided South Africa in which poverty is widespread and inequality is escalating. I am very aware that, with constitutional guarantees and protections of free speech,[13] I cannot claim to have John's bravery. I do, however, share John's aspirations and I write this article in the hope that I might still experience a just society in South Africa.

2. Judges under the apartheid legal order

> Government strategy became more devious. First, it ruled that 11 judges, as against the customary five, had to preside in AD [Appellate Division] cases concerning constitutional matters.[14] It then set about appointing to the AD more judges sympathetic to the NP [National Party] outlook . . . It also amended the constitution to provide that 'no court of law shall be competent to pronounce upon the validity of any law passed by parliament'.[15] Thus began decades of government whose hallmark was the emasculation of judicial independence. As the executive tightened its control by appointing NP minions to the Bench, the legislature promulgated a panoply of security and other laws restricting judicial review. The courts generally toed the NP line and lawyers who challenged the status quo were often subjected to considerable harassment.[16]

Unlike today's non-racial constitutional democracy with independent judicial review, the apartheid legal order was premised on an explicitly racist constitution and parliamentary supremacy, ostensibly 'unencumbered by the British doctrine of the Rule of Law'.[17] The virtually all-powerful executive and legislature regarded judicial review as anathema. In 1952 Prime Minister Malan, who assumed power in 1948, along with the National Party (NP) and its policy of apartheid, declared the following in Parliament:

> Neither Parliament nor the people of South Africa will be prepared to acquiesce in a position where the legal sovereignty of the lawfully and democratically elected

non-formalist, reasoning amongst apartheid-era judgments (such as *S v. Adams*; *S v. Warner* 1979 (1) SA 14 (A)); what is common to almost all judgments is 'moral disengagement on the part of the court, and . . . unwillingness to be guided by basic human rights'.

13. S. 16, Constitution of the Republic of South Africa Act 108 of 1996.
14. This was effected through the Appellate Division Quorum Act 27 of 1955.
15. This was effected through the South Africa Act Amendment Act 9 of 1956.
16. Centre for Applied Legal Studies (CALS), 'The Judiciary: Principle of the Devil', in *Fighting for Justice: The Centre for Applied Legal Studies, 1978–1991* (1992), at 17.
17. Dugard, *supra* note 2, at 37.

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> representatives of the people is denied, and where appointed judicial authority assumes the testing right, namely, the right to pass judgment on the exercise of its legislative powers by the elected representatives of the people . . . It is imperative that the legislative sovereignty of Parliament should be placed beyond any doubt, in order to ensure order and certainty.[18]

Clearly, the opportunities for judicial action of any kind, let alone for value-based activism, were narrow. The net result was a 'failure on the part of the South African judiciary consciously to promote human rights',[19] which John ascribed to the legal tradition, inherited from English law, of positivism. Yet, as John pointed out, judges did not lack room for progressive manoeuvring:

> [T]he judge is not a mere automaton who declares the law . . . he has a wide range of options open to him in fact-finding, in the interpretation of statutes, in the review of administrative action, in the application of precedent and in the selection of Roman-Dutch authority; and . . . in choosing between conflicting and contradictory principles of statutory interpretation, precedent and Roman-Dutch authority, the judge may legitimately select those principles, precedents or authorities from our liberal Roman-Dutch heritage which best advance equality and liberty.[20]

Highlighting the scope for activism and the opportunities for discretion to fill the gaps in the law, John called on judges consciously to promote the judicial advancement of human rights through the use of common-law principles of equality and liberty. He unequivocally promoted a more activist role for the judiciary in attempting to secure a more just society, and urged judges to advance purposively human rights values in their rulings. Despite being critical of the judiciary in general, he saw the potential, among 'moral' judges, for a progressive function within the judiciary as an alternative to resignation, as advocated by other critics.[21] Moreover, John put his ideas to work by practical application, initiating, through the Centre for Applied Legal Studies (CALS), a series of conferences for sympathetic judges. These conferences, which were held at a country resort over weekends, provided judges who were looking for ways to move beyond a mechanical application of apartheid laws with practical examples of how to utilize values and principles in their adjudication. John's form of academic engagement, although intellectually robust, was neither ivory tower nor armchair in approach. By providing judges with a practical 'politico-legal arsenal'[22] with which to adjudicate, John undoubtedly had a salutary effect on sections of the judiciary. Whether a more profound effect would have been achieved through mass resignations is moot, not least because the record suggests that there were never enough judges whose consciences were sufficiently stirred to resign in numbers large enough to instigate a crisis within the judiciary or within the apartheid legal order.

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18. *House of Assembly Debates*, (25 March 1952) Vol. 78, col. 3124, quoted in Dugard, *supra* note 2, at 33.
19. Dugard, *supra* note 7, at 372.
20. Dugard, *supra* note 6, at 286.
21. The main advocate of judicial resignation was Raymond Wacks. His argument that moral judges do more harm within an illegitimate system (by conferring legitimacy on it), than they would by resigning, is set out in Wacks, *supra* note 8, and also R. Wacks, 'Judging Judges: A Brief Rejoinder to Professor Dugard', (1984) 101 *South African Law Journal* 295.
22. Dugard, *supra* note 2, at 37.

Amongst John's writings on the role and functioning of the judiciary, I find one of his earliest works the most enduring. In his inaugural address as Professor of Law in the University of the Witwatersrand, delivered on 24 March 1971, John pointed to the inconsistency in the apartheid judiciary's stance vis-à-vis its law-making function:

> The South African judiciary has been relatively frank about its law-making function in the development of the common law . . . Why, then, is it that the myth of judicial sterility is preserved in the case of the interpretation of statutes? Why do we still adhere to the phonographic theory of the judicial function in this sphere?[23]

John answered these questions by pointing to the judiciary's acceptance of crude positivism, with its 'servile obedience to the will of the sovereign',[24] which made it difficult for judges to challenge statutes while allowing them to engage in law-making regarding the common law. I suggest that, while the positivist label was appropriate, what underlay the judiciary's reluctance to engage in law-making, other than developing the common law, was jurisprudential conservatism about the role of courts in society. John hinted at this when he referred to judges hiding behind the 'fig leaf of positivism'.[25] What I believe the judges were attempting to hide was a jurisprudential conservatism about their limited role in transforming a racially divided society. This was undoubtedly influenced (whether subconsciously or not) by what John called the 'inarticulate premise'[26] of political sympathy with the NP and the apartheid project, which rendered them overpoweringly executive-minded.

In what follows, I will contend that this strain of jurisprudential conservatism has continued into the post-apartheid era, despite the demise of the purely 'pale male' judiciary. However, in the new legal order of constitutional democracy, the judiciary has had to find a new fig leaf. I suggest that this is the doctrine of separation of powers. I argue that this new fig leaf hides the judiciary's ideological unease about transformative constitutionalism and its consequent reluctance to remedy the new fault line in society – escalating socioeconomic inequality – and shields it from playing a more activist role in South Africa's transformation.

3. Judges under the post-apartheid constitutional democracy[27]

> It is time, now, to turn to the present legal order in South Africa. Since 1994, South Africa has been a democratic constitutional state. How and why this happened lie beyond the scope of this article. The change has, however, had a profound impact on

23. Inaugural address, published as J. Dugard, 'The Judicial Process, Positivism and Civil Liberty', (1971) 88 *South African Law Journal* 181, at 183.
24. Ibid., at 185.
25. Ibid., at 189.
26. Ibid., at 187, 189.
27. I restrict my analysis of the post-apartheid judiciary to the Constitutional Court. I do this for two reasons. First, the Court is a post-apartheid institution, and all appointments have been made within a democratic constitutional order. This means that, unlike the rest of the court structure, from the outset the Court's composition has been 'democratic' and representative. This eliminates the apartheid composition factor that arguably has conditioned the transformative potential of the rest of the judiciary. Second, the Constitutional Court is the highest court in all constitutional matters, which means that it plays a definitive role in enforcing the Constitution.

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> the legal system and its jurisprudence. The new South African Constitution is a moral document. Even a cursory reading of its provisions demonstrates this. It is the supreme law, and law or conduct inconsistent with its provisions is invalid. The preamble to the Constitution identifies constitutional goals that include establishing 'a society based on democratic values, social justice and fundamental human rights'. Key to this is the Bill of Rights, contained in chapter 2 of the Constitution, which [in section 7(1) establishes that the Bill of Rights] is 'a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'.[28]

The Constitution of the Republic of South Africa (Constitution)[29] is not only 'moral', but it is also inherently transformative. For example, in entrenching the right to substantive equality, the Constitution explicitly sanctions positive discrimination in the interests of equity on an individual or collective basis: 'Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.'[30] As described by Cathi Albertyn and Beth Goldblatt, the transformative design of the Constitution has radical implications for state–society relationships and for the guardians of the Constitution (including, I suggest, obliging the judiciary to play an active role in advancing socioeconomic equality):

> We understand the transformation to require a complete restructuring of the state and society, including redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systematic forms of domination and material disadvantages based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realize their full human potential within positive social relationships.[31]

The unambiguously value-laden nature of the Constitution, with its transformative Bill of Rights, has made positivism irrelevant. Law is explicitly linked with morality and the Bill of Rights applies 'to all law and binds the legislature, the executive, the judiciary and all organs of state',[32] and law or conduct inconsistent with the Constitution is invalid. Any judge who fails to acknowledge constitutional values is not suffering from an allegiance to positivism. More probably, he is suffering a racist hangover from the past and does not appreciate the post-1994 constitutional

28. A. Chaskalson, 'From Wickedness to Equality: The Moral Transformation of South African Law', (2003) 1(4) *International Journal of Constitutional Law* 590, at 599.
29. Act 108 of 1996.
30. Section 9(2) of the Constitution.
31. C. Albertyn and B. Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality', (1998) 14 *South African Journal on Human Rights* 248, at 249.
32. S. 8(1) of the Constitution. It is debatable to what extent the Constitution, and specifically the Bill of Rights, has horizontal application. The relevant section of the Constitution – s. 8(2): 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right' – has not been conclusively clarified. However, many relevant domains of private conduct are explicitly regulated. For example, s. 9(4) of the Constitution prohibits private parties from unfairly discriminating directly or indirectly against anyone on any of the grounds listed in s. 9(3) – these include race, gender, religion, disability, ethnic or social origin, sexual orientation.

imperatives. In stark contrast to the positivism of the apartheid era, the Constitution 'enjoins the judiciary to uphold and advance its transformative design'.[33] As I shall argue, in its adjudication of socio-economic rights (SER) to date, the Constitutional Court has failed to promote meaningfully the realization of SER for poor South Africans and, as such, it has not met the challenge to uphold and advance the Constitution's transformative design.

One of the most progressive aspects of the Constitution is the inclusion of various SER[34] alongside more traditional civil and political rights. It is also clear that SER carry both negative and positive obligations in the same way as civil and political rights. Section 7(2) of the Constitution establishes that 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.' I focus on the adjudication of SER in the remainder of this article because of their critical importance to South Africa's transformation, in the context of deeply entrenched poverty and socio-economic inequality.[35]

The Constitutional Court (Court) has confirmed the justiciability of SER in several judgments, including *Government of the Republic of South Africa and Others* v. *Grootboom and Others* (*Grootboom*), in which the Court stated that 'Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only . . . The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in each case.'[36] As Marius Pieterse has explained,

> Post-1994 South African courts are not only permitted, but are constitutionally obliged to give meaning to socio-economic rights through interpretation, to evaluate government compliance with the duties they impose, to pronounce on the validity of legislation and policy in the socio-economic rights sphere and to remedy state non-compliance with socio-economic rights obligations.[37]

The Court has also clearly accepted the legitimate authority to adjudicate SER, at least in principle dismissing traditional fears that the judicial enforcement of SER uniquely entails policy and particularly budgetary considerations that are best left to the government. In certifying the 1996 Constitution (against the argument that the final Bill of Rights should not contain SER because of budgetary and separation of powers implications), the Court stated,

> 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

33. D. Moseneke, 'The Fourth Bram Fischer Memorial Lecture', (2002) 18 *South African Journal on Human Rights* 309, at 314.
34. SER are entrenched in s. 23 (labour rights), s. 25 (land and tenure security), s. 26 (housing), s. 27 (healthcare services, sufficient food and water, and social security), s. 28(1)(c) (specific, unqualified rights of children to basic nutrition, shelter, basic healthcare and social services), s. 29 (education) and s. 35(2)(e) (detained persons' right to the provision at state expense of adequate accommodation, nutrition, reading material, and medical treatment).
35. I do not suggest that civil and political rights are not transformative. However, I contend that SER have a more directly transformative potential in respect of the achievement of socioeconomic equality, which I consider to be the biggest challenge in contemporary South Africa.
36. 2001 (1) SA 46 (CC), at para. 20.
37. M. Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights', (2004) 20 *South African Journal on Human Rights* 383, at 383.

> conferred upon them by a bill of rights that it results in a breach of separation of powers . . . As we have stated . . . many of the civil and political rights entrenched in the [Constitution] will give rise to similar budgetary implications without compromising their justiciability . . . The fact that socio-economic rights will almost inevitably give rise to such [budgetary] implications does not seem to us to be a bar to their justiciability.[38]

Yet, as I set out below, in stark contrast to its boldness in accepting the authority to adjudicate SER, the Court has thus far failed to interpret progressively the scope and content of rights in a way that might 'improve the quality of life for all citizens and free the potential of each person'[39] and advance 'the achievement of equality',[40] as enjoined by the Constitution.

3.1. The SER record of the Constitutional Court

The Court has heard only five SER cases to date, focusing on only three specific rights: *Soobramoney* v. *Minister of Health (KwaZulu-Natal)* (*Soobramoney*)[41] and *Minister of Health* v. *Treatment Action Campaign (No. 2)* (*TAC*)[42] about the right to healthcare, *Grootboom* and *Port Elizabeth Municipality* v. *Various Occupiers* (*PE Municipality*)[43] about the right to housing, and *Khosa* v. *Minister of Social Development* (*Khosa*)[44] about the right to social security.

There are at least two reasons why there have been so few SER cases before the Court. First, as I have argued elsewhere,[45] the Court has failed to advance a pro-poor direct-access practice, such as the Indian Supreme Court has done, despite formal rules and a constitutional provision allowing for direct access 'in the interests of justice'.[46] Instead of viewing direct access as a potentially transformative mechanism, which might facilitate poor people raising constitutional matters in the public interest in approaching the Court directly as a court of first instance, the Court has only ever granted direct access in a handful of cases, and always to cure a formal defect rather than to remedy a situation in which a poor person might otherwise not gain access to the Court. This exclusive direct-access practice has undermined the Court's potential to act as an 'institutional voice' for the poor,[47] because it means that in order to get a matter to the Constitutional Court, poor people have to proceed through the normal court hierarchy, which, in the absence of legal aid for constitutional cases, is both lengthy and costly. As a consequence, very few

38. *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution 1996*, 1996 (4) SA 744 (CC), paras. 76–78.
39. Preamble of the Constitution.
40. Section 1(a) of the Constitution.
41. 1998 (1) SA 765 (CC).
42. 2002 (5) SA 721 (CC).
43. 2005 (1) SA 217 (CC).
44. 2004 (6) SA 505 (CC).
45. J. Dugard, 'Court of First Instance? Towards a Pro-poor Jurisdiction for the South African Constitutional Court', (2006) 22 *South African Journal on Human Rights* 261.
46. Section 167(6)(a) of the Constitution.
47. S. Gloppen, 'Courts and Social Transformation: An Analytical Framework', in R. Gargarella, P. Domingo, and T. Roux (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (2006), at 35.

socioeconomically disempowered individuals and groups have the resources for constitutional litigation.[48] The Court's failure to pursue a transformative direct-access practice has undoubtedly undermined the ability of poor people to have SER claims heard.

Second, and more directly on the subject of this article, on the few occasions when poor people have secured legal assistance to bring cases through the judicial hierarchy, the Court has interpreted SER in an overly cautious way that has provided few incentives to poor litigants to seek relief through constitutional litigation. Instead of robustly clarifying the content of SER and vigorously monitoring government performance to ascertain whether all obligations (negative and positive) have been adequately discharged or whether there have been violations to the core content of rights, the Court has chosen a diluted, and quite abstract, measure: inquiring into the reasonableness of programmes in the context of the availability of the state's resources. This standard of review – namely that the overall policy, legislation, and practices of government should be reasonable – 'requires litigants to have a sophisticated understanding of often complex policy and budgetary issues', which 'acts as a disincentive to the poor to bring cases to the Court, unless they have substantial legal and other expert support'.[49] The Court's tentative approach to SER adjudication is also reflected in its remedies. Although the Court decided in favour of the applicants in four of the five SER cases to date,[50] in each case the Court focused on remedying government legislation, policies, or programmes, and 'none of the judgments provided direct, substantive relief to the applicants'.[51] This cautious, non-activist, approach has further alienated potential claimants,[52] who perceive that there is little to be gained personally from SER litigation.

The remainder of this section elaborates on these two criticisms of the Court's SER adjudication (relief and standard of review).[53] Rather than focusing on whether the cases were overall rightly or wrongly decided (in the sense of who the Court ruled in favour of), I argue that, specifically in its SER adjudication, the Court has rejected or ignored pro-poor jurisprudential options and arguments, which might have directly promoted transformation in South Africa and most certainly would have improved the living conditions of the claimants. In section 3.2 I offer my explanation for this selective reluctance at concerted law-making in the realm of SER adjudication.

48. Notwithstanding the difficulties of objectively classifying rich and poor applicants, from discussions with clerks at the Court my research suggests that out of 24 cases in which judgments were handed down in 2005, the applicant was poor in only three cases (see Dugard, *supra* note 45, at 275).
49. J. Dugard and T. Roux, 'The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor: 1995–2004', in Gargarella et al., *supra* note 47, at 113.
50. *Soobramoney*, the first SER case, is the exception. Mr Soobramoney asked the Court to order a hospital to provide him with life-saving medical treatment. The Court ruled against Mr Soobramoney, finding that the hospital's policy of denying dialysis treatment to patients with incurable kidney disorders was not an infringement of the applicant's rights.
51. Dugard and Roux, *supra* note 49, at 113.
52. P. Bond and J. Dugard, 'Water, Human Rights and Social Conflict: South African Experiences', (forthcoming) *Law, Social Justice and Global Development*.
53. Here I draw on an earlier analysis, in Dugard and Roux, *supra* note 49, at 113–16.

3.1.1. Relief

Section 172(1) of the Constitution provides that '[w]hen deciding a constitutional matter within its power, a court . . . (b) may make any order that is just and equitable'. Moreover, Section 38 confers on courts the power to grant 'appropriate relief, including a declaration of rights'. Yet, as I summarize below, 'litigation aimed at advancing the rights of the poor has [thus far] resulted in fairly conventional and somewhat limited relief'.[54]

In *Soobramoney*, where the Court found that a hospital's refusal to provide the terminally ill Mr Soobramoney with dialysis did not infringe the applicant's Section 27(3) right to emergency healthcare, no relief was granted to Mr Soobramoney, who died of kidney failure shortly after the judgment. In *Grootboom*, a declaratory order was granted requiring the state to 'devise and implement within its available resources a comprehensive and coordinated [housing] programme progressively to realize the right of access to adequate housing'.[55] Although remarking in passing that the South African Human Rights Commission (which appeared as *amicus curiae* in the case) had a constitutional duty to 'monitor and report' on the state's progress in complying with the judgment,[56] the Court did not make this oversight function part of its order. Among the unsatisfactory consequences is the fact that 'when the Human Rights Commission attempted to report back to the Court on the intolerable conditions still prevailing in the claimant community, the Court refused to engage with it, saying that it had been divested of jurisdiction in the case.[57] In *TAC*, whilst deciding in favour of the claimant, the Court decided not to grant a structural interdict (as the court *a quo* had done) requiring the state to provide Nevirapine to pregnant mothers. Instead the Court opted for a weaker remedy, granting an order declaring the government's mother-to-child HIV/AIDS policy to be unreasonable, coupled with a mandatory order directing that this antiretroviral drug be made available at all public hospitals and clinics.[58] The Court's relatively prescriptive order in *TAC* was probably facilitated because it was obvious to the Court that the government had already decided to use Nevirapine in the prevention of mother-to-child transmission of HIV/AIDS.[59] In *Khosa*, the Court chose the remedy of providing a curative rewording of sections of the Social Assistance Act[60] and other legislation and regulations, to remove the unfair discrimination that precluded permanent residents from accessing the same social assistance benefits as South African citizens.[61]

54. K. Pillay, 'Addressing Poverty through the Courts: How Have We Fared in the First Decade of Democracy?', paper presented at a conference, 'Celebrating a Decade of Democracy', Durban, 23–5 January 2004.
55. *Grootboom, supra* note 36, at para. 99. It should be noted that prior to the main decision, the Court granted an interim order, on 21 September 2000, requiring the government to provide basic sanitation, water, and basic waterproofing materials to the applicants (*Grootboom and Others v. Government of the Republic of South Africa*, (unreported) CCT Case 38/00, paras. 1–3). However, this order was only ever partially implemented and its enforcement was not monitored by the Court.
56. Ibid., at para. 97.
57. See Dugard and Roux, *supra* note 49, at 114.
58. *TAC*, *supra* note 42, at para. 135.
59. M. Heywood, 'Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case against the Minister of Health', (2003) 19 *South African Journal on Human Rights* 278, at 308–9.
60. Act 13 of 2004.
61. *Khosa*, *supra* note 44, at paras. 86–96.

Thus, in spite of extensive powers to craft progressive remedies that might directly improve poor people's living conditions, in its first four SER cases the Court has 'refused relief in the one case in which a poor person sought a direct remedy (*Soobramoney*) and, in the other three cases, mandated that the applicable government policy be changed, without, however, granting any direct relief to the affected individuals'.[62] This record has been only slightly improved by the Court's most recent SER case, *PE Municipality*, in which the Court found that, in the context of the Section 26(3) right not to be arbitrarily evicted from one's home, in most circumstances a municipality would be obliged to procure a mediated solution and to provide alternative accommodation or land before an eviction could be executed.[63] This judgment does provide some concrete benefits to poor people, if only to provide further protection against being evicted without the provision of alternative accommodation. It does not, however, substantively improve the quality of life of the claimants or other people living in parlous housing conditions.

3.1.2. Standard of review

Although it was not the first case to deal with SER, *Grootboom* was the first case in which the Court began to develop a systematic approach to the justiciability of SER, and particularly in respect of the positive obligations of SER. Declining the minimum core content approach as raised by the *amicus curiae*,[64] the Court chose instead to adopt a narrow interpretation of the state's obligations vis-à-vis SER rights, in which the standard of review was not whether a core content component or the progressive realization of a particular right had been violated, but 'whether the legislative and other measures taken by the state are reasonable' in the context of the 'state's available means'.[65] In *TAC*, the minimum core content approach was again rejected[66] in favour of the reasonableness standard of review, which the Court explained was not itself directed at budgetary allocations,[67] suggesting that this is the Court's established method for positive obligations inquiries.

This relatively weak standard of review has been criticized for not being a rights-based test at all,[68] but rather for being derived from administrative law.[69] Given the 'abstract and open-ended nature' of the reasonableness inquiry, doubts have been expressed about 'its suitability in developing a socio-economic rights jurisprudence resonating with international law and with the transformative aims of the constitutional order'.[70] This is so especially when the reasonableness analysis is undertaken in the vacuum of the Court's failure to define the contents and obligations of SER.

62. Dugard and Roux, *supra* note 49, at para. 114.
63. *PE Municipality*, *supra* note 43, at paras. 29–30, 39–47, 56–9.
64. *Grootboom*, *supra* note 36, at para. 18.
65. Ibid., para. 41.
66. *TAC*, *supra* note 42, at para. 37.
67. Ibid., at para. 38.
68. D. Bilchitz, 'Giving Socio-economic Rights Teeth: The Minimum Core and Its Importance', (2002) 119 *South African Law Journal* 484; D. Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence', (2003) 19 *South African Journal on Human Rights* 1.
69. C. Sunstein, *Designing Democracy: What Constitutions Do* (2001), 224–37.
70. Pieterse, *supra* note 37, at 410.

In choosing this test (which only peripherally engages with the issue of budgetary allocations) rather than the explicitly rights-based minimum core content violations test, which is supported in international law,[71] the Court has demonstrated a jurisprudential conservatism in relation to SER adjudication which I expand on in section 3.2.

The Court has been more robust in defending unqualified negative rights, specifically the Section 26(3) right not to be arbitrarily evicted from one's home, which it did in *PE Municipality*. It has also responded more unambiguously when called on to consider the interaction between SER and the prohibition on unfair discrimination, a civil and political right, as was the case in *Khosa*.

Notwithstanding such advances, the failure of the Court to pursue a rights-based analysis of the content of SER and the nature of the state's positive obligations vis-à-vis each right, has been detrimental to the development of SER jurisprudence and, more importantly, to the transformation of South African society. I provide a possible explanation for the Court's cautious approach to adjudicating the positive obligations of SER below.

3.2. Explaining the Court's reluctance to actively enforce SER

Why has the Court been so equivocal in its enforcement of SER and why has it advanced so restricted a role for itself in addressing socioeconomic issues? Some commentators have ascribed to the Court a formalist approach in which the text is interpreted as literally as possible. However, while the Court has engaged in 'forthright formalism' on occasions,[72] for example in *Zantsi* v. *Council of State, Ciskei*[73] its general record reveals many judgments in which the Court has adopted a purposive, generous or contextual approach to the interpretation of rights, at least theoretically, and at least in parts of the judgment. For example, in the recent case, *Department of Land Affairs and Others* v. *Goedgelegen Tropical Fruits (Pty) Ltd.*, the Court noted its obligation to scrutinize its [the Restitution Act's] purpose' and to 'promote the spirit, purport and objects of the Bill of Rights . . . [preferring] a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees.'[74]

To some extent the distinctions between formal/textual, purposive, generous, and contextual interpretations are not very relevant in analyses of the Constitutional Court, which appears to mix different approaches between judgments and even within them. Of more relevance, particularly in the context of SER adjudication, are the commentators who have alleged that the Court has been reluctant to confront

71. The minimum core content approach has been developed mainly in the 1986 Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (UN Doc. E/CN.4 (1987), at 17) and the General Comments of the United Nations Committee on Economic, Social and Cultural Rights. Although South Africa has not ratified the 1966 International Covenant on Economic, Social and Cultural Rights, the Constitutional Court established in *S v. Makwanyane* (1995 (3) SA 391 (CC)) that, in interpreting the Bill of Rights, 'non-binding as well as binding' public international law are both relevant (para. 35).

72. J. Klaaren, 'Structures of Government in the 1996 South African Constitution: Putting Democracy back into Human Rights', (1997) 13 *South African Journal on Human Rights* 3, at 17.

73. 1995 (4) SA 615 (CC).

74. Unreported Case CCT 69/06, at para. 53.

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the political branches directly, or at least has been strategically managing its relationship with the executive.[75] While it is hard to rule out an element of managing its relationship with the executive, the Court's overall record does not suggest an overly executive-minded approach. In civil and political rights matters (the mainstay of the Court's cases), the Court has very often ruled against the government.[76] And, indeed, as outlined above, in four out of the five SER cases it has ruled against the executive, albeit over-cautiously. It is also simply not true that the Court has always failed to be bold in relation to the executive.

Recalling John's amazement at the apartheid judiciary's selective reluctance to see its own law-making function – accepting it in the development of the common law but refusing it in the interpretation of statutes – I suggest that something similar is happening today. The Constitutional Court accepts an aggressive, law-making function regarding civil and political rights, yet it is timid about its law-making function regarding SER.

Why is this so? I believe that the Court's tentative SER record can be explained by a jurisprudential conservatism[77] about the extent of its role in a socioeconomically divided, but democratically governed, society. And, just as the apartheid judiciary shied away from an activist role in a racially divided society (hiding behind a positivist confinement to apartheid law regarding interpretation of statutes), so the post-apartheid judiciary shies away from an activist role in a socioeconomically divided society, claiming separation of powers in a legitimate democracy as a shield against playing a more activist role in the transformation of South Africa.

This separation-of-powers angst is evident in the Court's reasoning, in which the Court's concerns about usurping the role of a democratically elected executive are clear. The Court's unease about its role in transformative constitutionalism was revealed in the first SER case, *Soobramoney*, in which it stated that it would 'be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters'.[78] Such anxiety about intruding into the traditional realm of politics is particularly evident in the Court's approach to budgets. For example, in clarifying the limits of the reasonableness standard of review in *TAC*, the Court explained:

> The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.[79]

75. T. Roux, 'Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court', (2003) 10(4) *Democratization* 92.
76. For example, in 2005 the Court ruled against the government in 35.7% of cases involving the state; M. Bishop et al., 'Constitutional Court Statistics for the 2005 Term', (2006) 22 *South African Journal on Human Rights* 518, at 526.
77. On the subject of jurisprudential conservatism, see K. Klare, 'Legal Culture and Transformative Constitutionalism', (1998) 14 *South African Journal on Human Rights* 146.
78. *Soobramoney*, *supra* note 41, at para. 29.
79. *TAC*, *supra* note 42, at para. 38.

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The Court's concern not to violate the doctrine of separation of powers is also apparent in its interpretation choices, that is to say, the decisions it made over the 'discretionary gaps'[80] available to it. As outlined above, the Court has the option to fashion progressive remedies, but instead it has chosen limited remedies that have not provided direct, substantive relief to the applicants. The Court also chose to reject an internationally recognized, progressive minimum core content approach that conforms to the Constitution's values, in favour of a weak standard of review for determining the positive obligations of socioeconomic rights.

Clearly, the adoption of the more progressive alternatives, in each case, would have required the Court to move into what is traditionally regarded as the political domain, because it would have 'required the Court to substitute its own view of the needs that ought to be prioritised . . . for that of the legislature and the executive'.[81] It might also have obliged the Court to review the budget and to scrutinize the allocation of resources, which have been thought historically to be beyond the 'limits of adjudication'.[82]

Yet the doctrine of separation of powers is more blurred and fluid than the Court makes it out to be. As James Madison wrote in 1788,

> Experience has instructed us that no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislature, Executive, and Judiciary; or even the privileges and powers of the different Legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.[83]

With time and the advent of constitutions, the boundaries between the legislature, the executive, and the judiciary have become even more imprecise. This is because

> it is necessary to government that sometimes the executive and sometimes the judiciary has to create rules, that sometimes the legislature and sometimes the judiciary has to enforce rules, and sometimes the legislature and sometimes the executive has to resolve controversies over the rules.[84]

In this very fluid matrix, 'adjudication is, inevitably, a site of law-making activity'.[85] Rather than hoping to continue to avoid a substantial overlap with the political branches of government, the Constitutional Court 'would be fulfilling its role as having a dialogue with the executive on economic and social rights rather than being involved with a territorial power struggle'.[86]

Indeed, South Africa's constitutional order demands a 'reconceptualisation of both the operation of separation of powers generally and of the role played by

80. See Roux, *supra* note 75, at 95.
81. Ibid., at 97.
82. L. Fuller, 'The Forms and Limits of Adjudication', (1972) 92 *Harvard Law Review* 353.
83. Quoted in P. Kurland, 'The Rise and Fall of the "Doctrine" of Separation of Powers', (1986) 85 *Michigan Law Review* 592, at 593.
84. Ibid., at 603.
85. See Klare, *supra* note 77, at 147.
86. G. Van Bueren, 'Alleviating Poverty through the Constitutional Court', (1999) 15 *South African Journal on Human Rights* 52, at 64.

the judiciary within the doctrine'[87] in order to give SER real meaning. For the Constitution and the Court to have real legitimacy, the Court must reveal itself behind the shadow of separation of powers in order to

> address the pressing needs of ordinary people. It cannot be seen to institutionalize and guarantee only political/civil rights and ignore the real survival needs of the people – it must promise both bread and freedom. If it does not do so, it will find no lasting resonance amongst the true guardians of the constitution – which are not the courts but the citizens.[88]

3.3. An alternative approach to SER adjudication

In a speech in early 2007 on 'Human Rights in South Africa: Past, Present and Future', John outlined the challenges facing South Africa as follows:

> In the apartheid years, the invasion of the civil and political rights of the individual enjoyed priority. Torture, judicial executions, restrictions on freedom of expression, assembly and movement were the main concerns of human rights lawyers. Today, poverty and the failure to deliver essential services to the majority of South Africa's people, constitute the main threat to human rights. South African courts, particularly the Constitutional Court, have been too little involved in such matters.[89]

In this article I have suggested that we need an activist judiciary that purposively pursues transformative adjudication with the goal of achieving socioeconomic equality. As Enoch Dumbutshena, a former Chief Justice of Zimbabwe, argues, the judiciary in a developing country should plan an activist role in the transformation of society:

> Judges must use their judicial power in order to give social justice to the poor and economically and socially disadvantaged. South Africa is best equipped to do this. Its bill of rights contains social and economic rights. In interpreting those provisions which protect social and economic rights, judges should remember that they cannot remain aloof from the social and economic needs of the disadvantaged. Through their activism, judges can nudge their governments so that they can move forward and improve the social and economic conditions of the poor. In South Africa the bill of rights is, without interpretation, activist in its own right. However, it requires activist judges to make its provisions living realities.[90]

In specific terms, this will require a revision of two critical aspects of SER adjudication. First, the Court will need to work towards a 'substantive interpretation of the content of socio-economic rights',[91] even if this means revisiting the minimum core content approach. Second, the Court must advance a new definition of separation of powers, which must be responsive to South Africa's current constitutional context as well as the need for socioeconomic transformation. It is important that the Court

87. See Pieterse, *supra* note 37, at 383.
88. N. Haysom, 'Constitutionalism, Majoritarian Democracy and Socio-economic Rights', (1992) 8 *South African Journal on Human Rights* 451, at 454.
89. J. Dugard, 'Human Rights in South Africa: Past, Present and Future', public lecture at the Centre for Human Rights, University of Pretoria, 27 March 2007, available at http://www.chr.up.ac.za/about/news.html#dugard.
90. E. Dumbutshena, 'Judicial Activism in the Quest for Justice and Equality', in B. Ajibola and D. Van Zyl (eds.), *The Judiciary in Africa* (1998),188.
91. Moseneke, *supra* note 33, at 314.

itself should determine 'the location, and degree of flexibility of these [separation of powers] boundaries . . . through principled, case-by-case deliberation'.[92] This principled deliberation should include the development of a coherent practice regarding the scrutiny of budgets, resource allocations and policies. Just because courts are ill-placed to formulate budgets and policies does not mean that they are institutionally incapable of subjecting budgets and policies to constitutional review. Indeed, in the context of civil and political rights adjudication, the Court has often evaluated policies and decided cases in ways that involved the rearranging of budgets, such as in *August* v. *Electoral Commission*.[93] SER adjudication, too, must benefit from such judicial robustness.

Through developing a new separation-of-powers paradigm, the Court will be able to begin a dialogue with the political branches of government and, in the process, will assist in defining the precise content of SER obligations. Critically, if the process is driven by the goal of transformation, the doctrine of separation of powers can become a means, rather than an end:

> Separation of powers is a distinctly constitutional tool. It addresses itself to the authors of the constitution; it enjoins them to match function to form in such a way as to realise the goals set for the state by political theory. Having decided that a particular goal ought to be striven after in a society, the doctrine then focuses our attention on the manner in which it may be achieved.[94]

Ultimately, any new definition must clarify a central role for the judiciary in upholding and advancing the Constitution's 'transformative design'.[95] To the extent that 'imposing such a mandate on the judiciary may imply a derogation from participatory democracy, such derogation has irrevocably taken place'.[96]

4. Conclusion

The historical record reveals that the apartheid judiciary did not view its role in terms of securing a better society for all South Africans, nor did it utilize what room it had for progressive adjudication in the context of a racially divided, politically unjust system.[97] Has the post-apartheid judiciary fared better? While not reviewing the judiciary as a whole, I have argued that the Constitutional Court has failed to take on an appropriately transformative role in an increasingly unequal society. I have suggested that this reluctance to make law in the realm of SER, when the Court has readily assumed a law-making role regarding civil and political rights, can be explained by jurisprudential conservatism, hidden under the fig leaf of the

92. Pieterse, *supra* note 37, at 405.
93. 1999 (3) SA 1 (CC). In this case the South African Electoral Commission's disenfranchisement-by-omission of prisoners was challenged only days before an election. In ordering the Electoral Commission to make reasonable arrangements to ensure that prisoners could register and vote, the Court rejected the government's arguments about the vast logistical and financial implications of such a remedy, in favour of a substantive enforcement of prisoners' right to vote.
94. N. Barber, 'Prelude to the Separation of Powers' (2001) 60 *Cambridge Law Journal* 59, 71–2.
95. See Moseneke, *supra* note 33, at 314.
96. Pieterse, *supra* note 37, at 404.
97. See Dyzenhaus, *supra* note 10.

separation-of-powers doctrine. The result has been a reluctance to define the content of SER, examine budget allocations, or provide individual relief to claimants, for fear of straying into the political domain. This has not only discouraged SER claims (there have only been five SER claims, and the rights to education, food, and water have still not been raised in the Constitutional Court, despite clear evidence of continuing violations of poor people's enjoyment of these rights), but it has also substantively weakened the Court's capacity to act as 'an institutional voice for the poor' and to play a decisive role in South Africa's transformation.

A change in ideological approach is needed and, indeed, is constitutionally mandated. South Africa's 'unashamedly political' Constitution 'expressly strives towards the egalitarian transformation of society and the achievement of social justice' and, in doing so, it requires a break from past legal culture:

> By requiring the judiciary to 'uphold and advance its transformative design',[98] the Constitution simply does not allow the degree of deference to which judges schooled in South African legal culture have become accustomed. The judiciary is no longer able to shy away from vindicating socio-economic rights merely because doing so would have political and resource repercussions . . . Merely because judicially enforcing socio-economic rights is difficult, does not mean that the task should be abdicated.[99]

In 1984, over twenty years ago and ten years before democracy in South Africa, John pointed out that an apartheid judge 'may legitimately select those principles, precedents or authorities from our liberal Roman-Dutch heritage which best advance equality and liberty'.[100] I suggest that the same admonishment could be adapted for the contemporary judiciary. Today, a judge should feel compelled to select those values and principles from our Constitution which best advance equality and dignity, even if this means overstepping the traditional dividing line between the political branches of government and the judiciary.

I can do no better than to end this article by borrowing a passage from the preface to John's 1978 book, in the hope of its continuing relevance today, albeit at a different time, in a different context, and from a different Dugard:

> It is hoped, perhaps naively, that this portrayal of the South African legal order and the role of its custodians will stimulate lawyers to reflect on the nature of their system of law, and might contribute, in some small measure, to its reform.[101]

98. Moseneke, *supra* note 33, at 314.
99. Pieterse, *supra* note 37, at 417.
100. Dugard, *supra* note 6, at 286.
101. Dugard, *supra* note 2, at xii.