

Social Rights Litigation as Transformation: South African Perspectives

Siri Gloppen

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Introduction

The paper analyses the role of litigation as a strategy to fulfil the social rights laid down in the South African constitution. Critically examining litigation as a means to bring the constitutional provisions to life, it explores how different aspects of the social, political and legal context condition the litigation process. Focus is on the social rights cases that the South African Constitutional Court has decided over the past decade. Comparative perspectives set the South Africa experience in relief, and inform the theoretical framework structuring the analysis.¹ By systematically examining the South African experience, the aim is to shed light on what has been achieved through social rights litigation; what has facilitated these achievements; and future prospects for social rights litigation in South Africa. Furthermore, it aims to extract some general insights into the potential and limits of litigation as a strategy for advancing social rights.

What are socio-economic rights?

I use the terms *socio-economic rights* and *social rights* interchangeably to refer to rights which correspond to a particular set of international human rights norms, most centrally reflected in the UN Convention on Economic, Social and Cultural Rights (CESCR).² The South African Constitution echo these norms when it recognises rights to housing, health care, food, water, social security and education, with special protection of these rights for children (in Sections 25-31)³. Hence, I see these provisions as constitutionalized human rights norms. As such they have a dual legal and normative validity. Their validity as positive law stems from their genesis – being the outcome of a legitimate procedure, in this case a democratic constitution-making process.⁴ They can also claim validity as international human rights norms, legally binding on states that are party to the relevant treaties, in this case principally the CESCR (which South Africa has signed but not ratified). Furthermore, these rights form part of the value system that UN member states commit to upon joining the organisation, and should be regarded as international common law, binding on all states.

Social rights litigation is here understood as litigation aiming at giving effect to these international human rights norms. I will not consider what may be termed “contractual socio-economic rights”, such as property rights.

¹ A modified version of this paper will be published as a chapter in Peris Jones and Kristian Stokke (eds.) *Democratising Development: The Politics of Socio-Economic Rights in South Africa*, The Hague, Martinus Nijhoff (forthcoming 2005). The framework was presented to the workshop on “Human Rights, Democracy and Social Transformation: When do Rights Work?” (University of the Witwatersrand, November 2003) and the seminar on “Making Socio-Economic Rights Justiciable: the South African Experience” (Centre for Human Rights, Oslo, October 2003). I am grateful to the participants, and to colleagues in the CMI Courts in Transition programme and research network, for valuable contributions.

² International Covenant on Economic, Social and Cultural Rights (CESCR), United Nation’s General Assembly resolution 2200A (XXI), adopted 16 December 1966. (<http://www.unhchr.ch/html/menu3/b/a_cescr.htm>)

³ Constitution of the Republic of South Africa Act 108 of 1996. (Hereafter “the constitution”) (<http://www.concourt.gov.za/constitution/index.html>). On the relationship between the South African constitutional rights and international human rights norms see John Dugard, *The role of human rights treaty standards in domestic law: the Southern African experience.* In P. Alston & J. Crawford (eds): *The future of UN human rights treaty monitoring.* (Cambridge University Press, 2000).

⁴ See H.L.A. Hart, *The Concept of Law.* (Oxford, Clarendon Press, 1961) on legal validity and rules of recognition.

By litigation alone?

Is litigation worthwhile as a strategy to fulfil social rights? Traditionally, social rights have been regarded as a matter to be mobilised around and fought for on the political arena, through parties and interest groups, elections and demonstrations, and to be implemented by means of social policy. When included in the constitution, they have been regarded as (utopian) directive principles for state policy, reflecting political aspirations, not justiciable rights to be administered by the courts.

There are arguments to support this view. Leaving issues of socioeconomic rights to judges are held to undermine the political process as its very core, running a stick into the wheel of democracy, obstructing its proper functioning.⁵ Questions regarding fairness in the distribution of scarce resources, and the adequacy of particular social policies, are at the heart of politics. To move these essentially political questions into the courtroom is considered unacceptable on normative grounds, as well as imprudent. Judges are not particularly well equipped to deal with issues involving economic and social policies, where the room for rational disagreement is wide.⁶ Blurring the line between the legal domain and the domain of politics might also do a disservice to the rule of law and undermine the courts' authority particularly in contexts where realisation of these rights for all is a utopian goal.

Sociologists of law argue that litigation is ill-suited as a strategy to advance social rights since the legal system tends to favour vested interests.⁷ Judges almost invariably belong to the social elite, and are rarely responsive to the concerns of marginalised groups. And the law itself reflects the prevailing power-relations. Hence, courts are unlikely to work in favour of the disadvantaged whose social rights are most at risk. To spend energy and resources on litigation rather than political mobilisation is prone to be fruitless, even counterproductive, as it serves to unduly legitimise the law in the eyes of the poor and hamper prospects of social transformation.

These are strong arguments. Against this backdrop, it is reasonable to discard litigation as a suitable strategy in the fight for social rights. Yet, those who have followed South African legal politics over the past decade may hold a different view. On some crucial social rights issues, where the political system has failed dismally to respond to mobilisation through political channels – legal mobilisation has achieved significant results. This is most striking with regard to the constitutional challenges brought against the governments' HIV/aids policy.⁸ And in the *Grootboom* case, when a poor community forcibly removed off public

⁵ The metaphor is borrowed from Jens Arup Seip, *Fra embetsmannsstat til ettpartistat* (Oslo: Universitetsforlaget, 1974). See also Siri Gloppen South African Constitutionalism 1994-2000: The difficult balancing act of the Constitutional Court (Doctoral Thesis, University of Bergen 2001) and Teunis Roux "Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court" in Siri Gloppen et al (eds) *Democratization and the Judiciary* (London: Frank Cass, 2004).

⁶ See Lon L. Fuller, "The Forms and Limits of Adjudication" 92 *Harvard Law Review*, 1978, s. 353, 394.

⁷ From the 1920s legal realists argued that, contrary to legal formalist beliefs judges do not primarily decide cases on the basis of legal rules or principles. What is decisive is how the facts of the case strike the judge and what on this basis seems just or adequate. (Brian Leiter, "Legal Realism." in Dennis Patterson (ed) *A Companion to Philosophy of Law and Legal Theory*, Oxford: Blackwell 1996: 261-279) Later studies have documented the importance of class, race and gender as determinants of legal practices (M.P. Baumgartner, "The sociology of law" in Patterson (ibid): 406-420).

⁸ Constitutional Court of South Africa, *Minister of Health and Others v. Treatment Action Campaign and Others* (No. 2) CCT 9/02, (18 april 2002). 2002 (5) SA 721 (CC). All the Constitutional Court judgments can be found at <http://www.concourt.gov.za/>. Reviews of all the cases discussed here can be found on the Community Law Centre website <http://communitylawcentre.org.za/ser/casereviews.php>.

land turned to the courts for relief, the South African courts demonstrated their willingness to take seriously the social rights of poor and vulnerable groups.⁹

South African social rights jurisprudence does not stand out as a counter-majoritarian ‘stick’. On the contrary, the courts seem to have removed obstructions to democracy’s functioning, without usurping the political domain, and can be regarded as performing their fundamental democratic duty of ‘unblocking the channels of democracy’.¹⁰

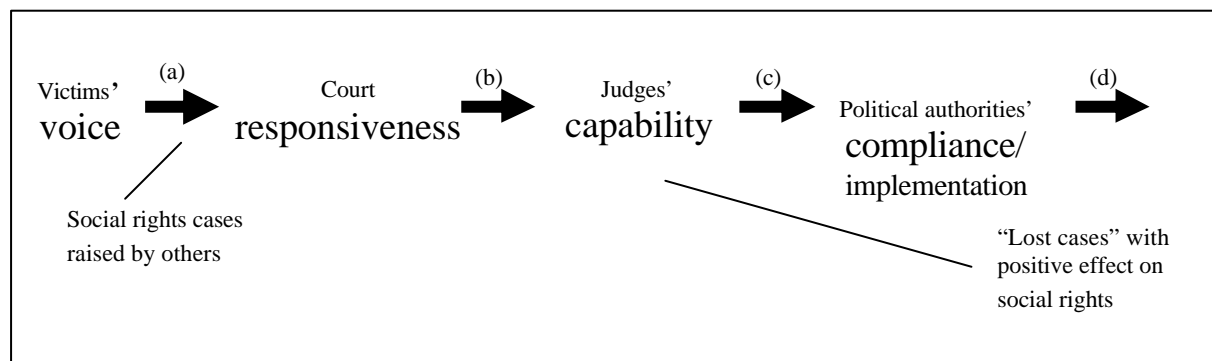
These landmark and well publicised cases of successful legal mobilisation on social rights issues have focused considerable attention on social rights litigation. The South African experience has raised hopes, domestically and abroad, regarding what litigation can achieve. It is thus appropriate to ask whether this optimism is justified. What are the potential and limitations of social rights litigation? Can the achievements be replicated – at other times and places – or did they depend on a particular set of social, legal and political circumstances?

To address these questions I first ‘dissect’ the litigation process and discuss factors interacting to determine whether social rights litigation succeeds or fails. The framework is subsequently used to analyse the South African experiences: To what extent are these factors present? What was their impact? A better understanding of factors that were decisive in the past may indicate likely future developments, and aid processes of judicial reform.

The anatomy of social rights litigation

To understand what enables social rights litigation, it is useful to break the process down into stages, as illustrated in figure 1.

Figure 1: The anatomy of the litigation process



(a) social rights cases brought to court; (b) cases accepted by the courts; (c) judgements giving effect to social rights; (d) impact on provision for social rights

The success or failure of social rights litigation depend on (a) the ability of groups whose rights are violated to articulate their claims and *voice* them into the legal system – or have the rights claimed on their behalf; (b) the *responsiveness* of the courts at various levels towards

⁹ Constitutional Court of South Africa, *Government of the Republic of South Africa and Others v. Grootboom and others*. CCT11/00, 2001(1) SA 46.

¹⁰ John Hart Ely *Democracy and distrust : A theory of judicial review*. (Cambridge: Harvard University Press 1980).

the social claims that are voiced; (c) the *capability* of the judges – that is, their ability to find adequate means to give legal effect to social rights; and (d) whether the social rights judgments that are handed down have authority in the sense that they are accepted, *complied* with and implemented through legislation and policy.

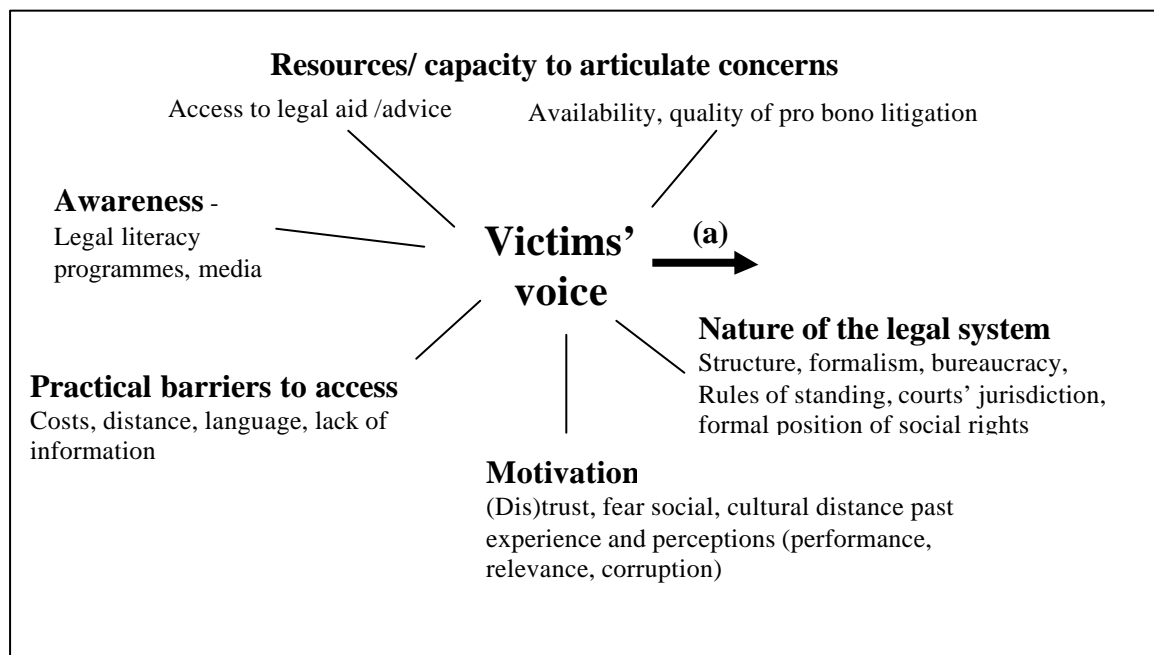
Here focus is on “successful litigation”, cases that result in a judgement giving legal effect to the litigants’ rights-claims. But even if the case is not decided in favour of the claimants, litigation may have a positive impact. Authorities threatened with court action may settle out of court, and when courts provide a platform for voicing social rights concerns, this may generate or intensify popular debate and create a political momentum. This indirect, political effect is represented in the figure by the downwards-sloping arrow.

As indicated in figure 1, “victims’ voice”, “court responsiveness”, “judges’ capability” and the “judgment’s authority”, represent different stages or junctions in the litigation process. The outcome at each stage is in turn the result of interaction between different factors.

(1) Voice

The first stage of the litigation process is the articulation of rights claims by, or on behalf of victims of social rights violations, and the voicing of the claims into the legal system. Figure 2 indicates factors influencing whether, and how forcefully, social rights claims are voiced.

Figure 2: Factors affecting litigants' voice



(a) social rights cases brought

To be able to voice social rights claims, victims must be (made) aware of their rights, the right-violation and the possibility for redress through the courts. People whose social rights are most at risk often lack such knowledge. Legal literacy programmes, human rights education, and media focus on social rights are essential in providing this.

Those whose social rights are violated must also have (access to) resources enabling them to effectively articulate their rights-claims – and to do so in a form that the legal system

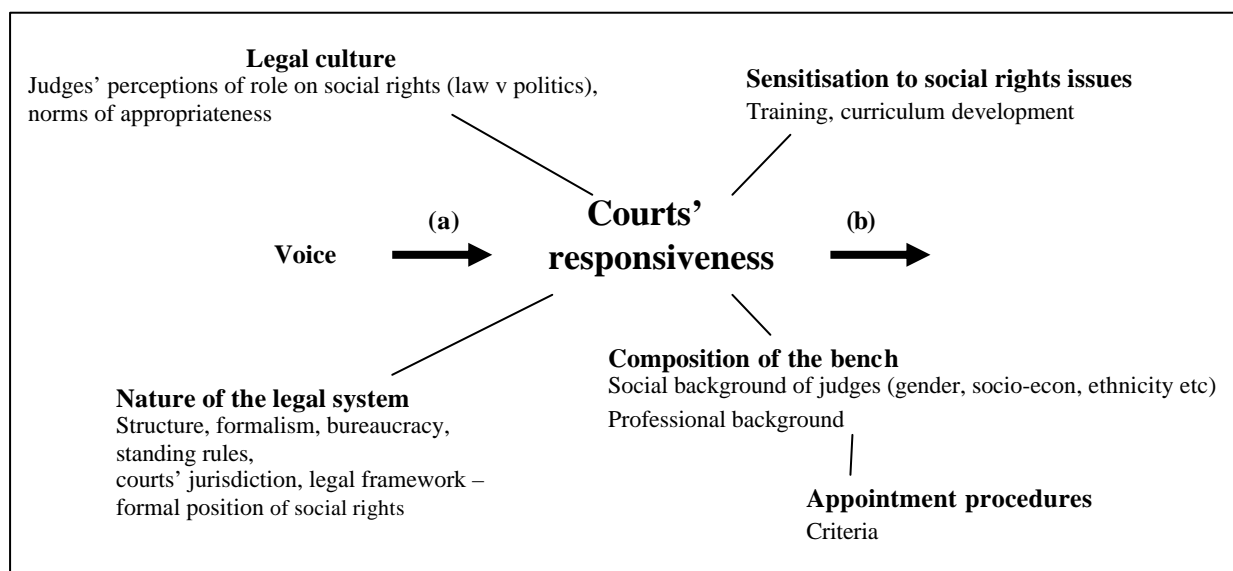
recognises. Social rights cases often raise complex legal issues, with few possibilities for lay people to effectively argue their own case. Access to legal expertise, through legal aid or organisations providing free legal assistance, is thus crucial.

Multiple barriers hamper access to the justice system for poor and marginalised groups. Some are motivational and psychological, such as fear and distrust of the courts due to cultural and social distance, or negative past experience. Litigation may also be discouraged by perceptions of poor performance, delays, corruption, bias – or a belief that court decisions are irrelevant. Other barriers are practical, such as the costs of litigating, geographical distance, language barriers, lack of information. Yet other barriers are legal and are related to the structure and nature of the legal system. The status of social rights in legislation and jurisprudence may motivate – or discourage -- the voicing of social right claims. So does the degree of formalism and bureaucracy involved. Most systems require detailed formal procedures to be undertaken before starting a case, and time consuming and costly appeal proceedings to reach the higher courts. The criteria for *locus standi* (who can take a case to court) vary. Particularly important for poor groups is whether an organisation or individual can litigate on behalf of others, and whether cases can be argued on behalf of a group or category of people (class action), or only individual cases are accepted.

(2) Responsiveness

For social rights litigation to succeed, the legal system must also be responsive to the claims that are voiced. They must be recognised as a legitimate matter for the court to decide. As figure 3 indicates, responsiveness is in part a function of “voice” – the manner, in which the claims are articulated, the legal strategies employed by the litigants and the skill with which the case is framed. But the responsiveness of the legal system to social rights claims also depends on other factors.

Figure 3: Factors conditioning courts’ responsiveness



(a) social rights cases brought **(b)** cases accepted

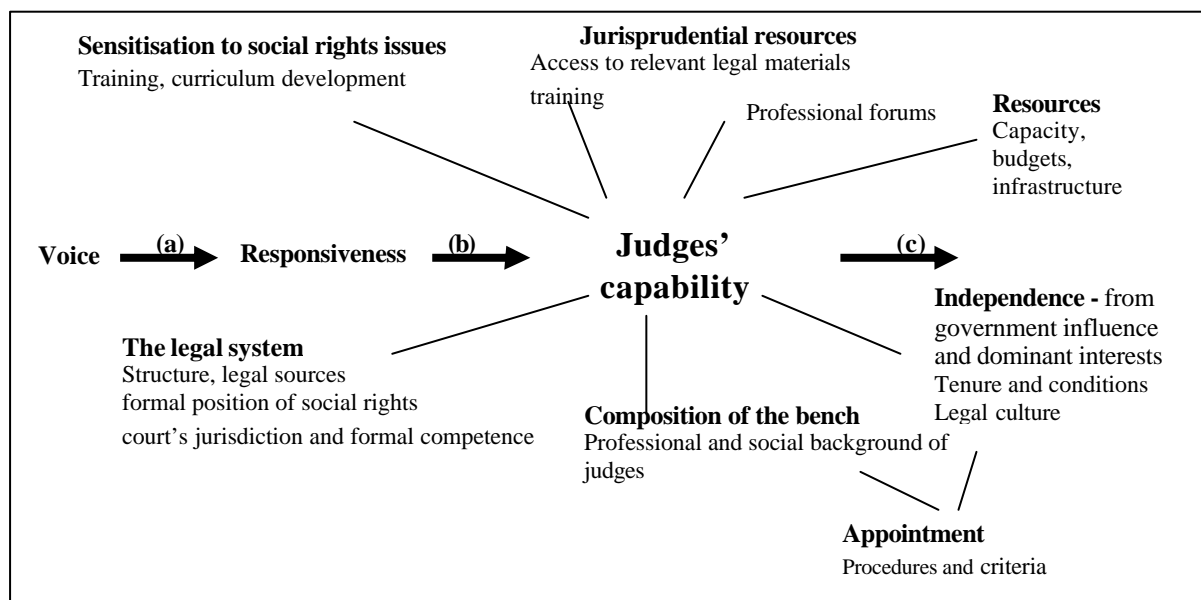
Again, the nature of the legal system is crucial, in particular the legal basis for social rights (including the status of international social rights conventions). And, where social rights are

formally recognized, are they justiciable rights or ‘directive principles’ outside the scope of the courts’ jurisdiction? The courts’ responsiveness also depends on the legal culture and prevailing theories of interpretation. These influences to what extent social rights are regarded within the proper domain of the courts and the judges’ perception of their own role – their norms of appropriateness concerning how they should deal with social rights. Judges’ sensitivity - individually and collectively - to the concerns voiced, also matter. This is in turn related to social and ideological background, as well as to education and whether they are sensitised towards social rights through ongoing training.

(3) Capability

The third stage of the litigation process regards the judges’ capability. That judges are willing to respond to social rights claims is not enough, they must also be able to find adequate legal remedies to repair the violation. This requires professional competence, access to relevant knowledge and command of the necessary legal remedies. The range of options include "minimal affirmation", merely requiring the state to *respect* a social right in the negative sense of non-interference; courts may rule that the state has a duty to *protect* social rights against encroachment by others; order the state to actively *promote* particular social rights by developing policies to this effect; or they can make concrete orders for state agencies to *fulfil* the individual claimants’ social rights. Furthermore, court orders may be *declaratory* (stating that laws or actions are in breach of a social rights obligation, but leaving to the state to device a remedy); *mandatory* (requiring specific actions to be taken) or *supervisory* (requiring the relevant agency to report back within a set time-frame).¹¹ As indicated in figure 4, court performance depends on the skill and capacity of the judges, and of the jurisprudential resources at their disposal.

Figure 4: Factors affecting judges'capability



(a) social rights cases brought; (b) cases accepted; (c) social rights judgements

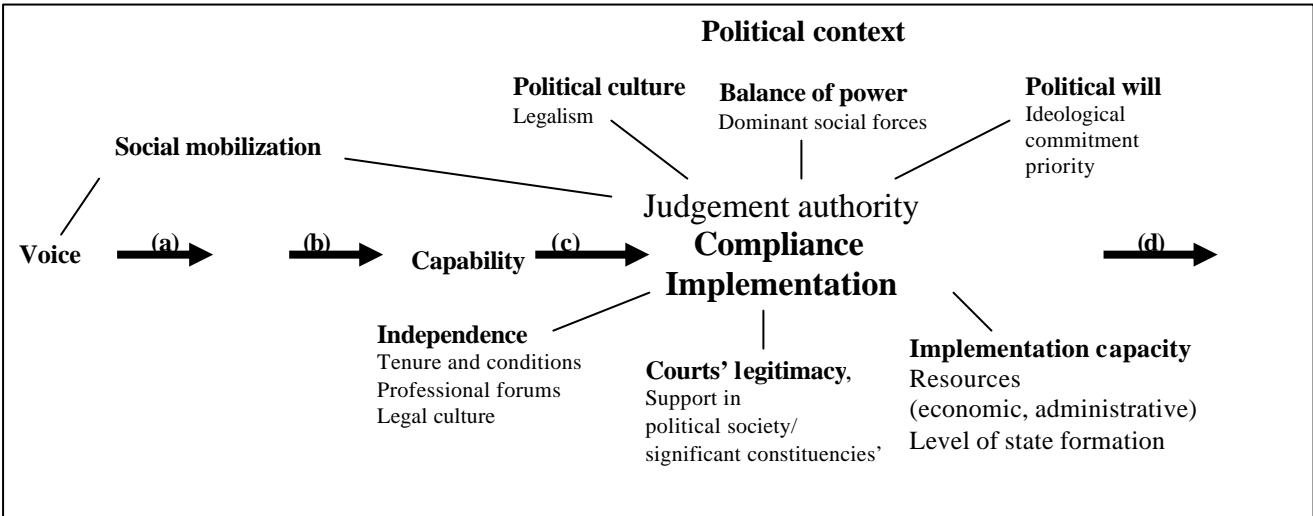
¹¹ See Roux (2004). See also Charles Epp, *The Rights Revolution* (Chicago: The University of Chicago Press,1998) and Herbert Jacob et al (eds) *Courts, Law, and Politics in Comparative Perspective* (New haven: Yale University Press, 1996).

To develop sophisticated social rights jurisprudence, requires highly skilled judges, research capacity and access to a range of legal materials. Professional forums to exchange ideas and knowledge may contribute positively, and strengthen judges’ professionalism and independence. In addition to the professional, jurisprudential resources, courts’ capability and capacity to deliver social rights judgments depend on their independence from the state and dominant social interests, and on the financial resources at their disposal.

(4) Compliance

The fourth stage is compliance. For litigation to succeed in improving the actual social rights situation, the judgments must be complied with by the relevant authorities and political action taken to implement the ruling. Compliance is again the outcome of a range of factors, as shown in figure 5.

Figure 5: Factors affecting compliance with social rights judgments



(a) social rights cases brought; (b) cases accepted; (c) social rights judgements; (d) effects on social rights provision

The authority of the judgement itself is important. This stems partly from the courts’ professionalism, independence and legitimacy. Several aspects of the political contexts are crucial for compliance with social rights judgments: the prevailing political culture; the balance of power between the parties, and, perhaps most important, the political will to follow up and give priority to social rights issues. Lastly, implementation of court rulings also depends on the state’s capacity – financial, institutional and administrative.

Ultimately, the proof of success is of course whether the situation changes for people on the ground with regard to the relevant right. This is not included in this framework, since it is notoriously difficult to establish a causal link between particular legal actions and the overall social development in a field. The situation with regard to a particular social right (say, housing) – is influenced by a wide range of factors (climate changes, violence and unrest, economic depression, unemployment etc.). To determine the effect of a particular ruling is thus difficult, beyond monitoring direct compliance and trace ‘ripple effects’ in law, policies and implementation.

Conditions for social rights litigation in South Africa

Turning to the analysis of social rights litigation in South Africa, I use the framework outlined above to guide the discussion. I start by examining factors influencing whether and how social rights claims are voiced; go on to discuss the courts' responsiveness to such claims; and the judges' capability to give legal effect to social rights; and finally, the factors influencing compliance and implementation of social rights judgements.

Voicing social rights claims

I start by examining formal, practical and motivational barriers that hamper the voicing of social rights claims into the South African legal system, then I go on to look at the resources available to potential litigants, before reflecting on how these factors have influenced (potential) litigants' voice.

The structure and nature of the legal system changed quite extensively with the democratic dispensation. South Africa became a constitutional state, and the 1996 Constitution formally recognizes social rights as substantive law, with status as justiciable rights. Effort has been taken to simplify the wording of the constitution – and to some extent legislation – to make it more accessible to ordinary people. Access has also been significantly improved by more lenient criteria for standing. Legal aid institutions can now litigate on behalf of a person – or group – whose social rights are violated, and there are possibilities for direct application to the Constitutional Court and direct access from the court of first instance, although strictly applied.

While access has been made easier, it is not as open as in some other countries, most notably India, where a newspaper-clipping or a letter to the Supreme Court may suffice to start proceedings¹² In the lawyer-driven South African system, judges can not take up a case on their own initiative only pronounce on cases placed before them. They can, however, decide which cases not to hear.¹³ They can also allow or invite particular *amicus curiae* or friends of the court to address the case, thus influencing the arguments heard. In some landmark cases – most notably in the *Grootboom* case - the judgment relied heavily on submissions from *amicus* rather than that the parties' arguments.¹⁴

As a whole, the South African legal system is quite favourable to social rights litigation. Yet, the system remains quite bureaucratic and formalistic compared to the low threshold of the Indian Supreme Court, and cases are often dismissed on technical grounds.

The nature of the legal system, and experience with, and perceptions of the courts affect people's motivation to use them as an arena in which to voice their claims. South Africans' attitude towards the courts and the law is marked by ambivalence. The courts still carry the legacy from the apartheid era when they were part of the white state apparatus enforcing unjust laws – but even then, the picture was nuanced. Human rights oriented judges stretched the law to attain justice and preserve political space, and the courts retained a modicum of legitimacy. Transformation has brought a less pale and male judiciary, but sitting judges

¹² Ajay Verma "The experience in India" p 149 in Roger Blanpain (ed) *Law in Motion* (The Hague: Kluwer Law International, 1997). See also Maja K Brix "The Impact of Judicial Activism in India" (MA thesis, Bergen: Faculty of Law, June 2004).

¹³ But with a light case load, the SA Constitutional Court has limited opportunities to choose the cases they want to decide.

¹⁴ In this case the Legal Resources Centre (Geoff Budlender) see (CCT 2000 (11/00): para 19).

retained their jobs and “hold-over” judges remain on the bench (some occasionally hand down judgments sparking outrage and allegations of racism). The changes in the legal system at the time of the transition – including the new constitutional court created to guard the new constitution – changed perceptions and expectations, not least in the domain of social rights. In the landmark judgment to certify the 1996 constitution, the Constitutional Court affirmed its commitment to social rights as rights to be enforced by the courts.¹⁵

But also the new, transformed judiciary has faced popular dis may. Controversial judgements by the Constitutional Court – abolishing capital punishment, enforcing stricter rights of accused and convicted persons, denouncing discrimination of gays and lesbians – has brought criticism. The Court is considered “soft on crime” and too liberal minded, eroding traditional norms and values.¹⁶ Some fear that efforts to transform the judiciary compromises professional quality. Problems with backlogs, delays, poor performance and perceived bias, particularly in the lower courts, add to the disenchantment. – But there are also strong traditions of legalism in South African society, of trusting a judge to hear your case. Ambivalence thus continues to characterise South African’s attitude towards the ir courts. This includes social rights cases, as we shall see - but first, a comment on the practical barriers hampering social rights litigation in South Africa.

Costs of lawyers and court fees, transport, income loss; language barriers, and lack of information and knowledge are substantial problems, particularly for the poorest sections of society and people living in the deep rural areas. These problems are shared by poor people virtually everywhere, but in contrast to many other countries, South Africans have significant resources to aid disadvantaged litigants. There are public and private programmes to increase rights awareness, and considerable capacity to assist litigation processes. The public legal aid system (which is limited and problem-ridden), is supplemented by legal NGOs, such as the Legal Resources Centre, the Centre for Applied Legal Studies, and the Community Law Centre, who provide legal assistance. While the demand for legal services is greater than the supply, and access is poor outside the urban centres, these organisations have played a crucial role in facilitating social rights litigation, by taking on test cases. They get the most senior advocates in the country to argue cases pro bono, and the availability of top legal expertise has been an extremely important resource in the successful social rights cases. Ironically, this extraordinary availability of legal expertise can be seen as part of the apartheid legacy. During the anti-apartheid struggle, legal academia and NGOs played a central role, and attracted many of the brightest legal minds in the country. So far, the organisations have succeeded in retaining well qualified people – and some who have gone on to work as advocates etc., have continue to do volunteer work. The question is whether and how this can be sustained in the long run – and replicated in other contexts.

On balance, conditions for victims of social rights violations to voice their claims into the legal system are reasonably favourable in South Africa – but to what extent has social rights claims been voiced? Contrary to what might be expected, given South Africa’s status as a showcase for socio-economic rights litigation – not many significant social rights cases have been taken through the legal system. In 1999 a newspaper article complained that

¹⁵ Constitutional Court of South Africa, Certification of the Constitution of the Republic of South Africa 1996. CCT 23/96.

¹⁶ Carmel Rickard, "Judges agree criminal justice system is in trouble." *Sunday Times*, 25 April, 1999. www.suntimes.co.za/1999/04/25/news/news14.htm J. Steinberg, "Rights, crime and the courts." *Business Day*, 19 April 2000. <http://www.bday.co.za/bday/content/direct/1.3523.602277-6078-0.00.html>

“... for whatever reason, few cases have been heard [in the South African courts] that have had the potential to affect the lives of those millions who remain disadvantaged. The much-proclaimed range of socio-economic rights has never been employed in litigation. The radical provision, which makes private legal relationships subject to the provisions of the Constitution, has been all but forgotten. Most cases involve crooks, corporations and other wealthy litigants.”¹⁷

While this has changed somewhat, and significant social rights cases have worked their way through the legal system, social rights claims have been more a trickle than a flood. To understand why, it may be useful to look at how notable social rights cases have been received and decided by the courts.

The responsiveness of South African courts' to social rights claims

The first case involving a constitutional social right came before the South African Constitutional Court in November 1997. The *Soobramoney* case concerned the right to emergency health services, but was decided primarily on semantic grounds, rather than on the substantial content of the right.¹⁸ Chronic renal failure requiring regular dialysis did not qualify as “emergency”. The judgment disappointed proponents of social rights litigation, not only because the litigant lost his case, but due to statements regarding the justiciability of social rights. The view of the Court seemed to be that matters with significant budgetary implications belong in the political domain, rather than under its jurisdiction, thus distancing itself from a more radical Indian judgment on the right to emergency health services.¹⁹ In the South African legal community *Soobramoney* was taken to indicate political deference, discouraging further social rights litigation. Or signalling that for such cases to succeed very careful framing and skilful argument would be required.

Three years later, in October 2000, the Court handed down judgment in the first case actually decided on the grounds of the social rights clauses in the Constitution. The *Grootboom* case concerned the right to housing and in particular the right of children to shelter. The applicants, living under appalling conditions in an informal settlement, had moved onto private land from which they were forcibly evicted. Camping on a nearby sports field, they applied for an order requiring the government to provide them with basic shelter. The Constitutional Court (unlike the High Court²⁰) did not recognise a directly enforceable claim to housing on the part of the litigants, but ruled that the state is obliged to implement a reasonable policy for those who are destitute. The judgment thus establishes socio-economic rights as justiciable rights, and defines an active role for the Court in assessing social policies and their implementation at various levels of government.

¹⁷ Mail & Guardian "Constitutional Court rates a mere pass." *Mail & Guardian*, February 25 1999.

http://www.mg.co.za/mg/news/99feb2/25feb-constitutional_court.html.

¹⁸ Constitutional Court of South Africa, *Soobramoney versus Minister of Health (KwaZulu-Natal)*, CCT 32/97 (Judgment date: 27 November 1997)

¹⁹ Paschim Banga khet Mazdoor Samity versus State of West Bengal 1996 SOL Case No. 169 (Supreme Court of India).

²⁰ The High Court stated that section 28(1)(c) of the Constitution gave all children a right to claim shelter on demand from the state, irrespective of the availability of resources. Furthermore, since it was in the best interest of the children not to be separated from their parents, the state was obliged to provide rudimentary shelter for these families. The judgement is reported as *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277(C).

The *Grootbooms* judgment was acclaimed among international academics for its creative and politically astute reasoning – carving out space for itself in the policy process without usurping the space for political decision-making.²¹ For prospective litigants it was, however, discouraging that the Constitutional Court limited its role to that of policing the policy-making process rather than recognising an enforceable individual right to shelter, or defining a minimum core of the right to be given absolute priority.²²

The third notable socio-economic rights case heard was politically controversial, but more straightforward in legal terms. The issue in *Minister of Health and Others v Treatment Action Campaign and Others (TAC)*,²³ was whether the state was obliged, under the right of access to health care (section 27(1) and (2) of the 1996 Constitution) to provide the anti-retroviral drug, nevirapine to HIV-positive pregnant women and their newborn infants. The court found that, where feasible, the state was obliged to provide for all to be included in the existing “pilot” policy. From a legal perspective this is less invasive than to direct government to formulate new policy. The expansion of the programme was also inexpensive, as the medicine would be supplied free of charge for 5 yrs.

The *TAC* judgment is more radical than *Grootboom* in the sense that it is mandatory and closer to acknowledging an individual, enforceable right. It also represented a huge political victory, and marked a turning point in the government’s position on HIV/aids.²⁴ But, as in the *Grootboom* case, the research undertaken was formidable. The litigants outperformed the political authorities in their own terrain.

After *Grootboom* other cases have built onto and developed South African jurisprudence on the right to housing. Particularly notable is the Constitutional Court judgment in the *Kyalami Ridge* case²⁵ and the *Modderklip* judgment from the Supreme Court of Appeal²⁶.

The *Kyalami Ridge* case arose when, after a flood in Alexandra Township, the government sought to establish a temporary transit camp on state-owned land. Nearby residents asked the High Court to restrain the Minister of Public Works from establishing the camp, which was not supported by legislation, contravened existing regulations, and undertaken without consultation. The High Court found in favour of the Residents Association, while the Constitutional Court underscored the government’s constitutional obligation to provide access to adequate housing, including temporary relief for people living in intolerable conditions or in crisis due to natural disasters or threats of demolition. As the camp was intended to give effect to this constitutional obligation, the government’s decision was held lawful.

²¹ Cass R. Sustein, “Social and Economic Rights? Lessons from South Africa” 11 *Constitutional Forum*, 2001.

²² Theunis Roux, “Understanding Grootboom – A response to Cass R. Sunstein” 12 *Constitutional Forum*; Roux (2004); David Bilchitz, ‘Placing basic needs at the centre of socio-economic rights jurisprudence’. *ESR Review* 4, 2003; Sandy Liebenberg, “South Africa’s Evolving Jurisprudence on Socio-Economic Rights: An effective Tool in Challenging Poverty?” 6 (2) *Law Democracy and Development*, 159, 2002.

²³ Constitutional Court of South Africa, 2002 (5) SA 721 (CC), 2002 10 BCLR 1033. (Judgment on 5 July 2002).

²⁴ Mark Heywood, ‘Contempt or compliance? The TAC case after the Constitutional Court judgment’. *ESR Review* 4, 2003.

²⁵ South African Constitutional Court, *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 (7) BCLR 652 (CC). (Judgment delivered on 29 May 2001)

²⁶ South African Constitutional Court, *Modder East Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd*, (SCA 187/03); *President of the RSA and others v Modderklip Boerdery (Pty) Ltd*, (SCA 213/03) (jointly referred to as *Modderklip*). My presentation of the case draws from Annette Christmas “Property rights of landowners va. socio-economic rights of occupiers” in *ECR Review*, Vol 5, No. 3, July 2004, at http://communitylawcentre.org.za/ser/esr_review.php.

In the *Modderklip* judgment, the Supreme Court of Appeal consolidated the protection to vulnerable occupiers, ruling that the state's responsibility towards people in desperate need includes the obligation to ensure humane evictions, which entails making available alternative accommodation. Balancing the rights of the occupiers against those of the landowners, the court underscored that the latter should not be prejudiced by the State's failure to fulfil its obligations. It thus ordered that the landowner was entitled to damages from the state in terms of existing expropriation legislation, while occupiers were entitled to occupy the land until alternative land was made available.

Lastly, the judgment in the *Khosa/Mahlaule* case concerns the right of access to social assistance for permanent residents (here Mozambican citizen).²⁷ The issue was a decision to exclude non-citizens from the programmes. The majority of the court decided that the litigants, and all similarly situated, had a right to access social assistance, and remedied the legislation by reading in the words "or permanent resident" after "South Africa citizen". The Constitutional Court's approach in this case is less cautious than in previous judgments. In the context of significant public xenophobia, it ruled to protect long-term permanent residents from the degradation of poverty - a decision with potentially grave budgetary implications. "This decision must thus be regarded as a positive portent for expanding access to socio-economic rights through constitutional litigation in the future."²⁸

To sum up, it seems that a main factor in 'stemming the tide' of social rights cases have been the signals sent by the Constitutional Court that it takes a lot to succeed with such claims – although the most recent judgments, providing classes of litigants with a legally enforceable rights, may increase prospective social rights litigants' expectations.

What explains the South African courts' reluctance to give effect to individual's social rights claims? According to the framework, courts' response to such claims are in part a consequence of the manner in which they are voiced, but also depends on the legal basis for social rights; the legal culture; and the judges' sensitivity to social rights issues.

In international terms and compared to the pre-1994 situation, South African courts have a sound legal basis for adjudicating on socio-economic rights. The social and economic rights – to housing, health services, food, water, social security and education – was included in the Constitution to enable it to serve as instrument for principled social transformation, and not a shield for protecting the status quo and the vested interests of the privileged. This ambition is also reflected in the provisions enabling affirmative action and horizontal application of rights (Sections 9 and 8).

For most of the social rights, the State's responsibility is, limited to "take reasonable legislative and other measures within its available resources to achieve the progressive realisation of these rights" (Sections 26(2), 27(2)). The exceptions, which apparently give rise to directly enforceable claims, are the right not to be evicted (Section 26(3)); not to be refused emergency medical treatment (Section 27(3)); the rights of prisoners to adequate nutrition and medical treatment (Section 35(2)) and the rights of Children (defined as those under 18 yrs) to

²⁷ South African Constitutional Court, *Khosa and Others v Minister of Social Development and Another* (CCT 12/03); *Mahlaule and Others v Minister of Social Development and Another* (CCT 13/03) (combined judgment referred to as *Khosa/Mahlaule*) (Delivered on 4 March 2004). My presentation draws on Julia Sloth-Nielsen "Extending access to social assistance to permanent residents", *ECR Review*, Vol 5, No. 3, July 2004, at http://communitylawcentre.org.za/ser/esr_review.php.

²⁸ Sloth-Nielsen (2004).

basic nutrition, shelter, basic health care and social services (Section 28). The 'bite' is, somewhat reduced by a general limitations clause permitting limitation of rights "in terms of laws of general application to the extent that limitation is reasonable and justifiable in an open and democratic society" (Section 36).²⁹ Nevertheless, the formal constitutional basis for courts to adjudicate social rights issues is comparatively strong in South Africa - much stronger than in India, the country that pioneered social rights litigation. And when certifying the 1996 Constitution the South African Constitutional Court explicitly stated that social rights are justiciable, not merely political aspirations.³⁰ The relatively cautious response to social rights thus cannot be ascribed to the legal basis.

According to the theoretical framework, courts' responsiveness to social rights issues also depends on the judges' sensitivity to the concerns voiced, which in turn is determined by the composition of the bench - the judges' social and ideological background, their legal education and training. In South Africa, diversity on the bench has been a priority. This is reflected in the system and criteria for judicial appointment, and prospective judges are questioned on their commitment to constitutional values and social transformation. The judges' sensitivity to social rights issues vary, but ongoing training aims to sensitise and educate judges and magistrates towards human rights.

A cautious approach to social rights may also stem from the legal culture, the prevailing theories of constitutional interpretation and whether social rights are regarded within the proper domain of the courts. This in turn influences the judges' norms of appropriateness regarding how to deal with social rights. Generally, the South African legal culture is influenced by the common-law tradition, with deference to political authority as a central democratic virtue. However, the injustice of apartheid law, lead many lawyers towards a constitutionalist perspective, where democracy is defined partly by commitment and adherence to basic human rights – including social rights. Post-1994 South African judges – particularly the first Constitutional Court bench, deciding the early, difficult cases – seemed genuinely committed to social right, and saw social transformation as an important part of their mandate.³¹ However, they were also deeply concerned with the boundary between law and politics. To establish their legitimacy as a legal institution vis-à-vis the political authorities, they had to strike a balance - neither give up on social rights, nor meddle unduly in policy-issues. This priority informs their social rights jurisprudence and motivates a cautious approach.

The capability of South African judges to adjudicate on social rights

The third crucial stage of the litigation process is when the judge(s), accepting the validity of a social rights claim, give it effect in a judgement. For the litigation to be successful, judges must be capable of identifying and applying legal strategies that effectively protect or advance the relevant rights.

As noted earlier, courts have several strategies at their disposal, they may require rights to be *respected*; *protected* against encroachment by others; that the state actively *promotes* rights; or acts to *fulfil* individual claimants' concrete social rights. Court orders may be *declaratory*,

²⁹ Limitation clauses are common in modern democracies (see article 19(1) of the German Basic Law and article 1 of the Canadian Charter of Rights and Freedom).

³⁰ Constitutional Court of South Africa, *Certification of the Constitution of the Republic of South Africa* 1996. CCT 23/96.

³¹ Interviews with CC judges 1997–2003.

merely pointing out breeches in social rights obligations; *mandatory*, requiring specific actions to be undertaken; or *supervisory*, ordering agencies to report on the implementation. The Constitutional Court judgments – particularly *Soobramoney* and *Grootboom*, but also to some extent *TAC* – have been criticised for being too deferential with regard to not intruding on the political domain, and too cautious in their legal remedies. Interestingly, both in *Grootboom* and *TAC*, the High Court went further than the Constitutional Court. In *Grootboom* the Cape High Court recognised an enforceable right of destitute children (and their guardians) to have shelter provided by the political authorities, while the Constitutional Court handed down a purely declaratory order requiring new policy to be made. In the *TAC* case, the Constitutional Court formulated a mandatory judgment, requiring the State to step up distribution of nevirapine to HIV positive mothers and their newborns but stopping short of the High Court's order, demanding that the state report back on progress within a set time frame.³² Recently, the Supreme Court of Appeal judgment in the *Modderklip* case and even more so the Constitutional Court in *Khosa/Mahlaule* have gone further in acknowledging individual social rights claims of vulnerable groups.

Which strategy a judge or bench opts for depends partly on the nature of the case, how it is argued (the impact of 'voice'); and on how the judge perceives the issue at stake in terms of facts and law (the impact of 'responsiveness'). More systemic factors influencing the repertoire of strategies available to a judge include his or her professional skills, training, access to legal material and research assistance, and opportunities to participate in professional forums.

While this might be decisive for judges' professional ability to find the most adequate means to enforce the right, the capability to actually go for what is best on professional grounds – against the will of powerful state (or private) actors – also depends on the independence of the judiciary as a collective and of the individual judge.³³

The South African Constitutional Court has excellent conditions for developing a broad repertoire of legal strategies: highly qualified judges, an excellent library, ample research assistance, and authority to draw on diverse sources of law, including international law and case material from foreign jurisdictions. They hear cases as one bench and represent between them a wealth of legal and other experience – and with a light case load they have the time to deliberate and reflect on suitable remedies for each particular case, as well as on the wider jurisprudential implications. In this respect, hardly any court, anywhere, has better conditions for developing sound judicial strategies for giving effect to social rights.

But do South African judges have sufficient independence to act on their professional judgement? Institutional mechanisms to guard against undue political influence are in place (constitutionally protected independence, secure tenure and remuneration, a circumscribed role for the executive in the appointment process, transparent nomination by the judicial service commission). However, the concern for legitimacy vis-à-vis the political authorities,

³² See Heywood (ibid).

³³ Judicial independence is the ability of judges to decide cases on the basis of their interpretation of the law and the facts of the case, without interference (actual or threatened) by government or other agents, and the ability of the courts to make their decisions 'stick'. See Gloppen et al (ed). (2004). The growing literature on judicial accountability includes Peter H. Russell and David M. O'Brien, (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (Charlottesville, VA: University Press of Virginia, 2001); Steven B. Burbank and Barry Friedman (2002) *Judicial independence at the crossroads : an interdisciplinary approach*. Thousand Oaks, Calif.: Sage Publications; and Andr as Saj o, A. and Lorri R. Bentch, *Judicial integrity*. (Leiden: Martinus Nijhoff Publishers, 2004).

may restrain the freedom of the judiciary to act contrary to government interests - particularly in a political context with a dominant ruling party. Those appointed to the Constitutional Court have also generally been ideologically close to the ANC government.

But the Court's also needs to generate legitimacy in other important constituencies (within the legal community, nationally and internationally, with the political opposition and in civil society), and this may induce it to look for opportunities to demonstrate its independence. For the Constitutional Court the relationship with the legal community is particularly important. As a novel institution, and comprising members with scant judicial experience – it was paramount to establish itself as a sound and respected institution on professional legal grounds. To earn respect for their legal craftsmanship seems to have been a main consideration, tying the court somewhat closer to conventional legal reasoning than the ideological disposition of the individuals on the bench might suggest.³⁴

Judges rarely admit to taking strategic considerations into account, but on the basis of the Constitutional Court's position vis-à-vis political society, we might expect judgments that generally affirm and support the political position of the government, but that contain limited and highly visible challenges to state policies. And so far, this is what has been forthcoming.³⁵

South African social rights jurisprudence: Authority, compliance and implementation

As noted earlier, compliance can be seen in terms of whether the relevant authorities (verbally) accept the rulings as authoritative; comply with the terms of court order and to what extent the ruling has implications for subsequent legislation, policies and administrative action – including ways in which other bodies with a mandate in this field, such as human right commissions, relate to the judgement.³⁶

The South African government has generally accepted adverse judgments, but with regard to the main social rights judgements, there has been noticeable foot-dragging.³⁷ With regard to the *Grootboom* judgement,

“The SA Human Rights Commission (SAHRC) has been monitoring the situation (...) it took one year for the local administration (the City of Cape Town) and the Western Cape provincial administration to finally decide where 'the locus of responsibility' lay with regard to the implementation of the *Grootboom* judgment. Even after this one-year period of inaction, the efforts by these two administrations to implement *Grootboom* is limited to putting together a plan to deal with the permanent resettlement of the Wallacedene Community. There is a clear lack of understanding that the judgment requires systemic changes to national, provincial and local housing programmes to cater for people in desperate and crisis situations.” (Pillay 2002)

³⁴ For an elaborate analysis of the Constitutional Courts negotiation of its relations to various constituencies, see Gloppen (2001).

³⁵ See analysis in Roux 2002, 2004.

³⁶ See S. Liebenberg (2003).

³⁷ Pillay, K. 2002. 'Implementing *Grootboom*: Supervision Needed'. ESR Review 3; see also S Liebenberg (2002); S Liebenberg (2003) "Making A Difference: Human Rights and Development-Reflecting the South African Experience" (Research paper presented at the Nobel Symposium on the Right to Development and Human Rights in Development held in Oslo, Norway on 13-15 October 2003) Roux (2004) and Heywood (2003).

Also regarding the voluntary settlement to provide the litigants with temporary accommodation, compliance was slow and partial (Pillay 2002).

Concerning the *TAC* case, government representatives made statements indicating that they were not prepared to let the courts dictate their policies. But once the ‘defeat’ was clear, they turned – at least in terms of rhetoric – and committed to changing their policies. However, monitoring of compliance has shown that implementation has been slow and uneven between the provinces. (Heywood 2003). Mpumalanga province failed to take steps to implement the judgement, despite having the capacity to do so, and the Treatment Action Campaign decided to instigate contempt of court proceeding - which seemed to have an effect (Heywood 2003).

This illustrates a point briefly discussed earlier, namely that litigation should not be viewed on its own. In the *TAC* case, litigation was part of a larger process of social mobilisation, and the case was effectively won on the streets before the verdict was handed down. This does not mean that litigation was irrelevant. On the contrary, it provided a focal point and platform for the struggle.

But what explains this failure to promptly implement the judgments? As we have seen, this can in part be ascribed to the nature of the judgments themselves. They rarely place concrete demands on the authorities regarding concrete measures to be undertaken, nor set timeframes within which this should be done.

Lack of capacity – financial, institutional and administrative - is another aspect, but political and normative factors are probably as important. Political factors include the balance of power between political forces, political will and whether the rulings are at cross purposes with the governments’ broader policy goals.³⁸

Lack of political will seems to be a factor. In the *TAC* case, this was related to personal idiosyncrasies in the political leadership, profoundly politicising HIV/Aids policy. This is reinforced by the power structure, differences in political culture and diverging views on the nature of South African constitutionalism.

The uneven balance of power in South Africa, with the ANC as the dominant political party, presents particular challenges. On the one hand, the space for contestation offered by the courts, and their role as guardians of democratic ideals and constitutional rights is particularly important when there is a lack of other forces able to sanction the government when it acts in breach of its mandate. This accountability function is central to the Constitutional Court’s *raison d’être* and its legitimacy with the domestic oppositions as well as internationally. On the other hand, if the Court is perceived to repeatedly undermine the government’s legitimate policy aspirations, this may jeopardize its legitimacy with the ruling party, expose the counter-majoritarian dilemma inherent in strong constitutionalism, and make the Court vulnerable to infringement of its authority.³⁹

There is a marked normative ambivalence in South Africa – and within the current ANC leadership – concerning the proper role of law in relation to politics. There is broad

³⁸ For a discussion of capacity and capacity development in relation to social rights realisation, see Ida-Eline Engh “Developing capacity to realise socio-economic rights: The example of HIV/Aids and the right to food in South Africa” *ESR Review*, Vol 5, No. 3, July 2004.

³⁹ See Gloppen (2000) and Gloppen et al (eds.) 2004.

commitment to the Constitution, but the liberal understanding of courts as a check on power, competes with other understandings, where the role of law primarily is to facilitate policy-implementation.⁴⁰ This brings us back to the initial discussion, on the disagreements over the proper locus for social rights – do they belong in the constitution as anything other than a statement of aspirations? Competing understandings of constitutionalism in South African political society may be a partial explanation for the lack of commitment to implement judgements seen to trespass on the political domain.

Despite disappointments, it is important to also remember the achievements gained - the judgments have to some extent been implemented and reflected in policies and legislation, and they remain important yardsticks that other institutions, such as the Human Rights Commission, use in their work to further social rights. And they continue to be important foci for social mobilisation around social rights issues.

Assessing social rights litigation as a strategy in fulfilling rights

Has this analysis brought us closer to understanding the potential and limitations of litigation as a strategy in fulfilling social rights? What is clear is that social rights can not be achieved by litigation alone. The impact of litigation is bound to be limited, even under the favourable conditions prevailing in South Africa in the past decade - where the ideological commitment to constitutionalism and social rights is strong, both in civil society and within the judiciary, and where the ideal of social transformation and progressive realisation of social rights has also been prominent in political society.

While not sufficient, social rights litigation can clearly be useful to improve the social rights condition in society. But it should not be regarded as the main avenue. The central purpose of social rights – as other rights – is first and foremost to commit and direct the people's elected representatives in their work to carry out their political mandate. Normally prospects for success might be greater by political mobilisation. But where there are blockages in the political system so that the voice of those deprived of their rights does not get through, litigation may be an alternative or complementary strategy.

Social rights litigation can play a constructive role – and has done so in South Africa as well as in other parts of the world. But it is demanding. For litigants to succeed, several conditions must be present, and not all of them are easy to reform at will. With regard to some of the factors that the analysis has identified as significant post apartheid South Africa has been in a unique position. One factor is the constitution itself (although the nature of the text is less unique than the interpretation given it by the courts). The quality of the judiciary, and in particular the first bench of the Constitutional Court has been crucial. Likewise the availability of resources for social rights litigation, both financial and in terms of quality of the legal expertise made available. These factors are difficult to replicate elsewhere. And they might also be difficult to sustain in South Africa in the future.

⁴⁰ See Gløppen(2000).

Summary

The paper analyses the role of litigation as a strategy to fulfil the social rights laid down in the South African constitution. Critically examining litigation as a means to bring the constitutional provisions to life, it explores how different aspects of the social, political and legal context condition the litigation process. Focus is on the social rights cases that the South African Constitutional Court has decided over the past decade. Comparative perspectives set the South Africa experience in relief, and inform the theoretical framework structuring the analysis. By systematically examining the South African experience, the aim is to shed light on what has been achieved through social rights litigation; what has facilitated these achievements; and future prospects for social rights litigation in South Africa. Furthermore, it aims to extract some general insights into the potential and limits of litigation as a strategy for advancing social rights.

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