

Court gives a legal voice to the poor and powerless

DENNIS DAVIS: COMMENT - Jan 22 2010 16:29

A series of talks designed to promote a public debate about the progress of constitutional democracy in South Africa and the key challenges for the future were held recently at UCT's Summer School. Judge Dennis Davis and advocate Gilbert Marcus were the first to deliver their speeches

Those entrusted with drafting a new democratic Constitution for South Africa were confronted with many difficulties. One was how to deal with apartheid's legacy of vast inequality and the grinding poverty of millions of South Africans.

From a constitutional perspective, the answer was not self-evident. With a democratically elected government committed to meeting the needs of the people, there was arguably no need for the Constitution to address itself to this question at all.

Arguments for the inclusion of socioeconomic rights in the Constitution were summarised at the time by Dennis Davis: "... [T]he arguments for the inclusion of social and economic rights such as the right to housing, medical care, education, a job and nutrition in a Bill of Rights rests on the premise that to deny these rights -- while according first-generation rights of speech, association and freedom of religion -- is to engrave into society a distorted notion of democracy.

"In other words, economic and social inequality is a form of political inequality, in that the former disables citizens from participating fully in the political process."

The architects of the Constitution adopted a formula that attempted to create an enforceable right while at the same time acknowledging the problem of limited resources. The debate then shifted to the interpretation and enforcement of socioeconomic rights, a task entrusted to the Constitutional Court.

The inclusion of these rights presented poor and marginalised communities with a potentially powerful weapon against the state. Courts can offer a unique forum for the voices of the politically weak, the poor and the marginalised sections of society to be heard in ways that would otherwise not be possible or as effective.

The Grootboom case in 2001 was to lay the foundations of the Constitutional Court's socioeconomic rights jurisprudence. The case concerned a problem all too familiar in South Africa -- the right of access to adequate housing.

The essential issue was described by Justice Zac Yacoob: "The group of people with whom we are concerned in these proceedings lived in appalling conditions, decided to move out and illegally occupied someone else's land. They were evicted and left homeless. The root cause of their problems is the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing."

Having been evicted, they applied to court for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation. In the high court they got what they asked for on the basis that the majority of those affected were children who had an unqualified right to shelter in terms of the Constitution.

On the day the matter was argued in the Constitutional Court, counsel for the national and provincial government advised the court that the community had been offered alternative accommodation "not in fulfilment of any accepted constitutional obligation but in the interests of humanity and pragmatism". The community accepted the offer. It was probably for this reason that the Constitutional Court did not find it

necessary to order the state to provide alternative accommodation.

It nevertheless declared that the state's housing programme fell short of the requirements of the Constitution because it failed to make reasonable provision within its available resources for people with no access to land, no roof over their heads and who were living in intolerable conditions or crisis situations.

The significance of the judgment lies in its articulation of the positive duties resting on the state. While the case concerned access to adequate housing, the principles laid down by the court are of broader application.

The next case of significance was the litigation in 2002 between the Treatment Action Campaign (TAC) and the government, then led by Thabo Mbeki. The long and bitter struggle waged by the TAC to enable pregnant mothers to obtain the medication that held out the real possibility of preventing the transmission of HIV to their children ought never to have occurred. It was the kind of case that a sensible and sensitive state should never have opposed.

One of the most common methods of transmission of HIV is from mother to child at or around birth, resulting in approximately 70 000 babies being infected each year. The TAC argued that this could be reduced effectively and substantially by a single dose of nevirapine to the mother and child.

This was a registered drug that had been offered to the South African government free of charge by the manufacturer for five years for use in the public health sector. The government had not accepted this offer at the time and had drastically limited the availability of nevirapine.

The TAC went to the Constitutional Court armed with a potent weapon in the form of the constitutional right of access to healthcare services. The court made short shrift of the state's case, declared that the government's existing policy fell short of its constitutional obligations and ordered that it was required "to devise and implement within its available resources a comprehensive and coordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV".

Mention should also be made of a 2004 decision by the Constitutional Court to extend social assistance grants to permanent residents. And last year the court handed down a number of decisions on socioeconomic rights, notably concerning water rights (Phiri) and the upgrading of informal settlements (Nkotyana).

Are, then, poor and marginalised communities better off with the entrenchment of socioeconomic rights in the Constitution? I suggest that the answer is in the affirmative for two principal reasons. First, there have been some very significant victories in the courts that may have been unattainable or at least considerably more difficult without the force of the socioeconomic rights that underpinned the arguments. The nevirapine case is perhaps the best example. The decision made it virtually impossible for the Mbeki administration to persist with its flirtation with Aids denialism.

Second, it is clear that the principles laid down by the Constitutional Court in *Grootboom* are taken seriously by the state, albeit in a somewhat inconsistent manner.

In a constitutional democracy the demarcation between the executive and the courts is always a delicate exercise. Were the courts to act as surrogate legislators, there would be a serious risk of engendering a very undesirable conflict between the judiciary and the executive.

Several incidents have indicated the unease with which some politicians view the oversight role of the courts.

I do not suggest that the courts should be or have been cowed into submission when dealing with socioeconomic rights cases. I mean no more than to emphasise the inherent delicacy of the need to strike the appropriate balance to safeguard our constitutional enterprise.

Gilbert Marcus SC is a member of the South African Bar. This is an abridged version of his address on Tuesday at the UCT Summer School

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