The Role of Social and Economic Rights in Supporting Opposition and Accountability in Post-Apartheid South Africa

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Introduction

In 1995, Ian Shapiro and I published an article about South Africa's democratic transition. In it we argued that South Africa's negotiated settlement had yielded a constitution that was more focused on guaranteeing representation for minority whites than it was on entrenching opposition. The interim constitution included power sharing clauses that reserved seats in the executive for all of the major parties, and had very weak mechanisms for ensuring a strong institutionalized opposition, either from minority parties or from dissenting back-benchers within the major parties. We argued that a strong institutionalized opposition was the key to a healthy democracy, and we were not alone in warning that the gravest danger to South African democracy would be the lack of opposition to the ANC.

Although the final constitution did not include many of the articles we had been most critical of, most importantly dropping the guarantee of power-sharing, it retained all of the constitutional provisions that strengthened the ruling party and weakened the opposition. The National Party dropped out of the executive in 1996 to take up the role of opposition, but in the 1999 election the ANC won an even larger majority of the vote. The NP subsequently disintegrated, and the Democratic Party has since taken up the mantle of official opposition, positioning itself as a watchdog party. Although the DP is vociferous, its small size has nevertheless ensured that its role would be more that of a chihuahua than a rottweiler. The ANC still faces very little opposition within parliament. It won a solid majority in 2004, and is not likely to face a serious challenge to its hegemony in 2009.

This does not mean however, that the ANC actually faces no opposition. In 1995,

Shapiro and I speculated that opposition to the ANC might come from within the party itself, and that the party might split among its competing constituencies. The ANC, we noted, was a broad church. The party's liberation struggle heritage carried sufficient moral weight that it could encompass social groups with opposing interests, but we anticipated that disaffection with the ruling party could soon break into open opposition from civil society groups affiliated to the ANC.

In fact, opposition has been most consistently voiced by community groups and non-governmental organizations whose members come from the ANC or from breakaway factions of the ANC. South African civil society has been vocal in its opposition to many government policies, taking the ANC to task for failing to provide adequate housing, for abrogating its commitment to healthcare, for failing to provide sufficient jobs, to guarantee a living wage, and to deliver the social and welfare services it has promised. Although this is not the kind of institutionalized opposition that Shapiro and I had in mind in 1995, it is certainly opposition, and it is playing an important role in maintaining democratic participation and deliberation. Despite ANC hegemony in parliament, civil society has sometimes succeeded in holding the ANC accountable.

One reason that popular participation has been effective in playing this role is that, while the final constitution dropped the guarantee of power sharing, it added a commitment to a raft of justiciable social and economic rights. Section 24 of the Constitution guarantees everyone's right to a safe and healthy environment and requires the state to protect the environment. Section 25(5) requires the state to enable citizens to gain equitable access to land. Section 26 provides a right to access to adequate housing and prohibits arbitrary evictions. Section 27 guarantees access to healthcare services,

sufficient food and water, and social security, and prohibits the refusal of emergency medical treatment. Section 28(1)(c) entrenches children's rights to shelter and basic nutrition, social services and healthcare services. Section 29 provides a right to education, and Section 35(2)(e) guarantees the right of detained persons to be provided with adequate nutrition, accommodation, medical care, and reading material.

For the most part, the ANC government has failed to fulfill the social and economic rights that are promised by the Constitution. In fact, the Constitutional Court has ruled that such rights are only guaranteed to the extent the government can afford them, and has been careful to insist that it cannot interfere in government policy regarding budgetary allocations. This severely limits the government's legal obligation to provide the level and type of socio-economic benefits and services the constitution appears to envisage.

As a result, there are reasons to be skeptical of the wisdom and value of enshrining socio-economic rights in a constitution. If nations lack the capacity to guarantee the rights they promise, are these in fact "rights?" If the constitution guarantees rights that the government does not uphold, does it undercut the idea of rights altogether? Should rights therefore be limited to the type of civil and political rights—the so-called negative rights--that most governments are in some position to protect? If governments are under limited obligation to ensure compliance with socio-economic rights, and lack the capacity to do so in a way that is justiciable, such rights may be meaningless or, even worse, potentially pernicious to the extent they undermine the legitimacy of rights more generally (Sunstein, 1993).

Whereas the transformative potential of socio-economic rights may be limited from a

legal standpoint, we argue that such rights have played an important role in opening up the political space of oppositional politics in South Africa. The existence of constitutionally enshrined socio-economic rights legitimates demands for government-provided welfare and services even as the government's neo-liberal policy direction attempts to evade such responsibility. The language of rights has additionally shaped the form of opposition in South Africa by framing the political demands of activists. Rights-language structures oppositional politics in a particular way. Finally, the existence of a particular menu of rights plays a role in determining which issues and political identities develop political traction.

The constitution, and the rights it enshrines, therefore plays an important role in motivating and sustaining political participation and opposition in South Africa. This is counter-intuitive because constitutionalism is generally understood as a framework for establishing the boundaries of political participation by setting limits on politics. Rights in particular are often said to stifle politics by removing issues from the realm of political action and mobilization to the courts. The South African case may offer an example of how constitutions, and the rights they enshrine, can instead generate politics, in particular as neo-liberal economic policies threaten increasingly to remand issues of welfare and redistribution to the private sector.

The Promise and Limits of Rights

As a weapon against the indiscriminate use of power, rights have had their ups and downs in recent years. Starting in the 1970s, scholars associated with the field of Critical Legal Studies issued an important critique against the transformative potential of

legal rights. CLS took the position that engaging in rights discourse was fundamentally incompatible with a broader strategy of social change. Although the extension of rights may energize struggle, and produce apparent victories in the short run, ultimately it legitimates the dominant structure of class, race, and gender inequality. Rights, they argued, reinforce existing social arrangements. Because they are indeterminate, they are subject to interpretation and contextual grounding which most often protects the status quo. According to Mark Tushnet, people lose sight of their real objectives when they abstract concrete experiences of discrimination and injustice into legal rights discourse (Tushnet, 1984). Peter Gabel argued that rights are an illusion that bind people to an imaginary political community of citizens and legitimate state power by appearing to offer grounds for redress (Gabel and Kennedy, 1984).

Embedded as they are in the evolution of liberal theory, rights also play an important role in framing the public sphere as a space of interaction among free and equal individuals. Patrick Macklem has noted that human rights law privileges individual civil and political rights over collective social and cultural rights. As he notes, "(r)ights bearers overwhelmingly are individuals, and their entitlements protects a zone of individual liberty from the exercise of public power." (Macklem, 2006:2) Ross Poole argues that rights isolate claims from public debate (Poole, 1999:126). Wendy Brown has shown that rights have acted historically "as a mode of securing and naturalizing dominant social powers—class, gender, and so forth." (Brown, 1995:99)

Critical Race Theorists, on the other hand, have been more sympathetic to the political use of rights, and issued a critique against CLS in defense of the strategic use of rights discourse and strategies in the Civil Rights Movement. Kimberlé Crenshaw argued

that CLS scholars had disregarded the transformative significance of rights in "mobilizing black Americans and in generating new demands" and ignored "the transformative potential that liberalism offers. Although liberal legal ideology may indeed function to mystify," she went on "it remains receptive to some aspirations that are central to black demands." (Crenshaw, in Crenshaw et al., 1995:110) The existence of rights, she argued, forced a crisis in hegemonic legitimacy when "powerless people force open and politicize a contradiction between the dominant ideology and their reality." (p.111) "Rather than using the contradiction to suggest that American citizenship was itself illegitimate or false, civil rights protestors proceeded as if American citizenship were real and demanded to exercise the "rights" that citizenship entailed." (p. 111)

Crenshaw insisted in particular that it was the very fact that rights are enshrined in the prevailing ideology that made them useful as an oppositional tool. "Merely critiquing the ideology from without or making demands in language outside the rights discourse" she argues, "would have accomplished little." (117) Her critique seems especially poignant in the context of neo-liberal political agendas that threaten to erase the role of government altogether, undermining the sovereign power--and obligation--of states to carry out reform or development. As she argues, "Some critics of legal reform movements seem to overlook the fact that state power has made a significant difference—sometimes between life and death—in the efforts of black people to transform their world. Attempts to harness the power of the state through the appropriate rhetorical and legal incantations should be appreciated as intensely powerful and calculated political acts." (117)

Crenshaw and others simultaneously recognized however, that the same rights

that were used to push reform in the civil rights era were pushing back against the advances of the civil rights movement in the 1980s. "Yet today" she says, "the same legal reforms play a role in providing an ideological framework that makes present conditions facing underclass blacks appear fair and reasonable." (117) The ostensible race neutrality of the legal system creates the illusion that racial disparities are the result of individual and group merit (117). Despite its emancipatory potential, the use of rights may ultimately limit oppositional politics, offering a degree of formal equality that masks underlying, and persistent, structural injustice. There are dangers, she warns, "both in engaging the dominant discourse and in failing to do so. What subordinated people need is an analysis that can inform them about how the risks can be minimized and how the rocks and the very hard places can be negotiated." (112)

Between them, critical legal scholars and critical race theorists map the possibilities and pitfalls of using rights as a strategy of social transformation. Even as rights have played an important role in protecting vulnerable individuals and minority groups from the indiscriminate use of majority power, so have they entrenched the status quo by substituting formal for real equality. Crenshaw's diagnosis, that we need to find ways of harnessing the emancipatory potential of rights without falling prey to their limiting logic, precisely renders the challenge facing political activists in the present age.

There are two ways in which the South African case may help us to think creatively about the strategic potential of rights. First, this literature contemplates the use of civil and political rights as a strategy for achieving inclusion. Crenshaw goes so far as to say that "the struggle of blacks, like that of all subordinated groups, is a struggle for inclusion…" (119) In South Africa however, formal political inclusion and universal

citizenship were substantially achieved in the democratic transition. Like Americans in the post-civil rights era, South Africans enjoy formal equality under the law and equal rights to political voice and participation. Black South Africans are in power in South Africa. What they do not enjoy, and what is at stake, is substantive social and economic equality. The rights that are still contested—in the sense that they offer a promise that has yet to be fulfilled--are social and economic rights. The South African case provides grounds for considering whether social and economic rights are susceptible to the same self-limiting logic that restricts the promise of civil and political rights, or whether they have greater potential to subvert the status quo.

The second difference that South Africa presents, and that was not contemplated by critical race or critical legal scholars, is the use of rights as a political, and not only a legal, strategy. For these theorists, the discourse of rights is synonymous with a legal reform strategy. When they write about the possibilities of rights, they are in fact contemplating the reach of legal reform, whether law can be transformed from within, and whether the courts are an appropriate or useful venue for social change. While South African political activists are certainly using legal reform to press their claims for social and economic rights, they are also using such rights to frame political debate, to mobilize oppositional consciousness, and to retrieve the notion of government accountability. This paper contemplates the use of social and economic rights as a political strategy in two senses. First, it examines the extent to which courts are not only a legal space, but also a political space. Second, it focuses attention on rights activism outside the court room, far from the offices of lawyers and legal scholars. The South African prism allows us to consider the relative merits of using rights as a strategy of political framing and

mobilization.

At best, the same commitment to rights that is employed to protect private property and preserve the status quo may also operate as a condition of collective action in liberal democracy. Constitutions that supplement the negative rights associated with protecting individual freedom with the positive rights associated with social welfare, may spark public debate and contestation. Rights can be deployed to stretch the boundaries of political engagement to produce new political actors. As new actors enter politics, they transform the terms of debate and the conditions of political action. They open our eyes to injustices we did not recognize before as injustices, exposing naturalized, and therefore invisible, hierarchies, and contesting the limits of inclusion and exclusion. They introduce new strategies and alliances to the politics of opposition, and they alter established conceptions of what can be contested when, where, and how. Through the provision of rights, liberalism sets, and has the capacity to extend, the terms of democratic contestation. If pushed, this critical leverage exposes the emancipatory potential of constitutionalism, and highlights the crucial role of opposition in democratic transformation.

Extending the Transformative Project

Karl Klare makes an argument for transformative constitutionalism in South Africa. He defines transformative constitutionalism as "a long term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction." (Klare, 150) He argues that the South African Constitution was intended by its framers as a document that would lead to the

transformation of society. The constitution marked a break with apartheid that would lay the groundwork for democratic justice. Constitutional Court justices are therefore obligated, he says, to take an activist stance in interpreting the Constitution in ways that will issue in social, economic, and political transformation. In South Africa, adjudication should have an explicitly transformative agenda.

In the field of law, his argument breaks from commonly held conceptions of constitutions as documents that are fundamentally conservative pre-commitment strategies, designed to offer protections against the potential excesses of democratic governance. Constitutionalism is understood as a limit on democratic politics. In the United States, judges who interpret the constitution with regard to the intent of the framers are considered deeply conservative. Judge Bork is the best known of these, and his Reagan-era Supreme Court nomination was rejected on the basis of his "originalist" approach to constitutional interpretation.

As Justice Kriegler has written about South Africa however, "(w)e do not operate under a Constitution in which the avowed purpose of the drafters was to place limitations on governmental control. Our constitution aims at establishing freedom and equality in a grossly disparate society." Klare and others are, correspondingly, trying to plumb the socially transformative potential of constitutions that support the rule of law in nascent democracies. Rather than acting as a curb on democracy, these constitutions may be used to deepen and extend a commitment to a society based on democratic values, social justice, and fundamental human rights. He is trying to develop what he calls a "revised, perhaps somewhat more politicized, understanding of the rule of law and adjudication that can consist with and support transformative hopes" while still maintaining

interpretive fidelity (151). In South Africa, it is possible to be both "originalist" and "activist" at the same time—two positions that stand at opposite ends of the spectrum in the United States.

As Klare and others have pointed out however, the Constitutional Court has actually been surprisingly conservative in its interpretation of social and economic rights. Justices have not, for the most part, delivered decisions, or engaged in reasoning, that would force the government to commit funding or make policy changes that support a transformative interpretation of social and economic rights. For example, as Theunis Roux has pointed out, the Constitutional Court has consistently declined to endorse the view that socio-economic rights mandate judges to second-guess the budgetary allocations to the areas of social provision protected by particular rights (Roux, 2003, p.10, quoted in S. Wilson p.438). The Court has refused to interpret the existence of social and economic rights as imposing a minimum core obligation on the state, even though the concept of a minimum core is central to international law on social and economic rights. Cass Sunstein has described the Court's decisions as "restrained," "respectful," and even "deferential" to the state (p.22 Brand), and Danie Brand argues that the courts have been acutely aware of the constraints under which they operate.

Brand and others (eg. Michelman, 2003) put this down to what is called a 'separation of powers' constraint. Courts are reluctant to enforce positive rights, it is argued, for three reasons that have to do with maintaining the independence of the judiciary and the separation of powers. The Court justifies its conservatism with reference to its lack of technical capacity (to decide issues of funding allocation), its lack of democratic accountability, and a concern over maintaining the institutional integrity of the court

(Brand, 22-23). These arguments, which are marshaled against including positive rights in constitutions more generally, have also been used to critique the South African Constitution in particular.

Michelman focuses attention on the second of these constraints, calling it the democratic objection. It seems there are a number of objections to constitutionalizing social and economic rights that might fall under the rubric of "democratic" objections. First, the courts are not democratically elected, and therefore allowing the courts to make decisions that are otherwise made by elected legislators is anti-democratic. Second, if the judiciary issues positive enforcement orders, it does so against the prevailing political will (Michelman, 16) by compelling the democratically elected government to enact policy against its will. By naming social citizenship a constitutional right, he says, we impose "a far-flung constraint on policy choice by majority rule." (Michelman, 29) Third, coming at it from another direction Dennis Davis has argued that justiciable socio-economic rights might "erode the possibility for meaningful political participation in the shaping of the societal good." (Davis, 1992 in p.21 Brand)

The Court faces at least one other challenge in its effort to decide social and economic rights cases, and that is that it is operating virtually without precedent. Section 39(1) of the Constitution obligates courts to have regard to international law in their interpretation of the Bill of Rights, and allows courts to have regard to foreign law. Although socio-economic rights are protected as justiciable rights in many constitutions, they have seldom formed the basis of constitutional litigation. As Brand argues, where case law exists, such as in India and Germany, it has largely been developed "in jurisdictions where socio-economic rights are indirectly recognised through extended

interpretation of other rights or application of broader constitutional norms." (Brand, 6)

As he goes on, "absent foreign jurisprudence on socio-economic rights, the focus in South Africa has been on international human rights law." (Brand, 7) The primary UN instrument in this respect is the International Covenant on Economic, Social and Cultural Rights (CESCR), which provides guidelines for domestic law, and the Committee on ESCR issues General Comments that are very influential in the interpretation of socio-economic rights (Brand,7). Nevertheless, the CESCR does not have an individual complaints mechanism through which a case might be laid against a state for violation of its provisions, which means that international law also fails to provide the authority that precedent offers to judges in deciding other cases.

The fact that the South African constitution includes justiciable social and economic rights is the main element of Klare's argument that the constitution itself is "postliberal" and, therefore, potentially transformative (Klare, 153-54). Yet the constitutionalization of justiciable positive rights poses two sets of challenges that have limited the Court's willingness to fulfill the Constitution's transformative potential: a perceived need to defer to the democratically elected legislature and executive in matters of social policy, and the absence of a robust body of case law that could be used to support interventionist rulings.

One way of trying to manage, or resolve, this fundamental tension is to attempt to fill the vacuum created by the absence of precedent with an alternative source of authority that comes from democracy itself. Klare argues that transformative constitutionalism is aimed at "transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction." (Klare, 150) He fails to specify however, where judges should take their cues from or what, other than

presumably their own consciences, should guide their reasoning. His vagueness here is striking. "In the background," he says, "is an idea of a highly egalitarian, caring, multicultural community, governed through participatory democratic processes in both the polity and large portions of what we now call the 'private sphere.'" (Klare, 150) This may be what is in the background of Klare's interpretation of the meaning of socio-economic rights, but it is not obvious that such rights automatically imply this, or any other, proposed meaning. Such rights still need to be given content, and courts need some authority, in so doing, that can counter the anti-democratic charge that is laid against them. If courts are going to make the kinds of interventionist, transformative judgments that they did in *Treatment Action Campaign* and *Grootboom*, which find against the democratically elected government and prescribe a particular policy outcome, they are going to need an external source of authority.

Michelman argues that the majoritarian objection against constitutionalizing socio-economic rights holds only if we employ a narrow definition of democracy which is not the only, or best, one available to us (p.13). "The point of naming social citizenship a constitutional right is to give a certain inflection to political public reason", he says (34). "'Democracy' then would name the practice by which citizens communicatively form, test, exchange, revise, and pool their constitutional-interpretive judgments…" (34). By moving the location of democracy from the legislature to civil society, Michelman proposes that democracy—that is, deliberation in the public sphere-- will in fact be strengthened through the constitutionalization of socio-economic rights.

Michelman does not specify however what is to be the relationship between the debate that takes place in civil society around the issue of rights, and what happens in the

courts. Sandra Liebenberg argues however that the capacity of social rights to open up political space (and presumably discussion) ultimately rests with the courts. As she says, "(t)he inclusion of socio-economic rights as justiciable rights indicates that the constitution envisages an important role for the judiciary in their enforcement. The jurisprudence will define the nature of the state's obligations in relation to socio-economic rights, the conditions under which these rights can be claimed, and the nature of the relief that those who turn to the courts can expect." If the courts interpret socio-economic rights as imposing weak obligations on government, the strategic political value of mobilizing around rights discourse will diminish. Court decisions, in other words, importantly shape the capacity of civil society to use rights to make demands on the state.

To what extent is the opposite also true? Are the decisions of the courts influenced by social activism and mobilization, and do justices take cues from the deliberation that takes place in the public sphere around particular issues? Was the evolution from *Soobramoney*--a decision in which the Court basically upheld the government's prerogative to make its own decisions about the allocation of healthcare--to *TAC*—an interventionist ruling that required the government to change its policy on providing nevirapine to pregnant mothers--influenced by popular mobilization around the issue of mother-to-child transmission of HIV/AIDS? Can public deliberation serve the Court as a source of democratic legitimacy and independence? Does civil society importantly shape the capacity of the Court to deliver decisions that hold the government to account?

Court Decisions & Political Mobilization: Evidence from South Africa

As we have already noted, the first ten years of South African democracy was characterized by the absence of an effective opposition party in Parliament. During this period, the ANC faced democratic opposition on three main fronts: From inside the Tripartite Alliance[1], from civil society groups and non-governmental organizations, and from other branches of government – chiefly the Judiciary.[2] Civil society groups in particular were surprisingly effective in voicing their opposition to, and holding government accountable for, poorly developed and implemented social policies. They did so by arguing that extant policies arbitrarily restricted certain groups' rights to access health care services, shelter and housing, as set out in Sections 26 and 27 of the South African Constitution (1996).

This strategy has not been entirely successful in transforming government policy[3], is time-consuming, and requires technical skills and financial resources that are not readily

[1] Judith February (2006: 132, 136) notes that COSATU, which maintains a permanent parliamentary office, has been particularly effective in influencing legislation and policy.

[2] Rod Alence (2004: 87-89) argues that, "[w]ith little meaningful institutional separation of power between the executive and legislative branches, South Africa's judiciary is central to prospects for accountable government". While Parliament has not been uncritical of government, its critiques have rarely culminated in policy changes or even sustained deliberation on contested issues (February, 2006: 137-138). ANC members of the National Assembly, who constitute the majority of representatives, have supported all 907 pieces of legislation passed during the period 1994-2004 (Alence, 2004: 84). Even the controversial Civil Union Bill of 2006, which many ANC MPs opposed, passed with 230 votes to 41 after "the ANC had issued a three-line whip, instructing all MPs to vote in favour of the bill" (BBC, 2006). The best known examples of the ANC's ability to neutralize parliamentary oversight occurred in 2000-2001 when it effectively silenced the Standing Committee on Public Accounts' (SCOPA) inquiries into a major arms procurement deal (Sole, 2005; February, 2006; Mattes, 2002). In contrast, the Judiciary has the most successful record of oversight vis-à-vis both Parliament and the Executive. In *Speaker of the National Assembly v. De Lille and Another* (1998), for example, the Cape High Court ruled that an opposition member of Parliament had been suspended from her position in a manner not in accordance with the rules of the National Assembly. However the most prominent cases decided against the Executive involve social rights claim, three of which we discuss here.

[3] Two of the most prominent social rights cases of 1994-2004, *Grootboom* and *TAC*, produced judicial decisions that pointed out the inadequacies of existing government policies. Only in 2004, four years after the *Grootboom* ruling, was a national housing program "explicitly geared towards the amelioration of

available to most poor and marginalized South Africans (Fakir in February, 2006).[4] Pieterse (2004: 904-905) argues that the limited success of social rights litigation also stems from the "technicist and positivist orientation of South African legal culture", a residue of its liberal democratic tradition and its "tendency to deny the inherently political nature of the judicial function, to accept as "normal" or "neutral" the institutional arrangements, rights discourses and interpretive exercises associated with classical liberalism and to view those associated with social democratic aspirations (even when concretized as legal standards) as inherently political in nature and thus unbefitting judicial deliberation". This has resulted in the judiciary focusing almost exclusively on the reasonableness of government policy, i.e. elucidating the standards for evaluating policy set out in Sections 26(2) and 27(2), rather than the ambit and scope of the rights themselves (Pieterse, 2004: 896-897). Pieterse's critique highlights a disquieting tendency in the court's approach to social rights decisions. However, it overlooks the fact that notions of reasonableness too are subject to political contestation and not purely a matter of objective review. Here we illustrate how social rights claims have in fact

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persons in crisis situations" incorporated into the National Housing Code" (Wickeri, 2004: 30). In the interim period, at least 4 separate cases (*Minister of Public Works v Kyalami Ridge Ratepayer's Association, 2001; Modderklip Boerdery (Pty) Ltd v. Modder East Squatters and Another, 2003; City of Cape Town v. Various Occupiers of the Road Reserve of Applicant Parallel to Sheffield Road, Phillipi, 2003; City of Cape Town v. Neville Rudolph and Others, 2003*) concerning attempted or actual evictions of communities living in informal settlements were argued in Courts around the country. In all four decisions, local governments were ordered to provide affected communities with emergency shelter, in keeping with the *Grootboom* decision. After the *TAC* case, government published its Operational Plan on Comprehensive HIV and AIDS Care, Management and Treatment in the year following the Court's decision. However, the TAC has since been forced to undertake litigation in order to obtain the state's implementation plan governing the rollout of anti-retrovirals in public hospitals.

[4] This is perhaps equally true of all formal modes of political participation that extend beyond voting, as many South Africans don't have the time, access to transport, technical skills or information to monitor government and hold it accountable for policy failures and procedural transgressions. Where civil society organizations do participate in Parliamentary procedures, for example by preparing submissions to Parliamentary Committees, there are "no uniform rules applying to the weight attached to or the treatment of" such documents (Habib & Hertzenberg in February, 2006: 136). No formal database exists of the organizations that have tabled submissions, nor of the submissions themselves (February, 2006: 136).

generated tentative and fairly concrete (if not widely enforced) standards for how government *may not* allow residents of the Republic to live.

Social rights litigation has been significant for another reason: it has allowed citizens to articulate their demands, critiques of government and experiences with its policies in a manner that has several positive implications for democratic accountability and opposition in South Africa. Using case study material, this section illustrates how social rights litigation has produced a formal and contemporary record of government failures in conceptualizing and implementing social policy. This record consists of sophisticated technical evaluations, as well as extremely personal narratives, contained in affidavits, of the objectionable conditions many South Africans live and work in every day. Second, it has compelled government structures at all levels to remedy these failures, sometimes with immediate effect, whether this entails checking excessive use of government power (e.g. in the case of forced evictions) or compelling it to fulfill obligations it has unjustifiably neglected (e.g. not distributing Nevirapine at all public sector hospitals).

Third, litigation has forced government to provide citizens with publicly articulated, recorded and justified responses as to the adequacy of its policies. This legal process has arguably yielded more productive analyses of social policy and deliberation on the nature of South African democracy than comparable parliamentary debates during 1994-2004. Finally, court cases based on social rights claims have provided citizens with a mechanism, other than elections, for demanding government accountability. This is significant, as the institutional design of South Africa's democratic system predisposes legislators to prioritize party loyalty above service to the citizens that elect them (Alence, 2004: 83). Significantly, the extent and quality of government engagement with social

rights litigation contrasts sharply with its uneven and sometimes punitive responses to street protests, parliamentary hearings or reports from parliamentary standing committees, the other main forums for opposition politics during this period.

One way of thinking through these issues is to compare two recent court cases, *Grootboom*[5] and *TAC*[6]*,* and the diverging ways in which they used social rights litigation in the wake of the *Soobramoney*[7] decision. *Soobramoney* laid out a conception of social rights as collective rights, i.e. rights properly claimed by and allocated to classes of citizens, not individual persons. Because *Soobramoney* signaled the court's unwillingness to recognize social rights claims articulated by individuals, it is pivotal in understanding why social rights have subsequently been particularly effective when deployed as a political, not a legal, strategy. In both *Grootboom* and *TAC* the Constitutional Court found against the South African government, issuing landmark decisions that forced it to reverse policy decisions and commit resources to particular categories of people. The *TAC* court case, however, was preceded and accompanied by significant popular mobilization and by a lengthy domestic and international political campaign for drugs preventing mother-to-child transmission of HIV/AIDS. In contrast *Grootboom* was not accompanied by significant political mobilization, other than the initial land invasion by the community. Below we compare these cases to draw out the links between social rights claims, litigation and political mobilization after *Soobramoney*.

[5] Government of the Republic of South Africa and Others v. Grootboom and Others CCT11/00, 2001(1) SA 46.
[6] Minister of Health and Others v. Treatment Action Campaign and Others (No.2) CCT 9/02 (18 April 2002)
[7] Thiagraj Soobramoney v. Minister of Health (KwaZulu Natal) CCT 32/97 (27 November 1997)

Court Decisions & Political Mobilization: Soobramoney, Grootboom & TAC

i. Soobramoney: Social Rights Should Address "The Larger Needs of Society"

Any evaluation of social rights claims involves a two-stage process (Govender, 2006: 101). First, the court has to assess whether a violation of rights has in fact occurred. The onus for proving this falls on the party/parties' making this claim (typically directed against the state) who may argue that a particular law is unconstitutional (e.g. *Khosa v Minister for Social Development*), that state conduct is inconsistent with a constitutional right (e.g. *Minister of Health v Treatment Action Campaign*), or that the opposing litigant's argument relies on a rule of law that is inconsistent with the general tenor of the Bill of Rights (as argued, for example, in *Afrox Health Care (Pty) Ltd v Strydom*) (Brand, 2005: 19-20). Legal arguments demonstrating these claims effectively try to elaborate a record of policy failure.

Second, the court must assess whether the limits placed on social rights, where these exist, are reasonable and justifiable in a "democratic and open society in which government is based on the will of the people and every citizen is equally protected by law" (Preamble of the Constitution of the Republic of South Africa, 1996). The burden of providing such justifications typically falls on the state and requires that it justify its policies in terms commensurable with the democratic commitments set out in the Constitution. "In effect, the Court assesses the importance of the right against the purpose of the limitation and assesses whether the means chosen to achieve the objective is proportionate and reasonable" (Govender, 2006: 101; see also Section 36 of the Constitution of the Republic of South Africa, 1996).

Soobramoney was the first social rights case argued before the Constitutional Court where the government and an affiliated service provider would have to account for their policies in these terms. It concerned the Section 11 and 27 rights of Mr. Thiagaraj Soobramoney, a chronically ill man, who had been denied access to life-saving dialysis treatment by Addington Hospital in KwaZulu Natal. In order to make optimal use of its 20 dialysis machines, which served the whole of KwaZulu Natal and patients from parts of the Easter Cape, this public hospital had developed a protocol that prioritized patients that would most benefit from dialysis. Mr. Soobramoney did not qualify for dialysis treatment on any of the grounds set out in the protocol and was thus denied treatment. He responded by making an urgent application to the Durban and Coast Local Division of the High Court for an order obliging Addington Hospital to provide him with dialysis treatment. The matter was heard by Combrinck J, who ruled against Mr. Soobramoney and dismissed the application. The plaintiff then took the case to the Constitutional Court, which ruled that his Section 11 and 27 rights had not been violated.

In its decision, the Court deferred to the judgment of the medical doctors at Addington Hospital, describing itself as "slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters" (*Soobramoney*, 1997: Par.29). It justified its non-interference on the grounds that Mr. Soobramoney's exclusion from the dialysis treatment service was not arbitrary, but based on both rational and reasonable considerations articulated by the Provincial Health Department in its budgeting process and the medical staff at Addington Hospital in their treatment guidelines.[8]

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[8] Paragraph 25 of the *Soobramoney* decision reads as follows: "By using the available dialysis machines in accordance with the guidelines more patients are benefited than would be the case if they were used to keep

Soobramoney served as a key reference point in both *TAC* and *Grootboom* as it illuminated the grounds on which Courts would recognize social rights claims. The decision had three major strategic implications. First, it effectively reinterpreted certain absolute rights, such as the right to life, as circumscribed by resource constraints. [9] *Soobramoney* suggested that the state's obligation to facilitate the right to life (Section 11) should be understood in the context of the resource limitations noted in Sections 26 and 27 of the Constitution (*Soobramoney*, 1997: Par.11). This signaled a context-sensitive (if conservative) approach to legislating social rights, where broader social and political concerns were considered as important as technical legal questions in reaching decisions. In future therefore, political mobilization outside of courts could potentially play a significant role in shaping the Court's assessment of the contexts in which rights claims were being adjudicated.

Second, the *Soobramoney* decision, formulated in the absence of political mobilization in support of the plaintiff and little public debate about his claims, framed the case as revolving around the concerns of an aggrieved individual. It did not regard Mr. Soobramoney as a member of a marginalized class of citizens deserving of redress, given the costly and specialized care he and similarly placed persons would require. Most significantly, the Constitutional Court argued that ruling in his favor would impact negatively on the state's capacity to fulfill its obligations towards "the larger needs of society" (*Soobramoney*, 1997: Par.31). The *Soobramoney* decision thus made explicit

alive persons with chronic renal failure, and the outcome of the treatment is also likely to be more beneficial because it is directed to curing patients, and not simply to maintaining them in a chronically ill condition. It has not been suggested that these guidelines are unreasonable or that they were not applied fairly and rationally when the decision was taken by the Addington Hospital that the appellant did not qualify for dialysis."

[9] For a critique of this interpretation, see Pieterse (2004: 899-902).

that individuals, and other vulnerable sub-groups with specialized needs, would not be able to use social rights provisions to secure access to costly social services. This implied that the Court would be more likely to recognize rights claims that could be presented as not only collective, but also as majoritarian.

The manner in which the *Soobramoney* decision was formulated ultimately implied that social rights could most successfully be taken up as a political, not legal, strategy. It required that social rights claims be articulated in terms of group identities grounded in socioeconomic marginalization. These identities would have to be forged outside of courts through some form of political mobilization. To use social rights effectively, otherwise disparate individuals would have to develop coherent narratives about the material need(s) in which their shared identity and claim(s) were grounded, the universality (and thus credibility) of their particular political identity, and the specific ways in which their marginalization was related to policy failures.

Soobramoney also pointed to the legal – and thus political – salience of the "reasonableness" of government policies. However, the judgment did not explain the normative commitments that allowed the Court to distinguish, on grounds other than cost, between vulnerable groups that could legitimately be denied social services in some contexts, and groups that should otherwise be prioritized because of their marginalized status.[10] Only in the Grootboom case would the Court begin to elaborate the conditions

[10] In an assessment of South Africa's progress on health care rights Karrisha Pillay (2003: 20-21) notes that the White Paper on Health (1997) gives special attention to meeting the needs of the poor, under-served, aged, women and children – all groups considered to be amongst the most vulnerable. The 2004 National Health Act makes includes all these groups, except the poor or under-served, and adds people with disabilities to its list of examples of "vulnerable groups". Pillay points out that the White Paper, in effect at the time of the Soobramoney case, "gives no insight as to how this determination was made and it is unclear why it does not, for instance, specifically include people living with HIV/AIDS, people with disabilities, etc. Instead it uses vague terminology like the "under-served" with little guidance as to exactly who would be included in such a category. A severe shortcoming is accordingly the failure of the national

under which the state had "the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need" (*Grootboom*, 2000: Par.96).

ii. Grootboom: Litigation Without Mobilization

The *Grootboom* case was precipitated by a land takeover in which 300 people living in appalling conditions moved onto land previously earmarked for low cost housing. Their settlement was then bulldozed by the provincial government without warning, leaving them with no alternative housing. Other than the land takeover by the plaintiffs themselves, *Grootboom* was not accompanied by significant mobilization or political activism, nor was the case embedded in a broader campaign for housing. Among the groups that might have become involved in the case, the absence of the newly founded Landless Peoples Movement was notable. Neither this organization, nor the more moderate National Land Committee, used the case as an opportunity to influence the Court's decision or to popularize their demands for an improved land reform policy.

Unlike *Soobramoney*, the *Grootboom* judgment evaluated the reasonableness of government policy not only in terms of its fiscal implications, but also with regards to its quality of implementation at all levels of government. The consideration given to policy implementation stems in large part from the arguments presented to the court by the *amici curiae,* i.e. civil society organizations acting in solidarity with the Grootboom

health framework to determine the criteria in terms of which 'vulnerable groups' are identified". Furthermore, government policy does not explicitly target all persons included in these groups, but specific subsets such as pregnant women or children under six. In this sense the groups listed, and policies devised to serve them, are essentially arbitrary, though their inclusion makes intuitive sense to most South Africans. As noted above, this lack of clarifity regarding criteria for assessing patients' vulnerability and its impact on their access to medical resources is echoed in the Soobramoney decision. It is particularly important to develop more explicit principles for prioritizing access to health care services as the kinds of groups judged "most vulnerable" or "under-served" are likely to change over time due to the emergence of new public health concerns, and new socio-economic configurations and status hierarchies in South African society – particularly if government succeeds at progressively realizing socio-economic equality.

community, and not those of lawyers for either the Government or the Grootboom community.

The Community Law Centre (CLC), arguing for the *amici curiae,* contended that government's one-size-fits-all housing policy unintentionally exacerbated existing socioeconomic inequalities because it imposed unreasonable limitations on the rights of adults in crisis situations to access either housing or shelter. Perhaps the most significant aspect of the CLC's argument was its emphasis on the criteria the court could use to judge the degree of deference it owed the Executive and Legislature. These guidelines emphasized that the groups adversely affected by extant housing policy, "children and the very poor", were "two of the most vulnerable in society". Quoting John Hart Ely, the CLC argued that "those whose rights need particular protection through the courts are 'those groups in society to whose needs and wishes elected officials have no apparent interest in attending'" (CLC, Par.108-9: 2000). Children are in this position because they may not vote, and impoverished citizens because they often cannot vote or participate in politics when their civil and political rights are enforced, but not their social rights. The CLC also argued that the degree of deference the Court owed the Legislature and Executive depended on the extent to which policies, or decisions about their enforcement, resulted from "thorough and consultative" processes consistent with politics in a democratic society.

This argument highlighted government's obligation to justify its actions and decisions, to be transparent in its decision-making processes and to give due consideration to the interests of minor citizens and the poor. Framing the case in this manner exposed the ways in which government had fallen short of these standards of

conduct at both the national and provincial levels. It also set out a justification for the prioritization of marginalized groups on the basis of their inability to otherwise participate effectively in the democratic process, and not solely on the basis of a history of discrimination, a factor legitimately highlighted in the preamble of the Constitution and several policy documents as grounds for promoting social rights. The CLC's argument was thus important from the perspective of accountability and opposition because it hinges the Court's duty to asses the reasonableness of policy, and thus the degree of deference owed to government, on government's compliance with broadly democratic procedures and concerns.

In its judgment the court endorsed the CLC's framing of rights claims, most significantly by ruling that citizens' Section 26 rights had been violated.[11] It explicitly endorsed their conception of social and political rights as interdependent (*Grootboom,* 2001: Par.23), as well as the state's obligation, at all levels of government, to implement policy in a legal, transparent and humane manner, consistent with the vision of democracy expressed in the Bill of Rights (*Grootboom,* 2001: Par.39-44; Par.83-90). The ruling also pointed out that the legislation drawn up to "respect, protect, promote and fulfill" the right of access to housing was not "contextually fair" (Brand, 2005: 5) as it in fact left the most destitute citizens worse off than their impoverished, but sheltered counterparts.

Grootboom thus refigured the basis on which social rights claims would be judged "reasonable" by stipulating that government programs were not constitutionally reasonable "if the measures, though statistically successful, fail to respond to the needs of

[11] This is in contrast to the Cape High Court ruling, which had recognized only that a narrower right, that of children's right to shelter, had been violated.

those most desperate" or to situations of crisis. Future policies would have to be flexible, coherent and well-implemented. Despite the fact that the Court showed its willingness to find against the government in this case, the decision also rejected the concept of a minimum core obligation, affirming the government's prerogative, and superior capacity, to develop housing policy given the need to rationally allocate scarce resources. However, its emphasis on the "contextually fair" nature of social rights, as well as its repeated references to the dignity the state should afford citizens in a democratic order, implied that the concrete implications of social policies, not their technical proficiency, would be central to deciding rights claims in subsequent cases. This conception of reasonableness would be crucial in *TAC*, where political mobilization would be used to source evidence of the arbitrariness of government policy and its fatal consequences.[12]

In the wake of *Grootboom* judges at all levels of the judicial system began expressing strong normative critiques of the government's lack of engagement with marginalized citizens prior to litigation, as well as the poorly reasoned responses to their claims presented in Court. This is significant, as it suggests that some members of the Judiciary saw the Courts as a forum for holding government accountable for policy failures, but also for its tendency to embrace a narrowly procedural approach to democratic participation. In the wake of *Grootboom* courts thus began to function not only as mechanisms of accountability, but also as sites where embattled communities could take the government to task for the poor quality of public deliberation on, and unresponsiveness to the adverse effects of public policies.

[12] The court's emphasis on equality of outcomes is significant given that government is typically silent on the inequalities generated by its neo-liberal economic policy, which favors economic growth and stability above job creation and redistribution, and its market-based approach to the provision of social services and land redistribution.

In *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* (2001), for example, Justice Cameron referred to state-civil society engagement preceding the trial as “a pitiable saga of correspondence, meetings, calls, appeals, entreaties, demands and pleas by public interest organizations” (Cameron in Heywood, 2003: 279). In *City of Cape Town v Neville Rudolph and Others* (2003) Judge Selikowitz of the Cape High Court described the city’s denial that a community was living in crisis conditions as “astonishing” and its presentation of the facts of the case as “indicative of a state of denial…and a failure [by the city] to recognize and acknowledge that there is, in fact, any category of persons to which it has any obligation beyond the obligation to put them on the waiting list for housing in the medium to long term” (Selikowitz in Wickeri, 2004: 29-30). These critiques are distinct from judicial assessments of government policy, and condemn instead the institution and its representatives for not taking seriously enough their responsibility for ameliorating the conditions in which some citizens live, nor citizens’ rights to challenge government in accordance with the commitments to participatory and deliberative democracy included in the Constitution.

Unlike with *TAC*, no single political organization or social movement has used the *Grootboom* decision to stake a broader claim in South African politics.[13] The success of the case clearly hinged on the arguments presented by an elite coalition of legal experts, an extremely narrow form of “political mobilization”, and not on sustained popular participation by grassroots civil society organizations. While the CLC was quite effective

[13] A similar claim can be made about the *Kyalami Ridge* (Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Other, 2001) and *Khosa* (Khosa and Others v. Minister of Social Development and Others (CCT 12/03), 2003) decisions, which respectively affirmed the government’s obligations to care for citizens in crisis situations and to provide social services to permanent residents of the Republic, not only legal citizens.

in compelling the Court to expand its notion of "reasonableness", the decision had little lasting impact on the public discourse surrounding land reform, housing policy or the status of property rights. The absence of a politically grounded critique of housing policy prior to the trial also meant that local and national government, at both the High Court and Constitutional Court level, emphasized only the cost-efficiency of its housing plan. It did not have to justify the limitations of its policy – something it had to do in response to the popular and technical critiques of its PMTCT-policy in *TAC,* for example. Furthermore, while *Grootboom* clearly condemned the poor implementation of the state's housing policy in Wallacedene, the details and scope of its impact nationally remained obscure in the absence of testimony from similarly affected communities in other parts of the country, particularly in peri-urban and rural areas. Had the case been supported by the NLC or LPM, such testimony could have been entered into the judicial record, potentially affecting the scope of the decision.

In its current incarnation, the most prominent civil society organization dedicated to land reform, the Landless People's Movement (LPM), would be hard pressed to deploy social rights as a political strategy.[14] If *Grootboom*, for the most part, followed a pattern of litigation without mobilization, the LPM has repeatedly stated its commitment to mobilization without litigation. It eschews working through the courts or with the government, taking a much more antagonistic approach to political participation. Its

[14] The LPM was founded in July 2001 in an attempt to address the failures of the South African government's willing-buyer willing-seller land reform strategy. It understands itself as a grassroots social movement, and thus as distinctly different from the professional NGOs that have dominated land reform in South Africa. The LPM is not merely concerned with facilitating the implementation of existing land reform policies, but takes exception to the state's "religious faith in the possibilities of the market to deliver land" (Mngxitama in Jacobs, 2003). In its understanding, land struggles constitute a fundamental challenge to the government's commitments to safeguarding property rights, and to achieving social reform and racial integration through market-based programs. The LPM has thus cast its demands as antagonistic to a particular set of policies, but also as incommensurable with the defining features of the neo-liberal post-Apartheid state.

campaigns utilize various forms of direct action, and are aimed at alleviating the needs of landless people in the absence of government policies that assist them in the short term. Its campaign titles convey this spirit and include the "Stop Forced Removals & Evictions", "Take Back the Land!" and "No Land! No Vote!" campaigns. These campaigns have been mostly local and neighborhood-based, with none being undertaken at the national level. Furthermore, the "lack of a single ideological line in the LPM means that strategies and tactics are sometimes contradictory, are unstable and fluctuate, and are highly sensitive to state responses" (Greenberg 2004: 29).

Government responses to these campaigns have been repressive for the most part, with activists often being forcibly removed from sites of protest and sometimes taken into custody. Furthermore, officials often deny the movement's requests for permits for marches and other civil demonstrations. Because government has not been forced by formal institutions to account for the arbitrary effects of its land policy, or its sometimes limited acknowledgement of LPM members' right to organize, the LPM's strategies have not led to any policy changes or debates with government officials.

While the LPM recognizes the groundbreaking character of the *Grootboom* and *TAC* decisions, it questions their significance, given the poor implementation record of both decisions (Mngxitama in Jacobs, 2003). This suggests an interpretation of both decisions as staid instruments of formal politics, as opposed to the Treatment Action Campaign's conception of litigation as one mechanism amongst many for forging new political coalitions and popularizing highly specific social rights claims. The TAC's model of litigation with mobilization has opened up new spaces of political contestation, created emergent political identities and extracted policy concessions, as demonstrated by its

2001 PMTCT case against the ANC government.

iii. TAC: Litigation With Mobilization

In August of 2001 then-Deputy Chairperson of the TAC, Siphokazi Mthathi, filed an affidavit against the Minister of Health and Provincial MECs for Health in the Transvaal Provincial Division of the High Court.[15] The TAC's affidavit contested whether (1) the government was entitled to refuse to make Nevirapine available to HIV-positive women who give birth in the public health sector and (2) whether it was obliged, as a matter of law, to set out clear timeframes for a national program to prevent mother-to-child transmission (MTCT) of HIV (*TAC*, 2001: Par.20-21).[16] It argued that the state's continued reluctance to implement a coherent, cost-effective and comprehensive MTCT program violated (1) government's 1994 commitment to provide children under the age of 6 and their pregnant mothers with "free medical care in every state hospital and clinic where such need exists", (2) provisions set out in the "National AIDS Plan for South Africa, 1994-1995" for preventing perinatal transmission of HIV – an agreement to which two post-apartheid Health Ministers were party, (3) the National Patients' Right Charter of 1996, (4) the HIV/AIDS Strategic Plan for 2000-2005, and (5) a commitment by Dr. Nkosazana Dlamini Zuma, after a joint meeting with the TAC on 30 April 1999,

[15] The arguments considered in the High Court and Constitutional Court cases were largely similar, with the latter case involving an additional set of disputes pertaining to a judicial order issued in favor of the TAC by Botha J that instructed government to allow Nevirapine to be prescribed in cases where it was "medically indicated" and where the relevant medical superintendent ruled there was capacity to do so. It further ordered government to formulate an effective and comprehensive PMTCT program and to present it to the Court before 31 March 2002 (Heywood, 2003: 301).

[16] Government responded to the TAC's case by arguing that it would be unaffordable to extend its comprehensive PMTCT program, which included the provision of formula to those unable to afford it, that the efficacy and safety of Nevirapine had not been sufficiently verified, that the public health system did not have the capacity to expand this service, and that widespread provision of the drug might lead to resistant strains of the virus and thus a public health catastrophe.

to take steps to lower the price of mother-to-child prevention measures. It also constituted a breach of several Constitutional provisions and international conventions government had ratified.[17]

The Constitutional Court's decision in *TAC* echoed *Grootboom* insofar as it again refrained from defining a minimum core set of social rights. The Court instead asserted its power to review health policy, rejecting the government's argument that the separation of powers limited it from doing so and from making anything other than declaratory orders. It also rejected the government's argument regarding constrained resources in toto, and dismissed all government arguments regarding safety and efficacy. The Constitutional Court declined to exercise supervisory jurisdiction in *TAC*, but ordered the government to devise and implement a comprehensive mother-to-child-transmission (MTCT) program and mandated government to immediately remove restrictions on the drug and make it available in the public sector, to provide training for counselors, and to take reasonable measures to extend testing and counseling facilities throughout the public health sector. The ruling was thus much broader and much more detailed than the one handed down in *Grootboom*. The *TAC* judgment also reiterated the Court's obligation "to guarantee that the democratic processes are protected so as to ensure accountability, responsiveness, and openness, as the Constitution requires," by ensuring that the state act

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[17] These were listed in the affidavit as Sections 9 (the right to equality and freedom from discrimination on the basis of socioeconomic status and race), 10 (the right to human dignity), 11 (the right to life), 12, (the right to make choices and decisions concerning reproduction) 27 (the right of access to healthcare services), 28 (the right of children to basic healthcare services) and 195 of the Constitution. It argued government policy was in violation of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and People's Rights, the Convention on the Elimination of Discrimination Against Women, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Racial Discrimination.

reasonably to provide access to socioeconomic rights on a progressive basis.[18] It thus reaffirmed the sentiments of the *Grootboom* decision that social rights could not only be used to document and remedy policy failures, but also as mechanisms for strengthening democratic accountability.

Three dimensions of *TAC* are particularly interesting for thinking about the use of social rights as a political strategy. These are the Treatment Action Campaign's use of litigation as one component of a broader political campaign, its influence on public discourse on HIV/AIDS and its importance for democracy, and its popularization of an emergent political identity that transcends HIV-positive status, that of the HIV-affected citizen.

a. Mobilization & Litigation Strategies

TAC was preceded and accompanied by significant popular mobilization by the Treatment Action Campaign (TAC) for improved access to drugs preventing mother-to-child transmission (PMTCT) of HIV/AIDS.[19] In both the High Court and Constitutional Court cases, it packed the Court with supporters in its trademark "HIV-positive" t-shirts and organized demonstrations outside the Court throughout the proceedings. Steven Budlender (cited in Belani, 2004: 24-25), a Constitutional Court clerk, claims that "within the Court, it was impossible not to consider the actual impact of the decision, as

[18] TAC decision at para 35 and para 36, in Forman, 288

[19] Achmat, quoted in Friedman and Mottiar (2005: 524), describes the demographic profile of TAC'S members as "80 percent unemployed, 70 percent women – the group most affected by HIV, domestic violence and violence in schools – 70 percent in the 14-24 age group and 90 percent African". Women make up half the stuff and about a third of TAC officebearers, but the public face of the organization remains predominantly male. TAC's formal structure provides for internal representative democracy. In practice, however, major strategic decisions are initiated and financial control strictly exercised by national leadership. Interviews with TAC members suggest that ordinary members' influence on and participation in key decisions are somewhat uneven (Friedman and Mottiar, 2005: 517-521; 526).

is sometimes the case in the insulation of the country's highest court. The TAC would literally be outside with placards, organizing support for a favorable decision and mobilizing the media to cover the case's outcomes".

Because it works through the courts, and has tried to engage cooperatively with the Ministry of Health and other government ministries and bureaucracies, the TAC has been accused of being too reformist, and of being insufficiently critical of the ANC (Jones, 2005). This critique seems unwarranted when compared to the TAC's willingness to deploy its record of cooperation with government as legitimate grounds for encouraging civil disobedience, and legal sanction of government policies, when its demands are frustrated by senior ANC members of government.

Of all the civil society organizations with grassroots membership structures active in South Africa today, the TAC has been most committed to using litigation as an explicit component of its political activism. It has also been involved as a friend of the court (amicus curiae), providing evidence and support in a number of cases that it has not brought directly. In his discussion of the TAC campaign to expand the PMTCT program, which the Ministry of Health had limited to one urban and one rural site per province for a period of two years, Heywood (2003: 300) describes the TAC's commitment to litigation in combination with activism as follows:

> *"For the TAC, litigation both emerges from and feeds back into a social context. Resort to litigation is not exclusive of other strategies. Litigation can also help to catalyse mobilisation and assist public education on the contested issues, as well as bring about direct relief to individuals or classes of applicants…However, support within TAC for a strategy of litigation could not be taken for granted. Internally numerous workshops were conducted with TAC volunteers to explain the case [before taking government to court for its PMTCT program".*

The organization has proved particularly adept in furthering its rights claims by creating opportune moments to alternately transgress and embrace national and

international laws governing property regimes, import/export regulations, distribution and manufacture of biomedical treatments for HIV/AIDS and related illnesses, and provision of social rights. It is against this broader approach to political activism that the TAC's 2002 Constitutional Court victory against the South African government should be interpreted (Greenstein, 2003; Achmat, 2004).

Two seemingly contradictory uses of law illustrate the TAC's political, as opposed to accommodationist, approach to the law. In 1998 the TAC entered a case filed by the Pharmaceutical Manufacturer's Association (PMA) against the South African government as an amicus curiae (TAC, 1998). The PMA challenged the constitutionality of an amendment to the Medicines and Related Substances Control Act that was intended to make essential medicines more affordable. The legal papers filed by TAC quickly became the focal point of the case. The organization's impact was extended beyond the court by TAC activists, who used the case to mobilize political support for its cause in South Africa and the US (Heywood, 2001). In direct contrast to its use of litigation in 1998, the TAC publicly and illegally imported Fluconazole, a brand-name drug used to treat systemic thrush in persons living with AIDS, in 2001. This action was part of the "Christopher Moraka Defiance Campaign", named for a recently deceased HIV-positive activist, targeted at convincing Pfizer to either lower the price of the drug, or give the South African government a voluntary license to distribute it locally.

While campaign used law and the other publicly flouted it, both actions had the effect of politicizing the gap between the humanitarian and normative commitments law is supposed to serve and protect, and the indignities that may nevertheless follow from its application. Both campaigns also contributed to the success of its 2001-2002 PMTCT

case as they elicited a drop in the price of ARVs, with Nevirapine even being offered to the government for free over a period of five years by Boehringer Ingelheim. This drop in cost, along with the government's refusal to accept free Nevirapine, would make it untenable for government to claim that an expanded PMTCT program would prove prohibitively costly. The "resource constraints" argument that had proved crucial in the Soobramoney case was thus reduced to a non-issue through activism preceding the PMTCT case, which was grounded in rights claims virtually identical to those voiced in Soobramoney.

During this same period the TAC also supported the Western Cape government and Medicines sans Frontieres in successfully undertaking a highly active anti-retroviral treatment (HAART) program in Khayelitsha. In doing so the organization helped to demonstrate that much more complicated ARV treatment regimes than the single dose of Nevirapine required to prevent MTCT could be feasible and effective in resource poor settings (Medicines Sans Frontieres et al, 2003; Heywood, 2003; Fourie, 2006: 105-172). Furthermore, the TAC later benefited from this amicable relationship with the Western Cape Government in building its Constitutional Court case against the national government. The Western Cape MEC for Health provided the TAC, and the Minister of Health, with detailed information about the practical considerations that affected the success of large-scale PMTCT programs (Heywood, 2003: 292). It used this information to modify the claims for a national treatment program it eventually submitted to the Constitutional Court.

Through campaigns and relationships such as these, which preceded and sustained the High Court and Constitutional Court cases, the TAC refined its use of litigation as a

political strategy. Taken together these measures prepared the ground for success in the TAC's Constitutional Court case as they generated empirical evidence, a normative consensus, and evidence of technical capacity to scale up the PMTCT program that would greatly strengthen its claims. All these strategies were explicitly political, and suggest a pragmatic approach to the law: the organization has both transgressed and used the law to great effect as a space for reforming notions of reasonableness, and for holding government accountable to the Constitution, as well as its own promises and policies.

b. The Changing Discourse on HIV/AIDS: Civil Society as a Source of Judicial Authority

The TAC's use of litigation in combination with mobiliziation also refigured public perceptions of HIV/AIDS. It effectively framed the epidemic as a public health concern relevant to the entire nation, and not as a matter of personal responsibility nor or a symptom of individual immorality (Friedman and Mottiar, 2005: 531). More specifically, it allowed the TAC to cast the PMTCT policy as the primary incarnation of this "national concern", and used sustained mass action to forge a normative consensus and demonstrate public support for its expansion (Heywood, 2003: 286; Achmat, 2004; Johnson, 2006).

By the time of its application to the High Court in 2001 the TAC could thus convincingly argue that government had no "rational or lawful basis" (*TAC*, 2002: Par. 22.11) for substituting "a *blanket* official decision for decisions made by medical professionals who are well qualified to make those decisions in the light of the circumstances of their individual patients" (*TAC*, 2002: Par.162, emphasis in text). Doing so produced "catastrophic results for the people affected, *and for the country*" (*TAC*,

2002: Par.162, emphasis added), and, in effect, forced hospital administrators "to act in a manner which is *perceived to be contrary* to the official policy" (*TAC*, 2002: Par.126.3, my emphasis).

The wording of the TAC's claims are significant because they portray this policy, but also HIV/AIDS, as one affecting "[m]illions of people … living in deplorable conditions and in great poverty" (*Soobramoney*, 1997: Par. 8,), and not only a small number of pregnant women making claims counter to the larger needs of society. Moreover, by framing doctors' violations of policy as "perceived" transgressions of "official policy", the TAC's affidavit effectively inscribes the well known apartheid dilemma of choosing between adherence to formal law vs. a "higher" moral law, on the PMTCT policy.[20]

The TAC's impact on the public discourse surrounding HIV/AIDS was particularly important in establishing the legitimacy of these demands for public-sector ARV programs, and for a more expansive PMTCT policy in particular. Friedman and Mottiar (2005: 531) point out that

> *"[t]he fact that people living with HIV and AIDS came to be seen as persons deserving of sympathy demanding a basic human right was the result of the strategy of the TAC and its allies [which include HIV-positive Supreme Court of Appeals Judge Edwin Cameron], not an asset they inherited…HIV/AIDS was not a popular issue among South African policymakers – it was seen as at best a diversion from the pressing tasks of creating a democracy on the ashes of minority rule…South Africa is a socially conservative society with pressing development needs occasioned by both the demand of organized black interest groups for racial redress and by the acknowledged need to address severe social inequalities. AIDS could well have been seen as a symptom of its victims' inability to control their sexual impulses and thus a consequence of social deviance which ought not to be rewarded by the public purse – or, at best, as a luxury which a*

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[20] One of the effects of this way of framing the issue is that it forced the Court to elaborate on the limits of political authority vis-à-vis other domains of expertise, i.e. on the scope of democratically elected officials' right to settle scientific and other epistemological debates through legislation or other democratic procedures. In discussing this question on the limits of the political, the Constitutional Court stipulated that the Minister of Health's concerns regarding the efficacy of Nevirapine were not "supported by the data" or the "wealth of scientific material produced by both [the TAC and government]" and that her concerns regarding the safety of the medication amounted to no more than a "hypothetical issue" (TAC, 2002: Par.58; Par.60). Political consensus amongst members of government about the undesirability of Nevirapine, in other words, did not trump medical consensus regarding the safety and efficacy of the drug in the Court's estimation.

society with pressing challenges could not afford…The fact that AIDS activist Gugu Dlamini was beaten to death by a mob enraged by her open acknowledgement of her HIV status is eloquent testimony to the depths of potential resistance".

The government's poor implementation of policies aimed at improving the status of women, the group most affected by HIV, as well as the misconceptions about HIV-transmission and the patriarchal and violent conceptions of masculinity celebrated during a recent trial where former Deputy President Jacob Zuma was accused of raping a family friend widely known to be HIV-positive, suggests a pitiable record of public debate on HIV/AIDS in SA, despite its progressive gender equality legislation. A recent Afrobarometer briefing paper nevertheless affirms the steadily increasing importance of HIV/AIDS as a mainstream concern during the period 1994-2004 (Afrobaromter, 2006). Even more significantly, 63% of respondents who prioritized either unemployment or HIV/AIDS thought that the government, rather than any other agency or institution, had the capacity to address these problems "within the next few years". While this does not prove that the TAC alone is responsible for increased political prominence of HIV/AIDS, nor the expectation that government can address it, it is likely that its prominent education, mobilization and legal campaigns – which frequently use the language of rights – have contributed to this effect.

The fact that several provinces expanded their public-sector PMTCT programs during the period between the High Court and the Constitutional Court decisions, despite then-Justice Minister Penuell Maduna asserting the provinces' "right" to ignore the Pretoria High Court's execution order (Mail & Guardian, 2002), exposed the lack of popular and political support for the PMTCT policy in its original form. It also demonstrated the widespread legitimacy the TAC's demands enjoyed by the time it resorted to litigation.

Support for the TAC's position amongst ordinary citizens, medical doctors working in the public sector, and even amongst senior members of provincial administrations, thus allowed Judge Chris to draw on a broader, and more directly articulated, democratic consensus on what HIV/AIDS treatment policy should look like in elaborating his execution order in favor of TAC. The impact of this order would have been far more constrained were he not able to draw on this alternate source of democratic authority, generated in civil society and articulated through forms of political participation that extended beyond voting in elections.

The counter-part to this is of course that the TAC's popular support and moral authority was enhanced by its ability to position itself as more committed to the democratic process than government officials, given its record of cooperation with government officials who reneged on various commitments to expand treatment programs. In court proceedings, members of civil society organizations could thus speak with more authority about the integrity of their attempts to change the PMTCT policy through conventional political channels than the government itself.

Policy Failures & Emergent Political Identities

Finally, the identities that gain political traction as a result of pursuing social rights claims deserve consideration. The TAC case, for example, granted rights to pregnant HIV-positive women and their infants that could not pay for Nevirapine out-of-pocket. Despite the focus of the case on such a narrowly defined group, the political campaigns surrounding the legal action led to an announcement by the National government – even before the Constitutional Court handed down its decisions – of a plan to roll-out universal

provision of ARVs. This suggests that identities that gain legal recognition, even where these are highly specific and artificially circumscribed (such as "poor HIV-positive mothers"), can be politicized outside of the courts in a manner that secures broader gains. In this instance, government was pushed to commit to treatment of all uninsured HIV-positive citizens, not only to a subset of HIV-positive women.

Paradoxically, the government's announcement of a universal HAART plan might well have to do with the level of specificity with which the disease, its impact and the limitations of public health services were described in supporting affidavits by HIV-positive women and medical doctors included in the TAC's High Court application. These accounts effectively illustrated the stakes involved in refusing to expand even the relatively straightforward PMTCT program, let alone refusing to develop a general HAART program. In the affidavits, two nurses detailed the large number of HIV-positive persons they counsel per day – between 10 and 15 according to one – and expressed frustration at not being able to offer them any treatment other than "plenty of stories" about how to deal with the diagnosis. The nurses' affidavits also demystified PMTCT treatment, stating that Nevirapine required no more skill or knowledge to administer than any other drug distributed at primary health facilities.

Most dramatically, the affidavits detailed the arbitrariness of the obstacles pregnant women faced in accessing treatment. Some had access to Nevirapine, hence giving birth to HIV-negative children, merely because they lived in neighborhoods located in a pilot site. In one affidavit a nurse described how a woman in labor had to take three taxis and walk over a footbridge in order to access Nevirapine at Baragwanath Hospital, after she had initially shown up at Kopanong hospital. Kopanong Hospital, which did not

distribute Nevirapine at the time, is in Vereeniging, on the border of Gauteng and the Free State. The Chris Hani Baragwanath Hospital is in Soweto, 43km away.

Another woman, "SH", was given a Nevirapine tablet some months before her child's birth, but went into premature labor and forgot the tablet at home. The hospital where she delivered her baby was prohibited from distributing the drug, and did not have an ambulance available to transport the infant to a site where it was available. They offered instead to transport the two-months premature infant to Baragwanath Hospital on a bus, an offer the mother refused because she felt it unsafe. During the course of the Constitutional Court case this woman, "SH" aka Sarah Hlale (who had by then publicly disclosed her HIV status), died due to AIDS related illnesses. Her death was widely reported. Three days after her death Government unexpectedly released a statement on HIV/AIDS that promised a universal roll-out plan for anti-retrovirals, to be implemented as soon as possible (Heywood, 2003: 309-310).

These women's accounts graphically illustrated the implications of the dry legalistic claim that government policy was unreasonable because it arbitrarily excluded some citizens' from accessing health care services. Though highly specific and extremely dramatic, it is unlikely that these experiences were uncommon given the extremely limited scope of the existing PMTCT program, and South Africa's high HIV-infection rate. The announcement of the ARV rollout plan after Sarah Hlale's death suggests that these women's experiences, together with TAC's success in framing the existing treatment policy as a matter that could potentially undermine the legitimacy of the democratically elected government, exerted some pressure on government to publicly endorse conventional AIDS science, a complete about turn on its previous position, and

to commitment to a universal treatment program (Heywood, 2003: 310).

* * *

The TAC case, when contrasted with both *Soobramoney* and *Grootboom*, clearly demonstrates that social rights claims are most effective when deployed as a political strategy. *Soobramoney* and *Grootboom* used social rights in the classical sense, i.e. as legal grounds for demanding redress (but little more). The precedents established in these cases have had a very narrow impact. They have not been used to push for reformulated housing or land redistribution policies, or even for demanding better implementation of existing policies and legal precedents. In the absence of a social movement dedicated to using social rights as a political strategy, the *Grootboom* ruling is still being used in a very minimalist manner, i.e. to fight illegal evictions by local governments in an incremental and piecemeal fashion. It has thus been taken up as a baseline, used by citizens to defend their “right” to live on sites with no services or infrastructure, no housing structures and that are quite often unsafe and/or toxic, but not as a springboard for redefining the resources it should be providing to landless citizens or citizens living in informal settlements, let alone as impetus for thinking critically about the spatial integration of Apartheid cities and towns.

In contrast, the TAC had used social rights first and foremost as a basis for organizing and mobilizing a political constituency, and for gaining access to senior government representatives. The organization has used social rights as a basis for litigation only as a matter of last resort. Its success in this regard demonstrates that the strategic potential of social rights for forging new political debates, identities, notions of reasonableness and mechanisms of accountability is latent. These outcomes can be generated only when

social rights claims are coupled with strategic political action that pursues a clearly defined objective, mobilizes a well organized membership and flexibility in use of strategies and even the law to realize commitments.

Social Rights, Democratic Opposition & Accountability: Concluding Comments

The notion of democratic opposition and accountability is context dependent (Butler, 2005). In South Africa the use of socioeconomic rights generates internal forms of democratic opposition that are effective in securing accountability and transparency – perhaps more effective than oppositional political parties would be given the current configuration of the party system (Butler, 2003). In the context of South Africa's institutional landscape, which forces a disjunction between citizens and political representatives who prioritize party loyalty and tightly controlled political boundaries, representative democracy generates limited accountability. In contrast, the use of social rights as a political, as opposed to legal strategy, expands the issues, identities and coalitions that are permitted to make credible claims on government.

The case study material presented here demonstrates how social rights can be deployed to reframe policies as well as the normative consensuses that surround them. This constitutes one locus of oppositional politics. In *Grootboom* & *TAC* for example, government already had a policy or plan in place that aimed to fulfill citizens' Chapter 2 rights. The success of these cases depended on being able to criticize specific elements of a concrete policy/plan/protocol and to suggest cost effective alternatives that could be framed as relatively more consistent with the normative commitments set out in the Constitution. This level of specificity would have been hard to achieve if there was

complete government inaction on these matters. It is easier to argue that a plan is inadequate or missing the mark than to claim no plan exists or to "legislate" one into existence through a Constitutional Court case.

The processes of drafting affidavits, sourcing personal and technical evidence of policy failures, exercising the right to access government documents and mobilizing political support for a social rights claim have proved invaluable in improving the quality and scope of deliberation about the kind of government residents of the Republic desire. The TAC's approach to social rights litigation, for example, frames concrete experiences of discrimination and injustice as important considerations in Constitutional Law. It also demands that government provide a reasoned response as to the adequacy of its policies that aim to limit desired experiences and demands.

Both *TAC* and *Grootboom* forged new normative "baselines" by generating an official record of condemnation from civil society and the judiciary regarding the hardships imposed by extreme poverty and the state's inflexibility in responding to it. This is significant, particularly in a context where these conditions are sometimes represented as almost mundane by a government that prioritizes economic growth (and neo-liberal modes of attaining it) and not wide-ranging economic redistribution. A second normative baseline has been forged around the issue of HIV/AIDS, which is now regarded as a matter of national importance and public concern by most South Africans. On the whole, it has become less subject to condemnatory discourses of personal responsibility or regarded as evidence of immorality.

The TAC has been quite successful in its use of social rights as a political strategy. Their campaigns illustrate how a language of rights can be used to create a politics that is

sustainable over time and broad in scope, but still coherent. At various points this organization has used rights claims to legitimately contest seemingly disparate issues, including the sanctity of intellectual property rights (Johnson, 2006), government's right to restrict access to certain documents in the interest of "good governance" (Ntsabula in Heywood, 2003: 287), and of course the restriction of public health services. The TAC's strategies suggest that rights claims are most effective when incorporated into broader grassroots campaigns that have specific policy objectives but employ a variety of interrelated strategies to secure them. It also suggests that transgressive, politicized acts undertaken by well-placed actors in civil society – acts such as Zackie Achmat illegally importing generic medicines or refusing to use anti-retrovirals until they are widely available in the public health sector – are integral to the process of reevaluating normative commitments in law and the notion of reasonableness these commitments encourage adherence to. Used in this manner, social rights claims make explicit the normative underpinnings of "the law", and the political stakes of implementing it through the process of judicial review, in a way that civil and political rights no longer do the biases implicit in these rights have been normalized to the extent that they now appear apolitical and neutral (Pieterse, 2004).

The empirical and theoretical debates presented here suggest that social rights are fundamentally different from civil and political rights because they function as ordinal variables, i.e. as scales for measuring a political community's progress in attaining some idealized goal. One can have one's social rights realized to a greater or lesser extent, and can undertake to fight for these rights in a more or less coordinated manner. Because the content of social rights are less easily determined that those of civil and political rights,

especially in contexts where courts are unwilling to elaborate the minimum core obligations associated with such rights, their realization depends on constant political engagement. This implies that social rights are also less likely to limit oppositional politics in the manner that civil and political rights do. The latter rights operate as nominal variables. Therefore, once marginalized citizens are formally awarded civil and political rights, i.e. once they are formally incorporated into the political community, it becomes extremely difficult to demonstrate the ways in which their formal status might nevertheless be circumscribed in practice. Social rights cannot be awarded through such simple categorical/nominal moves, and consequently function as more open-ended grounds for ongoing political struggles.

The argument presented here suggests that the transformative potential of constitutions may not be limited to the law. Constitutions may also be politically transformative to the extent that they offer grounds for an immanent critique of democratic governance. By enshrining rights, constitutions offer a standard by which societies can measure their progress toward goals they themselves have set. Constitutional rights also offer grounds upon which oppositions can constitute themselves, and by which they can offer a critique of government policy with internal legitimacy. By providing the soil for domestic oppositions to take root, constitutionalism may open up, rather than close down, the space of politics.

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