+SECTION27 incorporating the AIDS Law Project

catalysts for social justice

SUBMISSION ON THE DISCUSSION DOCUMENT ON THE TRANSFORMATION OF THE JUDICIAL SYSTEM AND THE ROLE OF THE JUDICIARY IN THE DEVELOPMENTAL SOUTH AFRICAN STATE

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INTRODUCTION

1. On 28 February 2012, the Department of Justice and Constitutional Development (DoJ&CD) released the *Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State* ("Discussion Document"). It invited written comments by May 31st 2012, but acceded to our request for an extension of one week to make this submission.

2. As its title suggests, the Discussion Document sets a framework for public discourse on the role that the judiciary has played and should play in the transformation of law and society in South Africa.

3. According to the Discussion Document, the process of measuring the role that the judiciary has played in the transformation of society will proceed by an assessment of the judgements of the Constitutional Court and the Supreme Court of Appeal (the "Superior Courts"). The *Terms of Reference for the Assessment of the Impact of the Decisions of the Constitutional Courts and the Supreme Court of Appeal on South African Law and Jurisprudence* (the "Terms of Reference") have also been issued and will guide the assessment process.

4. SECTION27 is a public interest law centre and registered law clinic that seeks to develop and use the law to protect, promote and advance human rights. As its name suggests, it has a particular focus on the right to have access to health care services, and the obligations imposed on the state and those who exercise private power in this regard. SECTION27 also focuses on the right to basic education.

5. This submission is also endorsed by the Lesbian and Gay Equality Project ("the Equality Project"); the Treatment Action Campaign (TAC) and the Forum for the Empowerment of Women.

6. SECTION27 intends to make a number of submissions on the document and its process in order to ensure that there is an informed public debate on the issues that it raises.

AN IMPORTANT DEBATE AND OPPORTUNITY TO RAISE PUBLIC UNDERSTANDING OF THE ROLE OF THE JUDICIARY AND THE RIGHT OF ACCESS TO THE COURTS

7. The publication of the discussion document comes at a time when heated debates are taking place about the transformation of South Africa and the respective roles of parliament, the executive, the judiciary and civil society. These debates, if conducted honestly and properly, are an important opportunity to deepen understanding of the constituent parts of our democracy.

8. Our respective organisations have used, and continue to use, the Constitution of the Republic of South Africa, 1996 ("the Constitution") to advance the fight for social justice. The TAC and SECTION27 (including its predecessor the AIDS Law Project) have

used the Constitution on numerous occasions and in different cases to fight for access to life-saving medicines. More recently, we have used the Constitution to ensure compliance with the right to a basic education.[1] The Equality Project has also used the Constitution to ensure equal protection of the law for sexual minorities.[2] On the basis of this experience, we therefore wish to give a perspective on the Discussion Document that will clearly differentiate us from some individuals and organisations that may turn to the Constitution in order to frustrate the aims of deep, ongoing transformation—either through preserving the status quo or through the consolidation of unfettered political or private power.

9. Our primary objective in this submission is to set out the role that has been and can still be played by the judiciary as it fulfils its constitutional mandate to vindicate the rights of poor and underprivileged people and to realise the broader vision of the Constitution which, as set out in the Preamble, is aimed at:[3]

> Heal[ing] the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; [l]ay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; [i]mprove the quality of life of all citizens and free the potential of each person; and [b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

10. The submission begins by highlighting the role of the courts as well as litigation in our democracy. We point out that, while the courts have an important role to play in the vindication of the rights of all people, as well as in holding government accountable, their power is inherently limited because they can only pronounce on a matter if it has been brought before them.

11. Because ours is a participatory democracy, based on separation of powers and checks and balances, the judiciary should not be seen as the sole frontier for the advancement of justice and accountability. The judiciary plays a distinct and important role together with other arms of government. It is however necessarily completely independent from them.

12. We then turn to barriers to access to justice and point out that the complexity of the legal process coupled with the excessive cost of legal services makes the justice system susceptible to the capture of elite interests at the expense of the poor and marginalised. We submit that government has an obligation to act on this issue.

13. Thereafter, we deal with:

- The concept of transformation of the judiciary and the legal profession;

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[1] See our reviews at http://section27.org.za.dedi47.cpt1.host-h.net/2010/05/05/alp-15-month-review-january-2009-march-2010/ and http://www.section27.org.za/wp-content/uploads/2012/02/SECTION27-REVIEW-APRIL-2010-DECEMBER-20111.pdf

[2] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Another* 1999 SA (6) 1 (CC); *National Coalition for Gay and Lesbian Equality and Another v Minister of home Affairs and Others* 2000 (2) SA 1 (CC) and *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC).

[3] Preamble to the Constitution.

- The proposed assessment of the decisions of the Superior courts;
- The state's capacity to implement court judgments; and
- The role of judicial criticism.

WHY POOR PEOPLE ARE FORCED TO APPROACH THE COURTS

14. Since the advent of our democracy in 1994, the higher courts have frequently become an arena of contestation between poor people, who seek to claim their rights, and government, which has frequently sought to deny them rights.

15. A cursory look at the law reports bears out this claim. People have taken the government to court to demand access to housing[4], access to medicines and health care[5], sufficient water[6], sanitation[7] and a number of other basic services. The Superior courts have also pronounced themselves on how the spirit, purport and objects of the Bill of Rights should infuse private contractual relations as well as private power in general.[8]

16. While the court process is a legitimate and necessary arena for contestation, the history of resort to litigation as a tool to vindicate such basic rights as well as the history of these cases *shines a harsh light on Executive and Legislative failures at various levels.*

16.1 In the first place, it evidences a failure of constitutionally-mandated organs of state, particularly the Executive, to realise these rights. This conduct on the part of government, as well as poor service delivery, which is a function of the executive particularly at the local government level, falls short of the basic values and principles governing public administration as set out in section 195 of the Constitution. Rising frustration with this failure in service delivery can be seen from the increase in the number of service delivery related protests over the last few years.

16.2 Secondly, it illustrates a failure of democracy and meaningful engagement. [9]

17. Under our constitutional system of separation of powers, one of the functions of Parliament, which is made up of the elected representatives of the people, is to hold the Executive to account on behalf of the electorate. Section 55(2) of the Constitution provides that:

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[4] *Government of RSA and Others v Grootboom and Others* 2001 (1) SA 46; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 Pty Ltd and Another* 2012 (2) SA 104 (CC) and *Occupiers of Olivia Road, Bearea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).

[5] *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 703, *Minister of Health and Another v New Clicks South Africa Pty Ltd an d Others* 2006 (2) SA 311 (CC) and *EN and Others v Government of the Republic of South Africa* 2007 (1) BLCR 84.

[6] *Mazibuko & Others v City of Johannesburg and Others 2010* (4) SA 1 (CC).

[7] *Nokotyana &Others v Ekhurleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC).

[8] *Barkhuizen v Napier* 2007 (5) SA 323 CC. See also *New Clicks* supra (note 4) on the importance of regulation of prices for medicines in the private pharmaceutical industry.

[9] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC); *Matatiele Municipality v President of the Republic of South Africa* 2007 (1) BCLR 47 (CC)

The National Assembly must provide for mechanisms –

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

(b) to maintain oversight of-

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

(ii) any organ of state

18. Section 92(2) of the Constitution further elaborates on the duty of oversight and accountability by providing that Cabinet members are 'accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions'. However, in our experience, Parliament's accountability function leaves a lot to be desired, because the members of the Executive, who are also members of Parliament, often hold significant influence in Parliament, with the result that the line between Parliament and Cabinet becomes blurred. This is compounded by a blurring of lines between the ruling party and the state and a conflict of loyalties between different responsibilities which members have to their party and the Constitution. Because Parliament frequently fails to act independently of the Executive, it does not fulfil its oversight role over the Executive's fulfilment, or non-fulfilment, of the Constitution. Thereby, people are often left with very little option but to go to the courts to claim their rights.

19. This leads to a further problem. Litigation is extremely expensive, and is often beyond the reach of ordinary people. Thus, while litigation is a legitimate avenue for resolving disputes between government and its people, it is not the most efficient or accessible, and therefore not the most desirable. This is perhaps even more so in the context of the Superior courts, because most cases begin at the lower courts before going to the High Courts. To proceed beyond the lower courts requires resources that only a limited number of litigants can muster.

20. In our view, the assessment should thus focus on the litigation history of some of the cases that end up before the courts, as well as whether resort to the courts could have been avoided.

21. This leads to a final point. Although it is the judiciary's role to adjudicate disputes, including disputes between government and its people, very often, matters relating to socio-economic rights involve issues of policy and resource allocation that ought to be decided by the Executive – provided that the decisions are within the framework of the law. The role of the courts is to determine whether government policies are constitutionally compliant. If adequate public participation is facilitated in the crafting of these policies, and if careful prior consideration is given by government to its constitutional duties with regard to particular rights, litigation is less likely to occur. This was something government had apparently understood after losing the case of *Minister of Health and Others v Treatment Action Campaign and Others*[10], when it was reported that the socio-economic cluster had set up a study group to consider the implications of the Constitution for service delivery. Certainly, in recent years the Department of Health has

[10] Supra note 6.

demonstrated a greater awareness of its duties, although the same cannot be said for all government departments.

22. The National Planning Commission's Diagnostic Report (NPC diagnostic report) bears out this claim when it concludes thus on the erosion of accountability:[11]

> [A]ccountability mechanisms are frequently not implemented as managers seek to avoid taking responsibility, while being reluctant to devolve authority to those below them. Staff and trade unions also engage in practices that challenge or undermine the authority of managers. The result, in many cases, is the erosion of accountability and lines of authority, with an adverse impact on organisational performance. In recent years we have seen citizens resorting to protest action, sometimes violent, to draw attention to their demands. *This demonstrates that many citizens are not only frustrated but also feel their voice is not being heard through formal channels.* (Our emphasis)

23. Again, the failure of accountability also exists at the upper echelons of the State. That is, we believe that there is a direct correlation between the failure of Parliament to hold the Executive to account in its failure to deliver services and the increase in litigation and protest action against the government.

24. Parliament has a duty to facilitate public participation in law-making processes.[12] Moreover, Parliament has duty to enact legislation that will enhance its capacity to exercise its oversight role over the Executive. Instances such as that involving the Money Bill Amendment Act, 9 of 2009 and the subsequent failure, after three years of the legislation having been passed, to create a Parliamentary Budget Office, only serve to handicap Parliament's oversight role and undermine democracy. We raised these criticisms in a submission we made to the Select Committee on Appropriations on the Division of Revenue Bill. [13]

BARRIERS TO ACCESS TO JUSTICE

25. There are several barriers to access to justice. The first barrier is the complexity of some of legal procedures, even those that are supposedly tailored for lay people. As an example, the process of getting a protection order under the Domestic Violence Act, 116 of 1998 is difficult to navigate without the assistance of a legal representative, in spite of the fact that it was designed for the use of ordinary people. Another example is the procedure under the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998 ('PIE'). Evictions happen on a daily basis, and most of the people being

[11] National Planning Commission Diagnostic Report, pg 24. Available from: http://npconline.co.za/pebble.asp?relid=68.

[12] See inter alia *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC); *Matatiele Municipality v President of the Republic of South Africa* 2007 (1) BCLR 47 (CC); *Moutse Demarcation Forum and Others v President of the Republic of South Africa and Others* 2011 (11) BCLR 1158 (CC).

[13] This submission is available at http://www.section27.org.za/2010/03/04/submission-onthe-division-of-revenue-bill-2010/

evicted are not in a position to understand the procedures set out in PIE without the assistance of legal representatives. Unfortunately, many people that are evicted are also not in a position to obtain the assistance of legal representatives.

26. The complexity of some legal procedures highlights a second problem about where the barriers of access to justice might actually lie. While the Terms of Reference focus on the assessment of the decisions of and access to the Superior Courts, the Magistrates' Court is a court of first instance for many matters, and therefore defines most people's experiences with the justice system. Thus, an assessment of the accessibility of the Magistrate's Court, including ease of its procedures, its physical accessibility to litigants and the competency of the presiding officers (particularly their knowledge and understanding of the Constitution), would provide a more accurate picture of the overall accessibility of the justice system. It would also give better insight into the experiences of ordinary people in the justice system; and more importantly, it would be a better indicator of whether the courts are fulfilling their constitutional mandate to deliver justice.

27. The third problem about access to justice is interrelated with the first. We submit that legal fees are excessive and therefore lawyers are often only accessible to the well-to-do. Moreover, most legal procedures are too complex to navigate without the assistance of a legal representative. Further, it is clear that the few pro bono legal services that are available cannot cater for the demand for affordable legal services.

28. If the right of access to courts is to be taken seriously, the excessive costs of legal services must be addressed urgently. Government must take a leading role in this regard. State legal services, such as those provided through Legal Aid South Africa, must be better tailored to meet the needs of the poor. They also require a larger budget, particularly for civil litigation. The Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions[14] makes several recommendations which must be carried out without delay if access to justice is to be improved. Chapter 9 and related institutions must be financially independent and Parliament has to make better use of the reports of these institutions in order to better exercise its oversight role.[15]

29. The excessive fees charged for legal services also create a distorted picture about the jurisprudence of the Superior courts. While the Superior courts have heard cases about socio-economic rights involving the rights of the poor, such cases are often few and far between. The reality is that the overall jurisprudence of the Superior courts largely reflects the disputes of the very few wealthy people who can afford to litigate up to those courts. It would, for example, be interesting to compare the number of matters of contracts adjudicated by the courts compared to those dealing with fundamental human rights.

30. Poor people only access the courts through a very small group of registered law clinics that pioneer social justice litigation as and when it is justified, but these

[14] http://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20chapter%209.%202007.pdf

[15] Supra note 6 pages 18-37.

organisations also face resource constraints that render them unable to meet the demand for such services. Furthermore, the few law clinics that exist operate within strict parameters. Apart from being confined by their own mandates for which they were established, law clinics are bound by restrictive rules of the Law Society, which, narrowly interpreted, allow them to act only for indigent individuals who would not otherwise be able to afford legal services. This limits the ability of law clinics to act in the public interest and advance constitutional rights through litigation. Recently, the Law Society of the Northern Provinces ruled that SECTION27 acted out of its mandate by representing the Medicines Control Council, a department of State, in a matter that related to the sale of widely-used painkillers and therefore in the public interest. Although the decision of the Law Society has since been rescinded and the rules relating to the ambit of practice of law clinics are being reviewed, several problems remain.

31. NGO's like Equal Education are mainly focused on the right to Basic Education and others like the Legal Resources Centre, Lawyers for Human Rights and the Socio-Economic Rights Institute (SERI), while having a broader mandate, can only focus on very few cases at a time due to capacity. Thus, we are left with a jurisprudence that is still shaped primarily by the disputes of the wealthy. *This does not mean that it is a bad jurisprudence. Only that it is not a balanced or equal jurisprudence.*

32. Because of the limited numbers of law clinics, and because of the strict mandate within which law clinics have to operate, poor people are unable to vindicate rights in important areas of life. Organisations similar to SECTION27 have specific mandates and are unable to address other equally important matters that fall outside those mandates.

33. For example, the case in which SECTION27 recently successfully litigated against the Limpopo Department of Education and the Department of Basic Education in relation to their failure to provide textbooks to learners at public schools throughout Limpopo for almost half of the academic year was one of the first cases dealing directly with the right to basic education.[16] This is in spite of the appalling state of basic education in South Africa.

34. Notably, despite the fact that those affected by the judgment live in Limpopo, it was necessary for the litigation to take place in Pretoria because Limpopo does not have its own court. This further restricts poor people's access to justice.

a. Similarly, there has been very little to no litigation around section 25 of the Constitution (the so-called Property clause) and the obligation it imposes on Government to expedite the land reform process.

b. Equally the application of the Bill of Rights to private citizens, including the rich and influential corporations of South Africa, has been little tested. Although the Constitution makes it clear that the rights in the Bill of Rights can bind natural and juristic persons in circumstances where this is appropriate, our jurisprudence in this area is still in its infancy, and

[16] http://section27.org.za.dedi47.cpt1.host-h.net/2012/05/17/court-victory-in-the-fight-for-quality-education/

> instances of abuse of private power mostly go unidentified and unchallenged.[17] Litigation could bring some clarification on this issue: for example, it would benefit the poor to have greater legal clarity regarding the obligations on pharmaceutical companies to afford access to life-saving treatments.[18]

THE MANDATE OF TRANSFORMATION

35. The Discussion Document mentions the concept of transformation in several places and it also alludes to the transformative mandate of the courts. While we accept that transformation is a fluid concept, the government and the DoJCD must set out much more clearly what it means by "transformation". In our view, the meaning of transformation should derive from and be informed by the vision that the Constitution envisages, which can be found in the preamble.[19]

36. The National Planning Commission in its National Development Plan made the following observation about strengthening judicial governance, and the rule of law in general, and the Judicial Service Commission (JSC) in particular:[20]

> For the Constitution, and the law in general, to be an agent of change, rather than an obstacle to socioeconomic transformation, the law must be interpreted and enforces in a progressive, transformative fashion. This requires a judiciary that is progressive in its judicial philosophy and legal inclinations. The selection and appointment of judges is of crucial importance, not just for the rule of law and the independence of the courts, but to socioeconomic transformation. At present, there is little or no consensus in the Judicial Service Commission or in the legal fraternity more generally, about the qualities and attributes needed for the bench.

37. We are in full agreement with the sentiment that transformation of the judicial system and the legal profession is a necessary precondition for the law to become a catalyst for social change. We also share the view that transformation requires a fundamental shift in values and attitudes of the individuals within the legal profession.

38. Thus understood, measuring transformation is by no means easy. However, a lot more could be done to give practical effect to the values of transformation, especially in judicial appointments. The Judicial Services Commission (JSC) should develop clear criteria that attempt to gauge the ability of judicial nominees to contribute to transformation. We believe that the best way to ascertain this is to look at the judgments of the nominees

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[17] Competition law is the one area where there is an exception to this.

[18] The TAC, represented by SECTION27, recently intervened in a case before the Supreme Court of Appeal. The case was about a patent infringement on a cancer drug called Docetaxel and it raises important issues about the high costs of patented medicines as opposed to generics. In its submission to the Court, TAC argued that when considering matters about patent infringements, especially in the area of essential medicines, the courts should consider fundamental rights, especially the right to access to healthcare.

[19] Supra note 3.

[20] http://www.npconline.co.za/medialib/downloads/home/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf

from the bench. Clear criteria will also guard against instances like that which we witnessed recently when insufficient candidates put themselves forward for the vacancies on the Constitutional Court bench.

39. The JSC also needs to do much more to guarantee its own independence and, by extension, that of the judiciary. While our JSC is the envy of the world when it comes to composition, in our view, civil society representation would enhance the legitimacy of the JSC.

40. Our tradition of drawing judges from members of the legal profession suggests that transformation of the judiciary cannot occur without transformation of the legal profession. Until today, the legal profession does not reflect the demographics of the country. This leads to the situation where only 2 of the 11 judges of the Constitutional Court are female. The recently released DoJ&CD's Policy Framework for the Transformation of the State Legal Services acknowledges that the State is one of the biggest consumers of legal services. This means the State has sufficient leverage and bargaining power to ensure that the cost of legal services can be more affordable and it should use that power to bring down the costs of legal services.[21]

ASSESSMENT OF DECISIONS OF THE SUPERIOR COURTS

41. A few preliminary remarks are warranted before we make our submission on this point. Firstly, the terms of reference for the assessment of the decisions of the Superior courts were released *prior* to the due date for the submission of responses to the Discussion Document. This raises questions about the intention and legitimacy of the public consultation process. It would have been preferable if the terms of reference had been developed in response to public submissions. Secondly, under our constitutional system of separation of powers, the function of adjudication, especially in matters pertaining to the interpretation of the Constitution, falls within the domain of judicial authority. The courts have, and should be seen to have, the final authority on legal matters on which they have adjudicated. An assessment of decisions of the Superior courts carried out by the Executive, however well intended, could raise the perception that the Executive is second-guessing the judicial authority. These perceptions matter, and for this reason, it would be better for government to request the South African Human Rights Commission to conduct the assessment. Lastly, the Terms of Reference for the assessment of the decisions of the court appear too broad for the assessment to be effective, especially considering that it encompasses two courts, and one of those courts—the Supreme Court of Appeal—is not limited to Constitutional matters.

42. South Africa's system of adjudication is adversarial in nature. This means that the courts adjudicate disputes on the basis of the arguments presented by the litigants. While the role of courts under a constitutional dispensation is not a mere passive one, the outcome of any dispute, in large part, turns on the argument and the ambit of the case presented by the litigants. This feature is important for the courts' role as impartial arbiter and it helps enhance its legitimacy. It also means that the decisions of the courts, and thus

[21] http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=27583&tid=68971

their jurisprudence, is informed in large part by the evidence and argument provided by litigants.

43. The adversarial nature of our judicial system has implications for the way in which the proposed assessment of the court decisions should proceed and what the assessment should illustrate. This point is made specifically with regard to the cases in which the State was a litigant. Considering the volume of cases decided by the Superior courts, these cases should be the focus of the assessment. Besides just looking at the decisions of the courts, a key focus of the assessment should look at evaluating the strengths and weakness of the submissions made by the State in these cases, as well as the way in which the State conducted these cases.

44. While we accept that it is within the State's right to put forward a position and defend it in court, we believe that the State's approach to litigation, especially in cases of socio-economic rights, should differ from that of ordinary litigants. The State is not an ordinary litigant. The State has a constitutionally stipulated duty to uphold the Constitution and to promote, protect and fulfil the rights in the Bill of Rights[22] and the fulfilment of this duty should inform the State's submission to litigation.

45. Additionally, the Discussion Document should make clear the purpose of assessing court decisions. While the document goes to great lengths to repeat the importance of the principle of judicial independence, it should be made clear what the purpose of this assessment is, and assure us that it is not an attempt to improperly influence the judiciary, or to clip its wings.

46. The final point pertains to the methodology that should inform the assessment of the impact of the decisions of the Superior courts. In our experience, the impact of a court decision that intends to vindicate rights depends largely on whether there is a social movement that monitors the implementation of the judgment. Two Constitutional Court decisions can be contrasted on this point—*TAC Minister of Health and Others v Treatment Action Campaign and Others*[23] and *Government of RSA and Others v Grootboom and Others*[24].

47. As a legal victory, the *TAC* case was built on the back of *Grootboom*. However, what distinguished the *Grootboom* decision from *TAC* decision was the existence of the TAC as a social movement. The TAC used the *TAC* decision to bolster the fight for HIV treatment by monitoring the state's compliance with the judgment, publicising it to relevant people, and exposing and publicising where the State was not acting in accordance with the Court order. This is the primary reason why the decision had a significant social impact. Today, South Africa's mother-to-child HIV transmission (MTCT) rate is under 4% at four to eight weeks after birth[25] and nearly 2 million people on the Public Anti-Retroviral Treatment programme.[26]

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[22] S7(2) of the Constitution.
[23] Supra note 6.
[24] Supra note 4.
[25] http://www.aidsmap.com/South-Africas-PMTCT-programme-reduces-mother-to-child-transmission-to-under-4/page/1880446/
[26] http://www.doh.gov.za/docs/reports/annual/2011/annual_report2010-11.pdf

48. *Grootboom* did not have a similar impact in part because of government's failure to properly implement the Court judgment, but largely because there was no similar social movement to ensure implementation. The assessment should thus consider the role of social movements and civil society, both in bringing cases to the Superior courts and in the impact of the decisions of the Superior courts. The NPC diagnostic report supports this point when it makes reference to the TAC in the context of the role of grass-roots organisations that actively enforced socio-economic rights. The NPC report notes that, in order to ensure access to anti-retroviral medicines in the public sector, the TAC took legal action, *bolstered by a social movement of people living with HIV* and who were in need of life-saving medicines. We maintain that the strategy of combining law with social mobilisation was and still remains necessary for court victories to have significant social impact.

THE PROPER ROLE OF THE COURTS AND SEPARATION OF POWERS

49. South Africa's Constitution makes provision for socio-economic rights that can be enforced through law. The Constitution also makes provision for judicial review of executive and legislative action. The latter feature is common in most constitutional democracies but the former is not.

50. What these two features have in common is that they both give rise to tension about the appropriate and legitimate role of the judiciary. Socio-economic rights have at their heart the allocation of state financial resources. However, when a case about socio-economic rights goes before the courts, the courts have to make an authoritative finding about the State's duty, and if necessary, the State has to re-allocate resources accordingly. Similarly with judicial review, the courts are empowered to test all government action for constitutional conformity if there is a dispute as to whether government acted within the parameters of the law. We will now set out why we think the different forms of review are acceptable.

51. In our view, the Superior courts have stayed within their terrain. This is reflected by the rules that govern judicial review of executive action. The scrutiny applied by the courts, which involves using the principles of legality[27], rationality[28] and good faith[29], reflects a substantial degree of deference to the policy choices of the Executive. The courts have constantly repeated that their role is not to question whether government could have made a better policy but rather whether government can explain its policy choice within the framework of the Constitutional rules that should govern Executive action. We believe that this approach is correct because it accords with the culture of justification that underlies our democracy as opposed to the culture of authority that underlay the apartheid order. Unlike the system of Parliamentary Sovereignty, where the will of parliament was supreme, our government must provide substantive justification for all its actions.

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[27] *Fedusre Life Assurance Ltd v greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC)
[28] *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).
[29] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

52. Although the standard of reasonableness, which is the standard of scrutiny applied in socio-economic rights cases, is slightly higher, it is equally appropriate. It is the court's job to determine what the Bill of Rights requires. For this reason, when the courts adjudicate a question about whether an Executive measure to realise a particular socio-economic right is appropriate, it has to apply a standard that reflects its role as the final arbiter of the rights in the Bill of Rights. In our view, this leaves sufficient scope for the executive to choose between different policy alternatives. For example, in the *Grootboom* case, the Court provided Government a set of principles to guide the policy. Government retained sufficient leeway to conceptualise, develop and implement a policy on housing. Importantly, the Court also avoided making a ruling on the specific housing services that that the State had to provide. This has the important effect of giving government sufficient scope to develop its own policies.

53. Finally, while we recognise that judicial power is susceptible to abuse, we believe that the judiciary is the least dangerous branch when it comes to abuse of power. Judicial authority is invoked when, and only when, a case is brought before a court. And even then, the Judiciary relies on the Executive to implement its judgments.

THE STATE'S CAPACITY TO IMPLEMENT COURT JUDGMENTS

54. The Discussion Document recommends a critical assessment of the Executive branch's capacity to implement court decisions. We welcome this recommendation and we believe that it should be implemented as a matter of urgency, especially when it comes to those judgments that deal with service delivery in poor communities.

55. The NPC's Diagnostic Report has highlighted the lack of capacity at various levels of government, suggesting that the improper implementation of court judgments might not necessarily be due to a lack of willingness on the part of government. [30] The report also points out that the lack of capacity varies across municipalities, with poor performance often tracking departments in previously disadvantaged areas. While the legacy problems will not admit to quick-fix solutions, government at the national level has to take leadership to come up with long-term solutions to solve this problem. Deployment to key positions must be aligned with competency as opposed to party loyalty. Government must also put in place performance indicators so that assistance and intervention can be given to struggling departments as required.

56. The lack of capacity does not fully explain the sub-par performance of government officials. Underlying these poor performances, in our view, is a failure to create a culture of accountability. Executive officials who act outside the law should be dealt with swiftly and openly and corrupt officials should be prosecuted. The case involving the non-delivery of textbooks in Limpopo is but one of many. An official in the Limpopo Department of Education who was courageous enough to blow the whistle on the award of the procurement and delivery of textbooks was dismissed for his efforts. A few months later, after national government exercised its powers under section 100 of the Constitution to

[30] P 25.

put the Limpopo Government under administration, the tender was finally cancelled. In this instance, the children of Limpopo went without textbooks because there was an environment in which corruption and patronage flourished and calls for accountability went punished. And, in the end, both the Department of Education and the Limpopo Provincial Government failed in their duty to provide basic education.

CRITICISM OF THE JUDICIARY

57. Judges should be able to carry out their functions without fear of intimidation or harm. The ability of judges to carry out their judicial duty depends in part on the co-operation of the other organs of State and in part on the legitimacy of the courts.

58. The Discussion Document correctly states that the judiciary should be subject to criticism and that this is not just normal but necessary for the functioning of our Constitutional democracy. As Harms JA explained in *New Clicks*[31] *'*[t]he judicial cloak is not an impregnable shield providing immunity against criticism or reproach'. However, there is a thin line between judicial criticism and judicial denigration, and the latter has the potential to damage the legitimacy of the judiciary and thus ultimately its authority. For example, comments from senior politicians in the ruling party that attack the person of the judges by labelling them as 'counter-revolutionary' and that imply that the judiciary is conspiring to frustrate the executive by being oppositionist to the ruling government[32], bear the hallmark of denigration, not criticism.

59. Judicial criticism, especially when it comes from bearers of public power such as cabinet Ministers, has to be informed and honest so as to preserve judicial integrity. After all, elected representatives all take an oath/affirmation 'to obey, observe, uphold and maintain the Constitution.'[33]

60. While respect for, and compliance with, court judgements enhances the legitimacy of the judiciary, criticism that impugns the dignity of the court detracts from that legitimacy and poses a fundamental threat to our constitutional order.

CONCLUSION

61. In conclusion, we submit that while the judiciary has a key role to play in the transformation of the legal system and of our country, the effectiveness of its role depends on two key ingredients:

1. The ability of people to access the courts; and

2. A cast iron guarantee that judicial authority will be recognised and respected.

62. Until poor and marginalised people have ease of access to the justice system, our society will not see sufficient significant social change. While our Superior courts have

[31] supra at para 39.
[32] http://www.anc.org.za/show.php?id=5946.
[33] Schedule 2 of the Constitution.

made significant decisions that have benefitted the poor, these victories were achieved by social justice organisations that operate with limited mandates and resources. For this reason, the debate around transformation of the judiciary has to be focused on eliminating barriers to access to justice as well as the overall quality of the justice system at all levels.

63. We have also submitted that Government has a crucial role to play in enhancing the legitimacy of the courts. Government's implementation of court judgments must improve. Finally, criticism of the courts, especially by members of the Executive and the Legislature, while remaining robust, must steer clear of denigration.

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