Article

Enabling agency: the Constitutional Court and social policy

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Abstract

South Africa's Constitutional Court has developed a reputation within and outside the country for promoting a social policy regime which actively seeks to reverse racial and economic domination. It has, however, also been sharply criticised for not doing enough to challenge the domination which produces poverty or to hand down rulings which dictate strongly pro-poor outcomes. The article seeks to explain why the Court has played a role in social policy and argues that this is a product of a consensus between the judiciary and the other two branches of government on the need to correct the effects of racial domination. It also assesses whether the courts have contributed to an expansion of social policy which challenges domination. It argues that they have done this only where they have ignored the demand that they impose a 'minimum core content' of social entitlements and have supported collective action by organisations representing the poor. It concludes that a court which enables agency is more likely to serve the poor than one which dictates policy outcomes.

Introduction

Can courts in a constitutional democracy ensure social policy attuned to the need of the weak and marginalised? South Africa's Constitutional Court has developed a reputation for doing just that (Sunstein 2000/2001). It is seen to defend the homeless against eviction, prod the government towards a more generous shelter policy and instruct it to extend medication to mothers living with HIV and AIDS.

The notion of courts as protectors of victims of domination predates 1994: in apartheid's last years, court rulings severely weakened influx control (Davis and le Roux 2009). In the 1980s, unions used the courts to support

collective action (Friedman 1985). After the 1996 Constitution entrenched social and economic rights, some Constitutional Court rulings have been hailed as important contributions to a social policy responsive to the poor. A legal scholar, discussing its role in these cases, notes that it has been 'remarkably successful, with a reputation among constitutional courts in new democracies second to none' (Roux 2009: 107).

But this judgement is hardly unanimous. One view supports social and economic entitlements, but challenges the view that the courts are the most appropriate instruments to ensure pro-poor social policy (Davis 1992). It argues that most decisions required of courts in social and economic rights cases are not legal questions but distributional choices best made by elected representatives. It warns that, while some judicial rulings may assist the poor and marginalised, courts are as likely to find against them (Rosenberg 1991); the poor may be better served by democratic politics than judicial protection. Whether to use the courts at all has been vigorously debated among activists (Sacsis 2014). Some legal academics have criticised the court for not doing enough to dictate pro-poor outcomes (Dugard 2008, Albertyn 2011). They argue not that the courts should not make social policy but that they have not done so vigorously enough.

This article will discuss the role of the Constitutional Court in expanding social policy. While the Constitution does mandate social and economic rights, there is nothing self-evident about this role because it also contains an escape clause: 'The state must take *reasonable* legislative and other measures, *within its available resources*, to achieve the progressive realisation of each of these rights'.[1] What is 'reasonable' and whether resources are available is in the eye of the beholder and these qualifications could be used to deny demands for rights. In many societies, courts have, as noted above, opposed policy sympathetic to the poor (a famous example is the clash between the Supreme Court and the Roosevelt administration in the United States of the 1930s) (Leuchtenberg 1963). That the South African court chose to play a social policy role therefore requires explanation. It will also assess whether the court has contributed to social policy which challenges domination. It will argue that it has done so when rulings have supported rather than substituted for collective action by organisations representing the poor – and that the appropriate role for courts seeking to expand the rights of people living in poverty is to strengthen the agency of the poor.

Two-case wonder?: The Court and social policy

Since 1994, the Court has intervened in a variety of cases with social policy implications. But its reputation for 'pro-poor' intervention is based primarily on intervention in two areas: protection from eviction, and provision of medicine by public health facilities.

Given the legal academic ink spilt on the Court's role in social and economic rights jurisprudence, it might seem that it has devoted much of its time to this litigation. It has not. It has handed down judgements which deal with housing, health, education, water, and municipal services – but these have been relatively sparse. Discussions of its activism tend to forget that its earliest social and economic rights ruling, the 1997 Soobramoney case,[2] refused to assist a critically ill patient who asked it to order a public hospital to offer him dialysis. The view that the Court has played a substantial role is, therefore, based on quality rather than quantity – relatively few rulings have significantly influenced policy and practice. This is probably true of all or most judicial systems in which social and economic rights are justiciable – interventions are usually sparing, their effect judged by the ripples they send through the legal system and society.

The first judgement on which the Court's reputation is built is the 2001 *Grootboom* case.[3] It was brought on behalf of homeless people living on a field from which the authorities wished to evict them; the Court partly upheld a lower court judgement ordering the government to devise a housing policy which would provide for the needs of the plaintiffs and people in similar circumstances. The ruling had little impact on Irene Grootboom, the homeless person in whose name the application was brought, or her community. While they were not evicted, critics of the Court never tire of pointing out (much to the irritation of its defenders), that Grootboom died without receiving a house (Tolsi 2012). However, the case has been used to secure court orders compelling municipalities to devise housing policies which provide for the needs of the poor rather than to evict them (LRC 2004). It has also been argued that the judgement moved property law in a direction favourable to the vulnerable because it 'dislodged the normality assumption that an owner is entitled to exclusive possession of his (sic) property…' (Albertyn 2011: 597).

The second was the 2002 *Treatment Action Campaign* (TAC) case in which the Court ordered the government to make anti-retroviral medication available in public health facilities to pregnant women to prevent mother to child transmission of HIV.[4] This is the only time it has ordered the

government to take action with substantial budgetary implications. The context was the TAC's campaign for treatment for people living with the virus and in particular for anti-retroviral medication at public expense (Friedman and Mottiar 2005). The ruling attracted attention partly because it ruled against the government on an issue on which it felt very strongly – the minister of Health threatened to ignore the judgement if it went against the government (but was almost immediately forced to retract) (Roux 2009: 124). Its effect was more concrete than *Grootboom* – anti-retrovirals were provided to mothers to prevent transmission and the government has introduced a treatment regime (Friedman and Mottiar 2005). In one view: 'The intrusive nature of the remedy… with a climate of public distrust over the ANC government's policies on AIDS, made (TAC) one of the most politically controversial cases to come before the (court) in the first ten years …' (Roux 2009: 134).

Since then, the Court has, in the view of legal scholars and activists, failed to realise the Constitution's potential for intervention on behalf of the poor and vulnerable. None of its subsequent rulings attracted the same enthusiasm as *Grootboom* and *TAC* – the *Mazibuko* case, in which it rejected the argument that it should force the state to provide the poor with a 'minimum core' of services (in this case an increased entitlement to free water)[5] has been attacked for ignoring the needs of the poor (Dugard 2010). Legal scholars have criticised the court's insistence on judging government actions by whether they are 'reasonable' rather than by whether they conform to a judicially-mandated minimum floor of entitlements (Ray 2011, Roux 2003). In this view, the court has, in its desire to avoid antagonising government or private economic power-holders, failed the poor.

But the court has handed down significant rulings, of which the best-known is the 2009 decision striking down provincial legislation permitting the eviction of shack-dwellers, ruling that the authorities had a duty to 'ensure that [residents'] housing rights are not violated without proper notice and consideration of other alternatives'.[6] The case was brought by a shack-dwellers' movement, Abahlali baseMjondolo, which has been in conflict with the KwaZulu-Natal provincial government: the authorities have been accused of trying to drive it out of shack settlements, both because it challenged the local political elite and because it won the court action (Sacsis 2009). The court has also instructed local governments to engage with residents threatened with eviction (Wilson 2011). In 2013 it overruled a decision by the governing body of a suburban school to exclude

a pupil because it said it had reached its capacity.[7] This challenges the power of suburban schools to exclude poor black learners. It has struck down discrimination against women in customary marriage[8] and inheritance.[9]

Some of these rulings have constrained the government, others private power-holders. Whether or not they have contributed to a re-ordering of social policy and practice, the image of a Court unwilling to intervene on behalf of the poor if this means trampling on the toes of the powerful is inconsistent with its record.

Watchdogs or comrades in arms? The Court and social policy

The literature offers two competing explanations for the court's role. Oddly, both are written by Theunis Roux (perhaps because he alone seems to have been interested in explaining it).

Both seek to explain why the government 'has periodically criticized the judiciary, but … has not… threatened to close (the Court) down, despite several significant policy reversals' (Roux 2009: 106). In other words, why it allows the court to tell it what to do. First, Roux adopts an explanation which, although he does not say this, relies on an approach akin to game theory. 'Political science accounts' which see the Court's rulings purely as political decisions, not interpretations of the law, do, he writes, tell some of the truth. But they have 'little appreciation for the restraining influence of legal doctrine on the behavior of constitutional courts'. While rulings do reflect judges' values, their legitimacy (in the eyes of lawyers who are their most significant peers) will be rejected unless they adopt 'forms of reasoning acceptable to the legal community of which it is a part' (Roux 2009: 108). This sets up a confrontation between legal logic and the prerogatives of 'the political branches'.

Roux wants to know what strategy the Court uses to continue interpreting the Constitution in a manner considered legitimate by its legal peers despite the fact that the government may not want this: 'some combination of principle and pragmatism seems likely to provide the best way for a constitutional court in a new democracy to establish its legal legitimacy while safeguarding its institutional security'. It must take 'principle' seriously because 'deciding cases according to law… legitimates courts in the legal sense'; it must be pragmatic because 'courts in new democracies, given the inherent weakness of their position, must perforce temper their commitment to principle with strategic calculations about how their decisions are likely to be received' (Roux 2009: 108). The court can afford to ignore

(presumed) public opinion when it has the support of the governing party – as when it abolished capital punishment (Roux 2009: 120) – or it can use it as a resource, as in *TAC*, where strong support in the media and among opinion-formers substantially lowered the risk of finding against the government (Roux 2009: 123).

In this view, the Court, since it lacks the power to enforce its judgements or ensure its survival, must pick its battles prudently. Roux argues that it defused potential clashes with 'the political branches' by adopting, from *Grootboom*, the 'reasonableness' test rather than insistence on a 'minimum core content' advocated by legal academics who want the court to force the state to implement a minimum level of services – in the water case, for example, a lower court ruled that the 6kl of water a month provided free to households was insufficient and that 12kl would be appropriate. Instead, the Court relied on testing whether, given the government's stated aims and the values of the Constitution, policies or practices are reasonable. According to justice Zac Yacoob who wrote its judgement, it lacked the information needed to establish a minimum core. This could only be established by' identifying the needs and opportunities for the enjoyment of such a right'.

> These will vary according to … income, unemployment, availability of land and poverty. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of …. determining a minimum core obligation …without …the requisite information on the needs and the opportunities for the enjoyment of this right.[10]

Instead, the Court adopted a 'reasonableness standard' which, Roux writes, requires it 'to assess whether a social programme unreasonably excludes the segment of society to which the plaintiff belongs'. It tests fair process, it does not make policy (Roux 2003: 97). The court may order the government to draft a new housing policy or engage with citizens – but it will not tell it what that policy must be or what engagement must produce (Roux 2009: 123). This 'preference for procedural remedies that promote political solutions when addressing social and economic rights claims' (Ray 2011: 108) has, in this view, prevented a clash with the government which the court would lose. By rejecting minimum core content, it '(respected) the political branches' primary budget-setting and policy-making powers' (Roux 2003: 97-98).

The one exception was *TAC*. Here the Court again refused to lay down a 'minimum core content' but it did tell the government what to do. It could do this, Roux argues, because 'the decision was less politically awkward

than at first appeared'. TAC's mobilisation campaign had created 'a groundswell of public support for the principled outcome' and 'key members of the ANC government had already begun to break ranks… by the time (the court) delivered its judgment ... President Mbeki and his health minister were politically isolated and had… lost the battle in the court of public opinion… this … made it much easier for the Court to enforce the Constitution. With the ANC government sliding toward an embarrassing political defeat, the Court's decision could even be said to have rescued it by providing an "objective" legal basis for the reversal of its policies' (Roux 2009: 124-5). So it is only where the government is weakened or divided or both, that the court can consider bold social and economic rights rulings.

Synergy, not strategy: the concealed consensus

Roux's account is flawed. First, the court's reasonableness test is not purely procedural.

It does claim that it is: Constitutional Court judge Kate O'Regan insists that *TAC* did not change policy – it ordered the government to make Nevirapine available at clinics 'because government itself had decided to … (do this), though on a restricted basis, and the Court found that there was no reasonable ground for that … In a sense, then, all the Court did was to render the existing government policy available to all'.[11] The *TAC* judgement contains a clear statement of the argument against vigorous judicial intervention in social policy:

> Courts are ill-suited to adjudicate upon issues … (which) could have multiple social and economic consequences …. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation… In this way, the judicial, legislative and executive functions achieve appropriate constitutional balance.[12]

This enables the court to insist that

> The orders made in these two cases illustrate the Court's institutional respect for the policy-making function of the two other arms of government. The Court did not seek to draft policy or to determine its content.[13]

It repeats this view in several judgements. In one, then Chief Justice Arthur Chaskalson declared:

> The separation required by the Constitution between the legislature and executive …and the courts … must be upheld otherwise the role of the courts as an independent arbiter of issues involving the division of powers between … spheres of government, and the legality of legislative and executive action… will be undermined.[14]

But this neat distinction between procedure and substance is untenable. In *Mazibuko*, O'Regan noted that it does require the government 'to revise its policy to provide for those most in need'.[15] This is a substantive, not a procedural, issue. For O'Regan, the Court's role is to ensure that the government meets its 'positive obligations' imposed 'by the social and economic rights in our Constitution' in at least two ways. 'If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness'.[16] Again, this is not simply a procedural function and it arguably has as much potential to antagonise the government as 'minimum core content'.

A further weakness is Roux's view that the court is trying to protect constitutional principle from political predation by a potentially hostile government. He is correct that courts must retain their legitimacy in the eyes of legal practitioners. Legitimacy is not simply desirable to constitutional courts – it is a necessity because their function requires consent from everyone with whom they engage. But it is a huge jump from this to the claim that legally accepted modes of reasoning enable judges to deduce what the constitution 'really says'. Roux acknowledges that '"legal legitimacy" refers to the plausibility (rather than correctness) of a judicial decision according to applicable standards of legal reasoning' (Roux 2009: 109). But he forgets this when he describes judgements which contain the required plausibility as an expression of the essence of the Constitution: he insists that in *TAC* the Court '(enforced) the constitution'. This reconstructs the fallacy that there is a 'pure' interpretation of the Constitution which must be protected from or imposed upon the political authorities. But a political opinion presented in plausible legal argument is still an opinion. More than the invocation of an imaginary constitutional essence is required to explain why a bench of middle class legal professionals should care whether a homeless person is evicted or a mother living in poverty receives medication.

The reason lies not in the difference between the Court and government but in their commonalities. The Court has been able to hand down its

judgements not because it had manoeuvred around the differences between it and the government but because the differences are less important than they seem. The judges selected to sit on the Court in its foundational phase all shared with the government a vision of a South Africa which would be 'non-racial and non-sexist' and committed to egalitarian goals. Some, like Chaskalson, Yacoob and Albie Sachs, had identified with the ANC before 1994 – others, like Dikgang Moseneke, belonged to parties other than the ANC (in his case the Pan-Africanist Congress) but shared its broad vision. Still others, such as O'Regan, were human rights lawyers. None were government lackeys. But all shared a view of the world which rejected the racial domination of the past and it is this which shaped their jurisprudence.

What was afoot was not a strategic game played out between a 'correct' view of the Constitution and politics – it was a conversation between jurists and politicians who shared the same stated goals. Roux points out that, where attempts to enforce the Constitution challenged the shared political understanding of court and government or even where a ruling may have inconvenienced the government but without ostensibly changing power relations, the Court declined to find against it. One was a challenge to a law allowing members of parliament elected on a party list to cross the floor, the other a case brought by mercenaries who wanted the government to prevail on another government to treat them fairly (Roux 2009: 124ff). While Roux calls these cases retreats from principle, they could equally well be seen as examples of issues on which the Court and the government shared the same view (mercenaries) or on which the Court did not care to inconvenience the government because it did not feel strongly about an issue (floor crossing).

Roux's analysis is puzzling since, in an earlier article, he makes much the same argument as the one proposed here – albeit leavened by continuing recourse to his game theoretical argument: the Court, he argued there, is 'scripting a role for itself as legitimator of the social transformation project' (Roux 2003: 107). He acknowledged that: 'Few constitutional courts anywhere in the world are independent in the strict sense – composed of people with political views opposed to those of the governing political elite' (Roux 2003: 94). He implied that the Court, at the time he was writing, comprised judges who shared with those who governed a stated commitment to reversing racial domination. Their task was not to challenge 'the political branches', but to help them implement a common 'social transformation project'. There might be disagreements about means but not ends. And so the government would not ignore or defy rulings which were issued from within the paradigm

which it daily proclaimed.

Even when the Court appears to be challenging the government, Roux argued, it is seeking to assist it (as, earlier, he suggested *TAC* had done). He illustrates his argument with an intriguing analysis of a 1998 case, *Pretoria City Council v Walker*.[17] The context was an attempt by municipal governments to integrate former black townships into a non-racial municipality. Because adequate administrative systems did not exist in the townships, residents were required to pay a 'flat rate' for water and electricity – those in the formerly white suburbs were levied on consumption. The difference in administrative capacity and the fact that townships had experienced service fee boycotts, prompted some councils (including Pretoria) to collect fees from the suburbs but not the townships. The plaintiff, a (white) suburban resident, refused to pay service charges on the grounds that the different rules for township and suburb discriminated against him. The court rejected his argument. It declared that different treatment was not necessarily unfair and so neither was a flat rate for townships and a consumption charge for suburbs. But it did find that the plaintiff was discriminated against because the council extracted payment for the same service from some municipal residents and not others.

The latter ruling seemed to contradict the argument that court and government were on the same side. The under-development of black townships was a cornerstone of apartheid, the attempt to reverse it was central to the post-1994 project: by telling the government it could not collect fees from affluent white suburbanites unless it also collected them from apartheid's victims, it seemed to be behaving more like the courts Roosevelt confronted than a willing partner in the 'transformation project'. But Roux points out that the flat rate – which the Court upheld – was government policy. Selective enforcement was not. The Court was not changing policy, but ensuring that it was enforced. It was also, in this view, strengthening policy by preventing the council from implementing it irrationally (Roux 2003: 102). In effect, Roux argues, the Court was upholding the transformation project but insisting that fair procedures be used to enforce it. And it did this partly because it believed this would safeguard the project from political attack (Roux 2003: 108). Similarly, in a case which dealt with subsidies to private schools, the Court insisted on procedural fairness while not challenging the principle behind policy: 'Once again, the court is here scripting a role for itself as legitimator of the social transformation project – endorsing the political branches' power to redistribute resources along more equitable lines, but

indicating its preparedness to strike down poorly conceived policies that infringe on procedural rights' (Roux 2003: 107).

The only problem with this analysis is its assumption that the judges were playing a 'scripted' strategic game. Judges who broadly supported the government's goals but felt that it was at times pursuing them in a manner which was provoking needless resistance are not engaged in strategic manoeuvre – they are trying to help achieve a goal they share with the government. Their constant protestations that they were only trying to help it do what it needed to do may not have been a ploy at all –it may well have been an accurate expression of what the judges thought they were doing.

Of course, the government was unlikely to act against a court which shared its values even if its rulings caused some inconvenience. It and the Court agreed on much more than that on which they disagreed. Equally important, the disagreements between court and government might, as *TAC* shows, also run through the 'political branches' themselves. Like most large parties, the ANC is not a monolith and sharp disagreements on how to achieve its goals are common. As long as the Court never challenged the 'transformation project' itself – and it never did – its social and economic rights judgements would please some in government even if it antagonised others, providing further protection.

This warns against the naïve view that courts can alter the policy course of a government reluctant to address the social and economic needs of the poor. It shows that stated government sympathy for addressing domination is needed before courts can nudge governments towards egalitarian social policy. There must, at the very least, be a consensus within the elite that change is desirable. Roux is right that constitutional courts rarely stray from the prevailing elite consensus. Where this acknowledges the need to address poverty and inequality, courts are likely to be able to address the issue. But this does not mean the Court is redundant – if all it was doing was helping the political elite implement its plans, there would be no need for it (there are quicker and cheaper ways of doing this than establishing constitutional courts).

Rather, courts at their best can improve the prospect that social policy will adhere to the stated values and will be applied in a fair way which reduces the likelihood of resistance. The need for this is often acute where governments proclaim a commitment to addressing poverty and inequality, but are far less likely to actually do this effectively. The Court's role in this case is to help ensure that the government implements its stated goal.

Constitutional courts should, therefore, be judged on whether they assist implementation of an existing consensus, not their capacity to alter political realities. Catherine Albertyn points out that the 'transformation consensuses', in the courts, 'operates at a fairly high level of abstraction…' (Albertyn 2011: 595). This is equally true in the political arena – agreement on 'non-racism' and 'non-sexism' are surely only the start of conversations. The courts' most significant role in these contexts is to fill in the detail.

But does the Court further the 'transformation agenda' to which the elite claims to be committed? Albertyn observes that: 'Positive outcomes to cases are often difficult enough. Transformative outcomes, which … (open) up the possibility of substantial shifts in social and economic relations and alter the underlying norms and rules, are rare and difficult' (Albertyn 2011: 597). So the Court might seek to assist the quest for social policy which performs these functions but may not do so in practice.

Enabling agency? The Court and concrete social policy

There is an important irony in the debate among legal scholars on the Court's role – the view which wants it to become far more assertive is least likely to contribute to social policy which addresses inequality.

Advocates of a court which imposes outcomes insist that the Constitution gives it latitude which it has been unwilling to use:

> [T]he South African Constitution, in sharp contrast to the classical liberal documents, is social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self- conscious about its historical setting and transformative role and mission'. (Klare 1998)

It thus enables the Court to engage in 'transformative constitutionalism' to realise the Constitution's values, a potential it has, by implication, not realised (Klare 1998: 146). Albertyn is concerned that the Court has not developed a jurisprudence appropriate to 'the lived reality of poor women' and urges engagement with its notion of reasonableness which 'could be used to hold government to account for ensuring that its policies are appropriately "engendered", and that the needs of women and men are built into … policies' (Albertyn 2009: 609).

Scholars who demand a far more assertive legal assault on poverty and inequality are critical of what Brian Ray, following Danie Brand, describes as the 'proceduralisation' of social and economic rights in the Court's

rulings. (Ray 2011:107). This approach was spelled out by O'Regan in *Mazibuko*:

> A reasonableness challenge requires government to explain the choices it has made. To do so, it must provide the information it has considered and the process it has followed to determine its policy … If the process followed by government is flawed … appropriate relief may be sought.[18]

This is seen by the Court's critics as a retreat from substantive equality, for it leaves the final say to a government whose commitment to the poor they doubt.

But the insistence that the courts become more assertive on social policy is not necessarily 'transformative'. It may be no accident that it is common for scholars in this school to ignore the agency of the poor – nowhere does Albertyn's analysis mention anything the courts might do to empower poor women to shape their own futures or suggest that poor women can do this (despite a rich history of women's agency in the fight against apartheid). The stress is purely on what jurists can do for them.

This reliance on the enlightenment of an elite rather than the agency of the poor manifests in omission as well as commission. As Ray points out, proceduralisation has been accompanied by an equally important trend – 'the Court's emphasis on participatory democracy and the ability of procedural remedies to democratise the rights-enforcement process' (Ray 2011: 107). A trend in judgements instructs the government to engage with those who its policies affect rather than imposing solutions on them (Ray 2011, Wilson 2011, Solange 2011). It is reasonable to assume that this too is seen by critics as a retreat from the Court's core role – telling government what the minimum standards of social policy should be. Their position is subject to the same objections as Roux's notion of 'constitutional principle' – it suggests that the Court's job is to discern and then implement a core in the Constitution, a document which one legal scholar labels inherently 'social democratic' (Marius Pieterse cited in Solange 2011: 454). That constitutional meanings might be contested or that these decisions are political rather than technical is ignored.

Obvious democratic objections could be levelled at this position. Judges are not elected and not accountable to those who their rulings affect except in an extremely abstract way. It is unclear why legal training should enable anyone to say what amount of free water is an appropriate level for indigent people. While Roux is dismissive of what he calls the 'standard argument' that judges 'are neither mandated nor institutionally equipped to undertake

the complex economic and interest-balancing inquiries that inform the allocation of public resources' (Roux 2003: 92) he does not show the flaws in this view. Insisting that lawyers and judges should decide social policy denies the right of those who the policies affect to do this. Given this, 'proceduralisation' of social and economic rights cases is not a flight from constitutional principle but a recognition that policy should be made by elected representatives, if they follow democratic procedures. It is in procedure that lawyers are trained and it seems far more consistent with democratic principles that they hold governments to account for procedural fairness in social policy-making than that they make policy themselves.

A court which orders a public authority to engage with plaintiffs rather than deciding what the result of that engagement should be is doing far more to recognise the agency of the poor than one which sets an arbitrary 'minimum core' for social services – hence Ray's observation that the trend towards mandated engagement can democratise the enforcement of social and economic rights. Rosa Solange, citing Armatya Sen, recommends engagement as a key element of 'transformative constitutionalism' consistent with democratic values. She notes a distinction between two understandings of this term among legal commentators: the first explains transformation as the 'achievement of certain tangible results or outcomes'; the second 'refers to the radical change of the institutions and systems that produce results themselves' (Brand 2009 cited in Solange 2011: 456). The second approach, she argues, is more appropriate to Sen's stress on the need for policy to be formulated by democratic deliberation – and more consistent with the norms which underpin a democratic constitution: '…at the heart of South Africa's transformative Constitution lies a participatory democratic culture that is integral to the achievement of social justice and development for all' (Solange 2011: 450) and which is advanced by the engagement which the courts have mandated.

The American legal academic Cass Sunstein hailed *Grootboom* as 'a powerful rejoinder to those who have contended that socio-economic rights do not belong in a constitution'. He argued that it had, uniquely (he knew of no court elsewhere which had done this), found an answer to how courts could intervene on the side of the poor without removing the prerogatives of elected governments. The ruling was 'respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met'. It had thus answered the argument that social and economic rights litigation

undermines democracy – the judgement 'suggests that such rights can serve, not to pre-empt democratic deliberation, but to ensure democratic attention to important interests that might otherwise be neglected in ordinary debate' (Sunstein 2000/2001: 123).

His assumption that the court had broken new ground which would lead international thinking proved optimistic. But the principle which underlines his point – that social and economic rights jurisprudence is likely to sustain democratic social policy-making only if it seeks to enable rather than to override the agency of both elected governments and those who elect them – is more consistent with democratic principle than the quest for 'minimum core content'.

The Court itself – in the person of O'Regan in *Mazibuko* – recognises this: 'Social and economic rights empower citizens to demand of the state that it acts reasonably and progressively to ensure that all enjoy the basic necessities of life. … (They) enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights'.[19] Rights as a source of power are more likely to be realised by jurisprudence which empowers agency than by imposing a standard on those who need these rights.

Respecting citizen agency

What are the concrete effects of the Court's rulings? Do they show that dictating outcomes or insisting on democratic process is more likely to produce social policy which changes power relations?

Some of this analysis may be speculative – evidence does not allow us to say what effect, if any, the *TAC* judgement had on the government's decision, in 2003, to agree to a comprehensive treatment regime. But evidence does support an important conclusion – that court rulings on social policy have been most likely to contribute to change if they are a supplement to, not a substitute for, collective action by the dominated. The point can be illustrated by comparing the outcomes of *Grootboom* and *TAC*. The *TAC* case has had more impact. Besides the point made earlier – that *Grootboom* did not change the life of its eponymous plaintiff – almost a decade after the ruling, residents of the Johannesburg inner city were still fighting evictions (Wilson 2011). By contrast, the achievements of the campaign to secure treatment for people living with HIV and AIDS have been striking. Late in 2013, the Minister of Health reported that

> 2,1m people are on antiretroviral treatment (up from 923,000 in 2009), 3 540 HIV treatment sites have been established (up from 490 in 2009), and 23,000 nurses are able to initiate patients on treatment, compared to 250 four years ago. (Thom 2013)

How much of this is attributable to the case is questionable – that publicly-funded HIV and AIDS treatment is no longer controversial is a product of a complex combination of events and processes (Friedman 2010). But the *TAC* judgement was a supplement to intense campaigning which did not end after it was handed down. The combination has produced one of the great social policy advances of the democratic era.

It could be objected that *TAC* did order the government to take specific action while *Grootboom* did not (although this does not explain the subsequent gains which were not ordered by the court). So, to strengthen the case, it is useful to mention the successful campaign to prevent evictions in Johannesburg's inner cities (Wilson 2011). This was a protracted attempt to prevent the city's council from depriving occupants of what it labelled 'bad buildings' of their shelter and to compel it to recognise their housing needs. It is described and analysed by Stuart Wilson, one of the lawyers who represented residents. The campaign ultimately halted the evictions and forced the council to engage with residents.

Wilson argues that recourse to the law was a product of the tenants' weakness. 'No matter how effective a grassroots campaign of direct action or political protest would have been, it seems unlikely that the occupiers of "bad" buildings would have been able to resist their removal without engaging in litigation…'. The 'organisational resources' needed to sustain a successful campaign 'were simply not present' (Wilson 2011: 137/138). But there were 'grassroots organisations' in the inner city who attempted to link residents to legal assistance (Wilson 2011: 140). A period of legal trench warfare, in which evictions were contested in court apartment block by block, ensued. It culminated in the *Olivia Road* case,[20] in which the court handed down an interim order requiring the parties to

> engage with each other meaningfully and as soon as it is possible… in an effort to resolve the differences and difficulties aired in this application in light of the values of the Constitution…. (Cited in Wilson 2011: 148)

Within weeks, the parties reached a settlement which 'represented an almost comprehensive surrender on the City's part'. Its capitulation to almost all the occupiers' demands 'was spectacular and was caused by a palpable (and,

in my view, exaggerated) fear of public censure from the … Court, which had made clear during argument that its sympathy lay with the occupiers'. In early 2008, the court ruled that the state was under a general obligation to 'meaningfully engage' with persons it sought to evict 'individually and collectively' and to 'respond reasonably' to the views and concerns raised during that engagement. The judgement 'left little doubt that the only reasonable response to desperately poor persons who would be rendered homeless on eviction was to provide them with at least some alternative accommodation' (Wilson 2011: 148).

Thus, while the residents' organisation was weak, they were organised enough to sustain the campaign against evictions, with the help of lawyers, for a protracted period. The ruling mandating engagement is also credited with ending the evictions and enabling residents to exert some influence on their future. This suggests that, even where organisation is weak, the court's stress on engagement can give voice to those over whom unaccountable power is wielded. The Court followed by mandating engagement in two other cases: In *Mamba v Minister of Social Development*,[21] '(it) ordered the Gauteng government … to engage with representatives of internally displaced refugees of … anti-immigrant violence … over the timing and procedures for closing the refugee camp' (Ray 2011: 111); and in the Joe Slovo case,[22] where again a 'mass eviction' was averted. A report by a non-governmental organisation on *Joe Slovo* observed:

> It was only after the Court ordered engagement over the details of the eviction process itself – including devising a detailed agenda of issues for that engagement and specifically requiring reservation of a set percentage of new homes for community residents – that the government finally took seriously the possibility of in situ upgrade that was a key demand of the residents. (Cited in Ray 2011: 113)

Far from falling short of an abstracted and essentialist standard of what the Constitution 'really means', these judgements provide the model for a social policy built not on the beneficence of legal minds but on a more enduring element – the collective action of citizens whose democratic rights enable them to contest attempts to relegate them to the margins. Court orders cannot replace citizen organisation – but where (even weak) organisation exists, rulings can assisted those who use collective action to build social policy more attuned to the needs of the dominated if rulings empower citizens by mandating engagement and compelling power holders to accurately inform the powerless (a key feature of the reasonableness

criteria).

The injunction to engage is not a guarantor of inclusive social policy-making. The president of Abahlali baseMjondolo, Sbu Zikode, has observed:

> Engagement is usually a window-dressing exercise to show that government is listening to us but with no real results for the poor…. your opinion will not be heard and you do not have access to jobs or services. (Tolsi 2012)

So the balance of power is not simply redressed by an injunction to talk. Ray argues, therefore, that the Court should take a more assertive stance – but to shape engagement rather than to determine outcomes:

> Government must commit to developing a robust infrastructure for engagement and to institutionalise engagement policies and procedures … the Court itself must be willing to at times … make substantive determinations of what these rights require as well as to prevent government from proceeding with policies where engagement was clearly inadequate. Civil society can assist … through sustained pressure on government and by bringing cases … to call attention to government's lack of sufficient institutionalisation. (Ray 2011:125-6)

This suggests that effective social policy can best be protected by insisting on a 'minimum core' – of engagement, not substantive outcomes. This is unlikely to substitute for severe power imbalances but it can act as a catalyst for collective action to achieve and maintain social policy gains.

The South African experience suggests, therefore, that courts can contribute to a more expansive social policy regime capable of addressing not only poverty and inequality, but the relations of domination of which they are a symptom. But it suggests too that this role is modest. It is most likely to be effective if it supports collective action and organisation where that exists and seeks, through mandated engagement, to stimulate it where it is absent or weak.

Notes

1. *Constitution of the RSA* Chapter Two Bill of Rights. Emphasis added.
2. *Soobramoney v Minister of Health* (KwaZulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (November 27, 1997).
3. *Government of the Republic of South Africa v. Grootboom 2000*(11) BCLR 1169 (CC).
4. *Minister of Health v Treatment Action Campaign* (No. 2) 2002 (5) SA 721 (CC).

5. *Mazibuko v City of Johannesburg* (2010) (Centre on Housing Rights and Evictions as amicus curiae) 4 SA1 (CC)
6. *Abahlali baseMjondolo Movement SA and another v Premier of the Province of KwaZulu-Natal and Others* (CCT12/09) [2009] ZACC 31; 2010 (2) BCLR 99 (CC) (October14, 2009).
7. *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* (CCT 135/12) [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) (October 3, 2013).
8. *Be v Magistrate*, Khayelitsha 2005 1 SA 580 (CC).
9. *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC).
10. *Grootboom* para 32.
11. *Mazibuko* para 64.
12. *TAC* para 38.
13. *Mazibuko* para 65.
14. *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) para 26.
15. *Mazibuko* para 64.
16. *Mazibuko* para 67.
17. *Pretoria City Council v Walker* 1998 (2) SA363 (CC).
18. *Mazibuko* para 71.
19. *Mazibuko* para 58.
20. *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC) ; 2008 (5) BCLR 475 (CC) (February 19, 2008).
21. CCT 65/08, Court Order dated August 21, 2008.
22. *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (CCT 22/08) [2009] ZACC 16; 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC) (June 10, 2009).

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