

Constitutional Court

achieving its transformative potential

The South African Constitution has awarded some important rights for the homeless and poor. **Geoff Budlender** looks at some of these judgements and reflects on why they have or have not been effective.

The South African Constitution is unusual in two respects. The first unusual aspect is this. Most constitutions reflect political and social changes which have already taken place, and incorporate them as part of the charter of the new or changed state. In South Africa, too, the Constitution reflects changes which have taken place, but it also reflects and constitutionalises changes which are yet to take place. In other words, it is a charter or a blue-print for a social transformation which is yet to happen. In this sense, it is a transformative Constitution.

The second unusual aspect is that the Constitution contains broad social and economic rights dealing with access to housing, health, food, water and social security which can be directly interpreted and enforced by the courts.

These two aspects of the Constitution are connected. At the time when the Constitution was adopted, many progressives had real concerns about the possible unintended consequences of a bill of rights which would bind government. The concern was that a bill of rights would entrench existing rights, and therefore entrench existing inequality.

There was also a concern that a bill of rights would obstruct government action aimed at social transformation, by limiting the regulatory powers of government. In some other countries, the entrenchment of property rights in particular has limited the regulatory powers of government. As Michael McNeil, a Canadian academic, pointed out more than 20 years ago, "There is an internal tension between the rights to property, and the rights of individuals to a fair share of the resources which guarantee the necessities of life."

The South African Constitution-makers attempted to deal with this in two ways.

First, the property rights in the Constitution were stated in a

limited form. The Constitution prohibits the arbitrary deprivation of property. In other words, deprivation is permitted if it is not arbitrary. In addition, the Constitution permits expropriation for public purposes or in the public interest, which includes land reform and providing equitable access to natural resources. If property is expropriated, compensation must be "just and equitable". The market value of the property is only one of the factors to be taken into account in determining what is just and equitable. The public interest and the history of the acquisition and use of the property also have to be taken into account.

The other way in which the Constitution dealt with the need for the social transformation was through creating positive rights to social benefits such as housing, health care services and so on, in order to balance the entrenchment of existing rights. In other words, the Constitution did not only entrench existing rights. It also created and entrenched rights to be held by those who are poor or marginalised.

PERFORMANCE OF CONSTITUTIONAL COURT

It is now 11 years since the new Constitution was introduced. It is a good time to stand back and assess whether the goals of the Constitution-makers have been



achieved. The judgments of the Constitutional Court, and what followed on from them, provide some useful indicators.

One has to start by recognising that 11 years after we adopted the 1996 Constitution, we still face the grim reality that vast numbers of people live in grinding poverty; that inequality has actually increased; that the housing backlog has increased; that we have unemployment running at about 30%, depending on what method of calculation is used; and that millions of school children still have no real prospect of receiving a decent education. These realities mock our commitment to transformation.

Clearly, the Constitution and the social and economic rights have not solved the problem. However, it was unrealistic to expect that a Constitution would by itself remove the deep seated poverty and inequality which are the legacy of colonialism and apartheid. The real question is whether the Constitution (and the Constitutional Court) have assisted us in dealing with these problems or whether, as some feared, they have actually entrenched the

difficulties. That is the question which I now address.

Michael McNeil's analysis of the tension between the rights to property and the rights of individuals to a fair share of resources which guarantee the necessity of life, was vividly illustrated in the *Kyalami* case in the Constitutional Court.

The *Kyalami* case concerned a number of people who were living in Alexandra on the edges of the Jukskei River. Their homes were washed away by floods. The government tried to provide them with temporary accommodation to be erected on state-owned land next to the Leeuwkop Prison. The neighbours objected. They said that the creation of a settlement of this kind on the land would have a negative effect on the value of their property. This was a clear illustration of the tension to which McNeil refers. The neighbours obtained an interdict from the High Court. The case then went on appeal to the Constitutional Court.

The appeal concluded that, "The fact that property values may be affected by low-cost housing development on neighbouring land is a factor that is relevant to the

housing policies of the Government and to the way in which Government discharges its duty to provide everyone with access to housing. But it is only a factor and cannot in the circumstances of the present case stand in the way of the constitutional obligation that Government has to address the needs of homeless people, and its decision to use its own property for that purpose."

In other words, the Constitutional Court carried out precisely the balancing exercise which was created by the Constitution, and came down in favour of the needs of homeless people.

This was not a surprising decision in the light of the earlier decision of the Constitutional Court in the *Grootboom* case. That case concerned the duty of the government, in terms of section 26(3) of the Constitution, to "take reasonable legislative and other measures, within its available resources" to achieve the progressive realisation of the right of access to adequate housing. The *Grootboom* case also concerned a group of homeless people. The

government argued that it had carried out its obligation to take “reasonable” measures to provide access to housing, by instituting an extremely large state housing programme – possibly the largest of its kind in the world.

The Court found, however, that although the programme was impressive, it was not “reasonable”. This was so because the programme did not give any priority or immediate relief to people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations. It provided housing for those on the long-term waiting-list, but no short-term solution for those who were in a crisis and needed immediate relief. The Court said that for a programme to be reasonable, “those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.” In other words, those who are most at risk must be given some urgent priority.

These cases illustrate the point that the Court has generally adopted a pro-poor approach. The social and economic rights are the driving force for that approach. The results of that approach are seen particularly in cases dealing with housing, social welfare and access to health services.

RIGHTS, BUT POVERTY PERSISTS

Why then, do we see persistent homelessness and hunger, where the Constitution contains such generous rights? The answer, I believe, is to be found not in the judgment of the courts, but in the way in which civil society has used or failed to use the Constitution and the judgments of the courts.

The Grootboom case was decided in 2000. In that case, the Court decided that the government’s housing policy did not meet the requirements of the Constitution, because it did not make provision for urgent relief for people in desperate circumstances. The judgment has had a real impact in restraining and limiting evictions in urban areas. The Grootboom community did receive some real benefit in the form of secure land, shelter, and basic services. However, it has to be said that the government has still not put in place an adequate emergency programme for dealing with the needs of people who are about to be evicted, or who are living in intolerable circumstances. Six years later, the judgment has not had its full effect.

Grootboom can be contrasted with the Treatment Action Campaign case. In that case, the Constitutional Court ordered the government to implement a national programme for the provision of medicine to pregnant women and their infants, to prevent transmission of HIV from mother to child at the time of birth. A national programme has been implemented. While it is far from perfect, it is very large in its scope, and it has saved the lives of literally thousands of babies. The government has gone further than the judgment required, and has now instituted a national treatment programme for people living with HIV/AIDS. In other words, government conduct has gone beyond what the Court ordered.

How are we to explain this difference? The key explanation, I believe, is the different responses from civil society.

Civil society organisations have failed to make use of the

Grootboom judgment to press the government to do what is necessary, through mobilising homeless people or through any other forms of social mobilisation. Government has not been placed under any pressure to carry out its obligations under the judgment. The result has been belated and inadequate compliance with the government’s constitutional obligations as they were explained by the Court.

By contrast, the TAC judgment was followed by a large scale social mobilisation which involved trade unions, church groups, media, and other civil society groups. There was already a social movement in place at the time when the judgment was given. The judgment strengthened that social movement, which grew in its efforts. This has promoted significant compliance by government with its constitutional duties.

The lesson to be drawn from this is that neither the Constitution nor judgments of the Constitutional Court, standing alone, can achieve transformation. However, they are potentially powerful weapons in the fight for social transformation. Whether they will achieve their potential depends on the willingness and ability of civil society groups to mobilise and to use them in a skilful, strategic and sustained manner. If that is not done, the Constitution will not fully achieve its transformative purpose. LE

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