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Democracy, Civil Society and the South African Constitution: some challenges

by

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Abstract

When South Africa adopted its post-apartheid Constitution in 1996, it was remarkable for both the inclusive and consultative process by which it was adopted as well as for its content. The process involved a massive public participation campaign in which the role of civil society was paramount. In relation to content, the South African Constitution is manifestly transformative and declares itself committed to the continued inclusion of civil society in governance. In the light of the provisions of the Constitution, this paper looks at the extent to which civic society meaningfully participates in structures of governance in post-apartheid South Africa. In particular it examines this question in the light of the global shift towards entrenched rights discourse and the consequent transfer of power to the judiciary to determine matters of social policy. In doing so it looks at the extent to which these new institutions of power assist the project of social democracy and redistributive justice. This paper was presented at the UNESCO/MOST Seminar on "Democracy, governance and associated complexities: The challenges involved in recognizing cultural pluralism", organized within the framework of the Second World Social Forum (Porto Alegre, Brazil, on 4 February 2002). Information is available on http://www.unesco.org/most/wsf/english/index.shtml.

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Contents

Introduction

South Africa's past was succinctly described by the Constitutional Court as 'a deeply divided society characterized by strife, conflict, untold suffering and injustice which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge' (*In Re: Certification of the Constitution of the Republic of South Africa 1996* 1996 (10) BCLR 1253 (CC) at para. 13). Like many other countries which saw the transition from authoritarian rule to democracy in the 1980s and early 1990s, South Africa's Constitution reflects this past. In the light of the provisions of the South African Constitution, this paper looks at the role of civil society in both the judicial and policy-making realms. It also looks at the role of the courts in policy-making in the light of a recent case study. I do not attempt to provide a definition of 'civil society' in this paper, being as it is an elusive concept. I use the term in a broad sense, to include all organizations and associations that exist outside the State. This would include NGOs, cultural, political, social and religious groupings both formal and informal, as well as the labour unions. While it is accepted that civil society is not homogenous or limited to socially progressive movements, in this paper I generally envisage those parts of civil society, which are committed to social transformation in South Africa. The term 'democracy' is similarly broad-ranging to capture the right to vote as well as the political and social values inherent in South African society since the advent of constitutionalism.

The process of achieving democracy in South Africa – the central role of civil society and public participation

History

South Africa's racist past can be traced back to well before 1948 when the National Party came into power and officially introduced the policy of apartheid. The first South African Constitution, the South Africa Act of 1910, provided for an all-white government and gave rise to a continued and often bloody struggle by the majority for a system free from discrimination and oppression. A number of discriminatory measures were taken during this time, including the enactment of the 1913 Land Act which effectively deprived African people of their land. This was also the time of the birth of the African National Congress (ANC), which provided the largest mass-based forum for the freedom struggle in South Africa. The struggle for freedom reached its height in the 1970s and 1980s, when State repression and internal opposition intensified and international attention was focused on the plight of South Africans. One of the significant developments in this period was the adoption of a new Constitution in 1983 – a spectacularly unsuccessful attempt to restructure racial and political arrangements while keeping power in the hands of the white minority. This Constitution created a tri-cameral parliament which was meant to co-opt so-called coloureds and Indians into the national parliament in separate houses, each dealing with their 'own affairs'. The African majority were completely excluded from this arrangement, and were to find their political voices either in black local authorities in their townships or as citizens of 'independent' homelands or self-

governing territories – regions recognized by no other country in the world except South Africa. This period also saw the rise of the powerful United Democratic Front – a mass-based umbrella body, which explicitly and implicitly identified itself with the African National Congress in exile. South Africa's isolation from the international community was also firmly in place by this time. It is well known that the international community played an important role in dismantling apartheid through various means – including sanctions and boycotts. Internationally, the anti-apartheid cause had more support than virtually other similar struggle in history. The rising protest movement in the country was made up of various disparate forces which formed a united opposition to the regime – including trade unions, student movements and religious groups, as well as alternative structures of local governance which had mushroomed as a result of the apartheid government's unwillingness to provide proper services in black areas. In short, it was clear that the crisis was reaching unmanageable proportions and the policy of apartheid was not sustainable.

The negotiation process

After a series of intermittent moves towards negotiations for change, the beginning of 1990 witnessed the unbanning of the ANC and the release of political prisoners, and the process of change was inexorably under way. In 1993 the ANC, having taken its rightful place as the chief negotiator on behalf of the liberation movement, the Government and 24 other political parties came together to negotiate South Africa's transition to democracy – first in the form of the Convention for a Democratic Society (CODESA) and then the unnamed Multi-Party Negotiating Forum (MPNF). A number of organizations and structures of civil society – particularly those which formed part of the broad liberation movement – worked together with the ANC to assist with developing policy positions and determining priorities for the new South Africa. This can often be seen in the Constitution itself: many of its provisions reflect the concerns of various civic organizations and interest groups. This assisted as well as empowered the ANC in many ways: the involvement of civic society in the negotiations gave the process more legitimacy and worker strikes in support of ANC demands often strengthened the hand of the ANC in the negotiations. In addition, many of the political leaders of the ANC had been in exile out of the country for a number of years and the close collaboration of structures of civil society helped the ANC to work out what the prevailing South African conditions required. The content of the South African Constitution was influenced immensely by the input of civil society and many of its provisions including the socio-economic rights and the establishment of State institutions supporting constitutional democracy were strongly lobbied for by the NGO sector. I deal in more detail with the content of the Constitution below.

Consultation, participation and compromise – with all sectors of South African society – was a key feature of the negotiation process as well. 'A history through the journey of [the negotiation process] reveals a uniquely South African characteristic: an obsession with consultation … more time and energy was spent on negotiating the process of arriving at the final Constitution than on negotiating the substance of it' (Ebrahim 1998: 4). A fundamental issue that had to be resolved early in the constitution-making process was which body would be charged with the task of drawing up South Africa's

Constitution. The National Party and its allies, realizing that they would not wield much power in a democratically elected body, wanted the Constitution to be drawn up by the unelected multi-party negotiating forum. The ANC and its allies, however, argued that South Africa's Constitution could only be legitimately written by an elected constitution-making body – an unelected body could not claim to have the requisite mandate from the electorate. The way in which this impasse was resolved was typical of the compromises that the parties were able to make during the negotiation process: the MPNF would draw up an interim Constitution as well as a list of principles to which the final Constitution must adhere. An elected Constitutional Assembly would draw up the final Constitution, but the Constitutional Court would be required to examine it and certify that it complied with the agreed principles before it came into force. The Constitutional Court described the process thus:

> 'The impasse was resolved by a compromise which enabled both sides to attain their basic goals without sacrificing principle. What was no less important in the political climate of the time was that it enabled them to keep faith with their respective constituencies: those who feared engulfment by a black majority and those who were determined to eradicate apartheid once and for all. In essence the settlement was quite simple. Instead of an outright transmission of power from the old order to the new, there would be a programmed two-stage transition. An interim government, established and functioning under an interim constitution agreed to by the negotiating parties, would govern the country on a coalition basis while a final constitution was being drafted. A national legislature, elected (directly and indirectly) by universal adult suffrage, would double as the constitution-making body and would draft the new constitution within a given time. But – and herein lies the key to the resolution of the deadlock – that text would have to comply with certain guidelines agreed upon in advance by the negotiating parties. What is more, an independent arbiter would have to ascertain and declare whether the new constitution indeed complied with the guidelines before it could come into force' (*In Re: Certification of the Constitution of the Republic of South Africa 1996* 1996 (10) BCLR 1253 (CC) at para 13).

Even during the certification process in the Constitutional Court, members of civil society, including political parties, were permitted to make submissions to the Court. The Court received a total of 84 submissions from NGOs and individuals and from 5 political parties (*Certification Judgment* 1996: para 24).

'You've made your mark - now have your say'

When the final Constitution was being drafted, one of the most important reasons for the success of the process was the Constitutional Assembly's public awareness and education campaign. This campaign was designed to educate the public on constitutionalism and basic rights, as well as to elicit the views of the public on the content of the new Constitution (Murray 2001: 106). Several strategies were used during this campaign. Thousands of public meetings were held, covering nearly every town and village in South Africa, both to educate and allow people to give feedback and make submissions on the content of the new Constitution. These meetings were advertised widely, especially through television and radio. Participatory workshops were organized in consultation

with civil society structures (Ebrahim 1998: 244). Members of the Constitutional Assembly participated extensively in this campaign, and travelled across the country – to townships, informal settlements, rural villages, churches, schools, etc. – to consult with the public about the constitutional making process. The media was also used extensively – over 10 million people a week listened to the constitutional assembly's show on the radio in one of the official languages and an estimated 160,000 people received a copy of the newsletter *Constitutional Talk*, also published in the 11 official languages, each fortnight (Murray 2001: 106-7). In addition, an Internet site was also launched, providing information on the constitution-writing process. A Constitutional Talk Line was set up to enable people to make submissions over the telephone. Sectoral public meetings were held with about 200 organizations representing a number of diverse interest groups. Murray reports that an independent survey found that approximately 73 per cent of adult South Africans had been reached by the campaign (Murray 2001: 107). In the Constitutional Assembly itself, six theme committees were set up, which had the task of collecting and considering submissions from the public – including organs of civil society, ordinary individuals and political parties (Houston et al 1999: 26). Members of the public could make submissions in their own languages, and approximately 2.5 million written submissions were made (Houston et al 1999: 26). In the space of a few short years, South Africans made their mark by voting in the first democratic elections in 1994 in unprecedented numbers, followed shortly by having their say in the content of the new Constitution in numbers just as unprecedented. Cyril Ramaphosa, the chairperson of the Constitutional Assembly, summed it up as follows:

> '… in the end the drafting of the Constitution must not be the preserve of the 490 members of this Assembly. It must be the Constitution which [the people] feel they own, a Constitution that they know and feel belongs to them. We must therefore draft a Constitution that will be fully legitimate, a Constitution that will represent the aspirations of our people' (quoted in Ebrahim 1998: 239).

The content of the Constitution – the influence and role of civic society

The constitutional provisions

The South African Constitution is written in plain language. It is also written in gender neutral language. But perhaps the most notable aspect of the South African Constitution is that it aims to transform society and respond to our history of inequality and oppression. It is often described as one of the most advanced and progressive Constitutions in the world. The preamble specifically recognizes the injustices of South Africa's history, honours those who worked for freedom and aims to heal the divisions of the past. The Constitution contains social rights and a substantive conception of equality, affirmative State duties, horizontality, participatory governance, multiculturalism and historical self-consciousness (Klare 1998: 146). The socio-economic rights include the right to health care, food and housing, subject to the available resources of the State. As described above, the content of the Constitution was influenced in a large measure by both the public input as well as the deep involvement of civil society in the negotiation process. The Constitution also attempts to protect the continued involvement of the public and civil society in governance in various ways. It is committed to access to

information and just administrative action. It dedicates a chapter to the basic values and principles of public administration in South Africa, including transparency and the right of the public to participate in policy-making. Several State institutions supporting constitutional democracy are also set up in terms of the Constitution. These are independent, and 'subject only to the Constitution and the law' (section 181(2)). They are accountable to the National Assembly and must present a report on their activities and performance of their functions annually (section 181(5)). Among these institutions are the Human Rights Commission, the Commission on Gender Equality and the Public Protector (a type of ombudsperson).

Unusually the Constitution also provides, both in relation to the national Parliament and the provincial legislatures, that mechanisms must be created to maintain oversight of the executive. Section 55(2) provides as follows:

The National Assembly must provide for mechanisms:

(a) to ensure that all executive organs of State in the national sphere of government are accountable to it; and

(b) to maintain oversight of

(i) the exercise of national executive authority, including the implementation of legislation; and

(ii) any organ of State.

These provisions are important because

> 'oversight and accountability help to ensure that the executive implements laws in a way required by the legislature and the dictates of the Constitution. The legislature is in this way able to keep control over the laws that it passes, and to promote the constitutional values of accountability and good governance. Thus oversight must be seen as one of the central tenets of our democracy because through it the legislature can ensure that the executive is carrying out its mandate, monitor the implementation of its legislative policy and draw on these experiences for future law-making. Through it we can ensure effective government. … Accountability is also designed to encourage open government. It serves the function of enhancing public confidence in government and ensures that the government is close and responsive to the people it governs' (Corder, Jagwanth and Soltau 1999: chapter 3).

Legislatures at national and provincial level are also constitutionally required to facilitate public involvement in their processes. To illustrate, section 59 of the Constitution provides as follows:

'(1) The National Assembly must

(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and

(b) conduct its business in an open manner and hold its sittings, and those of its committees, in public….

(2) The National Assembly may not exclude the public, including the media, from a sitting of its committee unless it is reasonable and justifiable to do so in an open and democratic society.'

Similar provisions are contained for the National Council of Provinces (the Upper House of Parliament loosely based on the German Bundesrat) and the provincial legislatures.

It is clear from the above that the Constitution appears to envisage a continued relationship of cooperation between State and civil society. This relationship is premised on civil society having a crucial role to play in service delivery and policy-making with the State, where similar goals of transformation and change are shared. Seen in this light, a relationship of cooperation may have many advantages, and can greatly assist in socio-economic delivery in South Africa. I discuss this issue below.

Constitutional supremacy and judicial review

It may appear surprising that the form of constitutional democracy opted for in post-apartheid South Africa was constitutional supremacy with judicial review. This is because many see judicial review as anti-democratic: it is conducted by unelected and unaccountable judges, who have the power to overturn the will of a democratically elected Parliament. In the South African context this question takes on added importance because the legislature's broad socio-economic transformation agenda became susceptible to review by the courts when it was democratically representative for the first time in our history. Constitutional supremacy gives judges immense power to decide matters normally placed on the legislative agenda and final say over issues as varied as the death penalty, abortion, the distribution of benefits in society and criminal justice matters. In both South Africa and elsewhere commentators have described this constitutional arrangement as the 'legalization of politics' and have explored ways in which to constrain the untrammelled exercise of judicial power. Numerous attempts have been made to explain the reasons why South Africa opted for this form of democratic governance. The constitutional order chosen by South Africans was as a result of a number of factors including the willingness of both sides to reach settlement by compromise. The ANC had a strong tradition of rights dating back to the adoption of the Freedom Charter in 1955, while the old order saw a Bill of Rights enforced by an independent judiciary as a way of safeguarding minority and group rights. Significantly, the adoption of a Bill of Rights was also in direct response to South Africa's past. Many negotiators saw the problem in South Africa as stemming from the type of partial minority-rule democracy – namely parliamentary sovereignty. Institutional oppression and grotesque human rights abuses were so endemic in the apartheid era that South Africans welcomed the new constitutional dispensation which gave expression to our country's new ethos and to opening 'a new chapter in the history of our country' (see the preamble to the Constitution). The decision to adopt constitutional supremacy as a form of governance must also be seen in the context of international developments during the 1980s and 1990s. During this time democratic constitutionalism became a norm in many parts of the world undergoing transition, and South Africa's decision to adopt a supreme Constitution was also an attempt to reintegrate itself into the international community (Klug 2000: 48).

In the light of the above outline of both the process and content of South Africa's constitutionalism, I will now move on to look at the extent to which we have been able to

realize the goals articulated in the Constitution including the role of civil society in this process. In particular I will look at the relationship between civil society and the State in the light of South Africa's history, the role of civil society in the legal and judicial process, and the increasingly troubled relationship between the courts and the State in the context of constitutional supremacy and judicial review. The two latter issues will be examined in the light of a recent case study on the provision of anti-retroviral drugs to HIV-positive pregnant women.

Post-apartheid South Africa: challenges for democracy

The relationship between civil society and the State

A strong relationship between civil society and the State can be one way of ensuring that governmental efforts at reconstruction and delivery, and the transformational goals in the Constitution are met through joint efforts. Where civil society and government appear to be committed to the same goals, and where government is largely made up of long-standing political allies, a relationship of cooperation appears natural. Indeed, this spirit of cooperation has frequently featured in relationships between the State and civil society in South Africa. One good example is that government has often been unable to utilize foreign aid effectively without the assistance of NGOs, and many donor agencies provide funding only on the basis of a partnership arrangement between civil society structures and the government. Civil society also has an important role to play in relation to the work of State institutions supporting constitutional democracy, such as the South African Human Rights Commission. The Commission has the task of annually reporting to Parliament on the steps that each government department has taken towards the realization of the socio-economic rights in the Bill of Rights. NGOs and other structures of civil society have already developed partnerships with the Commission to monitor this and to consult widely with communities on this issue (for this and further examples of joint State and civil society efforts see the CASE report 1999: 55 - 60). This relationship of cooperation is best evident in the continued formal alliance between the trade unions and the ANC.

However, strong democracy also needs a vibrant civil society to act independently of and as a watchdog over government – especially in relation to delivery of constitutional goals. The relationship between the State and civil society in apartheid South Africa was simple to understand: civil society existed in opposition to the State. Not so in the new South Africa. One of the most difficult issues facing civil society in post-apartheid South Africa is how to maintain the delicate balance between support for the new Government while maintaining sufficient independence from it. This is especially the case in the light of the collaborative relationship between much of civil society and the new South African Government, both during the liberation struggle and the transitional period. Since 1994, there have also been many members of civil society who have joined the ranks of the government. Consequently, criticism of the government and its policies may sometimes appear disloyal or even reactionary. This issue is one which will evolve and develop as South African democracy matures, but it is important that the need for a strong voice in the monitoring of governance should not be muted. Civil society has a crucial role to play

in ensuring that the transformative goals to which we committed ourselves are constantly supported *and* monitored. The measure of civil society's vibrancy and success will ultimately depend on its role in bringing about socio-economic change. In the final analysis, a number of strategies – collaboration, monitoring, assistance, and even policing of the State – are appropriate for civil society in South Africa if they are needed to achieve that goal.

The record of civil society's relationship with the State is patchy for other reasons as well. Like all other governments, South Africa has a large and often impenetrable bureaucracy. Despite the devolution of powers to other levels of government evident in the Constitution, the structure of the government is skewed in favour of centralism. This was the preferred form of governance of the ANC since 1994 on the basis that strong central government was essential to effective socio-economic delivery. This has resulted in government being too remote from the population and consequently access to government is often difficult. In addition, the most disadvantaged groups in South African society – those with the highest levels of poverty and lowest levels of education whom the transformative provisions in the Constitution were primarily designed to benefit and protect – are frequently the least organized. Consequently these groups are often not able to access their elected representatives to articulate their positions. South African society is still very much skewed in favour of the rich and powerful and it is the well organized groups such as business and labour whose voices are most frequently heard, at the expense of less organized groups such as the rural poor (CASE report 1999: 48-9). South Africa is second only to Brazil in the gap between rich and poor – and both the State and civil society need to deal more effectively with this legacy of inequality. This also involves assessing the extent to which organized civil society in South Africa is in danger of becoming an elitist functionary removed from the needs of the most disadvantaged and marginalized groups in society. How to make the concerns of these groups heard is a massive challenge both to State and non-State actors alike.

Despite the massive public education campaign conducted during 1996, recent studies also reveal high levels of ignorance about the work of Parliament, the policy making process and human rights institutions, which is directly linked to low levels of participation (Houston et al 1999). There is also a link between levels of knowledge and socio-economic status. In a national survey conducted in August 2000, only a third of the respondents could provide an answer on the purpose of the Bill of Rights. Thirty six per cent of those interviewed said that they had never heard of the Bill of Rights (CASE survey 2000: 3). The survey found that Africans were most likely not to have heard of the Bill of Rights at all (41 per cent, compared with 13 per cent of the white respondents). The researchers went on to state: 'If we combine the responses of those who have not heard or who had heard but did not know the main purpose of the Bill of Rights, 71 per cent of Africans fell into this combined category…' (CASE survey 2000: 4). Levels of knowledge about the Constitutional Court were equally low. Sixty- nine per cent of the respondents had either never heard of the Court or did not know what its main purpose was. This was also the case with regard to the State Institutions supporting Constitutional Democracy: sixty per cent of the respondents had never heard of the South African Human Rights Commission or did not know what its main purpose was, and 64 per cent

had never heard of or did not know the main purpose of the Gender Commission. This is a worrying trend, since the success of our democracy is at least partly dependent on the success of the constitutional provisions and institutions outlined above. Lack of knowledge of these institutions means that they are left to be used by the privileged sectors of society only. Literacy and education campaigns need to be instituted both by the State and civil society as a matter of priority. This is another example of an initiative that could successfully be carried out jointly.

Civil society and the courts

As discussed above, in line with global trends, South Africa has adopted a system of constitutional supremacy with judicial review. This gives powers to the courts to decide matters often placed on the legislative agenda. As stressed above, the South African Constitution is the cornerstone of our democracy and envisages large-scale egalitarian social transformation. However, notwithstanding the content of the Constitution, a review of constitutional litigation in the past seven years leads inescapably to the conclusion that it is the more privileged groups in society that are seeking the protection of the Bill of Rights in the courts. Indeed there are few instances of the more disadvantaged groups in society – the very groups the Constitution was designed to protect – using constitutional litigation as a way of articulating and protecting their rights (Jagwanth, 1999: 200). In addition, the jurisprudence of the courts has often not yielded the protection for vulnerable groups which the Constitution appears to envisage. Given that in a constitutional democracy, courts are the primary protectors and final arbiters of constitutional rights, this trend is a disturbing one. However, the role of organized civil society in constitutional litigation tells a better story. The South African Constitution permits class action litigation – that is litigation on behalf of an entire group of people affected by the subject matter of the case. It also permits interest-group interventions in litigation, which allows organized civil society to intervene in a case and present arguments to the court. This has led to many successes for these groups. For example, the National Coalition of Gay and Lesbian Equality, a voluntary association of gay people in South Africa and 69 organizations and associations representing such people, successfully brought two cases before the Constitutional Court on the basis of discrimination on the ground of sexual orientation.[1] Other groupings, which have successfully initiated or intervened in litigation in the Constitutional Court have been the Society for the Abolition of the Death Penalty,[2] the Women's Legal Centre,[3] Christian Education South Africa,[4] the AIDS Law Project[5] and the Community Law Centre.[6] The

[1] These cases are *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC) and *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* 2000 (1) BCLR 39 (CC).

[2] Intervention in *S v Makwanyane* 1995 (6) BCLR 665 (CC) and *Mohamed v President of the Republic of South Africa* 2001 (7) BCLR 685 (CC).

[3] Intervention in *Moseneke v Master of the High Court* 2001 (2) BCLR 103 (CC).

[4] Applicants in Christian Education South Africa v Minister of Education 1998 (12) BCLR 1449 (CC) and Christian Education South Africa v Minister of Education 2000 (10) BCLR 1051 (CC).

[5] Intervention in *Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC).

majority of the cases decided by the Court which have made an impact on the lives of disadvantaged South Africans have been brought by organized interest groups, and it is rare to find suits brought by individual litigants in this regard. Institutional obstacles as well as lack of access to resources and lack of knowledge about the content of rights frequently make litigation in the courts virtually impossible for ordinary people. The role of civil society thus becomes paramount, and ensures that judicial rights discourse does not remain the domain of the privileged few in society. It is also important for civil society in modern democracies to ensure that the new forums of decision-making, like the courts, become accessible. Public interest litigation strategies and intervention in courts by organized civil society has resulted in tremendous victories for disadvantaged groups in other parts of the world too – most notably India and Canada.[7]

An example of organized civil society bringing cases to the attention of the court is the recent high profiled case brought by an active and highly effective NGO, the Treatment Action Campaign (TAC) in the Pretoria High Court. In essence, the TAC argued that the State was constitutionally obliged to provide anti-retrovirals to HIV positive pregnant women. The court agreed. The case is now on its way on appeal to the Constitutional Court. I wish to conclude with a discussion of this case because it presents a number of important issues and challenges for democracy under a system of constitutional supremacy and judicial review.

The State and the courts: judicial review and democracy

In *Treatment Action Campaign v Minister of Health* (case no 21182/ 2001, as yet unreported) the High Court ordered the State to provide anti-retroviral drugs to pregnant mothers in State hospitals. The background to the application, as stated in the judgement, is the 'grim reality that 24 per cent of pregnant women in South Africa are HIV positive and that 70,000 children are infected each year through mother-to-child transmission of HIV'. The government had made the drugs available only at a limited number of pilot sites, which would serve about 10 per cent of the population when operational. The applicants put forward a number of arguments, the chief of which was that this policy violated a number of constitutional rights including the right to access to health care services, basic health care for children, and the right to equality and dignity. They argued that the Government's policy violated a number of South Africa's international obligations. They also showed that the cost to the Government of providing Nevirapine to pregnant women was negligible. In response, the Government argued that the court should defer to the policy choices made by it, and that mother-to-child transmission of HIV was only one facet of the Government's health care priorities. To force the Government to prioritize it over other equally pressing and important needs would lead to a distortion of the health budget. Moreover, this was not the appropriate role of an unelected court in a democracy. The Government pointed out that the limited pilot phase of the programme was necessary to collect and evaluate all the data needed to make a

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[6] Intervention in *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

[7] See particularly the work of the Women's Legal Education Action Fund (LEAF) in Canada.

final decision on how to implement it fully. Essentially, the Government expressed the concern that a court sitting in judgement of government policy of this nature would result in a breach of the separation of powers doctrine. The court disagreed and held that 'where the court, being a part of the judicial arm of government, sits in judgement on the reasonableness of steps taken by the executive in the fulfilment of its constitutional obligations, it is exactly a perfect example of how the separation of powers should work'. In doing so, a court does not take over the functions of the executive, it merely pronounces on a constitutional obligation. The court held that the Constitution obliged the State to institute a countrywide mother-to-child transmission prevention programme. It held that

> '[t]o the extent that the impression was created in the affidavits filed on behalf of [the government] that the further roll out of the programme will depend on the availability of resources, it must be dispelled. The resources will have to be found progressively. The availability of resources can only have an influence on the pace of the extension of the programme, but there must be a plan for further roll out. Only if there is a coherent plan will it be possible to obtain the further resources that are required for a nationwide programme, whether in the form of a reorganisation of priorities or by means of further budgetary allocations.'

The court ordered the Government to make Nevirapine available to HIV positive pregnant women at all public health centres in South Africa. The court also ordered the Government to plan a national programme for preventing or reducing mother-to-child transmission of HIV and report back to the court by 31 March 2002.

Soon after the judgement was handed down, the Government announced its intention to appeal to the Constitutional Court. In a statement, the Minister of Health said that the appeal route was opted for 'not because we are against protecting babies from HIV', but because the judgement gave the wrong answer to the question of who makes policy. The Minister went on to state the following:

> 'If this judgment is allowed to stand it creates a precedent that could be used by a wide variety of interest groups wishing to exercise quite specific influences on government policy in the area of socio-economic rights. It could open the way for a spate of court applications and "policy judgments" not only relating to health care but also to other service areas, such as education, housing and social services. What happens to public policy if it begins to be formulated piecemeal fashion through unrelated court judgments?'

The Minister notes that government planning could becoming fragmented and government spending priorities undermined and disrupted. The difficult balance government had to strike between contending service priorities would also become difficult to achieve. A judgement such as this, she argues, could 'throw executive policy in disarray and create confusion about the principle of separation of powers, which is a cornerstone of our democracy' (Tshabalala-Msimang, 2001).

These issues raised by this judgement are crucial to our understanding of constitutional democracy. The concern about the tension between entrenched and justiciable rights and democracy goes beyond the question of the legitimacy of unelected, unrepresentative and unaccountable judges deciding matters of social policy normally left to the elected

branches of government. The concern is also that the process of constitutional interpretation is an inherently and unavoidably subjective one, which is open to a number of different outcomes depending on the personal and moral convictions of the interpreter. The meaning of statements of abstract rights is imprecise, uncertain and incoherent. Thus, in seeking to find the meaning of the words of the Constitution, it is necessary to go beyond the words of the text and to engage in a form of political and moral reasoning. In other words, judges, like all of us, have personal and subjective viewpoints which they will bring into the process of constitutional interpretation. Allowing judges to exercise this power and influence matters of policy is clearly problematic. In addition, sceptics of judicial review argue that by their very nature, judges are likely to come from the elite groups in society and will exercise their subjective discretionary powers in favour of vested interests rather than disadvantaged groups. Thus, gains in the courts are more likely to be for privileged groups at their expense as courts show preferences for some policy choices over others. In other parts of the world, the subjective nature of constitutional interpretation has led to cases in which important gains made for women and other disadvantaged groups at the legislative level have been successfully challenged in the courts as violating other constitutional rights – affirmative action being the prime example. At the same time, entrenched rights documents must have an independent arbiter in the form of the courts, and the TAC case is a good example of how well this can work. Courts become in this regard, important sites of struggle as well – and initiation and intervention in litigation may help to reduce some of the perils of judicial review identified above. In relation to the TAC case, the HIV/AIDS crisis has reached endemic proportions and the Government appears unwilling to give this matter the attention and priority it deserves. The rights in the Constitution – for which South Africans fought so hard – will be reduced to mere paper rights if the State is not required to fulfil its obligations under them. The Constitution is a document, which aims to transform South African society, and socio-economic rights were included – mainly at the behest of the ANC negotiators – precisely for this reason. And in this case, thousands of lives could be saved through the court order. But the theoretical question remains: should there not be limits on the powers of courts to decide matters, which properly belong on the agenda of the elected branches of government? There are no ready answers to this dilemma. The TAC case shows the difficulty of courts constraining their power to defer to the legislative and executive agenda in appropriate circumstances, while at the same time fulfilling and promoting the transformative norms of the Constitution.

Conclusion

In this paper I have attempted to illustrate some of the challenges faced by civil society, the State and the courts and their relationships with each other in post apartheid South Africa. Among the significant challenges to constitutional democracy in South Africa, as in other parts of the world, are the appropriate roles of the various branches of government in social issues. However, what is clear is that civil society has a major role to play in assisting the project of social change both in and out of the courts.

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