Socio-economic Rights Adjudication and Democratic Urban Governance: Reassessing the "Second Wave" Jurisprudence of the South African Constitutional Court

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Abstract: This article responds to the criticism that the "second wave" of socio-economic rights judgments by the South African Constitutional Court unduly defers socio-economic dispute resolution to "outside" democratic structures. Given that socio-economic rights are strategically asserted through a range of political channels, from voting to participation in institutional processes and political protest, the article argues that the Court's socio-economic rights pronouncements must similarly be understood in a broader jurisprudential context, including the Court's treatment of elections, protest and structured political participation. This context reveals a Court preoccupied with ensuring that everyday governance and dispute resolution institutions and mechanisms exist, function and are strengthened, while simultaneously being accountable to citizens and responsive to their rights and concerns.

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A. Introduction

Only a slither of rights disputes is resolved through adjudication. More commonly, rights are asserted through various personal and political channels, ranging from participation in the processes of state institutions to everyday actions and interactions. Understandably, though, legal literature on rights-enforcement tends to fixate on the vindication of rights through adjudication. When it comes to socio-economic rights, much of the focus has therefore been on the experience of countries, such as South Africa, where the rights are justiciable.

Indeed, the initial socio-economic rights jurisprudence of the South African Constitutional Court has been near-exhaustively analyzed. While many commentators have commended the innovative, flexible and context-bound manner in which the Court has interpreted and enforced socio-economic rights whilst negotiating attendant separation of pow-

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ers and counter-majoritarian tensions,[1] others have lamented the interpretative sparsity and remedial timidity inherent to many of its judgments.[2]

This criticism has endured beyond the Court's initial, groundbreaking judgments in cases decided against the national government, such as *Government of the RSA v Grootboom*[3] and *Minister of Health v Treatment Action Campaign*,[4] to its so-called "second wave" of socio-economic rights decisions, a string of cases brought in the late 2000s, mostly against urban local governments and pertaining to urban housing and service delivery.[5] In relation to this "second wave", the criticism has often taken issue with the Court's tendency to defer the resolution of disputes to either conventional or newly created institutional dispute resolution mechanisms, which has seemingly been accompanied by an avoidance of substantive rights-interpretation. At its most vociferous, the criticism has accused the Court of relegating poor and destitute claimants to the very democratic arena whose failures have driven them to litigation in the first place, and has urged it to abandon its approach in favor of a more robust method that engages directly with the needs that claimants aim to vindicate.[6]

This article also reflects upon the "second wave", in its specific context of urban local government, but largely departs from this criticism. Persuaded by Katherine Young's assessment of the Court's decision-making approach as being aimed at catalysing rights-con-

1 See e.g. *Carol Steinberg*, Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence, South African Law Journal 123 (2006), pp. 264, 276, 284; *Cass R Sunstein*, Social and economic rights? Lessons from South Africa, Constitutional Forum 11(2001), pp. 123, 131; *Murray Wesson*, *Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court, South African Journal on Human Rights 20 (2004), p. 284.

2 See *David Bilchitz*, Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights, Oxford 2007, pp. 144-145, 155-162; *Danie Brand*, The proceduralisation of South African socio-economic rights jurisprudence, or "What are socio-economic rights for?", in: Henk Botha et al (eds.), Rights and Democracy in a Transformative Constitution, Stellenbosch 2003, pp. 36-37, 49-50, 55; *Sandra Liebenberg*, Socio-economic Rights Adjudication under a Transformative Constitution, Cape Town 2010, pp. 173-179; *Kirsty McLean*, Constitutional Deference, Courts and Socio-Economic Rights in South Africa, Pretoria 2009, pp. 187-189.

3 *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC).

4 *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC).

5 These were first referred to as the "second wave" by *Stuart Wilson*/*Jackie Dugard*, Constitutional jurisprudence: The first and second waves, in: Malcolm Langford et al (eds.), Socio-economic Rights in South Africa: Symbols or Substance?, Cambridge 2014, p. 35.

6 *Stuart Wilson*/*Jackie Dugard*, Taking poverty seriously: The South African Constitutional Court and socio-economic rights, Stellenbosch Law Review 22 (2011), pp. 664, 665, 670-672. See also *Danie Brand*, Judicial deference and democracy in socio-economic rights cases in South Africa, Stellenbosch Law Review 22 (2011), pp. 614, 623-625, 628-633; *Brian Ray*, Evictions, aspirations and avoidance, Constitutional Court Review 5 (2014), pp. 173, 177, 181, 193, 201-208; *Brian Ray*, Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's Second Wave, Cambridge 2016, pp. 187-190, 212-214.

ducive political solutions to social rights disputes,[7] and by Brian Ray's assessment of the "second wave" jurisprudence as being aimed at deepening participatory democracy,[8] I argue that the Court's approach to solving urban socio-economic rights disputes is appropriate, not least because it focuses on strengthening institutions, systems and processes of urban service delivery, and on making these more accountable, open and accessible to urban residents.

Following a discussion of the different ways in which urban South Africans assert socio-economic rights across different institutional and other spaces, the article argues that the Court's socio-economic rights jurisprudence must be understood in a broader jurisprudential and political context, which includes also its approach to matters dealing with electoral democracy, civic protest, and public participation in the legislative process. It proceeds to discuss some of the Court's high-profile judgments on these issues, before providing an overview of the "second wave" socio-economic rights decisions and indicating their resonance with the decisions pertaining to other forms of democratic participation.

The broader context reveals a Court preoccupied with ensuring that everyday governance and dispute resolution institutions and mechanisms exist, function and are strengthened, while simultaneously being accountable to citizens and responsive to their rights and concerns. This appears to be motivated by a concern not only for good governance, but also to ensure that rights work for *all* residents, rather than only for those who have access to litigation as means to enforce them. Furthermore, while the Court generally attempts to foster inclusive and participatory urban governance, it is clearly intent on preserving local government's ability to *govern*, in accordance with its democratic mandate and the rule of law. While it will not hesitate to intervene with exercises of state power which infringe or threaten socio-economic rights, the Court clearly insists that assertions of socio-economic rights similarly adhere to the rule of law and respect democratic processes.

B. Rights-Assertion, Democratic Participation and Urban Governance in South Africa

Everyday South African urban life continues to bear the scars of Apartheid. Poverty and social marginalization mostly remain racialized, and it is the poor, black inhabitants of South African cities – those residing in informal settlements, formerly black-designated townships, suburban backyard shacks and abandoned inner-city office buildings – on whose behalf socio-economic rights litigation is most often waged.[9] But apart from being the ben-

7 See generally *Katharine G. Young*, Constituting Economic and Social Rights, Oxford 2012, pp. 125, 153-154.

8 See generally *Ray* (2016), note 6.

9 See *Ronelle Burger*/*Servaas van der Berg*/*Sarel van der Walt*/*Derek Yu*, The long walk: Considering the enduring spatial and racial dimensions of deprivation two decades after the fall of Apartheid, Social Indicators Research 130 (2017), pp. 1101-1123. All of the cases discussed in section C II below were brought on behalf of poor, black urban dwellers.

eficiaries of the efforts of legal NGOs concerned with advancing social justice, the urban poor are also political actors in their own right, and regularly engage both City authorities and the central state through a range of collective and individual actions, alternatively or simultaneously channeled through official structures and unleashed in public space, in attempts to improve different aspects of their lives.[10]

Unlike under Apartheid, all South Africans have the right to vote and government at all levels is periodically elected by constituents from across race, class and other social strata. Eradicating poverty and overcoming the socio-economic legacies of Apartheid tend to feature heavily in election campaigns by all contending political parties, and resultant governments have all made significant, albeit insufficient, strides in addressing these issues. In particular, the African National Congress ("ANC"), which has convincingly won all of post-liberation South Africa's national elections and has also fared well in most provincial and local government contests, is known for having championed the inclusion of justiciable socio-economic rights in the 1996 South African Constitution ("the Constitution") and boasts a remarkable (albeit, once again, insufficient) governance record of having delivered millions of fully subsidized houses to poor citizens, and having extended heavily subsidized essential services to millions of poor households.[11]

Commentators and activists often point to the ANC's consistent electoral dominance in the face of continued poverty, inequality and deprivation, even in areas where living conditions are poor and where residents have (sometimes violently) protested these, as evidence that electoral accountability in South Africa has failed.[12] This failure is typically ascribed either to blind voter loyalty, a lack of credible political opposition to the ANC or both, and tends to be offered as explanation for high incidences of less directly democratic means of asserting socio-economic rights, such as protests or litigation.[13]

10 See *Claire Benit-Gbaffou*, Are practices of local participation sidelining the institutional participatory channels? Reflections from Johannesburg, Transformation 66/67 (2008), p. 6-8; *Susan Booysen*, With the ballot and the brick: The politics of attaining service delivery, Progress in Development Studies 7 (2007), pp. 17-18, 21-22; *Susan Booysen*, Public participation in democratic South Africa: From popular mobilisation to structured co-optation and protest, Politeia 28 (2009); *Julian Brown*, South Africa's Insurgent Citizens: On Dissent and the Possibility of Politics, Johannesburg 2015, pp. 16-20; *Laila Smith*/*Margot Rubin*, Beyond invented and invited spaces of participation: The Phiri and Olivia Road court cases and their outcome, in: Claire Benit-Gbaffou (ed.), Popular Politics in South African Cities: Unpacking Community Participation, Cape Town 2015, p. 249.

11 For figures on improvements in housing- and essential service delivery under ANC rule, see Statistics South Africa, General Household Survey 2016, Pretoria 2017, pp. 3-5; 29-52. See also *Burger*/*van der Berg*/*van der Walt*/*Yu*, note 9, p. 1102.

12 See *Doreen Atkinson*, Taking to the streets: Has developmental local government failed in South Africa?, in: Sakhela Buhlungu et al (eds.), State of the Nation: South Africa 2007, Pretoria 2007, pp. 54, 74; *Booysen* (2007), note 10, pp. 22, 25, 29; *Brown*, note 10, pp. 37-39; *Jackie Dugard*, Urban basic services: Rights, reality and resistance, in: Malcolm Langford et al (eds.), Socio-economic Rights in South Africa: Symbols or Substance?, Cambridge 2014, p. 293.

13 See *Atkinson*, note 12, p. 74; *Booysen* (2007), note 10, pp. 25, 29; *Boitumelo Matlala*/*Claire Benit-Gbaffou*, Against ourselves – local activists and the management of contradictory political loyal-

But this "breakdown" in electoral accountability is perhaps overstated, as illustrated by the outcome of the 2016 Local Government elections, where a seeming drop in ANC-voter participation combined with a slight increase in opposition support, to result in the governments of three major cities (Johannesburg, Pretoria and Port Elizabeth) falling to opposition coalitions, while the official opposition also overwhelmingly won in Cape Town, as it had done before. At least in the context of urban local government (which has also been the site of almost all community protest and almost all socio-economic rights litigation), it can no longer be as confidently asserted that South African governments are not held accountable through elections.

Of course, it is what happens *between* elections that matters most. The Constitution makes it clear that local government is at the coalface of progressively realising socio-economic rights through democratic, accountable and participatory governance focused on sustainable service delivery.[14] This is echoed and operationalized by the Municipal Systems Act of 2000, the preamble of which determines that active community participation in local government affairs is a "fundamental aspect" of the local government system. The Act further entitles residents to contribute to municipalities' decision-making processes, as well as to prompt and open communication with municipal structures, disclosure of municipalities' financial affairs, and publicly open municipal meetings and processes.[15] It also enjoins municipalities to "develop a culture of municipal governance that complements formal representative government with a system of participatory governance" through, inter alia, ensuring effective community participation in the development of municipal development plans, budgets and service delivery strategies.[16]

In metropolitan areas, the main official structure for participatory local governance is Ward Committees established in terms of the Municipal Structures Act of 1998, which are empowered, via elected Ward Councilors, to make recommendations on matters affecting their wards to relevant municipal governance structures.[17] While sometimes commended as important participatory spaces, especially for low-income residents, the effectiveness of

ties: The case of Phiri, Johannesburg, in: Claire Benit-Gbaffou (ed.), Are practices of local participation sidelining the institutional participatory channels? Reflections from Johannesburg, Transformation 66/67 (2008), p. 42-43. For more in-depth analysis of South African voting behaviour in this context, see *Daniel De Kadt*/*Evan S Lieberman*, Nuanced accountability: Voter responses to service delivery in Southern Africa, British Journal of Political Science (2017); *Eva Wegner*, Local-level accountability in a dominant party system, Government and Opposition 53 (2018), pp. 51-78.

14 Constitution of the Republic of South Africa (1996) preamble, sections 1(d), 152-156, 195(1)(e), Schedules 4B, 5B.

15 Local Government: Municipal Systems Act 32 of 2000, sections 4-5.

16 Local Government: Municipal Systems Act 32 of 2000, section 16.

17 Local Government: Municipal Structures Act 117 of 1998, sections 72-74. Metropolitan Councils consist of directly elected ward councillors alongside councillors proportionally elected across the metropolitan area (id, section 22). On participatory processes under the Municipal Structures and -Systems Acts, see *Sophie Oldfield*, Participatory mechanisms and community politics: Building

Ward Committees has been questioned. Research suggests that many Committees are dysfunctional while others amount to little more than tedious "talk shops", where the same concerns and frustrations are perpetually vented without any real resolution.[18] This is at least partly ascribed to Ward Councilors' limited clout and decision-making power within Metropolitan Councils and their beholden-ness to party-political structures.[19] There are further concerns about class- and interest group-capture, suppression of minority interests and disrespect for human rights in the proceedings of some Ward Committees.[20]

Research further suggests that, while Metropolitan Councils direct significant energy towards legislated participatory processes (particularly in relation to community input into development plans), these are often experienced as highly technical, substantively empty consultation processes involving top-down imposition of pre-determined policy outcomes, and allowing for little meaningful input by residents.[21] It further appears that residents often experience official communication channels with municipalities, from inquiries to petition, complaint and grievance processes, as cumbersome, unresponsive and ineffective.[22]

This lack of responsiveness is often blamed for a breakdown in trust between residents and local government.[23] More pertinently, it is typically pinpointed, alongside poor living conditions and inadequate service delivery, as a main cause of so-called "service delivery

consensus and conflict, in: Mirjam van Donk et al (eds.), Consolidating Developmental Local Government: Lessons from the South African Experience, Cape Town 2008, pp. 488-490; *Ray* (2016), note 6, pp. 293-296.

18 See *Atkinson*, note 12, p. 64; *Benit-Gbaffou*, note 10, p. 5-6; *Claire Benit-Gbaffou*/*Eulenda Mkwanazi*, Constructing communities in public meetings: Local leaders and the management of xenophobic discourses in Yeoville, in: Claire Benit-Gbaffou (ed.), Are practices of local participation sidelining the institutional participatory channels? Reflections from Johannesburg, Transformation 66/67 (2008), p. 114-115; *Booysen* (2009), note 10, p. 14; *Philippe Gervais-Lambony*, Meetings in Vosloorus (Ekurhuleni): Democratic public spaces or spaces for grievances?, in Claire Benit-Gbaffou (ed.), Are practices of local participation sidelining the institutional participatory channels? Reflections from Johannesburg, Transformation 66/67 (2008) ; *Ray* |(2016), note 6, pp. 296-297.

19 See *Benit-Gbaffou*, note 10, pp. 11-12, 16-19; *Claire Benit-Gbaffou*, Party politics, civil society and local democracy - Reflections from Johannesburg, Geoforum 43 (2012), p. 180; *Booysen* (2009), note 10, p. 24; *Oldfield*, note 17, pp. 491-494.

20 See *Benit-Gbaffou*/*Mkwanazi*, note 18; *Brown*, note 10, p. 66-68; *Oldfield*, note 17, p. 491, 498.

21 See *Benit Gbaffou*, note 10, p. 6-8; *Booysen* (2009), note 10, p. 13; *Brown*, note 10, p. 39; *Oldfield*, note 17, p. 488-489; *Li Pernegger*, The agonistic state: metropolitan government responses to city strife post-1994, in: Christoph Haferburg/Marie Huchzermeyer (eds.), Urban Governance in Post-Apartheid Cities: Modes of Engagement in South Africa's Metropoles, Pietermaritzburg 2014, p. 73; *Ray* (2016), note 6, p. 300-301; *John J Williams*, Community participation: lessons from post-apartheid South Africa, Policy Studies 27 (2006), pp. 197-198, 209-210.

22 See *Atkinson*, note 12, at 63-5; *Ray* (2016), note 6, p. 298; *Ivan Turok*, The resilience of South African cities a decade after local democracy, Environment & Planning A 46 (2014), p. 763.

23 See *Fulufhelo G. Netswera*, A case study of community participation in governance and service delivery in the city of Johannesburg, in: Mirjam Van Donk et al (eds.), Consolidating Developmental Local Government: Lessons from the South African Experience, Cape Town 2008, pp. 517-519; *Turok*, note 22, pp. 761-762; *Williams*, note 21, pp. 202, 204.

protests", which have become a feature of life across many poor urban townships.[24] Frequently violent and destructive (not only against state officials and property, but also against vulnerable community members such as foreign migrants), these protests have become popular not least for their ability to draw high-level political intervention, involving national political leaders actually listening, and responding to, community concerns.[25]

Similarly, the perceived breakdown of institutionalized spaces for meaningful community participation is often said to necessitate resort to the legal process in attempting to assert socio-economic rights.[26] Indeed, some regard service delivery protests and socio-economic rights litigation as different sides of the same coin, being what they regard as the only remaining effective ways of engaging an unresponsive State around issues of socio-economic deprivation.[27]

But while breakdowns in "official" participation channels may indeed spur more adversarial modes of engagement, the correlation is not always straightforward. Research has revealed, for instance, that community protest occurs also in areas which are comparatively better-off and where civic engagement channels function relatively well.[28] Moreover, far from eschewing conventional democratic participation, protesting and litigating citizens continue to partake in elections and to engage "official" governance structures.[29] Rather, it appears that citizens strategically employ a range of institutional and extra-institutional modes of engaging the State, sometimes discretely and other times in tandem, depending on various factors, including their motives and their perceived chances of being heard.

Accordingly, it is incorrect to dismiss "official" participatory spaces and governance structures as necessarily being forced, flawed or compromised while romanticizing adversarial modes of engaging the State as always being more effective, constructive and authentically democratic. Just as "official" channels of State/citizen engagement can be open and

24 See *Atkinson*, note 12, pp. 53, 58, 63; *Benit-Gbaffou*, note 10, p. 10; *Booysen* (2007), note 10, pp. 23, 28; *Dugard*, note 12, pp. 287, 290; *Christopher Mbazira*, Service delivery protests, struggle for rights and the failure of local democracy in South Africa and Uganda: Parallels and divergences, South African Journal on Human Rights 29 (2013), pp. 264-266, 268; *Ray* (2016), note 6, pp. 298-300; *Turok*, note 22, pp. 763-765.

25 See *Atkinson*, note 12, pp. 53-54, 58; *Booysen* (2007), note 10, pp. 24-25; *Dugard*, note 12, p. 293; *Matlala*/*Benit-Gbaffou*, note 13, p. 58.

26 See *David Bilchitz*, Are socio-economic rights a form of political rights?, South African Journal on Human Rights 31 (2015), p. 87; *Sandra Liebenberg*, Participatory approaches to socio-economic rights adjudication: Tentative lessons from South African evictions law, Nordic Journal on Human Rights 32 (2015) p. 313.

27 See *Brown*, note 10, p. 128; *Dugard*, note 12, pp. 290-295; *Jackie Dugard*/*Malcolm Langford*, Art or science? Synthesising lessons from public interest litigation and the dangers of legal determinism, South African Journal on Human Rights 27 (2011), p. 43; *Smith*/*Rubin*, note 10, pp. 249-250; *Wilson*/*Dugard*, note 6, pp. 670-671.

28 See *Peter Alexander*, Rebellion of the poor: South Africa's service delivery protests - a preliminary analysis, Review of African Political Economy 37 (2010), p. 32; *Mbazira*, note 24, pp. 265-267.

29 See *Benit-Gbaffou* and *Mkwanazi*, note 18, p. 114; *Booysen* (2007), note 10, pp. 25-26; *Matlala*/*Benit-Gbaffou*, note 13, p. 45; *Netswera*, note 23, p. 515.

responsive, and regularly yield benefits for broader communities, there have been instances where "popular" protests have been motivated by anti-democratic or illegal objectives,[30] or where protest action has intentionally damaged or destroyed public goods, violated the rights of vulnerable groups or forcefully subjugated collective interests to militant minority demands.[31] Similarly, while the deficiencies of "official" participatory channels explain why resorting to the legal process is sometimes an attractive option, it is by no means always a preferable alternative.

It is true that courts present orderly, fair, well-structured and unbiased spaces for deliberation, and are prone to produce reasoned and well-balanced outcomes for even the most wrought of disputes.[32] Legal processes further have an important equalizing power, in that they are typically un-swayed by power imbalances between parties and can afford the perspectives of poor and un-influential citizens equal weight to governmental objectives.[33] Moreover, since judgments come with significant finality and authority, and expect of parties, however powerful or recalcitrant, to adhere to them, they can force even the most unresponsive bureaucratic structure to take the needs of citizens seriously.[34]

However, litigation remains affordable and accessible only to a precious few. Its cost means that better-off residents are far better placed to utilize it, whereas the poor tend to be relegated to representation through NGOs, meaning that their demands get filtered through the funding- and related agendas of these organizations, whereas those whose personal aims do not correspond with these agendas are sidelined.[35] Given the simultaneous limited focus

30 See *Crispian Olver,* How to Steal a City: The Battle for Nelson Mandela Bay, Johannesburg 2017, pp. 95-111, describing violent protests being staged so as to enable corruption in municipal land procurement, by pressuring municipalities to suspend "ordinary" procurement processes in the face of protest-"emergencies".

31 See *Alexander*, note 28, p. 35; *Daryl Glaser*, Uncooperative masses as a problem for substantive and participatory theories of democracy: The cases of "people's power" (1984-6) and the "xenophobia" (2008) in South Africa, in: Claire Benit-Gbaffou (ed.), Are practices of local participation sidelining the institutional participatory channels? Reflections from Johannesburg, Transformation 66/67 (2008) , pp. 141, 144, 150-157; *Pernegger*, note 21, pp. 65, 67, 69.

32 See *Brown*, note 10, pp. 64-66, 126; *Marius Pieterse*, Coming to terms with judicial enforcement of socio-economic rights, South African Journal on Human Rights 20 (2004), p. 395.

33 See *Bilchitz*, note 26, pp. 97,103-105; *Brown*, note 10, p. 126; *Dugard*/*Langford*, note 27, pp. 55-57; *Sandra Liebenberg*, Needs, rights and transformation: Adjudicating social rights, Stellenbosch Law Review 17 (2006), p. 20; *Marius Pieterse*, On "dialogue", "translation" and "voice": A reply to Sandra Liebenberg, in: Stu Woolman/Michael Bishop (eds.) Constitutional Conversations, Pretoria 2008, pp. 336, 344; *Ray* (2016), note 6, p. 177.

34 See e.g. *Bilchitz*, note 26, pp. 105, 107-108; *Rosalind Dixon*, Creating dialogue about socio-economic rights: Strong-form versus weak-form judicial review revisited, International Journal of Constitutional Law 5-3 (2007), pp. 402-406; *Dugard*/ *Langford*, note 27, p. 58; *Smith*/*Rubin*, note 10, pp. 249-251, 274-275.

35 See e.g. *Bilchitz*, note 26, pp. 108-109; *Siri Gloppen*, Social rights litigation as transformation: South African perspectives, in: Peris Jones/Kristian Stokke (eds.), Democratizing Development: The Politics of Socio-economic Rights in South Africa, Leiden 2005, pp. 155-159, 165; *Pieterse*, note 33, pp. 336, 344.

and broad reach of litigation (with courts hamstrung by the facts and issues as presented and framed by the parties before them, while judgments impact persons and contexts far beyond these), this comes with real dangers of interest group capture and misrepresentation.[36] This is especially insidious where litigants and their demands do not represent the feelings of broader communities or, worse still, when they resort to litigation precisely to overthrow, disrupt, or circumvent the outcomes of broadly democratic and participatory processes.[37] Moreover, the finality and clarity for which judgments are typically praised may have undemocratic effects, in that they deny the volatility, open-endedness and context-dependence of both democratic deliberation and everyday assertions of rights.[38]

Courts clearly have reason to decide socio-economic rights disputes with significant caution. Any adjudicatory approach must not only be mindful of the separation of powers, but also of the different political and everyday participatory channels through which citizens express their rights, and through which authorities receive and respond to these expressions.[39] Given that litigation constitutes but one spoke in a far larger wheel of democratic rights-assertion across a range of institutional and non-institutional spaces, the socio-economic rights jurisprudence of the Constitutional Court further ought to be assessed within a broader context, that includes the Court's approach to the various complementary processes through which rights are asserted and given content.

C. Adjudicating Socio-economic Rights in the Context of Participatory Democracy

I. The Constitutional Court's approach to democratic participation

The Constitutional Court has handed down a handful of judgments pertaining to electoral democracy and the functioning of democratically elected structures, as well as on the extent of public participation in democratic governance. These provide important indications of how the Court conceives of the task of democratic governance in South Africa, and of how it views citizens' interactions with democratically elected structures.

When it comes to electoral democracy, the Court's judgments have mostly focused on upholding and strengthening the procedural foundations of the electoral system, in relation

36 See e.g. *Benit-Gbaffou*, note 10, p. 8; *Liebenberg*, note 26, pp. 313, 316, *Pieterse*, note 33, p. 338; *Ray* (2016), note 6, pp. 346-347.

37 See *Marius Pieterse*, Rights-based Litigation, Urban Governance and Social Justice in South Africa: The Right to Joburg, London 2017, pp. 217-218; *Smith*/*Rubin*, note 10, p. 261.

38 See e.g. *Dixon*, note 34, pp. 400-402; *Liebenberg*, note 26, pp. 312-313; *Pieterse*, note 37, p. 218; *Steinberg*, note 1, pp. 272, 275.

39 *Liebenberg*, note 26, p. 316 notes that such a broadened focus "extends beyond the well-worn counter-majoritarian dilemma of judicial review which is squarely located in a representative conception of democracy".

to voter registration and the accuracy and integrity of the voters' roll.[40] Substantively, the Court's most significant decisions in this realm have protected vulnerable groups against disenfranchisement, with two high-profile judgments having declared attempts to strip prisoners of voting rights unconstitutional.[41]

As to the functioning of duly elected bodies, the Court has to date only handed down one judgment pertaining to urban governance. In *Democratic Alliance v Masondo*, it dismissed an argument that local government structures always had to ensure proportional participation by opposition political parties. The Democratic Alliance (DA), at the time the main opposition party in the City of Johannesburg, challenged the constitutionality of the composition of the City's executive mayoral committee, which was appointed by the mayor and consisted only of ANC members. Emphasizing that the committee was executive in nature and was mainly concerned with service delivery, whereas representative deliberation took place in the broader, proportionally representative Metropolitan Council, the majority of the Court dismissed the challenge.[42] In partial response to a minority opinion that principles of representative and deliberative democracy required broader and more representative participation in all council committees,[43] a separate concurring judgment emphasized that, much as South African democracy was deliberative in nature, and much as all executive structures in the City were ultimately answerable to the broadly representative Council, democratically elected majorities needed to be allowed to govern:

> *"the Constitution does not envisage an endless debate with a view to satisfying the needs and interests of all. Majority rule, within the framework of fundamental rights, presupposes that after proper deliberative procedures have been followed, decisions are taken and become binding".*[44]

A similar balance between deliberation and respect for majority governance is evident from the Court's string of decisions pertaining to community participation in legislative processes. In *Doctors for Life International v Speaker of the National Assembly* and several subsequent decisions, the Court invalidated national legislation after finding that Parliament failed in its constitutional duty to reasonably facilitate meaningful public involvement in the legislative process. While holding that Parliament had to be awarded significant discretion in deciding upon the exact measures it adopted in fulfillment of this obligation, the Court held that these measures could be assessed for reasonableness, an inquiry which would turn on whether the measures gave members of the public effective and meaningful

40 See *New National Party of South Africa v Government of South Africa* 1999 (3) SA 191 (CC); *Kham v Electoral Commission of South Africa* 2016 (2) SA 338 (CC); *Electoral Commission v Mhlope* 2016 (5) SA 1 (CC).

41 *August v Electoral Commission* 1999 (3) SA 1 (CC); *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders* 2004 (5) BCLR 445 (CC).

42 *Democratic Alliance v Masondo* 2003 (2) SA 413 (CC), para. 18-19, 23, 26, 31-33.

43 *Masondo*, note 42, para. 55, 62-63, 72, 77-79.

44 *Masondo*, note 42, para. 43. See also paras. 38, 42, 49.

opportunities to render input into the content of legislation, and to have their input actually considered by lawmakers.[45] These judgments have generally attracted approval for their context-sensitive insistence on substantive, "deep", participatory democracy.[46]

But this "deep" conception of participatory democracy was not bottomless. In *Merafong Demarcation Forum v President of the Republic of South Africa*, the Court dismissed objections by residents of a municipality on the outskirts of the resource-rich Gauteng province, to a constitutional amendment which incorporated it into an adjacent, and significantly less developed, province. While the community argued that government only superficially engaged them in regards to a decision already taken,[47] the Court found that the engagement had been reasonable and that the legislature had duly considered and rejected the community's views prior to passing the legislation, thereby discharging the obligation to facilitate public involvement in the legislative process.[48] It emphasized that, while principles of participatory democracy demanded the open-minded consideration of the public's views, they did not mandate government by continuous consent and could not be viewed as bestowing a legislative veto upon affected communities.[49] While acknowledging that the government might have treated the community dismissively and "discourteously", the Court felt that litigation was not the appropriate way to hold it accountable and that the community's recourse instead had to lie in the broader democratic arena.[50]

While *Merafong* has been criticized for watering down the notion of participatory democracy which animated *Doctors for Life*,[51] its caution against allowing disaffected pockets of the citizenry to hijack the legislative process and its concomitant appreciation of the limited place of litigious action in a participatory democracy is difficult to fault. *Merafong* is especially significant because the litigation was pursued alongside other avenues of civic engagement, including legislative lobbying, a boycott of local government elections

45 See *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC), paras. 105, 111, 115, 124-129, 131, 145; *Matatiele Municipality v President of the Republic of South Africa* 2007 (6) SA 477 (CC); *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 (5) SA 635 (CC), paras 60-61.

46 See *Michael Bishop*, Vampire or prince? The listening Constitution and Merafong Demarcation Forum v President of the Republic of South Africa, Constitutional Court Review 2 (2009), pp. 327-328; *Ngwako Raboshakga*, Towards participatory democracy, or not: The reasonableness approach in public involvement cases, South African Journal on Human Rights 31 (2015), pp. 4-5, 11-12; 15, 19; *Ray* (2016), note 6, p. 287.

47 *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC), para. 45. See also *Sethulego Matebesi/Lucius Botes*, Khutsong cross-boundary protests: The triumph and failure of participatory governance?, Politeia 30 (2011), pp. 14-16; *Raboshakga*, note 46, p. 22.

48 *Merafong*, note 47, paras. 50-53, 59-60. See also *Moutse Demarcation Forum v President of the Republic of South Africa* 2011 (11) BCLR 1158 (CC).

49 *Merafong*, note 47, para. 50.

50 *Merafong*, note 47, para. 60.

51 See *Bishop*, note 46, pp. 338, 340, 364; *Raboshakga*, note 46, pp. 5, 23-28.

and sustained community protests. Moreover, persistence with these after the failed legal challenge paid off, with the legislature eventually yielding to the community's demands and reincorporating the municipality into Gauteng shortly before the next national elections.[52]

The Court echoed *Merafong*'s conception of participatory democracy, in the specific context of urban local governance, in *City of Tshwane Metropolitan Municipality v Afriforum*. In granting an appeal against an interim interdict prohibiting the changing of street names in the city of Pretoria pending an administrative-law review, the Court spoke out strongly against attempts by minority groups to stall or overthrow the implementation of decisions by democratically elected bodies. Viewing an interdict as an "extraordinary" and inappropriate remedy for alleged inadequacies in public consultation processes, the Court asserted that "public participation should not be elevated to co-governance or equal sharing of executive and budgetary responsibilities" and that "it cannot serve as a basis for a court to intrude into Council's sole operational space that a segment of those it serves, is displeased with the public participation process Council had otherwise facilitated".[53]

Merafong's treatment of community discontent as something best expressed and addressed in the political arena, further brings into focus the Constitutional Court's limited engagement with the ambit of the constitutional right to engage in peaceful protest action. While concerned with preserving the political space within which discontent can be collectively aired, the Court has upheld legislative restrictions on the right to protest, where these were aimed at protecting competing rights of vulnerable persons. In *South African Transport and Allied Workers Union v Garvas*, the Court affirmed that protest was "one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms",[54] but emphasised that the right to freedom of assembly and demonstration had to be exercised peacefully and with regard to the rights of others.[55] It thus found that legislative provisions which made protest organizers jointly liable for damages incurred during violent protests, constituted reasonable and justifiable limitations on the right to assemble.[56]

The *Garvas* judgment is buttressed by a growing body of case law emanating from the High Court, which shows a similar concern for preserving the political space for protest action as an incidence of participatory democracy, but also a similar insistence that protest action occurs peacefully and with due regard for the rights of others. In *Mlungwana v The State*[57] the Cape High Court declared a statutory requirement that all gatherings of 15 or more people proceed only with prior permission from authorities, unconstitutional for its

52 See *Bishop*, note 46, pp. 366-369; *Matebesi*/*Botes*, note 47, p. 4, 17.

53 *City of Tshwane Metropolitan Municipality v Afriforum* 2016 (9) BCLR (CC), para. 67. See also para. 66.

54 *South African Transport and Allied Workers Union v Garvas* 2013 (1) SA 83 (CC), para. 61. See also paras. 62-63.

55 *Garvas*, note 54, para. 68.

56 *Garvas*, note 54, paras 69, 84. For criticism, see *Brown*, note 10, pp. 93-94.

57 WCHC A431/15 (24 January 2018), unreported.

chilling effect on peaceful protest. The Court thereby overturned the criminal conviction of a group of Cape Town residents, who had chained themselves to the railings of the Cape Town Civic Centre in protest against poor sanitation services, without prior permission. Yet, in *UCT v Davids*, the same court upheld an interdict preventing violent student protestors from entering the campus of the University of Cape Town, holding that the constitutional right to protest did not sanction assault, violent intimidation, vandalism or the destruction of property.[58]

Overall, the political participation jurisprudence of South African courts predictably betrays a strong leaning towards strengthening and upholding the integrity and decision-making powers of formal democratic institutions. While concerned with protecting the rights of all citizens, however marginalised and vulnerable, to participate politically, and with ensuring that democratic institutions are responsive to community demands, courts are visibly cautious of subverting the outcome of formal democratic processes and of allowing discontent minorities to undemocratically impose their will on the greater citizenry. Given South Africa's history of oppressive and profoundly undemocratic minority rule, this is certainly understandable.

II. The "second wave" socio-economic rights judgments

Brian Ray has argued that the Constitutional Court's approach to participatory democracy in public involvement cases resonates with its approach to deciding the "second wave" socio-economic rights challenges.[59] For Ray, this is most patently so in relation to those "second wave" judgments vindicating the right of access to adequate housing, and its attendant prohibition on arbitrary and extra-legal evictions, under section 26 of the Constitution.

Following an earlier finding that opposing rights in eviction matters could be reconciled in a "dignified and effective" manner if parties were encouraged to "engage with each other in a proactive and honest endeavour to find mutually acceptable solutions",[60] provided that such engagement was bona fide, pragmatic and reflective both of a caring and responsive state and of the agency of occupiers,[61] the Constitutional Court proceeded, in *Occupiers of 51 Olivia Road Berea Township v City of Johannesburg*,[62] to elevate "meaningful engagement" both to a prerequisite of constitutionally permissible evictions and to a remedy in eviction disputes.

58 *University of Cape Town v Davids* [2016] 3 All SA 333 (WC), paras. 59-63.

59 *Ray* (2016), note 6, pp. 281, 287. See also *Bishop*, note 46, pp. 354-356; *Lilian Chenwi*, A new approach to remedies in socio-economic rights adjudication: Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others, Constitutional Court Review 2 (2009), p. 381; *Raboshakga*, note 46, pp. 13-15.

60 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), para. 39.

61 *Port Elizabeth Municipality*, note 57, paras. 41-43.

62 2008 (3) SA 208 (CC).

Olivia Road grew out of resistance to the implementation of an inner-city regeneration policy in Johannesburg, in terms of which residents of illegally occupied buildings that had physically degenerated to the point of posing a health and safety risk, were evicted without consideration of their housing needs. An NGO challenged the constitutionality of this on behalf of the occupiers of an apartment block near the Johannesburg CBD, arguing that City authorities could not evict occupiers without providing them with alternative accommodation.

Instead of addressing this claim, the Court made an interim order requiring the City to meaningfully engage with the occupiers, in attempting to reach a mutually acceptable solution to the dispute.[63] The Court indicated that it regarded meaningful engagement as a procedural prerequisite for "just and equitable" evictions in terms of prevailing housing legislation, compliance with which would be a central consideration in the judicial assessment of the reasonableness of any policy authorizing evictions.[64] In order to qualify as "meaningful", negotiations between the City and occupiers had to consider the consequences of evictions, interim and medium-term steps that the City could take to alleviate occupiers' hardship, the availability of short and medium-term alternative accommodation and the City's longer term obligations towards occupiers.[65] The Court emphasized that both the City and the occupiers had to engage in good faith, with willingness to compromise, and warned against a dismissive attitude by City officials and against unreasonable demands by occupiers.[66]

The Court proceeded to evaluate and endorse a settlement agreement reached between the City and the occupiers.[67] Satisfied that the dispute had been resolved reasonably, the Court declined to inquire further into the constitutionality of the City's housing plans and its methods of implementing these, expressing confidence that the City would over time refine its approach to inner-city housing in consultation with residents.[68]

Commentators cautiously welcomed the *Olivia Road* judgment. While there was appreciation for the Court's remedial inventiveness and an acknowledgement of the potential of the meaningful engagement requirement/remedy to foster participatory democracy,[69] there was some discontent over the Court's ostensible opting to create and defer to an outside dis-

63 *Olivia Road*, note 62, para. 5.

64 *Olivia Road*, note 62, paras. 10-13, 15-20, 22.

65 *Olivia Road*, note 62, para. 14.

66 *Olivia Road*, note 62, paras. 14-15, 20. See *Liebenberg*, note 2, pp. 298-299; *Brian Ray*, Proceduralisation's triumph and engagement's promise in socio-economic rights litigation, South African Journal on Human Rights 27 (2011), pp. 110-111; *Young*, note 7, pp. 125, 153-154.

67 *Olivia Road*, note 62, paras. 24-30. .

68 *Olivia Road*, note 62, paras. 32-37.

69 See e.g. *Brand*, note 6, pp. 635-636; *Chenwi*, note 59, pp. 373, 381-382; *McLean*, note 2, p. 150; *Liebenberg*, note 2, pp. 301-302; *Sandra Liebenberg*, Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of "meaningful engagement", African Human Rights Law Journal 12 (2012), pp. 17-18; *Ray*, note 66, pp. 109, 113-114; *Ray*

pute resolution mechanism, rather than to itself decide the issues.[70] Concerns were further voiced over the lack of normative parameters in the Court's conception of meaningful engagement, with doubts expressed over the potential of bureaucratized engagement processes to yield just outcomes, especially given power imbalances between City officials and building occupiers.[71]

These concerns were ostensibly affirmed by the Constitutional Court's subsequent decision in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes,*[72] which concerned resistance by residents of an informal settlement outside Cape Town, to their relocation to a site further from the inner city, necessitated by implementation of a state-driven, mixed-income housing project. Residents initially overwhelmingly supported the project and many relocated voluntarily to transitional housing. But relations soured when it transpired that fewer residents would ultimately be accommodated in the new development than some had been led to believe. Many now refused to move and, with the assistance of an NGO, challenged the constitutionality of their relocation.

It transpired that there were extensive attempts at community consultation during the leadup to and initial implementation of the project, but that these were inconsistent, sometimes contradictory and not always transparent. Despite lamenting these shortcomings, the Court found that they were not sufficient to render the process unconstitutional, emphasizing that the requirement of meaningful engagement had to be understood realistically and did not mean that consultation processes had to be perfect or that there had to be universal consensus on all aspects of an eviction and relocation.[73] It accordingly found that the prior engagement process had been reasonable and that the relocation could go ahead, albeit subject to further engagement about the particulars of individual relocations.[74]

This finding has been criticized for clawing back the remedial potential of meaningful engagement and thereby diminishing the substantive protection afforded by the constitutional guarantee against eviction.[75] However, as Brian Ray points out, critics underplayed the extent to which the order insisted on renewed/continued engagement during the course

(2016), note 6, pp. 249-255, 289-290; *Margot Strauss*/*Sandra Liebenberg*, Contested spaces: Housing rights and evictions law in post-apartheid South Africa, Planning Theory 13 (2014) pp. 428, 437.

70 See e.g. *Chenwi*, note 59, pp. 384-391; *Liebenberg*, note 69, pp. 19-20, 27; *Liebenberg*, note 26, pp. 328-329; *McLean*, note 2, pp. 150-151; *Ray* (2014), note 6, pp. 186; *Strauss*/*Liebenberg*, note 69, pp. 442-444; *Wilson*/*Dugard*, note 5, pp. 46-47.

71 See, e.g. *Chenwi*, note 59, p. 384; *Sandra Liebenberg*, Social rights and transformation in South Africa: Three frames, South African Journal on Human Rights 31 (2015), pp. 468-470; *Liebenberg*, note 26, pp. 328-329; *Ray* (2016), note 6, pp. 318-319; *Wilson/Dugard*, note 5, p. 46-47.

72 2010 (3) SA 454 (CC).

73 *Joe Slovo*, note 72, paras. 113, 117, 238, 244.

74 *Joe Slovo*, note 72, paras 7, 117-118.

75 See e.g. *Chenwi*, note 59, p. 382; *Liebenberg*, note 2, pp. 308-310; *Liebenberg*, note 69, pp. 22-23, 25; *McLean*, note 2, p. 159; *Strauss*/*Liebenberg*, note 69, pp. 440-443.

of all individual relocations, while also insisting that the State complied with a detailed list of substantive undertakings towards residents, including to facilitate access to their livelihoods and pertaining to their allocation of housing units in the development.[76]

Moreover, critics largely overlooked the resonance of *Joe Slovo*'s conception of meaningful engagement with the Constitutional Court's broader jurisprudence on democratic participation. The *Joe Slovo* Court was loath to derail a project undertaken by a democratically elected local government in pursuit of the common good, merely because of the discontent of some affected community members.[77] Several of the concurring judgments emphasized that the project was aimed at improving living conditions in the settlement, that residents would be among its beneficiaries, that most residents had initially supported it and that thousands had already relocated in order to enable it.[78] Moreover, it was clear that the City had made numerous bona fide efforts to engage residents, that it took account of their concerns and that it had taken steps to accommodate these (notably by offering free transport from the relocation site to residents' schools and workplaces).[79] On the same logic as in cases like *Merafong* and *Afriforum*, therefore, the *Joe Slovo* Court was not prepared to subjugate the outcome of a far broader participatory process to the interests of only some affected parties, simply because they happened to be in a position to litigate their concerns.[80]

Of course, as Sandra Liebenberg warns, there must be guarded against rights being (perhaps forcibly) waived during participatory processes.[81] But the detailed order in *Joe Slovo* appears to be targeted precisely at preventing this, while acknowledging that the trade-offs necessarily inherent to the progressive realisation of socio-economic rights are infinitely better negotiated through broader, participatory processes.

The remainder of the "second-wave" housing jurisprudence also insisted that individual evictions and the statutory processes that authorize them make room for meaningful engagement and take the housing needs of would-be evictees seriously.[82] The Court further remained unwavering in its preference for more accessible, "outside" dispute resolution processes, rather than constitutional litigation, to settle housing conflicts. The most promi-

76 See *Ray* (2014), note 6, p. 187; *Ray* (2016), note 6, pp. 122-125. The City found complying with these specifications so cumbersome that it decided against proceeding with the relocations.

77 Acknowledged by *Liebenberg*, note 69, p. 23; *Ray* (2014), note 6, p. 188; *Ray* (2016), note 6, p. 142; *Wilson/Dugard*, note 5, p. 49.

78 See *Joe Slovo*, note 72, para. 24, 107-108, 229, 234-235, 259, 303, 321, 363.

79 *Joe Slovo*, note 72, para. 107, 254-255, 321-322.

80 See also *Bishop*, note 46, p. 354.

81 *Liebenberg*, note 2, pp. 310, 314; *Liebenberg*, note 24, pp. 328-329.

82 See *Abahlali baseMjondolo Movement SA v Premier, KwaZulu Natal* 2010 (2) BCLR 99 (CC), paras. 104-122; *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) paras. 51-53; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 2012 (2) SA 104 (CC).

nent example of this was *Maphango v Aengus Lifestyle Properties*,[83] where the Court declined to decide a landlord-and-tenant dispute over an allegedly unfair rental practice, instead insisting that the parties subject themselves to the process of a statutorily established Rental Housing Tribunal. While decried by some as another example of the Court abdicating its responsibilities to ensure substantive justice between parties,[84] *Maphango* appears consistent with the meaningful engagement jurisprudence in its insistence that everyday habitation disputes be channeled towards more broadly accessible dispute resolution mechanisms, provided that these respected and protected constitutional rights.[85]

Similarly, the Constitutional Court found in *Joseph v City of Johannesburg*[86] that the City of Johannesburg acted unconstitutionally by precluding vulnerable residents from engaging with it over the terms of essential service delivery. The City had terminated the electricity supply to an apartment block for reasons of non-payment, without giving notice to the residents or allowing them to make representations. It transpired that the residents had in fact been paying for water and electricity, but that their landlord had failed to settle the account with the City. Since the City had no contractual arrangement with the tenants, it claimed that it owed them no procedural rights.

While declining to decide a claim that the City breached the right of access to adequate housing (of which access to electricity was argued to form part),[87] the Court held that the City was under a constitutional obligation to "act in a manner that is responsive, respectful, and fair" when delivering essential services to residents, regardless of whether they were in a contractual relationship with it.[88] This obligation was sourced in a "public law relationship" between local government and residents, underscored by the developmental obligations of local government listed in section 152 of the Constitution.[89] Its upshot was that, while the City did not have to meaningfully engage with residents in every instance where it intended to disconnect electricity, it at least had to give residents pre-termination notice and a reasonable opportunity to "make any necessary enquiries and investigations, to seek legal advice and to organise themselves collectively if they so wish".[90]

83 2012 (5) BCLR 449 (CC).

84 See *I De Villiers*, Spatial practices in Lowliebenhof: The case of Maphango v Aengus Lifestyle Properties, Potchefstroom Electronic Law Journal 17 (2014), pp. 2185-2186; *Ray* (2014), note 6, pp. 207, 210.

85 *Ray* (2014), note 6, pp. 202-203; *Ray* (2016), note 6, pp. 160-168.

86 2010 (4) SA 55 (CC).

87 *Joseph*, note 86, paras. 31-32.

88 *Joseph*, note 86, paras. 39, 42-44.

89 Including an obligation "to provide democratic and accountable government to local communities" and "to ensure the provision of services to communities in a sustainable manner". See *Joseph*, note 86, paras 23-24, 32-33, 36-39, 46.

90 *Joseph*, note 86, para. 60. See also paras. 52, 62-63, 70.

While commentators have been critical of the Court's avoidance of the arguments pertaining to the content of the housing right,[91] most welcomed the Court's elaboration of participatory rights inherent to the public law relationship between cities as service providers and their residents.[92] While not extending much beyond procedural fairness in administrative law, the "public law right" affirmed in *Joseph* is another instance of the Court insisting on the democratization of everyday urban governance processes, so as to enable the dialogic assertion and protection of socio-economic rights without necessitating a resort to litigation.[93]

Joseph tends to be contrasted with the Constitutional Court's contemporaneous judgment in *Mazibuko v City of Johannesburg*,[94] which found that it was not unconstitutional for the City of Johannesburg to deliver water by means prepaid meters in a poor township. While all households in Johannesburg received six free kiloliters of water per month in accordance with national policy, residents in most established suburbs were billed for excess consumption through a conventional credit system, whereas prepaid meters, that would dispense the free allowance but thereafter terminate supply unless further water was purchased, were installed as a pilot project in the Soweto suburb of Phiri. Fronted by poor Phiri residents living in large households for which the free monthly allocation was insufficient, but ultimately driven by a political movement opposed to the privatization of essential services, the legal challenge centered around the constitutional adequacy of the amount of free water provided by the City, as well as the prepaid policy's compliance with various aspects of the right to administrative justice and the right to equality.

Siding with the City on all issues, the Constitutional Court declined to consider whether the amount of free water provided by the City was constitutionally sufficient, opting instead to evaluate the policy for reasonableness. Seemingly swayed by the policy's intention of effecting sustainable, long-term water delivery across the city,[95] the Court found that it was reasonable and did not infringe the right of access to sufficient water, given that the free water allowance was demonstrably enough to fulfill the basic needs of average-sized households, and since the City also adopted an "indigency policy", in terms of which households that needed but could not afford extra water could apply for an additional free allowance,

91 See *David Bilchitz*, Citizenship and community: Exploring the right to receive basic municipal services in Joseph, Constitutional Court Review 3 (2010), pp. 51-54; *Melanie Murcott*, The role of administrative law in enforcing socio-economic rights: Revisiting Joseph, South African Journal on Human Rights 29 (2013), pp. 489-490; *Wilson*/*Dugard*, note 5, p. 53.

92 See *Bilchitz*, note 91, pp. 56-59, 62, 67, 77-78; *Dugard*/*Langford*, note 27, p. 46; *Wilson*/*Dugard*, note 5, p. 53.

93 See *Brand*, note 6, pp. 635-636; *Ray* (2016), note 6, pp. 131-133; *Shanelle van der Berg*, Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance?, South African Journal on Human Rights 29 (2013) p. 390.

94 2010 (4) SA 1 (CC). On the contrast, see *Dugard*/*Langford*, note 27.

95 *Mazibuko*, note 94, paras. 11-12, 166.

during the litigation.[96] Stating that it would be inappropriate for courts to quantify a "minimum core" amount of constitutionally sufficient water,[97] the Court regarded the policy as sufficiently balanced, flexible and inclusive to pass constitutional muster.

Significantly, the Court was unequivocal about socio-economic rights-based litigation being supplementary to participatory democracy, stating:

> *"The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participatory democracy that holds government accountable and requires it to account between elections over specific aspects of government policy".*[98]

The Court regarded the present case as an apt example of this accountability-enhancing function of socio-economic rights, highlighting how the litigation forced the City to justify and substantiate its policy position, and how the City responded to the litigation by continuously revising its policy in attempts to make it more rights-conducive and constitutionally compliant.[99]

Mazibuko has been derided in the literature for this limited conception of the role of socio-economic rights litigation, as well as for its formalist reasoning and its normatively sparse, institutionally deferent and procedurally-fixated employ of the reasonableness inquiry.[100] Pointing to the fact that the litigation was only initiated after more "democratic" attempts to oppose the installation of prepaid water meters (notably, consultation with City officials and protest action) failed, some have accused the *Mazibuko*-approach to reasonableness of draining socio-economic rights of remedial potential and of relegating claimants to a political arena already hostile to their plight.[101]

But, apart from not departing significantly from previous employs of the reasonableness standard, *Mazibuko*'s conception of participatory democracy, majority governance and the common good aligns not only with *Joe Slovo* and other housing judgments, but also with the Court's participatory democracy decisions.[102] As in those cases, the *Mazibuko* court seemed acutely aware of the very limited sample of the Phiri community presented by the claimants before it. It noted that the City pursued an undisputedly necessary policy project, that there was extensive public involvement in the policy's conceptualisation and implementation (including door-to-door consultations, dedicated ward committee meetings and

96 *Mazibuko*, note 94, paras. 83-89, 98-102.

97 *Mazibuko*, note 94, paras. 52-68.

98 *Mazibuko*, note 94, para. 160. See also paras. 59, 161.

99 *Mazibuko*, note 94, paras. 162-165.

100 See e.g. *Brown*, note 10, p. 133; *Liebenberg*, note 2, pp. 467-471, 478-480; *Liebenberg*, note 71, p. 455; *Ray* (2016), note 6, pp. 105-106; *Wilson*/*Dugard*, note 6, pp. 669-670.

101 See *Smith*/*Rubin*, note 10, pp. 263-265; *Wilson*/*Dugard*, note 6, pp. 670, 674-677.

102 See also *Ray* (2016), note 6, pp. 141-142, 281-282, 335.

several public meetings), that only a fraction of affected households refused to comply with the policy and that a community survey indicated general satisfaction with the policy and its attendant water meters.[103] While perhaps too easily conflating community acquiescence with approval, the Court was clearly satisfied that the water meters were installed in accordance with a policy that was designed to achieve the common good, was thoroughly canvassed, had reasonably taken account of community concerns and met with the approval of at least a significant majority of residents. As in the public involvement cases and in *Joe Slovo*, the Court was therefore loath to derail the implementation of the policy on the insistence of a disaffected, litigious minority, especially since the policy clearly satisfied the minimum requirements of constitutional reasonableness.

Moreover, as in *Olivia Road* and *Joe Slovo*, the *Mazibuko* Court's stance was clearly informed by an awareness of the City's bona fides and responsiveness, as displayed through its attempts to adapt its policy in order to better cater for the needs of residents and to minimize the negative effects of the policy.[104] In the years since the "second wave" judgments, the Constitutional Court has shown that it would protect residents' interests far more directly and uncompromisingly where such bona fides and responsiveness was absent. For instance, in *South African Informal Traders Forum v City of Johannesburg*,[105] the Court interdicted implementation of the City of Johannesburg's seemingly irrational decision to banish informal traders from the Johannesburg CBD, regardless of whether they were trading in compliance with applicable bylaws. The Court's stance appeared to be informed not only by the policy's devastating impact on the lives of traders, but also by the apparent fact that negotiations between the traders and the City were proving fruitless, due to cynical unresponsiveness on the part of the City.[106]

Overall, the "second wave" socio-economic rights decisions clearly exist on a spectrum alongside those concerning participatory democracy. As with the judgments on elections, protest, and participation in legislative or urban governance processes, they reflect a preoccupation with safeguarding and invigorating deliberative spaces for democratic governance. The Court has attempted to ensure equal access to participatory spaces and parity of participation, while taking care to balance the competing rights of participants. Furthermore, it has insisted that participation be meaningful, that participants be afforded reasonable opportunity to voice their concerns, and that these concerns be heard and duly considered by democratically elected authorities acting in good faith. Simultaneously, the Court has been vigilant against minority-capture of democratic institutions and has shown respect for principles of representative democracy, by safeguarding governmental margins of discretion and upholding outcomes of democratic decision-making processes.

103 *Mazibuko*, note 94, paras. 15-18, 133, 167. See also *Chenwi*, note 59, p. 380.

104 See *Bilchitz*, note 26, pp. 105-106; *Ray* (2016), note 6, p. 323; *Smith/Rubin*, note 10, p. 268.

105 2014 (4) SA 371 (CC).

106 *SAITF*, note 105, paras. 8-10, 31. See also the Court's uncompromising stance in *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC).

D. Reflections

Evaluating the Constitutional Court's approach in both the "first" and "second waves" of its socio-economic rights jurisprudence, Katharine Young argues that the Court has crafted for itself a catalytic role, in which it varies both the level of scrutiny to which it subjects challenged laws and policies, and the level of remedial sting accompanying orders of unconstitutionality, depending on what it regards as necessary to have a socio-economic rights dispute resolved in a rights-conducive manner.[107] Young proceeds to show that the Court's chosen level of scrutiny and remedial vigor depends on the particular context of every case, and is influenced by the relevant organs of State's levels of rights-awareness and responsiveness, as well as by the peculiarities in the breakdown of communication between them and citizens.[108]

On this account, the Court is not only concerned with its own relationship with the "democratic branches" of government when adjudicating socio-economic rights matters, but also with the efficacy of democratic accountability channels between the State and *citizens*.[109]

The above discussion appears to bear this out. On the one hand, the Court has deferred to the State's preferred mode of progressively realising socio-economic rights in instances where policies and processes were conceived and implemented in good faith, with meaningful input from citizens and with due concern for their interests, notwithstanding some adverse impact on the short-term interests of some (*Mazibuko*, *Joe Slovo*). On the other hand, where measures disregarded rights and precluded or made a mockery of their participatory assertion, the Court has been quick to intervene and put a stop to their implementation (*SAITF*). In-between these extremes, the Court appears consistently to have sought avenues through which to ensure the meaningful and participatory balancing of competing socio-economic rights and interests, and the fair and constitutionally consistent resolution of disputes. Where participatory fora or processes for the everyday balancing of competing interests existed, the Court has insisted that they be utilized (*Maphango*). Where they did not, the Court has insisted on their creation and institutionalization (*Olivia Road*). Where existing processes were not responsive, the Court has insisted on them becoming so (*Joseph*).[110]

Brian Ray's evaluation of the second wave jurisprudence similarly emphasises the Court's desire to strengthen participatory democracy. For Ray, the jurisprudence is not so

107 *Young*, note 7, pp. 172-175; *Katharine G. Young*, A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review, International Journal of Constitutional Law 8 (2010), pp. 387-412; *Katharine G. Young*, The avoidance of substance in constitutional rights, Constitutional Court Review 5 (2014), pp. 235-239.

108 *Young* (2010), note 107, pp. 416-417; *Young*, note 7, pp. 188-190. See also *Dixon*, note 34, pp. 400-414; *Kent Roach*/*Geoff Budlender*, Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?, South African Law Journal 122 (2005), pp. 327, 333, 346-351.

109 See *Brand*, note 6, pp. 625-633; *Ray* (2016), note 6, pp. 220-221.

110 *Young*, note 7, pp. 142-166 matches these "approaches" to different theoretical models of judicial review.

much about the creation and functioning of institutions, but rather about infusing the public-law relationship between local government and urban residents with meaningful opportunities for citizen-participation. In this regard, Ray is especially optimistic about the potential of meaningful engagement, both as a constitutional yardstick and as a remedy. He sees in meaningful engagement the potential to connect the Court's socio-economic rights jurisprudence with the "thick" notion of participatory democracy evident from judgments such as *Doctors for Life*,[111] and accordingly argues for the creation of participatory processes to inform the content of local government policies aimed at essential service delivery.[112]

What Ray underemphasizes, however, is the more state-leaning slant of much of the Constitutional Court's democratic participation jurisprudence (evident from judgments such as *Merafong* and *Afriforum*) as well as of some of the second wave socio-economic rights decisions (notably, *Mazibuko* and *Joe Slovo*). For the Court, participation stops short of directing the outcome of policy processes, and democratically elected structures preserve the right to make and implement governance decisions which serve the public good, even if this does not meet with the approval of all residents. What is important for the Court is that structures and processes through which socio-economic rights are realised are open, robust and responsive, and that they reach and implement their decisions reasonably.

Provided that the Court can be satisfied of the integrity of institutional participatory processes, it is unlikely to interfere with their outcomes. Apart from the stock-reasons for judicial deference to more majoritarian bodies, this seems also to be because the Court is aware of its own limitations *as a deliberative or participatory space*.[113] While it remains prepared to direct and oversee "external" institutional processes to ensure that they have rights-conducive outcomes,[114] the Court regards these processes as more broadly accessible, more resilient against interest group capture, more perceptive of competing interests and more allowing of everyday contestation over rights, than itself. By insisting that accessible institutions exist through which rights-disputes can be solved in a constitutionally compliant manner, rather than to prescribe the outcome of broader processes based on the argument before it in a single case, the Court can better ensure that its judgments have an impact beyond the individual parties before it, while also taking care not to overwhelm or paralyze bureaucracies through overzealously prescriptive remedies.[115]

Arguments that the Court should more explicitly articulate normative parameters to be observed in "outside" participatory structures should be taken seriously, not least because proceedings in such fora will typically not be subjected to ex post facto judicial over-

111 *Ray* (2016), note 6, pp. 275; 278-279; 287-292; 320-322.

112 *Ray* (2016), note 6, pp. 299; 302-306; 335-336.

113 See *Ray* (2014), note 6, p. 179; *Ray* (2016), note 6, pp. 188-190, 212-213, 220, 279.

114 *Ray* (2014), note 6, p. 187; *Ray* (2016), note 6, pp. 249-255; *Liebenberg*, note 69, p. 11; *Young* (2010), note 107, pp. 401.

115 See *Ray* (2016), note 6, pp. 346-347; 356 as well as authorities cited there.

sight.[116] But in the long run there is far more to gain by ensuring that the bodies constitutionally responsible for realizing socio-economic rights are empowered to do so effectively, responsively and in collaboration with citizens.

Of course, much will depend on how the Court's jurisprudence is received and internalised by state institutions and processes, as well as by citizens and the organizations that represent their interests. State institutions need to break free from a "top-down" culture of governance and to develop the bureaucratic will and capacity to give effect to socio-economic rights in more open, transparent, responsive and consultative ways than have hitherto been the case.[117] Public institutions other than the courts (such as the South African Human Rights Commission and the Public Protector) must increasingly be enabled and required to enable and oversee meaningful democratic participation and accountability.[118] Finally, citizens, conditioned by a history of resistance against an undemocratic and hostile apartheid State to resort to anti-democratic and destructive means of expressing their dissatisfaction, and NGOs steeped, due to the same historical context, in a tradition of adversarial and combative engagement with government, must be goaded into more constructive modes of democratic participation, conducive to the broader enjoyment of socio-economic rights by all segments of society.[119]

116 See *Bilchitz*, note 26, p. 98; *Liebenberg*, note 26, pp. 317-319; 329; *Liebenberg*, note 71, pp. 466, 470; *Ray* note 66, pp. 115-117.

117 See *Bilchitz*, note 26, p. 99; *Brand*, note 6, pp. 623-24; *Brown*, note 10, pp. 50-51, 63-64; *Ray* (2016), note 6, pp. 318, 336; *Williams*, note 21, p. 201.

118 See *Bilchitz*, note 26, p. 101.

119 See *Booysen* (2009), note 10, p. 12; *Glaser*, note 31, p. 139; *Ray* (2016), note 6, p. 340-341; *Williams*, note 21, p. 200.