

South Africa: The Role of the Courts in Realizing Rights to Health and Housing¹

Context

1. When Apartheid ended in South Africa in 1992, the new Constitution, adopted in 1996, included a comprehensive list of civil, political, social, cultural, and economic rights. The Constitution specifically recognizes the rights to housing and health care, including reproductive health care, and imposes an obligation on the state to take reasonable legislative and other measures, within available resources, to progressively realize those rights.² It also recognizes the interdependence, indivisibility, and interrelatedness of rights, and protects a range of civil, political, social, economic, and cultural rights that are directly or indirectly related to housing and health rights. The comprehensive protection of housing rights is particularly important in the South African context, where the right to housing is so closely linked to the right of access to land, and dispossession of land was a key feature of the creation of the Apartheid state. More broadly, the Constitution also provides for public engagement in social and economic policies, and facilitates public involvement in the lawmaking process and in oversight of policy implementation

2. South Africa's rights-based approach to social policy had been expressed for the first time in 1994, with the adoption of the Reconstruction and Development Programme (RDP), which expressly acknowledged housing and health care as human rights, which committed the government to delivering those services in a manner consistent with human rights standards and the democratic principles of inclusiveness, participation, and transparency. The program paid special attention to the basic needs of the poor, women and children, and other vulnerable groups. It was complemented by a macroeconomic framework – the Growth, Employment and Reconstruction Programme – which shared the same principles, while aiming primarily to increase growth and stimulate job creation.

Housing – Policy, Legislation, and Results

3. The formulation of South Africa's housing policy commenced prior to the democratic elections of 1994, with the establishment of the National Housing Forum. This forum was a multi-party, non-governmental negotiating body comprising 19 members from business, community, government, development organizations, and political parties then outside of government, who developed a broad housing sector convention, known as the National Housing Accord (NHA). This was followed a year later by the White Paper on a New Housing Policy and Strategy in South Africa (the White Paper on Housing), which had four main objectives: (a)

¹ Taken from: World Bank. 2008. "Realizing Rights through Social Guarantees: An Analysis of New Approaches to Social Policy in Latin America and South Africa" Social Development Department, Report No. 40047 – GLB. This summary was adapted by Andrew Norton from the original report, *Rights, entitlements and social policy in South Africa* (unpublished), by Sibonile Khoza, University of the Western Cape, South Africa (2007). The original report was commissioned as part of a wider research project on Rights, Guarantees and Social Policy. Summaries of all case studies and related documents from this project are available at <http://go.worldbank.org/P2LXPQU1Z0>.

² Sections 26(1)(a) and 26(2) for housing; sections 27(1)(a) and 27(2) for health care. The Constitution also protects the right of every person not to be arbitrarily evicted (section 26(3)); the right of children to shelter (section 28(1)(c)); and the rights of detained and sentenced prisoners to adequate accommodation at state expense (section 35(2)(e)). It also recognises other health-related rights, such as the right to bodily and psychological integrity; the right to an environment that is not harmful to health or well-being, and the right to emergency medical treatment (section 27(3)). It imposes duty on the state to respect, protect, promote, and fulfill the rights in the Bill of Rights (section 7(2)).

provide housing to the homeless and alleviate overcrowding; (b) improve the quality of housing through the provision of formal top structures (i.e., buildings); (c) increase the security of tenure and promote ownership; (d) develop “sustainable human settlements.” The White Paper set out the framework to be followed in the development of the national housing laws, policies, and programs.³

4. The White Paper aimed, first, to address the housing crisis directly through the scale of delivery of subsidized housing for low-income households, both for ownership and for rental; and second, to create an environment in which the subsidized housing market can operate normally as part of the broader, non-subsidized housing market. The key policy aimed at implementing the right to adequate housing was the Housing Subsidy Scheme, adopted in 1995, which provided a one-off housing grant to people with dependents who earned less than R3500 per month and had never owned a home before. Over time, this ownership program was extended to households earning less than R1500 (households earning between R1500 to R3500 are required to contribute R2479 to access their subsidy), and there was an increased emphasis on building core structures of houses. All subsidized housing delivery had to conform to the national minimum norms and standards – a 30m² unit (usually one room with a toilet) on a 250m² plot of land. With regard to rental housing, the delivery of well-constructed units has been limited by the fact that many people are unable to afford them (Rust 2006).

5. Several years after the White Paper, the Government also began to focus on the development of sustainable human settlements. The Comprehensive Plan for Sustainable Human Settlements of 2004 (also known as Breaking New Ground) is the key policy in this regard. It prioritizes the upgrading of informal settlements and integrated planning for sustainable human settlements. The Plan collapses income bands used to identify who should receive state housing support, and proposes the increased use of a People’s Housing Process as a mechanism for increased and improved housing delivery (National Department of Housing 2004). Among other things, this Plan introduces an expanded role for municipalities, which are closer to communities than national government. This means that municipalities will be the ones to determine the location and nature of housing as part of a plan to link supply and demand (Rust 2006).

6. Another important housing program, the Housing Assistance in Emergency Circumstances Programme, was also launched in 2004, as a consequence of the celebrated Constitutional Court decision in the *Government of South Africa and Others v. Grootboom and Others* (Box 6). This program aims at assisting people in urban and rural areas who have urgent housing needs as a result of natural disasters, eviction, demolition, imminent displacement, or immediate threat of life, health, and safety. Through this program, administered by municipalities, beneficiaries receive assistance in the form of alternative land, infrastructure, and

³ The first piece of legislation promulgated under this framework was the Housing Act of 1997, which repealed the discriminatory Apartheid housing laws, dissolved all Apartheid housing structures, and created a new non-racial system for the implementation of housing policy. It also clarified the roles and responsibilities of the three national, provincial, and municipal levels of government. Other housing laws enacted between 1997 and 1999 included (a) the Extension of Security of Tenure Act, which provides security of tenure and protection from arbitrary eviction for people who occupy land belonging to someone else in rural and peri-urban areas; (b) the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (commonly known as PIE), which provides a framework for the protection against unlawful occupation and simultaneously ensures that unlawful occupiers are treated with dignity; (c) the Housing Consumers Protection Measures Act of 1998; the Rental Housing Act of 1999, which sets out the relationship between and the duties of landlords and tenants, and permits the Minister of Housing to establish Rental Housing Tribunals to deal with the disputes between landlords and tenants; and (d) the Home Loan and Mortgage Disclosure Act, which promotes fair lending practices, and seeks to ensure that financial institutions are serving the housing credit needs of the communities without discrimination.

basic services. Qualified beneficiaries can also apply for subsidies for permanent housing (Khoza 2007, p. 156).

Box 6. Government of South Africa and Others v. Grootboom and Others

This case, brought before the Constitutional Court in 2000, involved a group of adults and children who had moved onto private land to escape bad conditions in an informal settlement. The group was evicted and their building materials were destroyed, rendering them unable to construct shelters. They applied to the High Court to be provided with temporary housing until they got permanent accommodation, relying on the right of access to adequate housing in section 26(1) and the rights of children to shelter in section 28(1)(c) of the Constitution. The Cape High Court said that there was only a violation of the right of children to shelter and not the right to adequate housing. In reviewing the case, the Constitutional Court set out the standard of “reasonableness” as a guide to deciding whether the Government’s housing program met constitutional requirements. According to this standard, the Government’s measures to provide adequate housing must be comprehensive, coherent and coordinated (para. 40); capable of “facilitating the realisation of the right” (para. 41); balanced and flexible, and appropriately provide for short-, medium- and long-term needs (para. 43); clearly allocate responsibilities and tasks to the different spheres of government, and ensure that financial and human resources are available (para. 39); be reasonably formulated and implemented (para. 42); and provide for the urgent needs of those in desperate situations (para. 44).

These elements of reasonableness have become key factors in developing and implementing other social policies programs, and in ensuring that they are in line with the human rights norms and standards articulated in the Constitution.

7. As a result of the White Paper, the Comprehensive Plan for the Development of Sustainable Human Settlements, and the Grootboom case, dramatic changes have occurred in South Africa’s housing landscape. About 1.4 million subsidized houses have been delivered since the introduction of the Housing Subsidy Scheme in 1994, at the cost of R20 billion (Public Service Commission 2003), and the government has added more than two million housing units to the formal housing in the country, comprising 15 percent of all formal housing units in South Africa. The Housing Subsidy Scheme, however, cannot keep up with the ever-increasing housing backlog in the large metropolitan areas. For example, Cape Town’s estimated housing backlog grew from 150,000 in 1995 to 240,000 in 2002, and Johannesburg and Durban have even larger backlogs (Public Service Commission, 2003). Corruption, incompetence, and skills shortages contribute to the poor implementation of well-intentioned policies and legislation.

8. The Plan for Sustainable Human Settlements may succeed in addressing the urgent needs of the country’s 2.4 million informal settlers in the medium to longer term. However, it has taken more than two years to complete the famous N2 Gateway Housing Project,⁴ which has been riddled with administrative and political problems, including alleged corruption in the issuing of tenders.

⁴ This major intergovernmental housing delivery project involves the national and provincial departments of housing as well as the City of Cape Town municipality. The project is aimed at delivering housing to more than 100 000 residents from poor backgrounds living in the city. It is a lead pilot project of the new Comprehensive Housing Plan for South Africa, which was adopted by the Cabinet on 1 September 2004. See Thamm (2006) and Pressly (2006).

9. New directions in housing policy have focused on strengthening provisions for groups with special needs (National Department of Health 2004), for emergency housing, and for increasing access to housing finance in the light of rising property prices. The constitutional protection of rights and laws, in and of themselves, cannot solve all social problems. For example, farm evictions have been on an increase since 1994. It was estimated that about 940,000 black South Africans have been forcefully removed from farms during the period 1994-2004. Wegerif (2006) argues that this is a failure of rights and the law. There is therefore a need for political will and strong civil society activism to hold government accountable to its constitutional obligations and policy and legislative commitments, and to monitor compliance by the government with court decisions and orders.⁵

Health

10. Prior to the RDP, the African National Congress developed the National Health Plan (African National Congress 1994), which sets out policies and principles for radically reforming the health care system. This was followed by the White Paper on the Transformation of the Health System of South Africa (White Paper on Health), which articulated the direction, strategies, and pace of reforms (Department of Health 1997). The White Paper on Health aimed to (a) unify the fragmented health system; (b) give priority to primary health care and make it available and accessible to all people; (c) ensure the availability of safe and quality essential drugs; (d) give special attention to the health needs of vulnerable groups such the poor, the elderly, women and children; and (e) promote the participation of community structures in the delivery of health care.

11. The reforms began with the dismantling of the racially fragmented health care system. The 14 Apartheid departments of health were unified into one national department and decentralized into nine provincial departments. The National Health Act 61 of 2003, which came into force in 2005, was enacted to put this new structure on a statutory footing (Department of Health 2001). The Act gave women and children access to free health care services in the public sector. It also gave special protection to people needing emergency treatment by outlawing the refusal to provide such treatment.

12. A central tenet of public health care (PHC) is universal access to a package of essential health services. The government has developed a framework for implementing PHC over a ten-year timeframe. This involves, among other things, creating a decentralized District Health System (DHS), consisting of 50 health regions and 170 districts (Rensburg 2004); and bringing communities into the planning and organization of health care services. Both the PHC and the DHS call for a fundamental shift in the allocation of health care resources, through the dismantling of racial and urban biases. The health budget is being diverted from academic and tertiary hospitals to fund PHC and DHS. From 1996 to 1998, there was a shift of 8 percent from hospital services and 10,7 percent towards district health services (Van den Heever and Brijlal 1997). In addition, a massive Clinic Building and Upgrading Programme constructed about 500 new clinics in rural areas between 1994 to 1999 (Abbot 1997).

⁵ One of the problems facing South Africa today is the government's increasing disregard of court orders, particularly on social security cases, in the Eastern Cape and in KwaZulu Natal provinces.

13. The Government's first step toward improving access to health care services was a 1994 decree granting free care at public health facilities to pregnant women and children under the age of six (Department of Health 1994). Access to free health care in primary health care facilities has since been extended to the entire population (Rensburg 2004). Another legislative measure, the Choice on Termination of Pregnancy Act 92 of 1996, has radically transformed access to abortion services. This Act allows free termination of pregnancy upon request during the first 12 weeks.⁶ Although rural women still experience problems in accessing abortion services, access generally has vastly increased.⁷

14. The Government has also taken steps to ensure that health care services are affordable. The Medical Schemes Act 131 of 1998, which outlaws discrimination in access to medical schemes on the basis of disability and state of health, also requires that these schemes offer a prescribed minimum of benefits to all members. The Pharmacy Amendment Act 88 of 1997 includes measures to encourage the setting up of pharmacies in rural and other underserved areas. The Medicines and Related Substances Control Act 90 of 1997 was passed with the aim of making medicines affordable through price controls, parallel importation, promotion of generic substitution, and the prohibition of incentives by drug companies. However, this measure has yet to be implemented, in part because of opposition from drug companies. The Government has developed and implemented the National Patients Rights Charter, which aims at improving the quality of health care. However, the Charter is not legally binding, and therefore does not offer any recourse.

15. Despite numerous initiatives to transform the South African health system, the reality is that – in terms of the World Health Organization's (WHO's) criteria of good health, equity, and responsiveness – the system is as problematic as it was 12 years ago. In a league table of health system performance, South Africa was ranked 175th out of 191 member states (Schneider et al. 2007, p. 290). Though post-Apartheid health sector transformation has been characterized by far-reaching policy statements that recognize the structural weaknesses of the health system, the cumulative effect of all of the policies and interventions described above has been disappointing. The amalgamation of numerous fragmented authorities into one national and nine provincial authorities, and changes to the gender, racial, and profession profile of health administration, stand as the most significant achievements of the post-Apartheid era. Beyond this, many of the structural problems of the health system remain. The distribution of resources (financial and human) between public and private sectors, and within the public sector, is as unequal as it ever was,⁸ and the performance of the public health system is highly uneven, both within and across provinces. This is reflective of enduring social inequities.

16. There have, nonetheless, been some significant areas of progress. Many interventions aimed at women have had positive outcomes. In particular, the abortion legislation and the resultant health services development have resulted in improvements in abortion-related morbidity and mortality (Jewkes and Rees 2005), although implementation remains far from

⁶ Section 2(1)(a) of the Choice of Termination of Pregnancy Act 92 of 1996.

⁷ The Act took effect on February 1, 1997. From February to July 1997, 12,887 abortions were performed. By December 1997, the number had risen to 26,406. Under the earlier law, the Abortion and Sterilisation Act of 1975, an average of 800 to 1,200 abortions per year were performed (South African Institute of Race Relations 1997).

⁸ In 2000, South Africa was ranked by the World Health Organisation as number 175th out of 191 member states (Schneider et al. 2007, p. 290).

satisfactory (Blanchard, Fonn, and Xaba 2003). The abortion legislation came into effect on 1 February 1997. By July 1997, 12,887 abortions had been performed, and by December 1997, the number had risen to 26,406 (South African Institute of Race Relations 1997). By comparison, under the previous legislation, the Abortion and Sterilization Act of 1975, which restricted access to abortion services, there was a high incidence of death from illegal abortions. Another success has been in the control of malaria. While malaria has a localized epidemiology in the northeast of South Africa and is not a major cause of ill-health nationally, it exceeds HIV as the foremost health problem in much of Africa. South Africa has been part of a regional collaboration on malaria control with Swaziland and Mozambique, which involves active spraying of households (with DDT), implementation of new malaria treatment regimens, and surveillance activities. The impact has been dramatic. In South Africa alone, the number of new malaria cases dropped from 64,622 in 2000 to 12,098 in 2006.⁹ And the withdrawal of user fees has led to significant expansions in access to and utilization of healthcare facilities, particularly among women and children (McCoy 1996).

Seeing Health and Housing Through the Framework of Social Guarantees

17. Table 6 summarizes some of the key developments and features of South Africa's health and housing regimes, in terms of the sub-guarantees framework discussed above.

Table 6. Accessing Social Guarantees in Health and Housing in South Africa		
	Health	Housing
Access		
<i>Are the beneficiaries and services clearly defined?</i>	<p>The Constitution guarantees that:</p> <ul style="list-style-type: none"> • Everyone has the right to have access to health care services, including reproductive health care (s27(1)). • No one may be refused emergency medical treatment (s27(3)). • Children have a right to basic health care (s28(c)). • Prisoners and detained persons have a right to adequate medical care (s35(e)). <p>Some policies provide for:</p> <ul style="list-style-type: none"> • Free primary health care for all citizens. • Free health care for children under 6 and pregnant and lactating women, as well as citizens with moderate to severe disabilities (all levels of care) (RDP and White Paper on Health). 	<p>The Constitution guarantees that:</p> <ul style="list-style-type: none"> • Everyone has the right to have access to adequate housing (s26(1)) • No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances (s26(3)) • Children have a right to shelter (s28(c)) <p>Some policies provide for:</p> <ul style="list-style-type: none"> • Subsidized housing for certain eligible beneficiaries e.g. households earning less than R1500 are eligible to a non-contributory housing subsidy and those earning between R1500 and R3500 must contribute some money to get the subsidy (National Housing Subsidy Scheme)
<i>Are there institutional procedures for monitoring access?</i>	<ul style="list-style-type: none"> • Monitoring and evaluation falls under the program Health Information Evaluation Epidemiology and Research, managed by the Deputy Director General of Health Service Delivery. 	<ul style="list-style-type: none"> • A Directorate of Policy and Programme monitoring in the Department of Housing exists to monitor the implementation of housing policy and program. • Provinces are required to submit

⁹ National Department of Health, *Malaria statistics (1999-2007)*. Available at <http://www.doh.gov.za/issues/malaria/annualdata.pdf>.

	<ul style="list-style-type: none"> • Additionally, there is an Office of Standards Compliance and under this office is a Directorate of Quality Assurance. The Directorate is responsible for the development of systems and methods for quality assurance. • The South African Human Rights Commission (SAHRC) collects information using questionnaires (or protocols) from government departments and compiles a report on progress made in realizing the right to health care, among others. 	<p>conditional grant reports and provide the information in terms of the approved guidelines, and make additional information available as necessary. The National Department submits expenditure reports and non-financial information on a quarterly basis to heads of departments, ministers, and members of Executive Council meetings, where the content is discussed in detail.</p> <ul style="list-style-type: none"> • The SAHRC also monitors progress in realizing housing rights in general.
<i>Are there legal or institutional mechanisms that ensure non-discrimination in the access to services?</i>	<ul style="list-style-type: none"> • The Promotion of Equality and Prevention of Unfair Discrimination Act (2000) provides legislative protection against discrimination. • The National Health Act and the Medical Schemes Act of 1998 specifically outlaws discrimination against people on the basis of their disabilities and health conditions. • Numerous policies also prohibit discrimination in the provision and access to health care services (RDP, White Paper on Health, etc.) • People who have been discriminated against can lodge complaints with the SAHRC or approach the courts, including the Equality Courts. 	<ul style="list-style-type: none"> • The Promotion of Equality and Prevention of Unfair Discrimination Act (2000) gives legislative protection against discrimination. • The Home Loan and Mortgage Disclosure Act. • The Draft National Action Plan to Combat Racism in the Housing Sector notes that, over and above existing patterns of inequity, racism and other forms of discrimination (e.g., discrimination against foreigners and people living with HIV/AIDS) also sometimes occur in the allocation of housing resources. • Numerous policies also prohibit discrimination in the provision and access to housing (RDP, White Paper on Housing, etc.). • People who have been discriminated against can lodge complaints with the SAHRC or approach the courts, including the Equality Courts. If it is a dispute between the landlord and the tenant, a complaint can be lodged with the Rental Housing Tribunal.
<i>Are services guaranteed for the amount of time needed?</i>	Free primary health care for all citizens; free health care for children under 6 and pregnant and lactating women; as well as citizens with moderate to severe disabilities (all levels of health care).	N/A.
<i>Is there a maximum waiting period for receiving the service?</i>	No.	No.
<i>If the service is unavailable within this waiting period, what is a guaranteed alternative (in the same time period)?</i>	N/A.	N/A. However, in the case evictions, people are often provide alternative accommodation where they can stay temporarily until their long-term housing needs are addressed.
Financial Protection		

<i>Do beneficiaries need to contribute to the cost of service?</i>	Not as far as primary health care is concerned.	Households earning less than R1500 are eligible for a non-contributory housing subsidy, and those earning between R1500 and R3500 must contribute some money to get the subsidy (National Housing Subsidy Scheme).
<i>Are services accessible to beneficiaries who cannot contribute to the cost?</i>	Yes, they are accessible.	According to the Minister, the contribution requirement will formally be discontinued.
<i>Is this information effectively communicated to the public?</i>	Information is available on government and civil society organizations' websites. It is also accessible in user-friendly manner and local languages at clinics and hospitals, as well as community-based organizations and district offices of health. But information is not always effectively communicated by the departments.	Information is available on government and civil society organizations' websites. It is also accessible in user-friendly manner and local languages at local offices of the housing department, through civic society organizations who also run information sharing workshops at community levels. But information is not always effectively communicated by the government departments.
Quality		
<i>Are there clear quality standards?</i>	Quality assurance programs in all provinces include: Clinical audits and monitoring of mortality and morbidity. They provide health teams with important information that enables them to address weaknesses in the provision of medical care.	The National Home Builders Registration Council regulates the quality of housing and provides a warranty for houses built under the subsidy scheme.
<i>Are programs being evaluated on a regular basis?</i>	<ul style="list-style-type: none"> • Yes, mechanisms exist both inside and outside the department to evaluate programs. • The Health Systems Trust conducts regular evaluation of specific programs; e.g., they often evaluate and monitor the prevention of mother-to-child-transmission of HIV/AIDS. • Through the monitoring mandate of the SAHRC, health care policies are also regularly evaluated for compliance with the rights-based approach to social service provision. 	<ul style="list-style-type: none"> • Yes, mechanisms exist both inside and outside the department to evaluate programs. • Through the monitoring mandate of the SAHRC, health care policies are also regularly evaluated for compliance with the rights-based approach to social service provision.
<i>Are the standards and evaluation results effectively communicated to the public?</i>	The standards are available, but people need to be empowered through training and education to access information about them.	The standards are available, but people need to be empowered to access information about them.
Redress and Enforcement		
<i>Are there mechanisms allowing citizens to claim adequate provision of the services guaranteed?</i>	<ul style="list-style-type: none"> • The National Health Act requires every province to have a formal complaints system covering all levels of care. • Provinces report that increasing numbers of patients have the confidence to make formal complaints. The existence of telephone hotlines has also made the process easier. 	<ul style="list-style-type: none"> • Yes, claimable administratively (if a person is on a housing waiting list). • Complaints can be lodged with the SAHRC. • A complaint can also approach the courts and Rental Housing Tribunal, if the matter involves rent.

	<ul style="list-style-type: none"> • Provinces monitor the pattern of complaints and performance in responding to complaints. • Complaints can be lodged with the SAHRC. • A complainant can also approach the courts. 	
Participation and Continual Revision		
<i>Do civil, parent, community organizations have a concrete role in the design, implementation, and monitoring of the program?</i>	<ul style="list-style-type: none"> • Government can call on civil society organizations when designing policy although this is discretionary. There is also the parliamentary process in the case of legislation, where civil society organizations are asked to comment on policy at parliamentary hearings. • Civil society organizations involved in monitoring the programs through the South African Human Rights Commission (SAHRC) 	<ul style="list-style-type: none"> • Often government calls on civil society organizations when designing policy. There is also the parliamentary process in the case of legislation, where civil society organizations are asked to comment on policy at parliamentary hearings. • Civil society organizations involved in monitoring the programs through the South African Human Rights Commission (SAHRC)
<i>Which law or institution guarantees citizen's involvement?</i>	The Constitution is founded on the values of openness, accountability, and transparency. Parliament is constitutionally obliged to facilitate public involvement in lawmaking processes (s72).	The Constitution is founded on the values of openness, accountability, and transparency. Parliament is constitutionally obliged to facilitate public involvement in lawmaking processes (s72). The Constitutional Court has enforced this provision in the Doctors for Life international case (2006).
<i>Are there mechanisms that allow for continual improvement of services?</i>	The Department of Health is responsible for policy documents and strategic plans that aim for improvement of services.	The Housing Department, through engagement with other interested parties, is responsible for drawing up policy proposals, which can form part of new and improved programs (e.g., the Comprehensive Plan for the Development of Sustainable Settlements, which recommends the department to delivery more and sustainable housing).

18. The following section examines the key institution dimensions of South Africa's transformation toward a rights-based approach to social policy since 1994.

The Institutional and Legal Framework

19. The Constitution established a number of institutions through which socioeconomic rights are implemented, monitored, and enforced. Such institutions also provide avenues for individuals and groups to meaningfully engage with the development and implementation of policy and laws, as well as to claim and defend their rights through judicial, administrative and other means. Key institutions include parliament, the courts and public bodies (institutions supporting constitutional democracy), and others statutory bodies.

20. **Parliament** is charged with the power to make laws and to play an oversight role over the executive. Through these roles, it has been involved in the design of legislation that gives

expression to social guarantees, and in the implementation and enhancement of social service delivery. In line with its constitutional obligation to facilitate public involvement in the formulation of legislation, Parliament also holds public hearings to solicit the views of civil society actors on pending legislation and critical policy issues. In addition, Parliament has undertaken provincial consultation visits on issues such as the implementation of abortion services, the rollout of anti-retrovirals, prevention of mother-to-child-transmission (PMTCT) programs, primary health care, hospital management, budgetary issues, and the recruitment and retention of human resources for health (Parliamentary Research Unit 2007). Through these visits, Parliament monitors the impact of policies and programs created at the national level, and determines whether they are delivering benefits and rights as anticipated.

21. The **courts** are another key institutional arena in terms of engaging with issues of rights, shaping social policies, the allocation of budgets, and the development of laws. In enforcing rights, particularly socioeconomic rights, the courts have been instrumental in setting and enforcing the human rights standards on which social policies must be based.

22. The Constitutional Court, the highest court in all constitutional matters, has been particularly important in enforcing rights. The first judges appointed to the Constitutional Court were human rights activists and legal practitioners who had played a critical role in the liberation and human rights struggle. Some of them had also drafted the interim Constitution and have assisted with the drafting of the constitutions of other countries.¹⁰ They came with the political credentials, legal knowledge, expertise, and commitment to apply the vision of the Constitution. Early in its existence, the Constitutional Court determined that the enforcement of socioeconomic rights is not fundamentally different from that of civil and political rights. At the very least, the court said, socioeconomic rights can be protected from minimum invasion¹¹ – meaning that the duty to respect them can be enforced. Subsequently, the court expanded its mandate from negative to positive enforcement – i.e., the duty to take steps to enforce social rights – as illustrated by the *Grootboom* case (Box 6). In recent years, the courts have been making decisions with wide-ranging implications for social policy and budgets.

23. Technical legal provisions within the Constitution have greatly facilitated the legal system's scope of action with regard to social and economic rights claims. The most important of these is the broad *locus standing* provision, through which (section 38) a broad range of individuals and groups can approach the court alleging that a right in the Bill of Rights is threatened or has been violated.¹² This provision helps to mitigate the three main barriers to poor people accessing the courts: cost, length of litigation, and lack of direct access (particularly to the Constitutional Court, which does not accept cases without legal representation). Various civil society organizations and public interest litigation groups have used the expansive locus standing provision to challenge social policies that do not adhere to human rights standards and constitutional requirements. One of the most successful groups to use this provision has been the

¹⁰ For example, the former Chief Justice and first President of the Constitutional Court, Arthur Chaskalson, served as a consultant on the Namibian Constituent Assembly for the drafting of the Namibian Constitution.

¹¹ South Africa Constitutional Court (1996), p. 78.

¹² Section 38 states that “anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are: (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest, and (e) an association acting in the interest of its members.

Treatment Action Campaign (TAC), which, along with its affiliate, the AIDS Law Project, has advocated for treatment for people living with HIV/AIDS (Box 7).

Box 7. Minister of Health and Others v. Treatment Action Campaign and Others

In 2002, the Treatment Action Campaign (TAC) challenged the limited nature of government measures to prevent mother-to-child transmission (MTCT) of HIV, on two grounds: (i) unreasonable prohibition against administering the antiretroviral drug, nevirapine, at public hospitals and clinics, except for a limited number of pilot sites; and (ii) failure to produce and implement a comprehensive national program for the prevention of MTCT of HIV/AIDS.

The High Court and the Constitutional Court, applying the reasonableness test developed in the *Grootboom* case, decided that the government program was unreasonable in restricting access to a potentially life-saving drug to only a few sites. Both courts also found that the state's program to prevent MTCT of HIV/AIDS did not comply with its obligations in terms of sections 27(1) and (2) of the Constitution, in that, by restricting the program to a few sites, it excluded a significant number of people who are desperately in need of the drug. The Constitutional Court ordered the Government to remove these restrictions and roll the program out nationwide.

24. Also significant for the enforcement of rights has been the constitutional rules on *amicus intervention* (Box 8). These rules allow an organization to intervene as *amicus curiae* (friend of the court) in a case that is before the courts. Numerous specialist organizations have intervened in cases involving the right of access to health care and housing.¹³ These interventions have provided the courts with expert information on a range of human rights issues, and have contributed significantly to the development of laws and policies that are responsive to the needs of the poor.

Box 8. Amicus Intervention: Do Socioeconomic Rights Impose Minimum Core Obligations?

The Community Law Centre (CLC) at the University of the Western Cape has intervened as *amicus curiae* on major socioeconomic rights cases, such as *Grootboom* (together with the South African Human Rights Commission) and *TAC* (together with the Institute for Democracy in South Africa (IDASA)). In both cases, the CLC and its partners sought to persuade the Constitutional Court to interpret socio-economic rights as imposing minimum core obligations on the state. The concept of minimum core obligations was developed by the United Nations Committee on Economic, Social and Cultural Rights, in its interpretation of the nature of the state's obligation under the International Covenant on Economic, Social and Cultural Rights.* According to this concept, the state has a core obligation to ensure access to the essential minimum levels of the rights (for example, basic foodstuff, primary health care, basic shelter and housing).

The essence of the *amicus* argument in both cases was that the socio-economic rights provisions in the Constitution entitle individuals to a basic (minimum) core service directly and immediately. While in

¹³ For example, owing to its socioeconomic rights focus and expertise and interest in the case, the Community Law Centre at the University of the Western Cape intervened in the Constitutional Court cases of the *TAC* (health rights), *Grootboom*, *Modderklip*, and more recently, in the Supreme Court of Appeal case of *City of Johannesburg v Rand Properties* (evictions).

Grootboom such a service would be basic shelter, including shelter for children, in TAC it would mean immediate access to nevirapine for pregnant women living with HIV/AIDS and their newborn babies. The Constitutional Court rejected this argument in both cases, asserting that (i) it would be difficult to determine in the abstract what the minimum threshold should be for the realization of the right, as the opportunities for fulfilling these rights varied considerably and the needs were diverse; (ii) determining the minimum core for a particular right requires a great deal of information to which the courts often do not have access; and (iii) courts are not institutionally equipped to make the wide-ranging factual and political inquiries necessary for determining what the minimum core standard should be.

In addition, the Court asserted that the language of the socioeconomic rights provisions in the Bill of Rights does not support the notion of imposing minimum core obligations on the state. Further, it found that it is impossible to give everyone access to a core service immediately, and that all that can be expected from the state is that it acts reasonably to provide socioeconomic rights on a progressive basis. Significantly, however, the Court contended that the concept of minimum core obligations might be relevant in assessing the reasonableness of the measures taken by the state. This finding has had far-reaching effects.

* General Comment No 3 (5th session), 1990, UN Doc. E/1991/23, The nature of State Parties' obligations (art.2(1) of the International Covenant on Economic, Social and Cultural Rights.

25. The final significant factor in setting the climate for active judicial intervention has been the power and willingness of the courts to intervene to ensure that the situation of rights claimants actually improves. In TAC, for example, the Constitutional Court not only declared that there was a breach of the state's obligation, based on the reasonableness standard, but also instructed the Government to remove all barriers to access, and to design a comprehensive program for the rollout of nevirapine nationwide.

26. However, some in South Africa believe that the Court could have done more to improve the lives of the poor and vulnerable by accepting that constitutionally mandated socioeconomic rights impose minimum core obligations on the state. By rejecting the minimum core standard, they argue, the Court simply protected their right to "inclusion" in policy development and implementation, but failed to define their needs as priorities (Bilchitz 2003). Others contend that the minimum core obligation represents the standard of rights provision necessary to meet the basic needs of vulnerable groups. Through this standard, they argue, vulnerable groups experiencing severe socioeconomic deprivation would have a directly enforceable right to a basic level of material assistance from the state; and the state would have to realize a certain minimum level first, without delay, and improve the level of provision beyond the minimum level over time (progressive realization). This standard would place the burden on the state to demonstrate that it marshaled all resources at its disposal to satisfy, as a matter of priority, its minimum core obligation.

27. According to some commentators, the practical implication of the Court's rejection of the minimum core argument is that the poor will not receive direct individual relief, although they may indirectly benefit from the positive order of the court (Liebenberg 2003). The fact that Grootboom did not get immediate direct relief (a house) from the positive judgment is an example in point. The *Grootboom* relief entitles a successful litigant to a reasonable policy which would only pass constitutional muster if it included people in desperate need of a service (house or health care service). However, individuals bear a heavy evidentiary burden to prove that the challenged government policy is in fact unreasonable.

28. Since the Court is unlikely to move beyond assessing the reasonableness of government measures, human rights practitioners, including supporters of the minimum core obligation, are now focusing their energies on developing a more robust standard of reasonableness as a way to respond to the basic needs of the poor. Initial supporters of the minimum core argument have also found solace in the fact that the Court has acknowledged the potential role of the minimum core standard in the reasonableness review process (Liebenberg 2004).¹⁴ The Court said that for a program to be reasonable, it must include short-term measures for vulnerable groups in desperate need and living in intolerable conditions. This element of the reasonableness review is generally regarded as an element of minimum core. However, some argue that it must be strengthened by employing a higher standard of justification where vulnerable groups are deprived of essential services (Liebenberg 2003).

29. In addition to the courts, a range of **quasi-judicial and administrative mechanisms of redress** exist in South Africa, including the South African Human Rights Commission (SAHRC), the Commission on Gender Equality (CGE), the Office of the Public Protector (Ombudsman), statutory institutions such as Rent Housing Tribunals, and various tribunals and boards that have a legislative mandate to resolve rights disputes. SAHRC is the most important of these quasi-judicial mechanisms. In addition its monitoring mandate, SAHRC has the power to receive and investigate complaints, report on human rights violations, and assist people in getting a speedy remedy when their rights have been violated. If it cannot resolve the complaint through negotiation or mediation, it can litigate (at no charge) on behalf of the complainant. The CGE uses the same procedures for gender-related issues. The Public Protector's scope of action is restricted by a prohibition on investigating complaints against individuals, and a policy of encouraging people to exhaust all other remedies before approaching the Protector's office.

30. Some legislation also prescribes non-judicial forms of resolving disputes. For instance, the Prevention of Illegal Evictions From and Unlawful Occupation of Land Act of 1998 requires that parties make an effort to settle their dispute through mediation before approaching the courts (section 7). Similarly, the National Health Act 61 of 2003 requires health care users to make claims in accordance with procedures posted near the entrances to clinics and hospitals. Complaints about doctors and nurses can be lodged with the relevant training and licensing institution (the Health Professionals Council of South Africa for doctors; the South African Nursing Council for nurses). In addition, the National Health Act provides for the establishment of a National Office of Standards Compliance and an Ombudsperson (not yet operational), who is responsible for receiving complaints about health care services.

31. In sum, few recourse mechanisms – whether administrative or legal – are found in the social policy framework. Rather, the mechanisms for claiming rights are derived from the governing legislation and the Constitution. Various institutions that people can use to claim their rights are established by statute or the Constitution. The strong constitutional framework; a stronger, pro-poor judiciary; and the inefficiencies and the lack of awareness of some non-judicial

¹⁴ Liebenberg, the initial supporter of the minimum core argument, regards the reasonableness test as giving the courts a flexible, context-sensitive tool to adjudicate positive socioeconomic rights claims. She sees it as allowing the Court to respect the role and competencies of the other branches of government, while abdicating its responsibilities to enforce the positive duties imposed by socioeconomic rights.

structures have created an over-reliance on the courts to resolve rights disputes. A greater use of non-judicial structures could go along way toward ensuring efficient and cost-effective negotiating space for the resolution of rights disputes.

32. Another significant institutional feature behind the culture of rights in South Africa is a range of active **civil society organizations** that take up issues on behalf of the poor and marginalized. These include the Treatment Action Campaign, organized in 1998 to advocate for treatment for people living with HIV/AIDS; the Anti-Eviction Campaign; the Landless Movement, which lobbies for fair land redistribution and restitution; the Homeless People's Alliance, which mobilizes the poor against homelessness; and the People's Housing Process, which encourages self-help in building houses.

33. It is important to note that these post-Apartheid struggles are located within the country's constitutional and human rights frameworks. Civic organizations have demonstrated the power of using the rights-based approach to fight for access to adequate housing and health care, and to influence government policy on treatment and prevention of HIV/AIDS. TAC, for example, has been skilled in using a combination of political negotiations, mass mobilization, and adversarial strategies such as litigation to achieve its goals. TAC's well-documented success¹⁵ demonstrates how the rights-based approach can be invoked to legitimize specific social claims.

Conclusion and Lessons

34. The South Africa case illustrates the potential complementarity of judicial (courts), quasi-judicial (e.g., SAHRC), and administrative (tribunals, facility-based complaints mechanisms) approaches to providing citizens with mechanisms of recourse and redress. Clearly, the shock of the political transformation created unusual conditions, but there are, nonetheless, lessons to be drawn. What is striking about South Africa in terms of economic and social rights is the extent to which rights specified in the Constitution have become a major feature of the social policy landscape. While written constitutions are increasingly including references to social and economic rights,¹⁶ there is great variability in the extent to which constitutional guarantees actually have an impact on policy, legislation, and resource allocation. The South African case illustrates a successful structure for taking the rights approach forward. In particular, the Constitutional Court, and the provisions of locus standing and amicus curiae, which allow for pro-poor public interest litigation, have enabled the court system to promote systems of redress and accountability more broadly, leading to a strengthening of non-judicial mechanisms.

35. At the same time, the slow progress made in some areas of social policy, particularly health care, suggests the need for a more rigorous social guarantees approach to specifying entitlements, as well as the chain of responsibilities for providing them. A useful starting point could be an examination of why inequities in resource allocations persist despite the profound political, policy, and institutional changes of the last 13 years. While the politics of redistribution in service provision are always complex, the Chilean experience suggests that a process of wide

¹⁵ See, for example, Mbali (2005) and Friedman and Mottiar (2006).

¹⁶ A review conducted of 187 countries found that 165 had written constitutions, of which 116 made reference to a right to education, and 73 made reference to a right to health care (Brinks and Gauri 2006, p. 3).

public debate about what levels of service should be guaranteed to all citizens can provide a way of forcing the hard choices to be made.

Source: World Bank. 2008. "Realizing Rights through Social Guarantees: An Analysis of New Approaches to Social Policy in Latin America and South Africa" Social Development Department, Report No. 40047 – GLB.