

Economic Policy and the Socio-Economic Rights in the South African Constitution, 1996–2021: Why Don't They Talk to Each Other?

MARK HEYWOOD

ABSTRACT: In this article I argue that during the first 25 years of South Africa's democracy, economic policy and socio-economic rights have tacked two parallel paths, rarely meeting and neither cognizant of the other. In the words of Philip Alston and Nikki Reisch, the result has been to 'decouple economic management from democratic decision-making'. Yet, shaping economic policy to enable a socially just society is, I argue on the basis of constitutional provisions as well as the design and architecture of the Constitution of the Republic of South Africa, 1996 (Constitution), an inescapable duty that falls on every level of government. Both constitutional jurisprudence and international law supports this contention. I argue that the failure of the executive and legislature to recognise this is evident from the various iterations of economic policy South Africa has pursued since 1996. Not only is the resulting gross inequality socially unsustainable (something most commentators agree on), but legally impermissible. In short, my argument is that the Constitution has as much sway over economic governance as it has been seen to have over political governance. I look at alternative economic policies, which are constitutionally permissible but warn that resorting to public impact litigation alone to bring about these policies will not be sufficient to bring about transformation and social justice. To reshape the economy within the constitutional tracks of social justice I suggest there is a treasure trove of jurisprudential permissions already available. However, to put this treasure trove to work, the following is required: constitutional advocacy with argument targeted at the executive and the legislature, as well as public education.

KEYWORDS: African National Congress (ANC), austerity, economic justice, inequality, international law, neoliberalism, participatory democracy, social justice, tax.

AUTHOR: Editor, *Maverick Citizen*; Adjunct Professor, Nelson Mandela School of Public Governance, University of Cape Town, South Africa.
Email: markjamesheywood@gmail.com

ACKNOWLEDGEMENTS: I acknowledge and thank Sandra Liebenberg, Steven Jensen and Nompumelelo Seme for advice, willingly sharing information and encouragement. Thanks to the late Vishnu Padayachee whose pioneering ideas about economic justice and rigorous pro-poor economic analyses finally helped set the article in

motion. The article is dedicated to social justice activists everywhere who work tirelessly for human dignity and equality, but who desperately need to elucidate a plausible 21st century theory of change if social justice and human rights are ever to become a reality.

All babies are born naked. Soon afterwards, however, some are dressed in expensive clothes and put on a path to a privileged life while the majority wear rags and must perform miracles to escape from a life of exhaustion, exploitation, servitude and fear.¹ — Yanis Varoufakis

Modern redistribution does not consist in transferring income from the rich to the poor, at least not in so explicit a way. It consists rather in financing public services and replacement incomes that are more or less equal for everyone, especially in the areas of health, education and pensions. ... Modern redistribution is built around a logic of rights and a principle of equal access to a certain number of goods deemed to be fundamental.² — Thomas Piketty

I INTRODUCTION

A great deal has been written about the ‘transformative’ nature of the Constitution of the Republic of South Africa, 1996 (‘Constitution’).³ The Constitutional Court itself has frequently commented on how the Constitution mandates government to pursue policies that aim at the realisation of rights and the narrowing of inequality.⁴ However, as the quantum of ‘available resources’ is implicated in almost all aspects of transformation and rights realisation, it is impossible to discuss this matter without addressing issues of economic policy. This is because ultimately it is the state of the economy (usually measured narrowly by the Gross Domestic Product (GDP), debt, levels of investment and employment) that government officials always tell us determines both how much funding can be budgeted for socio-economic rights and where funds are to be prioritised.⁵ This forces us to ask whether and how the South African government’s economic policy and the Constitution’s justiciable socio-economic rights talk to each other.

In this article, I examine this question by, first, setting out why and where the Constitution places positive obligations on the government in the realm of economic policy. I then suggest how economic policy, as determined by the executive and legislature, must, *like all other areas of law and policy*, be scrutinised to see whether it complies with constitutional obligations. Thereafter, I examine whether the South African government has taken the rights and obligations in their main economic policy directions into account. I focus on economic policy directions since 1994. I then conclude by making a series of recommendations for economic policy measures and programmes, supported by law, that would enable rights-realisation and social justice.

South Africa’s deepening poverty and inequality is a stain on the Constitutional era in my view. I argue that this is not the result of a design flaw in the Constitution, but of what former

¹ *Another Now, Dispatches from and Alternative Present* (2020) 53.

² *Capital in the Twenty-First Century* (2017) 609.

³ Constitution of the Republic of South Africa, 1996 (‘Constitution’). See, for example, T Fish Hodgson ‘The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers: Toward a Distinctly South Africa Doctrine for a more Radically Transformative Constitution’ (2018) 34 *South African Journal on Human Rights* 57–90 (which captures many of the debates around the degree to which South Africa’s Constitution is indeed transformative, and some of the impediments to its transformative powers through the lens of a discussion on separation of powers); and P Langa ‘Transformative Constitutionalism’ (2006) 17 *Stellenbosch Law Review* 351–360.

⁴ For a fuller discussion of this see part IIA.

⁵ For example, see *Economy and Finance*, available at <https://www.gov.za/about-sa/economy>, where the government states that South Africa’s *National Development Plan* (NDP) recognises that faster, broad-based growth is needed to transform the economy, create jobs, and reduce poverty and inequality by 2030.’

Deputy Chief Justice Dikgang Moseneke has called a failure to ‘grasp the nettle ... to change our world irreversibly.’⁶ I thus ask questions about what can be done to change this status quo.

II THE GOVERNMENT’S POSITIVE OBLIGATIONS RELATING TO ECONOMIC POLICY

In *Shadow of Liberation*, Vishnu Padayachee and Robert Van Niekerk⁷ examine the economic and social policy of the African National Congress (ANC) between 1943 and 1996.⁸ Their primary focus is on the evolution of economic policy. They document how during the early 1990s the constitution-making process was a constant backdrop to the ANC’s debates with its allies in the Congress of South African Trade Unions (COSATU) and the South African Communist Party (SACP) on economic policy. They also illustrate how the constitution-making and economic policy debates rarely talked to each other, confirming the assertion of Moseneke in his first book, *My Own Liberator*, that:

When the constitution was negotiated, the parties skirted around the need for social change. The negotiators did not stare in the eye the historical structural inequality in the economy. There was no pact on how to achieve the equality and social justice the economy promised. Instead, the constitution imposed qualified duties on the state to facilitate access to social goods such as health, housing, water, education and social grants. But these socio-economic entitlements were premised on and limited to state transfers as and when funds were available. On the face of it, the protections were praiseworthy and they promised a state-sponsored reduction of poverty, but in practice socio-economic rights did not speak to how to restructure the economy in a way that rendered it more productive and inclusive.⁹

From this, Moseneke concluded:

The absence of a social pact was a far-reaching omission given the inequality embedded in the social structure of the country at the start of the transition. I am, however, not debating whether at the time of the negotiations, given the balance of forces, a radical social pact was feasible. Short of an outright military conquest, probably it was not.¹⁰

The period examined in this article begins where Padayachee and Van Niekerk left off their analysis, in February 1997, the time of the coming into force law of the Constitution. By coincidence, this was also the moment that saw the ANC government, led by then Deputy President Thabo Mbeki, ushering in a conservative economic policy, known as the Growth, Employment and Redistribution (GEAR) strategy.¹¹ This policy was sharply and frequently criticised by the ANC’s alliance partners for caving in to ‘neo-liberal economic doctrine’; and for its plans to cut public expenditure on key socio-economic rights such as to healthcare

⁶ D Moseneke *All Rise, A Judicial Memoir* (2020) 71.

⁷ V Padayachee & R Van Niekerk *Shadow of Liberation, Contestation and Compromise in the Economic and Social Policy of the African National Congress, 1943–1996* (2019).

⁸ Also see M Heywood ‘Negotiating Liberation: How Failing to do the Maths Cost a Country its Dream’ *Daily Maverick* (29 October 2019), available at [https://www.dailymaverick.co.za/article/2019-10-29-negotiating-liberation-how-failing-to-do-the-maths-cost-a-country-its-dream/Shadow of Liberation](https://www.dailymaverick.co.za/article/2019-10-29-negotiating-liberation-how-failing-to-do-the-maths-cost-a-country-its-dream/Shadow%20of%20Liberation).

⁹ D Moseneke *My Own Liberator, A Memoir* (2016) 352–353.

¹⁰ *Ibid* at 353.

¹¹ Government of the Republic of South Africa, *Growth, Employment and Redistribution (GEAR) Strategy* (1996), available at <http://www.treasury.gov.za/publications/other/gear/chapters.pdf>.

services and basic education.¹² Former Minister of Trade and Industry Rob Davies referred to GEAR as ‘a lodestone around which the different contending forces in the struggle over the direction of the National Democratic Revolution (NDR) would mobilise for years to come.’¹³ He regarded it as the point at which ‘the finance ministry progressively assumed hegemony over economic policy.’¹⁴

Padayachee and Van Niekerk explored the genesis of GEAR and the abrupt end of the much more progressive Reconstruction and Development Programme (RDP). However, other than to say that the ‘unnecessary lurch to economic conservatism ... undoubtedly had serious negative consequences for the South African economy and for the poor and the working class’¹⁵ they did not document GEAR’s failures: these were most notably the changing shape of inequality and the precipitous rise in inequality in access to socio-economic rights, particularly health care services, sufficient food and basic education. Nor do they record the subsequent zigzags in the economic policies that followed GEAR.

Before providing an analysis of these policies, it is necessary to illustrate what bearing the Constitution’s positive obligations *must* have on the government’s economic policy and decisions, irrespective of the ideological complexion of the political party elected to power.

A The Constitution’s bearing on economic policy directions and decisions

According to recital 5 of its preamble the Constitution is ‘the supreme law of the Republic’. It is vested with this power ‘so as to’: ‘Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights’ and ‘[i]mprove the quality of life of all citizens and free the potential of each person.’

In the context of my argument, the three words ‘so as to’ are important. They establish that the Constitution’s drafters intended there to be a direct *causal* connection between the supreme law and its socio-economic objective to ‘improve the quality of life of all citizens and free the potential of each person.’¹⁶ According to Sandra Liebenberg ‘this contention is supported also by horizontal application provisions in sections 8(2) and (3) of the Constitution as well as by the injunction to interpret all law including legislation, common law and customary law to ‘promote the spirit, purport and objectives of the Bill of Rights.’¹⁷ The ‘so as to’ connection is further reinforced in the founding provisions where ‘[h]uman dignity, the achievement of

¹² The actual impact of GEAR on socio-economic rights is still disputed. For the left, GEAR was a watershed moment away from transformative economics. However, according to some researchers the evidence does not unequivocally support that contention. See, for example, A van Zyl & C van der Westhuizen ‘Deep Cuts? Social Service Delivery Under GEAR’ *Trade and Industry Policy Strategies (TIPS)* (2003), available at <https://www.tips.org.za/research-archive/annual-forum-papers/2003/item/360-deep-cuts-social-service-delivery-under-gear>. In this paper, the authors argue that ‘while budgeted and actual social spending and social spending as share of the budget increased, actual per capital social spending and social spending as share of GDP decreased over the period. We also find that social spending as share of GDP declined by less than total expenditure’s share of GDP. The evidence is therefore not conclusive enough to substantiate the claim that social spending was drastically cut under GEAR.’

¹³ R Davies *Towards a New Deal, A Political Economy of the Times of My Life* (2021) 71.

¹⁴ *Ibid* at 71. Importantly, at 70 Davies points out that the policy didn’t work in its objective of attracting significantly increased levels of Foreign Direct Investment (FDI). Arguably, a salutary lesson for today’s economic policy.

¹⁵ Padayachee & Van Niekerk (note 7 above) at 234.

¹⁶ Constitution recital 8 of the Preamble.

¹⁷ Private communication with Prof Sandy Liebenberg, December 2020.

equality and the advancement of human rights and freedoms' are listed as core values.¹⁸ It is on this basis that Moseneke DCJ could write in *Hoerskool Ermelo* that:

In an *unconcealed design*, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular. This it does in a cluster of warranties. I cite only a few.¹⁹

Moseneke was writing about the right to basic education, but there can be no doubt that his description of the Constitution's 'unconcealed design' extends to all rights. Significant too is the declaration that 'law or conduct inconsistent with it is invalid'.²⁰ The use of the word 'conduct' clearly extends this injunction beyond just the state. Also, note the unambiguous duty created by the mandamus that 'the obligations imposed by it must be fulfilled'.²¹

The importance of the preamble and the founding provisions has been emphasised consistently and unambiguously by the Court, for example in *Van Heerden* where (then) Moseneke J referred to the Constitutional 'command' in relation to equality referring to this as 'a standard which must inform all law and against which all law must be tested for constitutional consonance'.²² In the words of Moseneke J: 'Of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice.'²³ He further found that:

This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. *The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage.* It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution.²⁴

The importance of the Constitution's founding provisions is evident from the way in which they are encased in the Constitution and protected against alteration and watering down. A unique threshold of 75 per cent is set for any amendment to Chapter 1, compared with two thirds for all other chapters. Chapter 2, the Bill of Rights, goes further in reducing any ambiguity about the Constitution's purpose. It makes its jurisdiction clear by stating that it 'applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'.²⁵ Private parties and 'conduct' also fall under the Constitution's sway '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'.²⁶

¹⁸ Constitution s 1(a). This is listed as the first of the Constitution's values.

¹⁹ *Head of Department: Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another* [2009] ZACC 32, 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC) ('*Hoërskool Ermelo*') (emphasis added).

²⁰ Constitution s 2.

²¹ *Ibid.*

²² *Minister of Finance & Other v Van Heerden* [2004] ZACC 3, 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC), [2004] 12 BLLR 1181 (CC) ('*Van Heerden*') at para 22.

²³ *Ibid* at para 25.

²⁴ *Ibid* at para 27 (emphasis added).

²⁵ Constitution s 8(1).

²⁶ *Ibid* s 8(2).

It is now well established in a line of jurisprudence that the state has a positive duty to intervene in private conduct to prevent private actors from violating rights, including economic conduct, where it is necessary to facilitate the realisation of a right.²⁷

Liebenberg illustrates the (barely tapped) power of the Constitution over private markets by pointing to the substantive judicial interventions in property law under the influence of the right to housing as ‘one of the best and more explicit examples of the ways in which the Constitution has had an impact on private law’.²⁸ In addition, intervention in the pharmaceutical market is a clear example of what the state can do when recognising and fulfilling a duty to intervene to realise socio-economic rights, in this case s 27. In the cases of medicines, governmental action was prompted by the devastating HIV/AIDS epidemic in the early 2000s and because of the centrality of affordable medicines to the ‘right of access to healthcare services’.²⁹ Even in this case it required the existence of a strong activist movement, the Treatment Action Campaign (TAC),³⁰ mobilising for affordable medicines to put pressure on the government to use its constitutionally sanctioned powers to bring down the price of medicines.

However, I argue that this unconcealed design does not stop at the Constitution. Since 1996 the language of much subsidiary legislation provides further evidence of a recognition of this duty. For example, according to the Competition Act, the very *raison d’être* of the Competition Commission and Tribunal is ‘to promote employment and advance the social and economic welfare of South Africans’.³¹ Although the words used in the Competition Act are ‘economic welfare’ I argue that the legislature’s meaning here is intended to be almost interchangeable

²⁷ *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council & Another* [2006] ZACC 9, 2006 (11) BCLR 1255 (CC), 2007 (1) SA 343 (CC) (‘AAA Investments’); *AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Security Agency & Others* [2013] ZACC 42, 2014 (1) SA 604 (CC) (‘AllPay’); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* (CC) [2011] ZACC 33, 2012 (2) BCLR 150 (CC), 2012 (2) SA 104 (CC) (‘Blue Moonlight’); *Daniels v Scribante and Another* [2017] ZACC 13, 2017 (4) SA 341 (CC), 2017 (8) BCLR 949 (CC) (‘Scribante’); *Governing Body of the Juma Masjid Primary School & Others v Essay NO & Others* [2011] ZACC 13, 2011 (8) BCLR 761 (CC) (‘Juma Masjid’); *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3, 2011 (5) BCLR 453 (CC), 2011 (3) SA 237 (CC), [2011] 6 BLLR 527 (CC), (2011) 32 ILJ 545 (CC) (‘Mankayi’); *Nkala & Others v Harmony Gold Mining Company Limited & and Others* [2016] ZAGPJHC 97, [2016] 3 All SA 233 (GJ), 2016 (7) BCLR 881 (GJ), 2016 (5) SA 240 (GJ) (‘Nkala’).

²⁸ S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) especially chs 6 & 7.

²⁹ For example, see *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others* [2005] ZACC 25, 2006 (8) BCLR 872 (CC) (‘New Clicks’), where at para 236 Moseneke J writes: The scheme is criticised by the Pharmacies on the ground that regulation of prices is less effective than market forces. The choice of price regulation, if not inconsistent with the Medicines Act, was a policy decision within the domain of the legislature and the executive with which this Court will not interfere. This Court is concerned with whether the scheme meets the requirements of the Medicines Act and was adopted in accordance with the provisions of the Constitution and PAJA, and not with whether there may be better ways of achieving the same purpose. Further, at para 734 Moseneke writes: ‘I do not agree that by devising a scheme to make medicines affordable through regulation 10, which sets the dispensing fee for pharmacies, the Minister’s conduct is ulterior, irrelevant or irrational to the purpose of s 22G(2) and (3).’ Considering some contemporary debates about economic policy it might also be worth noting how Moseneke dispenses with the fear-mongering argument that regulating prices would deter investment and cause a collapse of pharmacies by weighing the actual expert evidence placed before the court. All these statements have resonance and relevance when it comes to the power of the Constitution over markets and economic policy.

³⁰ *Minister of Health & Others v Treatment Action Campaign & Others* (No 2) [2002] ZACC 15, 2002 (5) SA 721, 2002 (10) BCLR 1033 (‘TAC’); M Heywood ‘South Africa’s Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Rights to Health’ (2009) 1 *Journal of Human Rights Practice* 14–36.

³¹ Competition Act 89 of 1998 s 2(c).

with socio-economic rights. However, the question of the inconsistency of language within the Constitution and between the Constitution and other legislation is something that will need further analysis by academics and probably eventually the courts.

Scholars and the courts have agreed that the Constitution does not create a hierarchy of rights.³² Nonetheless, they have accepted that there are what have been termed ‘empowerment rights’ as well as rights such as access to information and administrative justice that facilitate access to other socio-economic rights. Section 29, the right of ‘everyone to basic education’, is one of these.³³

In the context of its ‘unconcealed design’, it cannot be an accident that once the Constitution, in chapter 2 section 8, has dealt with the *application* of the Bill of Rights, the first tangible self-standing right, it deals with the right to equality. Its place in the Constitution would suggest that equality is a right that must envelop all other rights. Section 9(2) of the Constitution makes this express by stating that ‘[e]quality includes the full and equal enjoyment of all rights and freedoms’. The state ‘may’ take ‘legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination’³⁴ Admittedly, ‘may’ is not as strong as the injunction that the state ‘must’ take ‘reasonable legislative and other measures to progressively realise’³⁵ the socio-economic rights to housing and health care services. However, even if ‘may’ is read conservatively, it amounts to a permission.

³² In *Government of the Republic of South Africa & Others v Grootboom & Others* [2000] ZACC 19, 2001 (1) SA 46, 2000 (11) BCLR 1169 (*Grootboom*) Yacoob J referred to all rights as being ‘inter-related and mutually supporting’ at para 23, noting that ‘[s]ocio-economic rights must all be read together in the setting of the Constitution as a whole’ at para 24. The relationship between rights is built on in subsequent jurisprudence. For example, in *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) (*Port Elizabeth Municipality*) at para 23: The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each case. This is cited approvingly by Nkabinde J in *Juma Musjid* at para 70, when she discusses ‘the role of our courts when confronted with competing rights’. The right to education is specifically described as an empowerment right by the UN Committee on Economic, Social and Cultural Rights in General Comment No. 13: General Comment 13 (21st Session, 1999) ‘The Right to Education (art 13)’ UN Doc E/C.12/1999/10 para 1. This description and quote from the General Comment was cited with approval by the Constitutional Court in *Juma Musjid* at para 41. Kristina Bentley and Richard Calland describe access to information (ATI) as a ‘leverage right’ and ‘a tool to advance social and economic rights’ (K Bentley & R Calland ‘Access to Information and Socio-Economic Rights: A Theory of Change in Practice’ in M Langford, B Cousins, J Dugard & T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) 341–364, 342. There are also a number of works recognising the important role of administrative justice in protecting socio-economic rights, for example: G Quinot et al *Administrative Justice in South Africa: An Introduction* (2nd Ed, 2020); G Quinot & S Liebenberg ‘Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa’ (2011) 3 *Stellenbosch Law Review* 639–663.

³³ For example, *Juma Musjid* (note 27 above); *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng & Another* [2016] ZACC 14, 2016 (4) SA 546 (CC), 2016 (8) BCLR 1050 (CC) (*FEDSAS*).

³⁴ Constitution s 9(2). This is confirmed in the dictum of Moseneke J in *Van Heerden* (note 22 above) at paras 22–26.

³⁵ This is the language used in Constitution s 26 (Housing) and s 27 (Health care, food, water, and social security).

In a 2020 judgment of the North Gauteng High Court³⁶ Kollapen J wrote of the ‘general transformative trajectory of the Constitution in which the principle of equality finds centre place’ and quoted approvingly from the Constitutional Court judgment in *Minister of Justice and Others v Restructuring and Insolvency Practitioners Association and Others*³⁷ to the effect that ‘[t]hroughout the many, many years of the struggle for freedom, the greatest dream of South Africa’s oppressed majority was attainment of equality. By that I mean remedial, restitutionary or substantive equality, not just formal equality’.³⁸ It is significant to the theme of this article that this case was about positive action taken by the government to specifically protect black businesses when it intervened in the tourism market in the context of the Covid-19 pandemic. Kollapen J found that this was ‘not only permissible at the level of principle but warranted and necessary’.³⁹

At the level of principle and given the deep fault lines including those of poverty, race and exclusion that continue to exist in our society, the onset of the Covid 19 crisis has on the one hand united South Africans in dealing with and attempting to overcome the impact of the virus. On the other hand it has also sharply highlighted the fault lines in our society where it is so evident that more often than not the poor and the disadvantaged face the major brunt of the crisis. The response to the crisis must therefore recognise this uneven playing field and therefore calibrating such a response to deal with the impact of the crisis as well as the effect of historical disadvantage is not only permissible at the level of principle but warranted and necessary.

The point is simply that a race neutral response can have the effect of deepening the fault lines on our society.⁴⁰

The untapped potential of section 9 to drive economic transformation is something several academics are increasingly beginning to focus their attention on. Cathi Albertyn, for example, in a paper presented at a conference of the *South African Journal on Human Rights* in February 2021 referred to substantive equality as being ‘redistributive’ in paying attention to ‘what structures people’s freedom.’ She said that during the Covid-19 pandemic the courts had emphasised ‘the omnipotence of the Constitution in economic decision making by the government.’⁴¹

Notably, in section 9(2) ‘social origin’ is also a listed category on which the state may ‘not unfairly discriminate directly or indirectly’. This is reinforced by the legislature in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which recognised ‘socio-economic status’ in section 34 as a directive principle to be considered for inclusion as a prohibited ground of discrimination because of ‘overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination’.⁴²

³⁶ *Solidarity obo Members v Minister of Small Business Development & Others; Afriforum v Minister of Tourism & Others* [2020] ZAGPPHC 133 (*Solidarity*) at para 28.

³⁷ *Minister of Constitutional Development & Another v South African Restructuring and Insolvency Practitioners Association & Others* [2018] ZACC 20, 2018 (5) SA 349 (CC), 2018 (9) BCLR 1099 (CC).

³⁸ *Ibid* at para 61.

³⁹ *Solidarity* (note 36 above) at para 36.

⁴⁰ *Ibid* at paras 36–37.

⁴¹ C Albertyn ‘Section 9 Steps Up? Substantive Equality, Economic Inclusion and Positive Duties in a Time of Covid’ (presentation at the *South African Journal on Human Rights* Conference on ‘The Covid-19 pandemic, inequalities and Human Rights in South Africa’, February 2021).

⁴² According to Sandy Liebenberg ‘SER status is still a directive principle and has not yet been included in the prohibited grounds but can be enforced through other grounds or analogous grounds. There are apparent amendments to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA)

Arising from this understanding of positive duties the courts, in a number of cases, have found that the failure to take ‘reasonable measures’ and dedicate ‘available resources’ towards the realisation of socio-economic rights amounts to unfair discrimination based on race and social origin. For example, in *Minister of Basic Education v BEFA* the SCA found that ‘[t]here can be no doubt that those without textbooks are being unlawfully discriminated against’,⁴³ adding that ‘[t]he law is clear. ... We must guard against failing those who are most vulnerable. In this case we are dealing with the rural poor and with children. They are deserving of Constitutional protection.’⁴⁴ Further evidence to support the argument that the Constitution requires government to pursue a pro-poor economic policy through legislation and regulations is the inclusion of socio-economic rights (related to the environment, housing, health care, food, water, social security, children and education) that must:

1. Either be progressively realised ‘within available resources’, but with the firm instruction that the state ‘must take reasonable legislative or other measures’ to this end;⁴⁵
2. Or be provided for as soon as possible ‘unless and to the extent that it is impossible under the circumstances’⁴⁶ because they are unqualified. This must include every child’s right to ‘basic nutrition, shelter, basic health care services and social services’ and everyone’s ‘right to a basic education.’⁴⁷

As a result of litigation by, inter alia, the Legal Resources Centre (LRC), the Centre for Child Law, Equal Education and SECTION27 the courts have begun to elaborate on the immediate duties that arise from the right to a basic education.⁴⁸ However, there is still no clarity about the exact ambit of a child’s right to basic nutrition or health care services. In addition, the ad hoc efforts of the state to use social security to fulfil these rights through grants such as the Child Support Grant (CSG) or – during the Covid-19 crisis, the Social Relief of Distress and Caregivers Grant — are almost certainly insufficient to meet these two rights if they are assessed purely by the cost of what is required to fulfil these needs, i.e., the cost of meeting a child’s minimum caloric level.

currently being drafted. Equality courts have recognised socio-economic status as ground, for example, the Khayelitsha police resourcing challenge.’ (Private communication, February 2021). Liebenberg’s reference is to *Social Justice Coalition & Others v Minister of Police & Others* [2018] ZAWCHC 181; 2019 (4) SA 82 (WCC) where the Equality Court found that ‘[d]iscrimination on the ground of poverty, in my view, and as the applicants have shown, amounts to unfair discrimination’ (at para 65) and declared at para 94.1 ‘that the allocation of Police Human Resources in the Western Cape unfairly discriminates against Black and poor people on the basis of race and poverty’.

⁴³ *Minister of Basic Education v Basic Education for All* [2015] ZASCA 198, [2016] 1 All SA 369 (SCA), 2016 (4) SA 63 (SCA) at para 49.

⁴⁴ *Ibid* at para 50.

⁴⁵ Constitution ss 26 & 27.

⁴⁶ F Veriava *Realising the Right to Basic Education, The Role of the Courts and Civil Society* (2019) especially 114–116 ‘The Immediate Realisation Principle – Towards the “Standard of Possibility”’, where Veriava asserts that ‘at the remedy stage, where government is unable to provide a particular input immediately, it will be required to establish this. Government must then provide details as to the precise nature and extent of the constraints, including budgetary constraints, that would make immediate provisioning impossible.’

⁴⁷ Constitution ss 28 & 29.

⁴⁸ See J Brickhill ‘Introduction: The Past, Present and Promise of Public Impact Litigation in South Africa’ in J Brickhill (ed) *Public Interest Litigation in South Africa* (2018) 3–47; and C McConnachie & S Brenner ‘Litigating the Right to Basic Education’ in J Brickhill (ed) *Public Interest Litigation in South Africa* (2018) ch 11 281–306.

That some of these duties do fall directly on the state was affirmed in the *Treatment Action Campaign* case,⁴⁹ in which the Constitutional Court recognised that because medicines are a specialised and legally regulated good it was not primarily in the power of parents to ensure children had access to them (as distinct from housing in *Grootboom*,⁵⁰ where ‘parental care’ forms part of the responsibility in ensuring their children have ‘access to adequate housing’ and ‘shelter’).⁵¹ However, as a counter argument particularly in the context of how much weight should be attached to the budgetary implications of ordering the fulfilment of a right, it could be posited that one of the factors persuading the Court to order the government to roll-out a programme providing the anti-retroviral drug Nevirapine was that it was being offered free by the manufacturer and was therefore affordable within the state’s budgetary and economic constraints. This would suggest that the Court felt that if the state did not have to pay for fulfilling the obligation it could not raise resource constraints as a defence to its conduct.

It would seem nonsensical to think that the Constitution would be designed in a way that would burden the government with a set of obligations to fulfil its citizens’ rights with major budgetary implications, but at the same time be ‘neutral’ (in Kollapen J’s words) on the policy arena of government – economics – that is most determinant of whether (or not) it could acquire the resources needed to fulfil these rights. It would be equally nonsensical that courts would make orders with budgetary implications without envisaging that a concurrent duty falls upon the government to devise economic and fiscal policies that are needed to provide the resources to implement them.

B All roads should lead to rights

The contents and structure of the Bill of Rights, its centrality to the whole Constitutional schema, is crucial to supporting my argument that economic policy must be formulated with the objective of fulfilling rights and must be assessed through this lens by policy-makers (and when called upon by the judiciary) at every stage. I go even further and argue that other chapters of the Constitution work towards the same end. Accordingly, in chapter 3, the principles of cooperative government and intergovernmental relations set out in section 41 include the following:

- (b) *secure the well-being* of the people of the Republic;
- (c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
- (d) *be loyal to the Constitution*, the Republic and its people.⁵²

In Chapter 10, the relevant basic values and principles governing public administration, listed under section 195 include:

- (b) Efficient, economic and effective use of resources must be promoted;
- (c) Public administration must be development-oriented;
- (d) Services must be provided impartially, fairly, equitably and without bias;

⁴⁹ (*TAC*) (note 30 above); for a discussion of this case see, for example, 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* (2003) 278–315.

⁵⁰ *Grootboom* (note 32 above).

⁵¹ *Ibid* at paras 70–79; see also the discussion on children’s rights in the *TAC* case (note 30 above) at paras 74–79.

⁵² Constitution s 41 (emphasis added).

- (e) *People's needs must be responded to, and the public must be encouraged to participate in policy-making.*⁵³

Moreover, in chapter 14, we find section 237, 'Diligent Performance of Obligations', tucked away under the General Provisions and insufficiently relied on or cited. It requires that '[a]ll constitutional obligations must be performed diligently and without delay.'⁵⁴

Finally, in support of the argument advanced about the centrality of realising/fulfilling rights to the 'unconcealed design' of the Constitution is the fact that important mechanisms are built into the Constitution to try and ensure rights are properly and consistently integrated into government planning. For example, one of the constitutionally prescribed functions of the South African Human Rights Commission (SAHRC) is that:

3. Each year, [it] *must* require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.⁵⁵

Unfortunately, as a result of years of serial poor compliance with its questionnaires and requests whilst then Advocate Kollapen was the SAHRC's chairperson (2002–2009), the Commission was frustrated in meaningfully fulfilling this responsibility. In my view, the use of the word 'must' means that failing to ensure this information was provided and assessed is arguably a violation of the SAHRC's obligations under section 184(3) undermining a key aspect of the Constitution's design in relation to socio-economic rights. According to the current Chairperson, Advocate Bongani Majola, 'the section 184(3) mandate is handled by the Research Unit of the Commission who have advised that the Commission still exercises it and annually sends requests to organs of state requesting information on the measures referred to therein. However, it is the reporting of the results and sharing of the government data that remain challenges.' Majola added that nevertheless, 'the Commission is working on those challenges and that had written to government departments in 2017/18, drawing their attention to the section and advising them that the Commission would be requesting this information each year.' He said:

In essence, the S184(3) mandate is being adhered to. The data is being requested from government, and is then analysed against accepted indicators and benchmarks derived from constitutional and international jurisprudence. Monitoring and assessment occurs based on this information, supplemented with official, public information such as that provided by Stats SA. It is verified against SAHRC provincial monitoring data and CSO monitoring reports. Furthermore, evidence from civil society is also used to compare against and is often used to challenge the State's information.⁵⁶

⁵³ Constitution s 195 (emphasis added).

⁵⁴ It is important to note here that both ss 195 and 237 have been found to be justiciable, and not mere baubles on the constitutional scaffold. See, for example, *Minister for Justice and Constitutional Development v Chonco & Others* [2009] ZACC 25, 2010 (1) SACR 325 (CC), 2010 (2) BCLR 140 (CC), 2010 (4) SA 82 (CC); *Public Protector v SA Reserve Bank* 2019 (6) SA 253 (CC) at para 151; and *Economic Freedom Fighters v Speaker of the National Assembly & Another* [2017] ZACC 47, 2018 (2) SA 571 (CC) at para 217, where the Court says of s 237 that 'It is the duty of this Court to ensure that this injunction is followed.'

⁵⁵ Constitution s 184 (emphasis added).

⁵⁶ Personal communication with Advocate Bongani Majola on 8 and 24 March 2021. Between 1997 and 2012, the SAHRC produced annual socio-economic rights progress reports (available at <https://www.sahrc.org.za/index.php/sahrc-publications/section-184-3-reports>) but has now ceased doing so. In correspondence, Majola argues that 'the realisation of socio-economic rights, to a large extent, stalled in 2008 and there has been very

I argue that 25 years after the signing of the Constitution the failure to ensure compliance with section 184(3) is an omission that raises more questions about the robustness of what I would term the ‘social justice system’ and the adequate resourcing of essential ‘state institutions supporting democracy’, the name given by chapter 9 to institutions like the SAHRC, the Commission for Gender Equality (CGE) and the Auditor General.

C Chapter 13: Unlucky for many – the sting in the Constitution’s tail?

In the early 1990s, as South Africa entered upon the path of political negotiations to end apartheid, the country was not an island and very much subject to both the political and economic winds that were blowing across the globe. The world was at an early point in the ascendancy of neo-liberal economics and its related state- and law-craft. In his book *Globalists*, Quinn Slobodian argues that ‘neoliberalism has been less a discipline of economics than a discipline of statecraft and law.’⁵⁷ With meticulous research he shows how the outcome of decolonisation generally, and the negotiations in South Africa in particular, occupied the neo-liberal theorists.⁵⁸ In South Africa, the ways in which the market could be insulated from democracy were a vital issue for conservative economists globally. As a result, they threw some of their intellectual weight and influence behind the old regime and engaged in discussion about strategies to shape the new legal framework. Friedrich Hayek visited South Africa in 1963 and Milton Friedman in 1976. In a chapter looking at the race politics of the Mont Pelerin Society and its approach to decolonisation, Slobodian records how leading neo-liberals had established a relationship with the National Party from the 1960s, and how —

Hayek’s message to Hutt and others was that a state captured by black voters would cease to be a problem if the state itself was stripped pre-emptively of its right to grant exemptions from the discipline of the competitive market. ... Hayek’s proposal was to downgrade the significance of representative government by reducing its roles to the enforcement of competition and contract.⁵⁹

This fits with the argument of Padayachee and Van Niekerk that the ‘apartheid regime and the local capital skilfully used their access to not inconsiderable political, economic and intellectual resources to outfox and outmanoeuvre’ the ANC economics team, noting too it was a ‘major bonus’ that ‘these policy ideas more or less coincided with those of the Washington Consensus institutions’.⁶⁰ Both paid very careful attention to those parts of the future Constitution that would have a bearing on economic policy and public expenditure. For example, they detailed the sudden convergence between economic policy-making and Constitution writing when it came to deciding the mandate of the South African Reserve Bank (SARB), something they describe as ‘the most significant decision taken on economic policy at the constitutional

little improvement since (i.e., a lack of progressive realisation). There have also been retrogressive measures in budgeting and spending for socio-economic rights, including fruitless and wasteful expenditure on budgets.’ The lack of an independent and trusted measure for assessing socio-economic rights realisation is a weakness, which makes the role of reporting to, and acting on, recommendations of UN treaty bodies even more important, as discussed later in this article.

⁵⁷ Q Slobodian *Globalists, The End of Empire and the Birth of Neoliberalism* (2018) 11.

⁵⁸ Ibid in ‘A World of Races’ ch 5 146–181.

⁵⁹ Ibid at 175. William Hutt was a lecturer at the University of Cape Town for nearly 40 years and published a book titled *The Economics of the Colour Bar* (Ludwig von Mises Institute) in 1964.

⁶⁰ Padayachee & Van Niekerk (note 7 above) at 176.

negotiations in the early 1990s.⁶¹ Their argument is that those responsible for economic policy in the ANC ‘failed the democratic movement in some crucial ways: by too easily embracing a Washington Consensus world view’ and arguing that ‘there was no alternative’.⁶²

In relation to the SARB Padayachee and Van Niekerk document the way in which the Constitution-drafting process tied the bank’s mandate irrevocably to inflation targeting, which was, and still is, a key pillar of neo-liberal economic thinking that was prevalent in the 1990s and 2000s.⁶³ Thus, according to section 224, the SARB’s primary object is ‘to protect the value of the currency in the interests of balanced and sustainable economic growth in the Republic’.

Inflation targeting refers to the use of monetary measures (sometimes called monetarism or supply side economics) such as high interest rates, which aim to constrict money supply, and borrowing to prevent inflation. In the interest of preserving the value of the currency by so doing they also discourage *expansionary* policies by governments that necessitate large scale borrowing for investment in public services such as those needed to realise rights of access to healthcare services or basic education.⁶⁴ However, monetarism is a highly contested economic theory, rather than a scientific rule, that should not have been embedded in a constitutional provision. Doing so made South Africa unusual amongst nations. Today, the efficacy of inflation targeting is increasingly questioned by many economists, including 2001 Nobel prize winner in economics Joseph Stiglitz.⁶⁵ Yet, in this sphere of government, the Constitution has circumscribed the powers of the executive, the legislative and even the judiciary.

In recent years, debates between political parties and within the ANC-SACP-COSATU Alliance have tended to focus on the merits of the constitutionally guaranteed independence of the SARB from government,⁶⁶ another neo-liberal shibboleth of the early 1990s that found its way into the final Constitution. Yet, in many ways, this is of secondary importance to fixing its ‘primary object’ in perpetuity. The SARB could, for example, be independent but still adopt expansionary economic policies that could have the effect of weakening the currency whilst strengthening human rights. The ripple effect of this has been to inhibit a raft of economic measures needed to fulfil duties to realise rights that might necessitate a more expansionary monetary policy. Government has succumbed to what former US Treasury secretary Larry

⁶¹ Slobodian (note 57 above) at 180. At the Constituent Assembly, Theme Committee 6.2 dealt with financial institutions and public enterprises. For those researchers interested in revisiting what shaped the text of chapter 13 of the Constitution, the Committee’s membership and Constitution’s terms of reference are available at <https://ourconstitution.constitutionhill.org.za/theme-committee-6/>.

⁶² Slobodian (note 57 above) at 157.

⁶³ For one historical account of neo-liberal economics, see B Appelbaum *The Economists’ Hour, How the False Prophets of Free Markets Fractured our Society* (2019).

⁶⁴ For example, see all the chapters in R Balakrishnan & D Elson (eds) *Economic Policy and Human Rights, Holding Governments to Account* (2011); and R Balakrishnan, D Elson & J Heintz *Rethinking Economic Policy for Social Justice, The Radical Potential of Human Rights* (Routledge, 2016).

⁶⁵ For example, see, the interview with Stiglitz by G Isaacs ‘Joseph Stiglitz Speaks on Opportunities for SA Economy but Warns “Austerity” Does not Deliver’ *Daily Maverick* (20 November 2019), available at <https://www.dailymaverick.co.za/article/2019-11-20-joseph-stiglitz-speaks-on-opportunities-for-sa-economy-but-warns-austerity-doesnt-deliver/>.

⁶⁶ See L Donnelly ‘Kanyago Calls Out ANC Manifesto on the Reserve Bank’ *Mail & Guardian* (18 January 2019), available at <https://mg.co.za/article/2019-01-18-00-kganyago-calls-out-anc-manifesto-on-the-reserve-bank>; for arguments in favour of independence see K Naidoo ‘Integrity and Independence Must be the North Star that Guides both Central Banks and Journalism’ *Daily Maverick* (21 October 2019), available at <https://www.dailymaverick.co.za/article/2019-10-21-integrity-and-independence-must-be-the-north-star-that-guides-both-central-banks-and-journalism/>.

Summers has called a ‘balance of financial terror’, or what we might call in our context balancing rights against a terror of finance.⁶⁷ Padayachee and Van Nierkerk leave their analysis of the intrusion of economics into constitution-making at the doors of the SARB. They do not interrogate other parts of the constitutional text relating to finance, in which, I believe, their thesis could have been more strongly affirmed.

Overall, chapter 13 of the Constitution, titled Finance, is arguably one of the pivotal chapters of the Constitution. In a sense, it should be the real gateway to the Constitution’s social justice vision. Yet, paradoxically, it is a gateway that is blocked. Despite the Constitution’s design, it does not mention any financial obligations towards rights at all. Although there is a reference to ‘equitable shares and allocations of revenue’,⁶⁸ there is no use of the word ‘equality’ or ‘rights’. These are subsumed under ‘national interest’ and, even worse, ‘national debt’. This makes the chapter at best inconsistent, and at worst completely at odds, with the objectives of the Constitution set out in its founding provisions.

The problem first becomes evident in the sections dealing with the division of revenue. For example, in section 214 (2), setting out the criteria that the annual Division of Revenue Act 9 of 2021 (‘DORA’) ‘must take into account’, the Constitution is prescriptive when referring to accountability, ‘effective financial management, debt, fiscal capacity’. The language becomes considerably more amorphous than that used in the Bill of Rights. Section 214 (2), for example, refers to:

- (d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;
- ...
- (f) developmental and other needs of provinces, local government and municipalities;
- (g) economic disparities within and among the provinces.

The same can be said of the reference to ‘transparency, accountability and effective financial management of the economy, debt and the public sector’ prescribed in section 215(1).

Finally, it is worth debating the effect of the Constitution in establishing an independent Financial and Fiscal Commission (FFC). I argue that there is a danger that the FFC’s central responsibility in the fiscal and budgetary process pre-empts duties that fall squarely on Parliament to ensure the realisation of socio-economic rights. DORA may only be enacted after the FFC has been ‘consulted and any recommendations of the Commission have been considered’.⁶⁹

Given all of the above, as well as the powers allotted to the Treasury in section 216(1) to ‘ensure both transparency and expenditure control in each sphere of government’ (though ‘standard accounting practice, uniform expenditure classifications and uniform treasury norms and standards’) there is good reason to worry about how the Constitution’s social justice mandate may be diluted or subverted. Further, given what we have learned through hard experience of the vulnerability of the state to capture by both ideological and criminal interests, it should at least be borne in mind that were these institutions all to fall under the control of persons with a conservative ideological bent (for example one who prioritises ‘fiscal discipline’

⁶⁷ Quoted by A Tooze in *Crashed, How a Decade of Financial Crises Changed the World* (2018) 35.

⁶⁸ Constitution s 214.

⁶⁹ Constitution ss 214(2) & 220. The work of the Finance and Fiscal Commission and the extent to which its records show it has been aware of its constitutional obligations (outside of chapter 13) is an issue I flag as meriting further research.

at the expense of human rights), it would be possible to thwart the democratic process of legislature, as well as its duty under international law to ensure that ‘the maximum of its available resources’ are always directed towards rights realisation.⁷⁰

D Public participation on money matters

In February of each year, Parliament must approve the division of revenue and proposals on tax. This function is set out in section 77 of the Constitution, Money Bills. Section 77(3) requires that ‘[a]n Act of Parliament must provide for a procedure to amend Money Bills’. This did not happen until 2009 with the passing of the Money Bills Amendment Procedure and Related Matters Act 9 of 2009, which also established a Parliamentary Budget Office (PBO). This meant that until 2009 the legislature’s powers were limited to approving or rejecting the budget, i.e., it was not allowed to make amendments. Although Parliament and the committees tasked with the processing the budget hold hearings and debate the Bills,⁷¹ there has not yet been an instance where they are amended or rejected; not even, for example, over the contentious decision to increase Valued Added Tax (VAT), a regressive taxation measure with a greater adverse impact on the poor, from 14 to 15 per cent in 2018.

As a result, economic policy – despite its make-or-break implications for rights – is treated as if it is purely the domain of the executive and inoculated from real scrutiny by the legislature. Except in very broad outline, in the debate that follows the annual State of the Nation (SONA) address by the President and budget speech by the Minister of Finance, economic policy has never been intensely scrutinised through the lens of rights obligations by either the National Assembly or by the courts. It was, thus, an unusual departure in response to the 2021 budget when Michael Sachs, the former head of the Treasury’s budget office and acting head of the FFC, was reported to have called into question the budget’s constitutionality, because it ‘unambiguously envisages a retrogression in socio-economic rights set out in the bill of rights’, which was likely to extend beyond the three years of the medium-term expenditure framework until debt has stabilised.⁷² In a paper prepared by the FFC, we find the following unprecedented statement:

Neither the budget speech nor the budget review makes any reference to the state’s constitutional obligations regarding these matters. There is also no indication that government has considered how the rights contained in the Constitution will be protected in the context of falling resource allocations. It is hard to avoid the conclusion that executive has not considered these matters seriously when preparing its budget proposal to parliament.⁷³

⁷⁰ According to art 2(1) of The United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR), ‘[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’

⁷¹ K Pearson ‘Explaining the Process of a Post Budget Submission to Parliament’ *Daily Maverick* (21 February 2020), available at <https://www.dailymaverick.co.za/article/2020-02-21-explaining-the-process-of-a-post-budget-submission-to-parliament/>.

⁷² L Ensor & M Sachs ‘Questions the Budget’s Constitutionality’ *Business Day* (2 March 2021), available at <https://www.businesslive.co.za/amp/bd/national/2021-03-02-michael-sachs-questions-the-budgets-constitutionality/>.

⁷³ Finance and Fiscal Commission, Supplementary Comment on Budget 2021 and the Bill of Rights (5 March 2021).

Leaving economic policy to the executive was a catastrophic omission in the constitutional design. In making the (unpopular at the time) case for socio-economic rights, Etienne Mureinik showed that he understood that economic policy would have an impact on rights and might require judicial oversight in cases where it was disputed:

if the government is confident of its economic case, let it make it in court, where it can be exposed to scrutiny. If the government could adduce economic evidence and argument to make a plausible case, the court would have to uphold the programme. A central deficiency of the present order is that the economic case for a government programme, if it is made at all, is made at the level of slogan and newspaper headline, and, occasionally, at the not much less superficial level permitted by the constraints of parliamentary procedure.⁷⁴

A strange constitutionally approved anomaly has therefore been created. Whilst courts have found that Parliament has a duty to ensure meaningful public participation in relation to other state duties and areas of life,⁷⁵ such as the changing of provincial boundaries, the same principle has not been applied for economic policy and the budget.⁷⁶ Up to this point, the effect of this has been to tilt influence away from ‘we, the people’ and towards unelected influencers of economic policy such as international rating agencies, banks, and international financial institutions: this, despite economic policy’s important implications for human rights. The result, according to Alston and Reisch, is precisely that ‘the making of tax policies is often seen as the epitome of democratic decision-making in practice, rather than as a process that might, by its opacity and propensity to be hijacked by special interests, pose a real threat to the assumptions underlying the democratic state’.⁷⁷ Put bluntly, it is when economic policy is shifted away from having to answer to constitutionally protected human rights that it becomes vulnerable to capture. One way to counter this, according to Liebenberg, lies in the ‘unexplored potential in the “meaningful engagement” jurisprudence of the CC, which the Court has linked to the “reasonable measures” requirement in sections 26(2) and 27(2).’⁷⁸

Based on the above analysis, I conclude as follows:

1. The realisation of socio-economic rights is fundamental to the basic structure of the Constitution.

⁷⁴ E Mureinik ‘Beyond a Charter of Luxuries: Economic Rights in the Constitution’ (1992) 8 *South African Journal on Human Rights* (1992) 464–474, 472.

⁷⁵ *Doctors for Life International v Speaker of the National Assembly & Others* [2006] ZACC 11, 2006 (12) BCLR 1399 (CC), 2006 (6) SA 416 (CC) (‘*Doctors for Life*’); and *Matatiele Municipality & Others v President of the Republic of South Africa & Others* (2) [2006] ZACC 12, 2007 (1) BCLR 47 (CC) (‘*Matatiele*’). Significantly, in *Matatiele*, the Court said: ‘The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say’ (at para 68).

⁷⁶ It seems ironic that in the electoral contests between political parties a great deal of debate is often around economic policy. This is something the electorate assess as they choose which party to vote for. Parties are elected to government on the basis of their promises and economic ideologies. Yet, once in government economic policy becomes the exclusive terrain of the executive and, for the most part, seems to be placed out of reach of the legislature and, some would argue, the courts.

⁷⁷ P Alston & N Reisch ‘Introduction: Fiscal Policy as Human Rights Policy’ in P Alston & N Reisch (eds) *Tax Inequality and Human Rights* (2019) 1, 2.

⁷⁸ Private communication, February 2021.

2. Economic policy, conduct and governance should be open to the same level of scrutiny, and therefore correction by courts where needs be, as political conduct, where there is now an extensive jurisprudence that has (repeatedly) reached all the way to the conduct of the President.⁷⁹
3. There is a surmountable problem with the design and language of parts of the Constitution that has the potential to stymie the Bill of Rights. This is especially evident in chapter 13.
4. Although the language of the Constitution is silent on economic obligations, and sends contradictory signals, this silence cannot mean that the government therefore has a free rein to impose austerity measures⁸⁰ or adopt economic policies that denude socio-economic rights of resources; it cannot cause a 'progressive regression in rights' or 'regressive realisation' (an apt oxymoron), as is clearly happening now.⁸¹ Relevant here is an emerging line of jurisprudence that forbids retrogressive measures when it comes to rights.⁸²

My claim that the Constitution should have a direct bearing on economic policy is supported by an evolving jurisprudence around these rights. Thus far, most of this jurisprudence has focused on the state's duties when budgeting for rights and, directly linked to this, its duty to protect 'available resources' from corruption. Up to this point, therefore, I argue that constitutional law governing budgeting has established the following benchmarks:

1. A budget is a non-negotiable component of a reasonable plan to realise socio-economic rights.⁸³
2. It is not a defence for the state to simply aver that it does not have available resources. It must provide evidence that it does not.⁸⁴

⁷⁹ See D Davis & M Le Roux *Lawfare: Judging Politics in South Africa* (2019) 273–276.

⁸⁰ G Isaacs 'South Africa is Bent on Austerity and Should Change Track' *Institute for Economic Justice (IEJ)* (21 April 2020), available at <https://www.wits.ac.za/news/latest-news/opinion/2020/2020-04/south-africa-is-bent-on-austerity-and-should-change-track.html>.

⁸¹ In recent years, South African civil society organisations have increasingly invoked the Constitution to challenge 'fiscal consolidation' and pointed out its negative impact on socio-economic rights. See M Heywood 'Threading the Budget Through the Eye of the Constitutional Needle' *Daily Maverick* (20 October 2020), available at <https://www.dailymaverick.co.za/article/2020-10-20-threading-the-budget-through-the-eye-of-the-constitutional-needle/>. Submissions have also been made to Parliament by organisations like the C-19 People's Coalition (available at <https://c19peoplescoalition.org.za/submission-to-the-standing-and-select-committees-on-appropriations/>) and Budget Justice Coalition (available at <https://budgetjusticesa.org/>). However, although this issue is fiercely contested, it has not yet reached the courts. One of the complaints of civil society is that carefully considered submissions to Parliament's finance committees are not being properly considered. In 2021, this led to the BJC choosing to boycott the public hearings on the Appropriations Bill.

⁸² S Liebenberg *Austerity Budgeting During South Africa's Covid Pandemic: Can it be Challenged under the Socioeconomic Rights Doctrine of Retrogressive Measures?* (February 2021) Presentation at the South African Journal on Human Rights conference on 'The Covid-19 pandemic, inequalities and Human Rights in South Africa'.

⁸³ *Grootboom* (note 32 above) at para 68.

⁸⁴ *Khosa & Others v Minister of Social Development & Others, Mahlaule & Another v Minister of Social Development* [2004] ZACC 11, 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) ('*Khosa*') at para 62. In *Mahlaule*, the Court rejected the state's assertion that the extension of the benefits in question to all eligible permanent residents would 'impose an impermissibly high financial burden on the state' (at para 60). In doing this, it emphasised that the state had failed to provide 'clear evidence to show what the additional cost of providing social grants to aged and disabled permanent residents would be' (at para 62). But even if the state's 'speculative' calculations could be accepted, the Court ruled that these did 'not support the contention that there will be a huge cost in making provision for permanent residents' (at para 62).

3. In planning for rights, the state must look at the availability of resources within its overall budget and not just in one particular envelope.⁸⁵
4. When it comes to those rights that are immediately realisable, like ‘basic education’ or ‘children’s rights to basic nutrition, shelter, basic health care services and social security’, the state must budget sufficient resources to fulfil those rights, unless it can show that it is *impossible* to do so.⁸⁶

In relation to corruption, the duty to protect resources destined for rights realisation has been found to provide justification to show why the state must ensure the independence of its National Prosecuting Authority (NPA) and investigative units, because, as the Constitutional Court said in *Glenister v President of South Africa*, corruption has become ‘a scourge’ that ‘poses a real danger to our developing democracy’:

It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights. Organised crime and drug syndicates also pose a real threat to our democracy.⁸⁷

The jurisprudence provides an important foundation for the assertion that *all* policies adopted by the state should facilitate the progressive realisation of socio-economic rights. However, thus far this jurisprudence has been confined to the state’s duty to budget its ‘available resources’ appropriately to realise human rights as part of plans and policies. Even an important judgment like *Blue Moonlight* is about how government divides its fiscal cake, not how it bakes it in the first place. Inevitably, this means that when the cake shrinks, for whatever reason, rights shrink with it. That is precisely what is happening in South Africa. Thus, I argue that there is an *a priori* duty to ‘take legislative and other measures’ that are needed to raise the financial resources needed to budget adequately for the realisation of rights. As already mentioned, there is ample support for this contention in the UN Committee on Economic Social and Cultural Rights (CESCR) doctrine on mobilising ‘the maximum available resources’.⁸⁸

⁸⁵ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* [2011] ZACC 33, 2012 (2) BCLR 150 (CC), 2012 (2) SA 104 (CC) (‘*Blue Moonlight*’) at para 74: The City provided information relating specifically to its housing budget but did not provide information relating to its budget situation in general. We do not know exactly what the City’s overall financial position is. This Court’s determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.

⁸⁶ Veriava (note 46 above) at 114–116. The question of how, with what speed and by what means the state budgets for immediately realisable rights has not yet been resolved by the courts and has left these rights somewhat hollow. At the time of writing, a judgment was still awaited from the Limpopo High Court in the case of *Rosina Komape & Others v. Minister of Basic Education & Others*, a matter that relates to the state’s duty to provide safe sanitation at schools in Limpopo. In 2018, in *Komape & Others v Minister of Basic Education* [2018] ZALMPPHC 18 Müller J had included a structural order to build school toilets. The Limpopo Education department responded that it did not have sufficient budget and would not be able to fulfil the right before 2030. SECTION27, the applicants’ attorneys, returned to court to challenge non-compliance with the original court order.

⁸⁷ *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC) (‘*Glenister*’) at para 57.

⁸⁸ UN Committee on Economic, Social and Cultural Rights *An Evaluation of the Obligation to Take Steps to the ‘Maximum of Available Resources’ Under an Optional Protocol to the Covenant [on Economic, Social and Cultural Rights]* E/C.12/2007/1 (10 May 2007), available at <https://www2.ohchr.org/english/bodies/cescr/docs/statements/Obligationtotakesteps-2007.pdf>.

The blame for this lacuna in the law cannot lie at the door of the courts.⁸⁹ They can only deal with what is presented to them. In this instance, the first failure lies with the executive and legislative to understand their constitutional obligations. It also lies with the failure of civil society in its public interest litigation to challenge state failure in this regard. According to Alston and Reisch, the result of this ‘neglect of tough issues regarding public financing’ is that ‘[h]uman rights experts have been sidelined in debates about the fiscal foundations of social progress and remain largely ignorant of one of “the most fundamental ways through which power and equality are mediated in society and in the economy: taxation.”’⁹⁰

E Tax and rights

In his acclaimed analysis of modern inequality, Thomas Piketty argues that building what he terms ‘a fiscal and social state’ is an essential part of modernisation and economic development. He warns, however, that:

The historical evidence suggests that with only 10-15% of national income in tax receipts, it is impossible for a state to fulfil much more than its traditional regalian responsibilities: after paying for a proper police force and judicial system, there is not much left to pay for education and health. Another possible choice is to pay everyone – police, judges, teachers, and nurses – poorly, in which case it is unlikely that any of these public services will work well. This can then lead to a vicious circle: poorly functioning public services undermine confidence in government, which makes it more difficult to raise taxes significantly. The development of a fiscal and social state is intimately linked to the process of state-building as such.⁹¹

To those who might argue that taxation and fiscal policy is not a constitutional or human rights issue, he has this to say: ‘Taxation is not a technical matter. It is pre-eminently a political and philosophical issue, perhaps the most important of all political issues. Without taxes, society has no common destiny, and collective action is impossible.’⁹²

Nobody would dispute that taxation is a matter governed by a variety of fields of law. However, many probably would dispute the unambiguous assertion made by Alston, in his capacity as UN Special Rapporteur Human Rights and Extreme Poverty, that ‘[t]axation policies are human rights policies.’⁹³ This is why in South Africa today, any argument about rights realisation has to address the state’s fiscal policy, and why it is important to stress that having a plan to raise sufficient revenue, including but not limited to raising taxes, is a constitutional duty. This was confirmed *inadvertently* by the Constitutional Court in some of its earliest judgements. For example, an early warning of the need to secure resources for rights was given in *Soobramoney* where, after referring to the socio-economic rights enshrined in sections 26 and 27 of the Constitution, Chaskalson P stated:

⁸⁹ Liebenberg argues that decisions like *Mazibuko & Others v City of Johannesburg & Others* [2009] ZACC 28, 2010 (3) BCLR 239 (CC), 2010 (4) SA 1 (CC) (‘*Mazibuko*’) have had a chilling effect on positive rights realisation in the sphere of ss 26 & 27 rights. ‘Even if one disagrees with the outcome, I think the reasoning in the judgment supports a very deferential and procedurally orientated approach to socio-economic rights. Which is not to say that one can’t do something with procedure in terms of prising open some spaces for civil society to get their voices heard on questions of budgetary decision-making.’ (Personal communication (note 78 above).

⁹⁰ Alston & Reisch (note 77 above) at 8.

⁹¹ Piketty (note 2 above) at 627.

⁹² *Ibid* at 630.

⁹³ Human Rights Council *Report of the Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston* UN Doc. A/HRC/29/31 (26 May 2015) at para 53.

What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, healthcare, food, water and social security are *dependent upon* the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources.⁹⁴

In similar vein, Sachs J in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* observed that ‘absent government compulsion to pay taxes, the expenditure necessary for elections to be held, for parliament to pass legislation, or for this Court itself to uphold fundamental rights, would not be guaranteed.’⁹⁵

Fareed Moosa, for example, explains it as follows:

Section 7(2) of the Constitution obliges the State to ‘respect, protect, promote and fulfil’ the rights entrenched in the Bill of Rights. To do so necessitates that the government has sustained access to adequate finance. Financial constraints in the public treasury will hinder the State’s ability to achieve social justice through the fulfilment of, inter alia, socio-economic rights. Unless the problem of strained governmental resources is overcome, the aspiration of a fully transformed society with human dignity, freedom and equality for all will have a hollow ring. Finances derived from taxes are, thus, crucial. Success of the social transformation project hinges on the efficiency and effectiveness of tax collection by the South African Revenue Service (SARS). Inadequacy in public finances will hamstring the South African government’s ability to fulfil the human rights of its people which, in turn, will give rise to cries that the government is failing in its duty under the Constitution to perform all constitutional obligations ‘diligently and without delay’.⁹⁶

The Human Rights Commission recommended, inter alia, in its 2017/18 Equality Report the following:

It is accordingly recommended that government continues its review of South Africa’s tax. ... National Treasury must report to the Commission on measures considered or taken to increase tax revenue in an effort to achieve substantive socio-economic equality, while minimising any detrimental impact on the rights of the poor, within 3 months of the release of this report.⁹⁷

The argument here is not that the Constitution or the courts should prescribe to government the details of a particular economic policy it should follow or set tax levels – that would obviously violate the separation of powers. Rather, constitutional obligations to ensure equality, social justice and socio-economic rights must create a set of parameters within which economic policy choices are either lawful or unlawful. Money bills are laws of general application, and they can therefore limit rights, but they may only do so ‘if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including ... less restrictive means to achieve the purpose.’⁹⁸

The language of section 36 means that there are boundaries. If an economic policy, assessed in the light of expert evidence, will on the balance of probabilities give rise to a retrogression of fundamental rights, or not facilitate their progressive realisation, and if there are alternative

⁹⁴ *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17, 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (*‘Soobramoney’*) at para 11 (emphasis added).

⁹⁵ *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* [1995] ZACC 13, 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 at para 250.

⁹⁶ F Moosa ‘Tax Administration Act: Fulfilling Human Rights Through Efficient and Effective Tax Administration’ (2018) 57 *De Jure* 1–16, 1.

⁹⁷ South African Human Rights Commission *Equality Report 2017/18: Achieving Substantive Economic Equality Through Rights-Based Radical Socio-Economic Transformation in South Africa* (2018) 27.

⁹⁸ Constitution s 36.

policies or measures (such as taxes) that would, then it is these alternative policies that the government is obliged to follow in our constitutional state. It is interesting that the Finance and Fiscal Commission, in a submission referred to above, seems to recognise this as it states in its critique on 2021 budget ‘that “available resources” implies a distributional question. Not only has government decided to reduce allocations to healthcare and basic education and reduce the real value of social grants over the medium term, it has also decided to reduce the resource envelope available to it by lowering the tax burden.’⁹⁹

As argued by Kate Raworth in her 2017 book, *Doughnut Economics: Seven Ways to Think Like a 21st Century Economist*,¹⁰⁰ economic policy-making should emulate medicines ‘that combine the uncertainty inherent in intervening in a complex system (like the human body) with having responsibility for significant impacts on other people’s lives.’ She suggests that, like medical practice, economics should abide by a ‘do no harm’ principle and adopt other ethical principles. I argue South Africa’s constitutional law should play a part in establishing this as a normative principle.

F Duties created by international law

South Africa has ratified several international and regional human rights treaties that give rise to express duties to mobilise the ‘maximum available resources’ to realise a raft of socio-economic rights. Particularly relevant here are the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by South Africa in 2015, the Convention of the Elimination of all Forms of Discrimination against Women (CEDAW), ratified by South Africa in 1995, the Convention of the Rights of the Child (CRC), ratified in 1995, and the Convention on the Rights of People with Disabilities (CRPD), ratified in 2007. Also important is the African Charter on Human and People’s Rights, to which South Africa is a party.¹⁰¹

Ratifying these treaties has given further weight to existing domestic obligations derived from the Constitution. In *Al Bashir*,¹⁰² for example, the SCA found that ratifying the Rome Statute and the passing by Parliament of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the Implementation Act) gave rise to certain clear duties at a domestic level. With reference to the constitutional design to place South African within the ‘family of nations’ it explained the ‘inter-relationships’ of both customary international

⁹⁹ Finance and Fiscal Commission (note 73 above) at para 11.

¹⁰⁰ K Raworth *Doughnut Economics: Seven Ways to Think Like a 21st Century Economist* (2017) 160–162. It is unfortunate that Raworth and other ‘Rethinking Economics’ economists seem to attach little value to human rights law in their proposals about how to reorganise economies in order to meet essential needs and limit environmental damage. I see this as an indictment of the failure of human right activists to steer the law into the territory of economics. This is despite the opportunity created by the marked drift towards recognizing socio-economic rights and socio-economic status in constitutions, particularly between 1990 and 2010. This drift is documented in J Heymann, A Sprague & A Raub *Advancing Equality, How Constitutional Rights can Make a Difference Worldwide* (2020), who, drawing on a database of all the world’s constitutions, point out at 184 that ‘[m]ore recently adopted constitutions are likelier to prohibit explicit SES discrimination: only about one third of constitutions adopted before 1990 include an explicit guarantee, compared to more than three-quarters of those adopted since 1990.’

¹⁰¹ African Commission on Human and People’s Rights *Pretoria Declaration on Economic, Social and Cultural Rights in Africa* (2004).

¹⁰² *Minister of Justice and Constitutional Development & Others v Southern African Litigation Centre & Others* [2016] ZASCA 17, 2016 (4) BCLR 487 (SCA), [2016] 2 All SA 365 (SCA), 2016 (3) SA 317 (SCA).

law and international agreements within our law and the duties that arise therefrom.¹⁰³ In this case, it was the duty to arrest former Sudanese President when he was in Johannesburg in 2015 to attend an ordinary session of the African Union (AU). Following in the wake of this case, the North Gauteng High Court revoked the executive's decision to withdraw from the International Criminal Court without seeking the approval of legislature, noting:

As the Constitutional Court explained in *Glenister II* para 96, a resolution by parliament in terms of s 231 (2) to approve an international agreement is 'a positive statement ... to the signatories of that agreement that parliament, subject to the provisions of the Constitution, will act in accordance with the ratified agreement'. Therefore, the approval of the international agreement in terms of s 231 (2) creates a social contract between the people of South Africa through their elected representatives in the legislature, and the national executive. That social contract gives rise to the rights and obligations expressed in such international agreement.¹⁰⁴

In a similar vein, in 2018, the Constitutional Court overturned the decision of then President Jacob Zuma to withdraw South Africa from the Southern African Development Community (SADC) Tribunal noting the 'centrality' of international law 'in shaping our democracy'.¹⁰⁵ If this has been found to be the case in relation to the Rome Statute and the SADC Tribunal, both – it is important to note – human rights bodies, then South Africa's ratification of the ICESCR must give rise to a similar level of positive duties to take measures to advance the rights therein. Although we have the benefit of a Constitution whose Bill of Rights encases many of the rights found in the ICESCR, there are subtle but significant differences, such as between the duty to raise 'maximum available resources' (ICESCR article 2) and 'available resources' (SA Constitution sections 26 and 27) to realise rights. In my view, the Bill of Rights therefore does not relieve either the executive or the legislature of the duty to take account of General Comments and the reports of the small army of Special Rapporteurs, whose mandate is to advise states and assist the development of policy and legislation that is aimed at giving effect to the obligations assumed voluntarily by state parties to the international human rights treaties.¹⁰⁶ This necessity is evident in our jurisprudence, which usually occurs as the last resort of people seeking constitutional protection. It is not however evident in our policy and law making, which is required to be proactive in taking seriously our international obligations.¹⁰⁷

¹⁰³ Ibid at paras 62–65.

¹⁰⁴ *Democratic Alliance v Minister of International Relations and Cooperation & Others (Council for the Advancement of the South African Constitution Intervening)* [2017] ZAGPPHC 53, 2017 (3) SA 212 (GP), [2017] 2 All SA 123 (GP), 2017 (1) SACR 623 (GP) at para 52. In this case, at paras 33–34, the court quoted approvingly from *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC) ('*Glenister II*') regarding the 'structure and effect' of s 231 of the Constitution. However, in my view, there must remain debate about the extent of the duties arising from ratification of a treaty that is not then explicitly incorporated into domestic law, as is the case with treaties such as the ICESCR. This still grey area is unfortunately at the heart of my discussion on the power of constitutional law over economic conduct.

¹⁰⁵ *Law Society of South Africa & Others v President of the Republic of South Africa & Others* [2018] ZACC 51, 2019 (3) BCLR 329 (CC), 2019 (3) SA 30 (CC) at para 4.

¹⁰⁶ On the domestic legal effect of the ICESCR, General Comments and Concluding Observations, see S Liebenberg 'South Africa and the International Covenant on Economic, Social and Cultural Rights, Deepening the Synergies' (2020) 3 *The SA Journal on Judicial Education* 13–41.

¹⁰⁷ As holistic guides to states' obligations under these treaties see, for example, UN Human Rights Office of the High Commissioner *Handbook for Human Rights Treaty Body Members* (2015); and UN OHCHR *Working with the United Nations Human Rights Programme: A Handbook for Civil Society* (2008).

Under the ICESCR South Africa is obliged to report on its progress in implementing the rights in the Covenant every two years which is then reviewed by the Committee on Economic, Social and Cultural Rights.¹⁰⁸ Civil society is also permitted to make submissions before the Committee.¹⁰⁹ The last took place in 2018. After the hearings, the Committee issues concluding observations and recommendations to the state party, which come under 32 different sub-headings.¹¹⁰ Many of its findings are far-reaching. For example, in the November 2018 report, the Committee commented on the state's duty to allocate the 'maximum of its available resources' to socio-economic rights, while welcoming 'the efforts pursued since the end of apartheid, the persistence of such inequalities signals that the model of economic development pursued by (South Africa) remains insufficiently inclusive'.¹¹¹ It went on, noting that '[t]he state party's fiscal policy, particularly relating to personal and corporate income taxes, capital gains and transaction taxes, inheritance tax and property tax, does not enable it to mobilise the resources needed to reduce such inequalities; and is not sufficiently progressive in that regard'.¹¹² The Committee, therefore, recommended that South Africa 'review its fiscal policy'¹¹³ and 're-examine its growth model in order to move towards a more inclusive development pathway'.¹¹⁴ On the vexed matter of the 'austerity measures' currently being implemented by the South African government, it suggested an approach not dissimilar to that which the Constitutional Court has taken when presented with disputes over the government's previous failures to fulfil rights to housing and access to health care services. It 'reminded' the state party that:

where austerity measures are unavoidable, they should be temporary, covering only the period of the crisis; necessary and proportionate; not result in discrimination and increased inequalities; and ensure that the rights of disadvantaged and marginalised individuals and groups are not disproportionately affected.

The committee recommends that the state party:

- (a) Increase the level of funding in social security, health and education;
- (b) Task the Department of Planning, Monitoring and Evaluation with ensuring that public policies are directed towards the realisation of the rights of the Covenant; and

¹⁰⁸ According to article 16.1 of the ICESCR, '[t]he States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.' See, also, United Nations Office of the High Commissioner on Human Rights (UN OHCHR) *Reporting Compliance by State Parties to the Human Rights Treaty Bodies: Concepts and Definitions* (15 May 2020), available at <https://www.ohchr.org/Documents/Issues/HRIndicators/MetadataReportingCompliance.pdf>.

¹⁰⁹ According to the UN OHCHR, '[t]he reporting process should encourage and facilitate, at the national level, public participation, public scrutiny of State policies, laws and programmes, and constructive engagement with civil society in a spirit of cooperation and mutual respect, to advance the enjoyment by all of the rights protected by the relevant treaty.' (ibid at 1).

¹¹⁰ UN Committee on Economic, Social and Cultural Rights *Concluding Observations on the Initial Report of South Africa* (November 2018), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/ZAF/CO/1&Lang=en.

¹¹¹ Ibid at para 16.

¹¹² Ibid.

¹¹³ Ibid at para 17(a).

¹¹⁴ Ibid at para 17(e).

- (c) Ensure the Standing Committee on Public Accounts in the national parliament (and its equivalents in provincial parliaments) take such rights into consideration in assessing the budgetary choices of the national and provincial governments respectively.¹¹⁵

According to ‘other recommendations’ made by the CESCER, South Africa is expected to respond to these recommendations as well as to ‘disseminate them widely at all levels of society, including at national, provincial and municipal levels, in particular among parliamentarians, public officials and judicial authorities, and that it (South Africa) inform the Committee in its next periodic report about the steps taken to implement them.’¹¹⁶

States are required to report back on progress with recommendations in their next periodic report; in South Africa’s case this will be in October 2023. However, the committee requested responses to its recommendations concerning social security, social assistance, and refugee rights to education within 24 months. One of their recommendations was to ‘[e]nsure that those between the ages of 18 and 59 with little or no income have access to social assistance’.¹¹⁷ In March 2021, South Africa submitted a response, including a report that the Department of Social Development had ‘commenced policy work for income support for those between the ages of 18 to 59 with little or no income, including the consideration of a universal Basic Income Grant.’¹¹⁸ This obviously falls far short of the committee’s recommendations, something that will add weight to arguments that the ‘missing middle’ in SA’s social security system, that is the millions of unemployed people between 18 and 59, constitutes a violation of rights under section 27(1)(c), the right of everyone to ‘social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.’¹¹⁹

III HAS ECONOMIC POLICY BEEN TAILORED TO ENABLE RIGHTS REALISATION?

In his reply to the debate on the 2018 SONA, President Cyril Ramaphosa said the following:

What emerged clearly from the debate yesterday, is that all the members of this Parliament are committed to build a nation where progress is measured not by growth in gross domestic product or global competitiveness rankings, but by how the lives of the most vulnerable and marginalised are changed for the better.

We are building a nation where our greatest concern must be those in society who have least. The poor. The unemployed.

The most important people in this country are not those who walk the red carpet in Parliament, but those who spend their nights on the benches outside its gates.¹²⁰

¹¹⁵ Ibid at para 19.

¹¹⁶ Ibid at para 82. See also the CESCER note on follow-up procedures to concluding observations, available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/FollowUp.aspx?Treaty=CESCR&Lang=en

¹¹⁷ Ibid at para 48(c).

¹¹⁸ Republic of South Africa *South Africa’s Response to the Concluding Observations and Recommendations Follow Up Procedure* (March 2021) para 2.2.1, available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/FollowUp.aspx?Treaty=CESCR&Lang=en.

¹¹⁹ M Heywood ‘UN Finds that Austerity Measures Implemented in SA “May Further Worsen Inequalities”’ *Daily Maverick* (19 February 2019), available at <https://www.dailymaverick.co.za/article/2019-02-19-un-committee-finds-austerity-measures-implemented-in-sa-may-further-worsen-inequalities/>.

¹²⁰ President Ramaphosa *Reply to the Debate on the State of the Nation Address* (20 February 2018), available at <http://www.thepresidency.gov.za/speeches/reply-president-cyril-ramaphosa-debate-state-nation-address>.

Since then, Ramaphosa has frequently repeated this mantra, particularly as a result of the crisis created by Covid-19 and the lockdown measures instituted under the national State of Disaster.¹²¹ In many of the President's recent public speeches we find phrases like 'inclusive economy', a 'new economy founded on fairness, empowerment, justice and equality' and 'build back better' to be very much in vogue.¹²² However, fine words aside, as pointed out by Austrian sociologist Rudolf Golscheid more than a century ago, it is only when we come to the national budget and the Medium Term Budget Policy Statement (in October every year) that we find 'the skeleton of the state stripped of all misleading ideologies.'¹²³ The question is: Have South Africa's economic policies borne out the claims of Ramaphosa and his predecessors to be governments 'measured not by growth in gross domestic product or global competitiveness rankings, but by how the lives of the most vulnerable and marginalised are changed for the better?'¹²⁴

Answering this brings us back to where we left off with Padayachee and Van Niekerk earlier in this article. In the early 1990s, as it prepared for taking over government, the ANC set up a left-leaning Macro Economic Research Group ('MERG') to develop economic policy proposals for the ANC once in government.¹²⁵ However, its proposals were castigated by the mainstream media and *Shadow of Liberation* records how the MERG proposals were discarded in late 1993.¹²⁶ MERG gave way to the Reconstruction and Development Programme (RDP), 1994–1996, which was developed within the Alliance and served as the platform on which the ANC campaigned in 1994.¹²⁷ However, it too was unceremoniously abandoned within two years. Since 1996, the ANC in government has adopted five different economic policies. They are:

- (1) The Growth, Employment and Redistribution: A Macro-economic Strategy for South Africa (GEAR), 1996–2005.¹²⁸

¹²¹ See televised Addresses to the Nation by President Ramaphosa on 21 & 27 April 2020; see, also, M Heywood 'Human Rights, the Rule of Law and Covid-19 in South Africa' *Blog Symposia, Global Health, Global Responses to COVID-19: Rights, Democracy, and the Law, Health Law Policy, Human Rights, International, Privacy, Public Health* (June 2020) available at <https://blog.petrieflom.law.harvard.edu/2020/06/04/south-africa-global-responses-covid19/>.

¹²² M Heywood 'Resetting South Africa: From Locking Down to Scaling Up' *Daily Maverick* (2 June 2020), available at <https://www.dailymaverick.co.za/article/2020-06-02-resetting-south-africa-from-locking-down-to-scaling-up/#gsc.tab=0>. See also, M Heywood 'No Recovery Without Redistribution' *Daily Maverick* (18 August 2020), available at <https://www.dailymaverick.co.za/article/2020-08-18-no-recovery-without-redistribution-no-social-contract-without-meaningful-inclusion-of-civil-society/>.

¹²³ Alston & Reisch (note 77 above) 1.

¹²⁴ Ramaphosa (note 120 above).

¹²⁵ Padayachee & Van Niekerk (note 7 above) 88.

¹²⁶ See, also, W Freund 'Swimming Against the Tide: The Macro-Economic Research Group in the South African Transition 1991–94' (2013) 40 *Review of African Political Economy* 519–536; and V Padayachee & R Van Niekerk 'ANC's Past Policies Worth Revisiting' *Mail and Guardian* (26 October 2018), available at <https://mg.co.za/article/2018-10-26-00-ancs-past-policies-worth-revisiting/>, where they describe the MERG reports 'orientation and core recommendations'.

¹²⁷ Government of the Republic of South Africa *White Paper on the Reconstruction and Development Programme* (1994) *Government Gazette* Notice no 1954, available at <https://www.gov.za/sites/default/files/governmentgazetteid16085.pdf>.

¹²⁸ Government of the Republic of South Africa *Growth, Employment and Redistribution Programme*, available at <http://www.treasury.gov.za/publications/other/gear/chapters.pdf>.

- (2) The Accelerated and Shared Growth Initiative for South Africa (ASGISA), 2005–2010.¹²⁹
- (3) The New Growth Path, 2010–2013.¹³⁰
- (4) The National Development Plan (NDP) 2030,¹³¹ adopted in 2012, paradoxically at more or less the same time as an undeclared policy of austerity based on cutting public spending and fiscal consolidation.¹³²
- (5) The Economic Recovery and Reconstruction Plan adopted in 2020.¹³³

In relation to each of these policies, our analysis requires us to ask the following questions: Were the constitutional obligations towards rights realisation expressly considered as part of their conception? Did the implementation of these policies have a negative or positive effect on rights? I suspect the government will argue that each of these policies is expressly predicated on overcoming poverty and inequality by building an economic foundation that is robust and strong enough to create employment and increase revenue for taxes. However, broad, non-specific references to the Constitution are insufficient if the policies are not capable of realising the rights in the Bill of Rights.

Whenever the Government has been challenged in court over the constitutionality of its approach to socio-economic rights and equality, the track record of its defeats bears this contention out. In 2002, after losing the Constitutional Court case against TAC over a programme to provide the drug Nevirapine to preventing mother-to-child HIV transmission, Ayanda Ntsaluba, the then Director General of the Department of Health, told me that the government intended to set up a social cluster of DGs to look at implications of socio-economic rights for departments such as health and education, but also for governance and decision-making about resource allocation more broadly.¹³⁴ There is, however, no evidence that this happened. Instead, since the conclusion of TAC in 2002, the government has continued to lose almost every case in which it faced a challenge over the non-fulfilment of its duties to provide for socio-economic rights. Examples are the Limpopo textbooks cases,¹³⁵ the challenge

¹²⁹ Government of the Republic of South Africa *Accelerated and Shared Growth Initiative*, available at https://www.gov.za/documents/accelerated-and-shared-growth-initiative-south-africa-asgisa-annual-report-2008?gclid=Cj0KCQiAjiBBhCJARIsAE9qRtAmxVT3iwjG3gS574Vfrg1LxrUBdLafRbrLJca7gSWwFRZCyyh39IaAiqDEALw_wcB.

¹³⁰ Government of the Republic of South Africa *National Growth Plan*, available at https://www.gov.za/sites/default/files/NGP%20Framework%20for%20public%20release%20FINAL_1.pdf.

¹³¹ Government of the Republic of South Africa *National Development Plan*, available at <https://www.gov.za/issues/national-development-plan-2030>.

¹³² In my personal interactions with officials of the Treasury and other experts, there is a commonly shared view that 2012 was the year in which increases of public expenditure on rights plateaued before beginning an actual decline. The Finance and Fiscal Commission paper (note 73 above), for example, notes at para 5 that ‘over the last decade or so the services established to ensure the provision of these rights have been under significant budget pressure.’ See, also, M Blecher, J Davén, A Kollipara, Y Maharaj, A Mansvelder & O Gaarekwe ‘Health Spending at a Time of Low Economic Growth and Fiscal Constraint’ (2017) 40 *South African Health Review* 25–40.

¹³³ Government of the Republic of South Africa *Economic Reconstruction and Recovery Plan*, available at https://www.gov.za/sites/default/files/gcis_document/202010/south-african-economic-reconstruction-and-recovery-plan.pdf.

¹³⁴ Heywood (note 30 above). For further discussion of interactions with government officials regarding HIV and the right to health care services, see M Heywood *Get Up! Stand Up! Personal Journeys Towards Social Justice* (2017) 106–151.

¹³⁵ *Minister of Basic Education v Basic Education for All* [2015] ZASCA 198, [2016] 1 All SA 369 (SCA), 2016 (4) SA 63 (SCA).

of minimum norms and standards for school infrastructure¹³⁶ and, most recently, the challenges over the National School Nutrition Programme (NSNP) brought in 2020 during the Covid-19 crisis.¹³⁷ The only exception was the important *Mazibuko* case over water rights,¹³⁸ but despite the applicants not succeeding with their claim, the case could hardly be considered a victory for government. The judgment by O'Regan J contains an important section titled 'The role of courts in determining the content of social and economic rights: the proper interpretation of section 27(1)(b) and 27(2) of the Constitution' which includes the following:

The Constitution envisages that legislative *and other measures* will be the primary instrument for the achievement of social and economic rights. Thus, it places a positive obligation upon the state to respond to the basic social and economic needs of the people by adopting reasonable legislative *and other measures*. *By adopting such measures*, the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness.¹³⁹

The million Rand question is what are these 'other measures' that the state could reasonably be taking to guarantee socio-economic rights. It seems that because it has not applied its mind, supported by the fact that there is no express constitutional directive on economic policy-making, the Constitution has, at no time, directly influenced the shape of economic policy. This has brought us to a point where, in the context of the Covid-19 pandemic, which has deepened poverty and widened inequality,¹⁴⁰ there is a fraying of the constitutional contract and a danger that the constitutional centre will no longer hold.

Twenty-five years into the life of the Constitution, the time for judicial deference – indeed silence – over economic policy is over. The economic policy currently being pursued by the government is ad hoc, incoherent, fragmented, and amorphous. It lacks a theoretical and evidence-based foundation. Even as much of the world moves away from neo-liberal notions of economy, South Africa's economic policy still centres on an increasingly discredited notion of fiscal consolidation achieved through debt reduction. This is to be achieved by cuts in public expenditure with a particular focus on reducing the public sector wage bill, a matter that will be heard on appeal by the Constitutional Court later in 2021.¹⁴¹

The results are catastrophic for the poor. Education is a case in point. Earlier in this article I have referred to basic education as an 'empowerment right' and pointed to the importance the Constitutional Court has attached to it in several of its judgments. Yet, since 2010, government funding per pupil has fallen by 8 per cent from 2010 to 2017, from R17 822 per child to R16 435.¹⁴² In the 2021 Budget Review, the Treasury was explicit that it is regressing on rights, saying that:

¹³⁶ *Equal Education & Another v Minister of Basic Education & Others* [2018] ZAECBHC 6, [2018] 3 All SA 705 (ECB), 2018 (9) BCLR 1130 (ECB), 2019 (1) SA 421 (ECB).

¹³⁷ *Equal Education & Others v Minister of Basic Education & Others* [2020] ZAGPPHC 306, [2020] 4 All SA 102 (GP), 2021 (1) SA 198 (GP).

¹³⁸ *Mazibuko* (note 89 above) at paras 46–68.

¹³⁹ *Ibid* at para 66 (emphasis added).

¹⁴⁰ One of the most effective measures of the impact of Covid-19 on key socio-economic indicators has been the ongoing waves of the National Income Dynamics (NIDS) Coronavirus Rapid Mobile (CRAM) surveys conducted by researchers at the University of Stellenbosch, available at <https://cramsurvey.org/reports/>.

¹⁴¹ *Public Servants Association & Others v Minister of Public Service & Others* [2020] ZALAC 54, [2021] 3 BLLR 255 (LAC).

¹⁴² N Spaul, A Lilenstein & D Carel 'The Race Between Teacher Wages and the Budget, The Case of South Africa 2008–2018' *Stellenbosch University, Research on Socioeconomic Policy Group* (June 2020), available here <https://resep.sun.ac.za/wp-content/uploads/2020/06/>

Low compensation growth of 0.8 per cent over the MTEF (Medium Term Expenditure Framework) period, combined with early retirements, will reduce the number of available teachers. This, coupled with a rising number of learners, implies larger class sizes, especially in no-fee schools, which is expected to negatively affect learning outcomes.¹⁴³

A similar scenario faces the right to health. Despite the findings of state failure by Moseneke DCJ in relation to the Life Esidimeni tragedy¹⁴⁴ and by the SAHRC in access to mental health care services more generally,¹⁴⁵ resources for mental health care have not increased sufficiently to fulfil the rights of people with mental illnesses. Although, in April 2020, money was provided for what was billed to be a 'R500m stimulus package' to respond to the Covid-19 crisis, little of this was new money and a significant part was found by moving money from within and across government departments, to the detriment of other rights.¹⁴⁶ The stock response to this, but one that goes to the heart of the argument made in this article, is that the government has no alternative. It is responding to the inflexible 'laws' of economics and the market. The alternative, according to the Minister of Finance, Tito Mboweni, is to face a 'sovereign debt crisis', which would have an even more detrimental impact on rights.¹⁴⁷

However, it is here that a section-36 analysis would uncover a body of expert economic opinion that would show the contrary.¹⁴⁸ Options are available to the government. Yet, options, such as to increase personal income taxes on the highest income bracket, a once-off wealth tax¹⁴⁹ or to borrow money from funds that exist *within* the country (such as the over capitalised

spauill-lilenstein-carel-2020-the-race-between-teacher-wages-and-inflation-19jun20-1.pdf; see, also T Kahn 'Angie Motshekga reveals plunge in education spending per pupil' *Businesslive* (10 May 2018), available at <https://www.businesslive.co.za/bd/national/2018-05-10-angie-motshekga-reveals-plunge-in-education-spending-per-pupil/>.

¹⁴³ SECTION27 '2021 Budget not so Hopeful for Basic Education or Healthcare' available at <https://section27.org.za/2021/02/2021-budget-not-so-hopeful-for-basic-education-or-healthcare/> quoting National Treasury *Budget Review 2021*.

¹⁴⁴ Moseneke J *Life Esidimeni Arbitration Award* (2018), available at <http://www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf>.

¹⁴⁵ SA Human Rights Commission *Report of the National Investigative Hearing into the Status of Mental Health Care in South Africa* (November 2017), available at <https://www.sahrc.org.za/home/21/files/SAHRC%20Mental%20Health%20Report%20Final%2025032019.pdf>.

¹⁴⁶ See the Institute for Economic Justice's analysis of the fiscal stimulus, *No Recovery Without Rescue: Covid-19 Scorecard Update* (2021), available at <https://www.iej.org.za/no-recovery-without-rescue-covid-19-scorecard-update/>; see, also, D Gqubule 'Puffery and Confusion Marks SA's Recovery Plan' *New Frame* (28 February 2021), available here <https://www.newframe.com/puffery-and-confusion-mark-sas-recovery-plan/>.

¹⁴⁷ L Omarjee & K Magubane 'Sovereign Debt a Crisis of Biblical Proportions for Mboweni-led Treasury' *News24* (29 October 2020), available at <https://www.news24.com/fin24/economy/sovereign-debt-a-crisis-of-biblical-proportions-for-the-mboweni-led-treasury-20201029>.

¹⁴⁸ See, for example, an *Open letter to President Ramaphosa* written by 75 leading 'economists, economic and business analysts and economic justice analysts' (April 2020), available at <https://iej.org.za/wp-content/uploads/2020/03/PDF-Download-Open-economist-letter-COVID-19-Final.pdf>; and 'Economists and economic analysts letter to MPs' (1 June 2020) urging Parliament to reject the Supplementary budget, available at <https://www.news24.com/fin24/opinion/read-in-full-budget-breaks-president-ramaphosas-promise-economists-letter-to-mps-20200701>.

¹⁴⁹ For data on wealth inequality and wealth concentration in South Africa, see A Chatterjee, L Czajka & A Gethin *Estimating the Distribution of Household Wealth in South Africa* (April 2020) World Inequality Database Working Paper 2020/06, available at <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/scis/documents/Estimating%20the%20Distribution%20of%20Household%20Wealth%20in%20South%20Africa.pdf>, who argue that: 'The top 10 per cent own 86 per cent of aggregate wealth and the top 0.1 per cent close to one third. The top 0.01 per cent of the distribution (3 500 individuals) concentrate 15 per cent of household net worth, more than the bottom 90 per cent as a whole.'

Government Employees Pension Fund and the Public Investment Corporation)¹⁵⁰, have been discarded without public debate in favour of the exact opposite. In the February 2021 budget corporate income tax, reductions were made at the same time as reducing the real value of social grants, drawing universal criticism from civil society organisations, pointing to the deleterious effect this would have on rights and, paradoxically, the economy itself.¹⁵¹

In the final part of this article, I explore some of these options – the ‘less restrictive means’ of activist’s arguments are available to the government and would help fulfil its mandate to achieve social justice and equality.

IV STRATEGIES TOWARDS A RIGHTS-BASED ECONOMY/ ECONOMIC POLICY

Concluding their introduction to the collection of essays on *Tax, Inequality and Human Rights*, Alston and Reisch say that one of their messages is that:

human rights proponents can no longer pursue the limited agenda that has been the bread and butter of human rights research and advocacy for the past half-century, focused on reiterating the normative principles enshrined in numerous international treaties, exposing transgressions, and assuming that change will come without any engagement with the structural issues that often shape and facilitate the violations they are criticizing. Fiscal policies and the broader economic, social and political priorities they reflect must become part of the overall debate, even if specific groups insist on pursuing more specialised agendas.¹⁵²

During his tenure as the UN Special Rapporteur on Extreme Poverty and Human Rights, Alston highlighted the fact that although the idea of socio-economic rights had found its way into international law and national constitutions, it had not been followed by a remodelling of legislation governing economic policy to serve the law. In a 2016 report to the Human Rights Council, he drew attention to this and called for a better system to embed and institutionalise socio-economic rights in policy-making, which he termed a ‘Recognition, Institutionalisation and Accountability (RIA) framework that focuses primary attention on ensuring recognition of the rights, institutional support for their promotion and accountability mechanisms for their implementation.’¹⁵³

Affirming the approach suggested by Alston, I believe that what is needed is recognition that just as criminal justice requires a criminal justice system (with, e.g., police, courts, prisons, independent human rights monitors), the realisation of social justice requires that we conceive of a social justice system, with well capacitated institutional regulators of quality, consistent and methodical monitoring, delivery systems (like schools and hospitals), oversight bodies and appropriate budgets.

¹⁵⁰ See D Gqubule ‘Alternative Options to End Austerity and Fund a Stimulus for the SA Economy’ *Policy Brief Presented to the National Labour and Economic Development Institute* (31 May 2021).

¹⁵¹ M Heywood ‘Civil Society Organisations Condemn Mboweni’s “Sugar-coated” Austerity Budget 2021’ *Daily Maverick* (25 February 2021), available at <https://www.dailymaverick.co.za/article/2021-02-25-civil-society-organisations-condemn-mbowenis-sugar-coated-austerity-budget-2021/>; and Institute for Economic Justice ‘Press statement, The Budget 2021: Slashing public expenditure places the economy at risk’ (25 February 2021), available at <https://www.iej.org.za/the-budget-2021-slashing-public-expenditure-places-the-economy-at-risk/>.

¹⁵² Alston and Reisch (note 77 above) at 22.

¹⁵³ United Nations General Assembly, Report of the Special Rapporteur on Extreme Poverty and Human Rights, A/HRC/32/31 (April 2016), available at <https://srpoverty.org.files.wordpress.com/2018/08/social-and-economic-as-human-rights-report-2016.pdf>.

Fortunately, it would seem as if this message is being heard in South Africa, at least within civil society. In the last few years, several social justice organisations have pivoted their rights activism to start to encompass budget and economic advocacy. The formation of the Institute for Economic Justice (IEJ) in 2019, which is closely aligned with civil society human rights organisations, provides a backbone of pro-poor economic analysis. It joins organisations like the Studies in Poverty and Inequality Institute (SPII). Similarly, the Budget Justice Coalition (BJC), founded by ten organisations, is increasingly vocal on economic and rights issues as well as providing a forum for the exchange of ideas amongst organisations working to advance different socio-economic rights. These organisations are beginning to move beyond critique. They are involved in human rights-based monitoring of budgets, developing monitoring tools¹⁵⁴ and, most importantly, starting to sketch out human rights based economic policies, supported by a normative strategy to campaign for measures that will assist their implementation. In 2020, for example, the BJC developed an Alternative People's Budget on the eve of the publication of the government's Medium Term Expenditure Framework (MTEF).¹⁵⁵ In early 2021, its critique of the budget generated extensive media coverage and public discussion.

This is reflective of an international trend towards 'Rethinking Economics' in civil society and academia. For example, Rethinking Economics, which describes itself as a 'network of students, academics and professionals building a better economics in society and the classroom' is a student organisation, which now has chapters in many universities internationally.¹⁵⁶ Respected heterodox economists, such as Kate Raworth and Stiglitz, are now advancing feasible alternative economic models. Tellingly though, these economists are not yet tying their proposals to a human rights framework or appreciating that there may be leverage in either national or international human rights law for their proposals. The reason, which should be a wake-up call for constitutional lawyers, is that they have become sceptical of the power of human rights, influenced by books like Samuel Moyn's *Not Enough, Human Rights in an Unequal World* into believing that human rights are 'unambitious and ineffectual in practice' and 'merely nipping at the heels' of the neo-liberal giant Moyn calls the 'Doppelgänger' of market fundamentalism; and thus unable to have any impact on inequality.¹⁵⁷

The problem does not only lie with human rights. One of the greatest challenges is to overcome the dominance in economic thinking of neoliberalism and what it prescribes concerning how economies grow or stagnate. This dominance has not been achieved because it is the best model, but because it has been shored up by the terror of finance and threats of what will happen if its prescriptions are broken. The least that we need is an informed debate about economics, including the contentions of Modern Monetary Theory about how economics and

¹⁵⁴ See, for example, Studies in Poverty and Inequality (SPII) 'Gap Analysis Report and Performance Monitoring Framework for the ICESCR Developed for the SAHRC' (2016), available at <http://spii.org.za/wp-content/uploads/2019/01/2016-SPII-Gap-Analysis-and-Monitoring-Framework-for-the-SAHRC.pdf>.

¹⁵⁵ Budget Justice Coalition: I Yesizwe 'An Alternative Human Rights Budget' (October 2020), available at <https://www.iej.org.za/budget-justice-coalition-imali-yesizwe-an-alternative-human-rights-budget/>.

¹⁵⁶ The Rethinking Economics website, available at <https://www.rethinkeconomics.org/about/> provides more information about the purpose and organization of this network.

¹⁵⁷ S Moyn *Not Enough: Human Rights in an Unequal World* (2018) 216 & 218. I address Moyn's thesis and reflect on the impact and efficacy of human rights as a practical tool in social movement's struggles for social justice in M Heywood 'South Africa's Journey from Socialism to Human Rights: The True Confessions of an Errant Socialist' (2019) 11 *Journal of Human Rights Practice* 305–323. I find that in South Africa, whilst human rights have shortcomings (mainly those addressed in this article), human rights activism has been the most consistent and singular factor driving transformation and rights realisation.

economies must adapt in a world that now faces a perfect storm of the climate crisis, inequality, and pandemics such as Covid-19. To this end, in South Africa there is a need for co-operation between economists and lawyers to provide better arguments, evidence and modelling to show that a socio-economic rights based economic model is feasible. The irony is that South African capitalism is trapped by the very status quo that it seeks to protect, which is destroying jobs and wealth (the opposite of what capitalism claims it is best at doing) thereby creating an ever-shrinking domestic market. Moseneke writes that ‘equality rights properly asserted may serve as a catalyst for economic growth and in turn socio-economic upward mobility.’¹⁵⁸ This is a crucial insight because contrary to what free market thinkers would have us believe, there is a dynamic market and economy waiting to be unleashed through realising human rights.

In response to the Covid-19 pandemic in late 2020, the South African government adopted a new economic policy, called the Economic Recovery and Reconstruction Plan.¹⁵⁹ However, based on the criticisms of continued austerity economics that I have pointed to above it seems likely that this plan will repeat the mistakes of earlier economic policies and, thus, be still-born and lead to polarisation rather than consensus around a social compact as hoped for by Ramaphosa. In the words of Dennis Davis: ‘I see no tangible evidence of a viable move towards the type of inclusive growth which can vindicate the social democratic promises of the Constitution.’¹⁶⁰ There are already signs of this in the growing divisions between the government, public sector workers and their trade unions as well as between the ANC and pro-poor social justice movements.

To conclude this article, and as an attempt to illustrate how it is possible to practically embody the social justice mandate of the Constitution below, I set out some of the components that would make a human rights-based economy feasible and self-sustaining. In the context of fears sometimes expressed about arbitrary, irrational, and unreasonable actions by governments towards markets it is important to note that all the measures I suggest are possible *within* the rule of law and many of the instruments and institutions that would be needed to give effect to them are already at South Africa’s disposal:

A Maximising available resources

As a range of writers, including Piketty, Alston and Stiglitz attest, together with the hard-lived realities of many governments who find they are now unable to fund basic social services causing growing inequality, the conservative approach developed towards taxation over the last 40 years the fiscus will never be anywhere near big enough to meet the needs of the 21st century state or the human rights obligations governments have willingly taken upon themselves when they

¹⁵⁸ D Moseneke ‘Foreword’ in J Heymann, A Sprague & A Raub (eds) *Advancing Equality: How Constitutional Rights can Make a Difference Worldwide* (2020) xix.

¹⁵⁹ Address by President Cyril Ramaphosa to the Joint Sitting of Parliament on South Africa’s Economic Recovery and Reconstruction Plan (15 October 2020), available at https://www.gov.za/speeches/president-cyril-ramaphosa-south-africa%E2%80%99s-economic-reconstruction-and-recovery-plan-15-oct?gclid=Cj0KCQiA7YyCBhD_ARIsALkj54o5wINV-4aqWaj3kiLvByxqYz8Ou87rtibjkB1jJ1OjnPamwCb7aTAaAldQEALw_wcB.

¹⁶⁰ DM Davis *Funding of the Vaccine and the General Implications of Budget 2021 for Inclusive Growth and Reduction of Poverty: An Outline of a Presentation to the Wits Institute for Social and Economic Research (WISER)* (1 March 2021).

ratify international human rights treaties.¹⁶¹ This is not because the state confronts an absolute limitation on the resources it can raise, in fact according to Gqubule¹⁶² and other economists it has substantial resources at its disposal, but because it has made policy choices that limit its power to garner the resources that are available. Yet, it is possible to substantially expand the fiscus through legal means. In a recent speech judge Dennis Davis, the former chairperson of Davis Tax Committee, talked of a significant tax gap of up to R100 billion a year and referred to ‘vast sums of money which will continue to flow under SARS radar.’¹⁶³ In this context, it should be noted that many of the recommendations made by the Davis’ committee, which was set up in 2013 to ‘to assess our tax policy framework and its role in supporting the objectives of inclusive growth, employment, development and fiscal sustainability,’¹⁶⁴ have still not been implemented. Note again that realising socio-economic rights does not feature in the Tax Committee’s terms of reference. Some of these include:

- Improved tax collection;
- Introducing a wealth tax on the wealthiest people in South Africa;¹⁶⁵
- Clamping down on illicit financial transfers and tax evasion.

In addition, there is enormous scope for bolstering the capability of state institutions to act more expeditiously and effectively against corruption as well as irregular, fruitless and wasteful expenditure, which robs the fiscus of tens of billions of Rands a year.¹⁶⁶

B Reducing the cost of healthy and dignified living

In South Africa, many of the goods and services that are designated as socio-economic rights or which are essential to facilitate access to rights, are priced out of reach of the poor, be this safety and security, essential nutrition (food), potable water, health care or basic education. Yet, the state has at its disposal legal means to intervene in markets to reduce private expenditure by the poor on public goods in ways that do not amount to further taxes on the poor. For example:

- The state’s powers under the Medicines and Related Substances Amendment Act 14 of 2015, such as parallel importation and compulsory licensing of essential medicines that are unjustifiably expensive, have never been used despite the defence the government made

¹⁶¹ ICESCR art 2; Convention of the Rights of the Child art 4; UN Convention on the Elimination of All Forms of Discrimination Against Women art 2 (although it is notable that there is no direct reference to resources).

¹⁶² Gqubule (note 150 above).

¹⁶³ Davis (note 160 above).

¹⁶⁴ ‘Introduction’ Davis Tax Committee website, available at <https://www.taxcom.org.za/> quoting former Minister of Finance Pravin Gordhan; see, also, *Closing Report* (2018), available at [https://www.taxcom.org.za/docs/20180329%20DTC%20Closing%20Report\(2\).pdf](https://www.taxcom.org.za/docs/20180329%20DTC%20Closing%20Report(2).pdf).

¹⁶⁵ Davis Tax Committee ‘Report on Feasibility of a Wealth Tax in South Africa’ (April 2018), available at <https://www.taxcom.org.za/docs/20180329%20Final%20DTC%20Wealth%20Tax%20Report%20-%20To%20Minister.pdf>. See, also, a 2021 debate between the Southern Centre for Inequality Studies, T Cohen, D Forslund & D Davis in the *Daily Maverick* over a wealth tax: D Davis ‘The Great Wealth Tax Debate: Heed the 60 million South Africans, rather than the 100 000 Wealthiest,’ available at <https://www.dailymaverick.co.za/opinionista/2021-02-07-the-great-wealth-tax-debate-heed-the-60-million-south-africans-rather-than-the-100000-wealthiest/>.

¹⁶⁶ M Heywood ‘Land of Glorious Impunity and How to Ensure Constitutional Accountability for Public Resources’ *Daily Maverick* (2 February 2021), available at <https://www.dailymaverick.co.za/article/2021-02-02-land-of-glorious-impunity-and-how-to-ensure-constitutional-accountability-for-public-resources/>.

of the lawfulness of the Act when it was challenged by the Pharmaceutical Manufacturers Association in 1998.¹⁶⁷

- It is possible to better regulate the private health sector and thereby reduce the spiralling costs of private health care by implementing the recommendations made by the Competition Commission's Health Market Inquiry (HMI), whose final report was released in 2019 but has not been implemented.¹⁶⁸
- There is a positive duty to implement better price regulation of aspects of the food market, to ensure affordability of essential nutritious food, particularly for children.¹⁶⁹ The success of Health Promotion Levy on sugary beverages (the so-called sugar tax), introduced in 2018, which has both generated revenue and changed unhealthy patterns of consumption,¹⁷⁰ is a model that should be extended to other unhealthy foodstuffs such as fast foods.
- As demonstrated during the Covid-19 lockdown, alcohol and other substance abuse costs families and the state tens of billions of Rands in providing health care for preventable trauma and disease. A combination of investment in effective public health/health literacy campaigns and better regulation and enforcement around alcohol and tobacco sales would reduce the burden and cost of preventable disease and trauma, allowing redirection of savings to areas of essential health care that are currently starved of resources.

C Investing in the infrastructure of delivering rights

Properly directed public and private expenditure aimed at fulfilling key socio-economic rights in the Constitution, would boost the economy and make it possible to:

- Create jobs (and income) in the public sector through a massive social infrastructure improvement project aimed at delivering rights to health care services, basic education, food, water and a safe and healthy environment; and
- Identify public goods that are underpinned by human rights, where jobs can be created that would ultimately be cost saving. For example, a properly trained and remunerated workforce of Community Health Workers (envisaged but not properly implemented since the first Health White paper in 1994), would help to prevent the development of communicable and non-communicable diseases such as TB and diabetes, which, if not prevented, become extremely costly to the public health system.¹⁷¹ Similarly, informal workers, like waste pickers, who already play a major part in protecting the environment

¹⁶⁷ M Heywood "Debunking Conglomotalk": A Case Study of the Amicus Curiae as an Instrument for Advocacy, Investigation and Mobilisation' (2001) 5 *Law, Democracy and Development* 133–163.

¹⁶⁸ Competition Commission of South Africa 'Health Market Inquiry into the Private Healthcare Sector, Final Findings and Recommendations Report' (September 2019), available at <http://www.compcom.co.za/healthcare-inquiry/>.

¹⁶⁹ T Ledger *An Empty Plate: Why We Are Losing the Battle for Our Food System, Why it Matters and How We Can Win it Back* (2016).

¹⁷⁰ M Essman, L Smith Taillie, T Frank, Shu Wen Ng, BM Popkin & EC Swart 'Taxed and Untaxed Beverage Intake by South African Young Adults After a National Sugar-sweetened Beverage Tax: A Before-and-after Study' (2021) 18 *PLoS Medicine*, available at <https://doi.org/10.1371/journal.pmed.1003574>

¹⁷¹ M Heywood *The Broken Thread – Primary Health Care, Social Justice and the Dignity of the Health Care Worker* (2014), a paper presented to the Wits Institute for Social and Economic Research (WISER) seminar series, available at <https://health-e.org.za/2014/09/02/paper-broken-thread-primary-health-care-social-justice-dignity-health-worker/>.

through recycling,¹⁷² could play a role in saving the state billions of rand a year incurred through illegal dumping and the loss of recyclable waste to landfills. In addition, jobs can be created in clean energy alternatives as part of what is termed the ‘just transition’ away from carbon-based energy as part of climate crisis mitigation and adaptation plans.

A combination of these measures would start a cycle of growth *and* realise rights thereby creating hope. Income from employment will generate demand for consumer goods – and expand the market. An expanding rather than continually shrinking¹⁷³ domestic market would create new jobs in the market for goods and services and these employees too will start to pay taxes. By paying taxes we recycle public expenditure back into the fiscus as a result of more people paying tax. It is such Keynesian thinking that underlies the Biden administration’s rescue package in the United States. The question is why, particularly given its constitutional obligations, the South African government cannot do the same.

V CONCLUSION

In the last three decades, in the absence of the maximum of available resources being made available by the state in South Africa, the public goods that should be the stuff of socio-economic rights have increasingly been privatised and have become the basis for new post-apartheid inequalities. This is a global phenomenon.¹⁷⁴ It is most evident in the food, health, and education systems in South Africa, each of which has seen growth in the private market and exclusion of those who cannot afford to purchase their human rights. Those wholly

¹⁷² S Kings & S Wild *South Africa’s Survival Guide to Climate Change* (Pan Macmillan, 2019) 167. According to Kings & Wild, there are 60 000 to 90 000 people who earn a living from picking municipal waste. This number is likely to have grown because of the loss of formal employment caused by Covid-19 lockdowns. They quote research suggesting ‘about R17 billion is lost to landfills every year’. For further information on the role of waste pickers see, for example, the work and research of Women in Informal Employments: Globalizing and Organizing (WIEGO), available at <https://www.wiego.org/informal-economy/occupational-groups/waste-pickers>.

¹⁷³ In early 2021, unemployment in South Africa reached a record high, with over 30 per cent of the workforce unemployed. However, other than the temporary Social Relief of Distress Grant expanded for Covid-19 (that ended in April 2021 but was reinstated in August in the wake of riots that engulfed Gauteng and KwaZuluNatal in particular in which people ransacked and looted shops), there is no grant available for unemployed adults. Nonetheless an estimated 17 million people survive on social grants of one form or another, costing the fiscus R229.4 billion in 2021/22. Although South Africa’s social security system is a fulfilment of the state’s duties under s 27(1)(c) and is unique for a developing country, many argue that it is unsustainable financially and socially. The fact that so many people are dependent on social grants is a result of the failure of the Constitution’s key promises in its Preamble rather than an affirmation of it. It is the result of failures that have been documented in this article. The small amounts of money that people receive for social grants (for current value of grants, see <https://www.businessinsider.co.za/what-to-know-about-budget-2021-including-civil-servant-pay-and-social-grant-hikes-2021-2>) is survivalist. It does not meet their basic needs, including the amount it would cost to fulfil a child’s right to basic nutrition, where that child is wholly dependent on the state. From an economic perspective, despite being the fourth largest allocation in the budget (after basic education, health, and debt servicing), it is such a small amount per capita in terms of purchasing power. It does not have any expansionary or multiplier effect. It does not allow people to enter the economy. It just allows them to eat. As a result, there is growing clamour for the introduction of a Basic Income Grant (BIG), whose function would be to try to provide people with enough money to enter the economy and begin to generate new value. As mentioned above (note 119 above), the government says that it is considering this. However, based on current economic policies, it seems highly unlikely.

¹⁷⁴ See United Nations Development Programme (UNDP) *Human Development Report: Beyond Income, Beyond Averages, Beyond Today, Inequalities in Human Development in the 21st Century* (2019), available at <http://hdr.undp.org/sites/default/files/hdr2019.pdf>.

dependent on the state, still overwhelmingly black people, who were historically disadvantaged by apartheid, are then left at the mercy of failing public health systems and inadequate basic education, which can no longer protect – never mind fulfil – their fundamental rights. My argument is that this situation will continue until the economic policies that give rise to it are realigned with the Constitution. It is for this reason that Alston and Reisch challenge us with what they call an ‘existential question’:

The concrete consequences of privatization for the respect, protection and fulfilment of human rights confront human rights with an existential question: can they continue to concentrate only on what is feasible within a system that is required to function with ever fewer public resources, or must they tackle broader issues of fiscal policy?¹⁷⁵

Tackling ‘broader issues of social fiscal policy’ is not just ‘a lust of the blood, but a permission of the [Constitutional] will’, to abuse Iago’s cynical comment on Roderigo’s infatuation with Desdemona in William Shakespeare’s *Othello*.¹⁷⁶ If this lacuna is not filled, South Africa’s democratic project risks being destroyed as inequality and poverty become more and more entrenched, causing our society to develop in a shape directly contrary to the vision and values set out in both the Preamble and founding provisions of the Constitution. If social justice activists fail to ‘grasp the nettle’ (as Moseneke suggested we should do) and begin to take better advantage of the Constitution, given its unassailable mandate, activism for the ‘full and equal enjoyment of all rights and freedoms’ will be disarmed.

In 2020/21, there has been discussion within organisations such as the Budget Justice Coalition and SECTION27 about turning to the courts and legal strategies to challenge the rights violations that occur as a result of fiscal policy have been considered.¹⁷⁷ However, at this point, that is, arguably, not a question primarily for the courts, although they will inevitably have to address these issues in the near future, but for all rights-bearers under our Constitution, including the MPs and MPLs they elect to represent them in the national and provincial legislatures, who swear to ‘obey, respect and uphold the Constitution’ upon assuming office.¹⁷⁸ Obedience must include its social justice and equality mandate.

The reason action and resolution on this ‘existential question’ is so vitally important is because ultimately the whole legitimacy of South Africa’s constitutional enterprise depends on it. Covid-19, and the measures taken to mitigate it, have deepened poverty and inequality. An opportunity to centre Covid-19 mitigation measures on realising socio-economic rights that would have reduced vulnerability and Covid-19 transmission in overcrowded and under-resourced settings was missed. Instead, like in most other societies, government

¹⁷⁵ Alston and Reisch (note 77 above) at 17.

¹⁷⁶ W Shakespeare *Othello* act 1, scene 3, line 330.

¹⁷⁷ In October 2020, SECTION27, for example, briefed counsel on a possible case to challenge cuts to the Education Infrastructure Grant (EIG) and its regressive effect on learners’ rights to basic education in Limpopo. In August 2021, the Alternative Information and Development Centre (AIDC) applied to be an *amicus curiae* in the Constitutional Court appeal against the Labour Appeal Court’s judgment affirming government’s renegeing on the third year of a wage agreement for public sector workers. It said it wanted to make arguments about how ‘the LAC failed to approach the key questions from the constitutional paradigm that governs exercises of public power implicating the economy. The LAC particularly failed to situate the public service in its constitutional context and to appreciate its crucial role in the realisation of the rights in the Bill of Rights, instead setting the public service *against* rights.’ (at para 5) The National Treasury opposed the application, and it was refused by the Court on procedural grounds. The written submissions of the AIDC were drafted by T Ngcukaitobi SC, J Brickhill and M Bishop.

¹⁷⁸ Constitution, schedule 2, s 4(1), Oaths and Solemn Affirmations.

opted for lockdown, coercion¹⁷⁹ and minimal economic support. South Africa has suddenly been accelerated along a path, with growing unemployment and rights regression, that is unsustainable. Fry and Gqubule warn that ‘the inadequate economic response to the pandemic and the planned austerity measures will eviscerate the dreams and promises of South Africa’s liberation and herald the start of a second lost decade in terms of economic development until 2030.’¹⁸⁰

It has been the experience of many other societies that where transformation and equality cannot be achieved within the rule of constitutional law people and parties may opt to fight for it outside the rule of law. This is what substantially underlies the trend of the last decade towards populism internationally in what Pankaj Mishra calls ‘the age of anger’.¹⁸¹ Society is now looking for ways to ‘build back better’ a term coined by the United Nations but now frequently used by politicians across the globe, including in South Africa.¹⁸² We have the legal architecture to do so. Were the human rights that are so central to South Africa’s democracy to be made central to its economic renewal, it were possible that our country could be put back on the path towards the vision that inspired the many who sacrificed their lives in fighting for a society truly rooted in the Preamble’s promise of ‘democratic values, social justice and fundamental human rights’.

¹⁷⁹ In two 2021 interviews with the Petrie-Flom Centre at Harvard Law School I reflected on South Africa’s response to Covid-19 through the lens of human rights. See C Reichel *One Year Later: COVID-19, Human Rights, and the Rule of Law in South Africa* (13 April 2021), available at <https://blog.petrieflom.law.harvard.edu/2021/04/13/human-rights-rule-of-law-south-africa-covid/>; and “*I Think of It in Terms of Years*”: *The Future of the COVID-19 Pandemic in South Africa* (20 April 2021), available at <https://blog.petrieflom.law.harvard.edu/2021/04/20/covid-pandemic-south-africa-vaccines/>.

¹⁸⁰ I Frye & D Gqubule *Maximum Available Resources and the South African Covid-19 Rescue and Stimulus: New Thinking in New Times* (April 2021) 4 (report published as part of the Financial Transparency Coalition’s Towards a People’s Recovery Report).

¹⁸¹ P Mishra *Age of Anger, A History of the Present* (Penguin, 2017) 31.

¹⁸² R Hamann “‘Building Back Better’ May seem like a Noble Idea. But Caution is Needed” *The Conversation* (4 February 2021), available at <https://theconversation.com/building-back-better-may-seem-like-a-noble-idea-but-caution-is-needed-154587>.

