

CONSTITUTIONAL JUSTICE PROJECT

Transformative impact of constitutional jurisprudence

Lessons on the justiciability of socioeconomic rights within a context of separation of powers

Presentation to WSSF 13 September 2015

Background: Structure of CJP

- **THEME 1:** Legal analysis of the landmark and related decisions of the CC and SCA
- **THEME 2:** Implementation of court decisions highlighting long-term benefits
- **THEME 3:** Desktop study on Direct Access to the CC
- **THEME 4:** Access: Costs of litigation and speed with which cases are finalised
- **Methodologies:** desktop studies, interviews, focus groups, colloquia

Theme 1 sub-themes

- **Sub-theme 1:** Analysis of the contribution of court decisions to reform of South African jurisprudence and law
- **Sub-theme 2:** Assessment of the impact of SA jurisprudence and court decisions on socio-economic rights
- **Sub-theme 3:** Comparative analysis of the mutual influence between South African, SADC and African within the context of international law
- **Sub-theme 4:** Assessment of how constitutional jurisprudence has contributed to the transformation and development of common law and customary law in South Africa

Groups of respondents

Former CC Justices	8
Sitting SCA Justices	2
Sitting High Court Justice	1
Advocates	7
Attorneys	3
Academics	8
TOTAL	29

Jurisprudence and legal practice

The following areas are discussed in this presentation:

- Constitutional transformation
- Jurisprudential and social transformation
- Separation of powers
- Minimum core content
- Constitutional dialogue

Constitution of the Republic of South Africa, 1996 - Preamble

We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to

Preamble continued

- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- Improve the quality of life of all citizens and free the potential of each person; and
- Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

Bill of Rights

7. Rights

- This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
- The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill. [*Internal limitations]

Socio-economic rights

9. **Equality**; 10. **Human dignity**; 24. **Environment**

26. **Housing**

- 1) Everyone has the right to have access to adequate housing.
- 2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

27. **Health care, food, water and social security** – access to

28. **Children**

- 1) Every child has the right

... c. to basic nutrition, shelter, basic health care services and social services;

29. **Education**

- 1) Everyone has the right

a. to a basic education, including adult basic education

165. Judicial authority

- 1) The judicial authority of the Republic is vested in the courts.
- 2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- 3) No person or organ of state may interfere with the functioning of the courts.
- 4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
- 5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

Weak separation of powers & Chapter 9

181. Establishment and governing principles

1. The following state institutions strengthen constitutional democracy in the Republic:
 - a. The Public Protector.
 - b. The South African Human Rights Commission.
 - c. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
 - d. The Commission for Gender Equality.
 - e. The Auditor-General.
 - f. The Electoral Commission.

Section 181 cont'd.

- 2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.
- 3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.
- 4) No person or organ of state may interfere with the functioning of these institutions.

The meaning of Constitutional “transformation”

- As part of the Constitution’s commitment to democracy, social justice and uplifting the quality of life of all people, it specifically protects a range of socio-economic rights (SERs).
- Constitution envisages a journey towards substantive equality
- The CC clarified early on that, in South Africa, SERs are justiciable and the Court has an important role to play in interpreting and adjudicating SER claims.

“The courts’ decisions on socio-economic rights have undoubtedly shown how rights-directed litigation can improve the conditions of many socially vulnerable people, in ways that would have not been possible without these rights. The decisions also show how rights claims can be practically translated into material improvements to people’s lives”.

Justice Edwin Cameron (2014: 270)

The journey is best undertaken together

“[T]he breakthrough that the TAC made with AIDS was a combination of public opinion, advocacy, public demonstrations, media exposure, and litigation, and the law working hand-in-hand ... You’ve got to use the law and public awareness at the same time.”

Former CC Justice

Preliminary findings and main trends

- Although there isn't full consensus on the meaning of the courts' role in social and economic transformation, it is generally agreed that the courts have been transformative within the context of constitutional imperatives, such as the separation of powers.
- The meaning of transformation needs careful consideration, but it is clear that justiciable SERs place both negative and positive obligations on the state and that the state should “respect, protect, promote and fulfil” all rights (section 7).

- The executive is responsible for the development, choice and implementation of policy – and bears primary responsibility for the realisation of SERs, and hence social transformation.
- The courts are widely understood to be ‘guardians’ of the Constitution, and thus have the right and duty to review government legislation and policy.
- A few respondents noted that transformation through the adjudication of SERs is a narrow understanding of transformation.

- Respondents repeatedly pointed out that, as the courts do not implement their own orders, lack of transformation cannot be “blamed” on the courts. Problems include the failure – or delay – by the executive or legislature to implement the courts’ decisions.
- Most respondents expressed deep concern regarding the impact of the failure to implement court orders on respect for the Constitution and the rule of law.
- Most respondents were of the view that transformation happens incrementally and that the courts have been ‘wise’ in their approach to transformation within our particular historical and constitutional context.

- Legal practitioners especially consider that the CC has been more focused on social justice than the SCA.
- The CC is more sensitive to societal needs, as well as the resource constraints and limitations that face government, whereas the SCA sees itself as the “watchdog” of government and focuses less on the socio-economic impact of its judgments.

Separation of Powers

A Senior Advocate summed up a common view - the courts should not interfere with policy-making -

“the courts are only as strong as there is buy-in, and ... the type of judicial activism as often called for might be a short-term solution to somebody’s specific problem, but in the long-term might well cause antagonism with the other branches of Government and with other sectors in society, and in fact, weaken the legitimacy of the courts. So ... the overarching project of the courts is to solve the particular case that is before them in the best possible way for the litigant, but in a manner that promotes democracy, deliberation, public buy-in”.

However, *“to some extent service delivery is a problem, so the courts should take a more activist role ... in terms of remedy perhaps”.*

- The doctrine of separation of powers (SoP) is inherent in the Constitution because it regulates the exercise of public power.
- This doctrine should not be seen as inflexible, and the principle should not detract from the courts' right of judicial review.
- Courts may evaluate the reasonableness of government policy and action, and have a duty to grant effective remedies for the enforcement of SERs, including structural interdicts against government departments.

Constitutional Dialogue

- Entering into such a dialogue could assist in moving us towards a determination of the content of SERs and a determination of what would be needed to ensure that South Africans live in dignity.

Constitutional dialogue can be a positive process -

“... our [Kenyan] Constitution provides very clearly that the three arms are robustly independent, they have independent mandates. But there is a provision for consultation, for dialogue, for interdependence under collaboration, and that’s a tall order because at the moment there’s a lot of debate as to how you can [have] independence and how you can also have dialogue ... In fact, in our Constitution that culture is becoming open. I think in Africa we’re basically saying, it’s good to do it transparently, and I think that’s a good development”.

Willy Mutunga, Chief Justice of Kenya, UFH 2014

Preliminary findings and main trends

- Most respondents were sensitive to the democratic imperatives of the SoP doctrine and understood that the courts are not well-placed to make policy, or even prescribe policy choices to government.
- However, the courts' right of judicial review and the justiciability of SERs does place the doctrine within a specific local context.
- Courts do have the authority and responsibility to judge the reasonableness of government policy and should do so without fear or favour.

- There was a view expressed by a number of respondents that given government's failure to efficiently and effectively deliver basic services, courts could become more interventionist by, for instance, adopting innovative remedies such as structural interdicts and meaningful engagement (with court oversight).
- Most respondents cautioned that the courts should take into account post-apartheid governments' resource constraints. Others argued it is time to become more demanding and less cautious: we are no longer a "young" democracy.

- A former CC justice was of the view that dialogue between the courts and the executive is absolutely necessary and engagement of that nature was not unusual in South Africa, for example, the engagement that took place in relation to the Legal Practice Bill.
- The former judge highlighted the need for engagement to effectively implement / enforce court orders – as part of constitutional dialogue.

“Minimum core” in respect of SERs

- In both the *Grootboom* and *TAC* cases, the CC was urged by the amici curiae to adopt the concept of a ‘minimum core obligation’
- The CC rejected the minimum core argument (including in *Mazibuko*), holding that sections 26 and 27 did not entitle any individual to the direct provision of minimal levels of the relevant goods and services from the State.
- CC criticised by some for failing to take these opportunities to give substantive content to the rights to housing / shelter and health care specifically - only partially protecting these socio-economic rights.

An Advocate eloquently summed up the views of many -
“[T]here can be no debate about whether the Courts must engage with Government policy-making or not. I think the Constitution obliges the Courts to do so. If Government comes up with a policy scheme that’s challenged, the Courts are obliged to evaluate that scheme against the Constitution. So I don’t think that it’s open to anybody to say that policy falls outside of the domain [of the courts]. That’s for me the starting point. The question [really] is how the Courts engage with policy issues” (emphasis added).

Preliminary findings and key trends

- The debate around the recognition of a “minimum core” is heated in South Africa, although interview respondents agreed that it is an inadequately flexible approach and that the “reasonableness” yardstick is a more appropriate test that prevents the courts becoming too involved in policy-making.
- All respondents recognise the complexities entailed in establishing the substantive content of a minimum core for each SER – content changes over time with fluctuations in national prosperity.
- Almost all believe that it is not the responsibility of the courts to determine content.

- The drafters of the Constitution decided on a particular formula that requires government to take reasonable steps to ensure the progressive realisation of SERs within available resources. Courts cannot ignore this approach set out in the text of the Constitution.
- Overwhelming support for the understanding that, once it is accepted that SERs are justiciable, which the Constitution does, “then manifestly it is the Court’s prerogative to involve itself in this debate”.

- Most respondents supported the CC's preference for the 'reasonableness' test of government's programmes for the progressive realisation of SERs, rather than supporting the minimum core approach.
- Most informants hold the view that, in a constitutional democracy, the legislature and the executive bear the primary responsibility for delivering on SERs. If they do not do so, the most appropriate remedy is removal at the next election.

- Between those poles, there is general support for the courts playing a role in extreme and urgent cases, and when government persists in failing to act ‘reasonably’.
- In the absence of detailed and inclusive debate or discussion [‘dialogue’], the CC could step in to order specific performance – as it had, for example, in *TAC*.

Constitutional dialogue

- Many respondents suggested that an important opportunity exists for a concerted joint effort by various combinations of the executive, the legislature, academics and civil society, possibly led by the SAHRC, in order to identify the substantive content of a minimum core for each SER – as part of a **constitutional dialogue**.
- This approach would support both the democratically elected and accountable government, as well as the courts' constitutionally mandated oversight role.

A senior lawyer who worked for a Chapter Nine body –

- *The process of realising socio-economic rights enshrined in our Constitution is evolving as citizens learn about their rights.*
- *Equally, lawyers are learning about how to take up the causes of the people, and how to interpret them within the context of socio-economic rights.*
- *Some cases might well be thought of as purely legal issues arising out of some statute and so on, but when one looks at them from a broader perspective, one might find that “almost every issue could be argued [in] socio-economic rights [terms] as well”, complementing existing, and more familiar, arguments.*

Preliminary findings and main trends

- Decisions by the CC are based on legal principles of broad application.
- Litigation in SER matters should be a last resort. Because of separation of powers considerations, the CC needs to see that concerted efforts have been made to exhaust available opportunities to engage the responsible authorities to achieve the realisation of rights.

- SER litigation is complex and requires careful planning, solid and convincing research. Undue haste can set back the cause by many years.
- Litigation of SERs is usually dependent on the existence of an organisation (e.g. TAC) that focuses on the right in question, and has forged links with and an understanding of an affected community.
- SERs are often litigated in the lower courts, but because cases often don't reach the apex courts, we may be less aware of these decisions.

- The particular formulation of the ‘negative’ right not be evicted from one’s home has caused it to be the most extensively litigated SER.
- The sense of urgency – even crisis – that arises when mass homelessness looms has encouraged and enabled litigation on this issue.
- One ex-CC justice suggested that the need for food may be partly satisfied by government’s social grants programme.

Thank you for your attention
Comments are welcome