

**CONSTITUTIONAL JUSTICE PROJECT**  
**Transformative impact**  
**of constitutional jurisprudence**

**The judiciary, public goods and service  
delivery – Realising socio-economic rights**

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# Overview and context

- Joint HSRC and UFH research
- The following areas are discussed in this presentation:
  - Constitutional transformation
  - Jurisprudential and social transformation
  - Context:
    - Supremacy of the Constitution
    - Judicial authority (vulnerable)
    - Separation of powers (weak)
    - Minimum core (no agreed content)
    - Implementation of SER judgments (uneven)
    - Constitutional dialogue – A way forward?

# Constitution, 1996 - Preamble

We, the people of South Africa,

Recognise the injustices of our past ...

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -

- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- Lay the foundations 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;
- Improve the quality of life of all citizens and free the potential of each person; and
- Build a united and democratic South Africa ...'.

# Bill of Rights

## 7. Rights

- (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
- (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or \*elsewhere in the Bill. [\*Internal limitations]

# SERs: the right to a programme (mostly)

9. **Equality**; and 10. **Human dignity**

24. **Environment** - not harmful to well-being.

26. **Housing** – (1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

27. **Health care, food, water and social security** – access to ... progressive realisation of these rights.

28. **Children** - Every child has the right [now] ... c. to basic nutrition, shelter, basic health care services and social services;

29. **Education** - Everyone has the right [now] a. to a basic education, including adult basic education

## S. 165 of the Constitution – Judicial authority

- 1) The judicial authority of the Republic is vested in the courts.
- 2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- 3) No person or organ of state may interfere with the functioning of the courts.
- 4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
- 5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

# The meaning of Constitutional “transformation”

- As part of the Constitution’s commitment to democracy, social justice and uplifting the quality of life of all people, it specifically protects a range of socio-economic rights (SERs).
- Constitution envisages a journey towards substantive equality.
- The CC clarified early on that, in South Africa, SERs are justiciable and the Court has an important role to play in interpreting and adjudicating SER claims.
- BUT, the counter-majoritarian dilemma...

# Transformation: preliminary findings and main trends

- Consensus is elusive on the meaning of the courts' role in social and economic transformation, but it is generally agreed that the courts have been transformative within the context of constitutional imperatives, such as the separation of powers.
- The meaning of transformation needs careful consideration, but it is clear that justiciable SERs place both negative and positive obligations on the state and that the state should "respect, protect, promote and fulfil" all rights (section 7).



- As the courts do not implement their own orders, lack of transformation cannot be “blamed” on the courts. Problems include the failure – or delay – by executive or legislature to implement courts’ decisions.
- Deep concern regarding impact of failure to implement court orders on respect for the Constitution and the rule of law.
- Most believe transformation happens incrementally and that the courts have been ‘wise’ in their approach to transformation within our particular historical and constitutional context.

- Given government's failure to efficiently and effectively deliver basic services, courts could become more interventionist by, for instance, adopting innovative remedies such as structural interdicts and meaningful engagement (with court oversight).
- Most respondents cautioned that the courts should take into account post-apartheid government's resource constraints. Others argued it is time to become more demanding and less cautious: we are no longer a “young” democracy.

# 1. But, the Separation of Powers

- The doctrine of separation of powers (SoP) is inherent in the Constitution – evident in regulating the exercise of public power – checks and balances, and dispersal, eg Chapter 9 institutions.
- Doctrine not inflexible, and the principle should not detract from the courts' right of judicial review.
- Courts may evaluate the reasonableness of government policy and action, and have a duty to grant effective remedies for the enforcement of SERs, including structural interdicts against government departments.

# Separation of Powers

A common view: courts should not interfere with policy-making -

*“the courts are only as strong as there is buy-in, and ... the type of judicial activism as often called for might be a short-term solution to somebody’s specific problem, but in the long-term might well cause antagonism with the other branches of Government and with other sectors in society, and in fact, weaken the legitimacy of the courts. So ... the overarching project of the courts is to solve the particular case that is before them in the best possible way for the litigant, but in a manner that promotes democracy, deliberation, public buy-in”.*

*However, “to some extent service delivery is a problem, so the courts should take a more activist role ... in terms of remedy perhaps”.*

# Preliminary findings and key trends

- Respondents sensitive to the democratic imperatives of the SoP doctrine and understood that the courts are not well-placed to make policy, or prescribe policy choices to government.
- However, the courts' right of judicial review and the justiciability of SERs does place the doctrine within a specific local context.
- Courts do have the authority and responsibility to judge the reasonableness of government policy and should do so without fear or favour.

## 2. "Minimum core" of SERs

- Not defined in the Constitution
- Who should determine the content of rights?
- In both *Grootboom* and *TAC*, CC urged by amici curiae to adopt the concept of a 'minimum core obligation'
- The CC rejected the minimum core argument (including in *Mazibuko*), holding that sections 26 and 27 did not entitle any individual to the direct provision of minimal levels of the relevant goods and services from the State.
- CC criticised by some for failing to take these opportunities to give substantive content to the rights to housing / shelter and health care specifically - only partially protecting these socio-economic rights.

An Advocate eloquently summed up the views of many –

*“[T]here can be no debate about whether the Courts must engage with Government policy-making or not. I think the Constitution obliges the Courts to do so. If Government comes up with a policy scheme that’s challenged, the Courts are obliged to evaluate that scheme against the Constitution. So I don’t think that it’s open to anybody to say that policy falls outside of the domain [of the courts]. That’s for me the starting point. The question [really] is how the Courts engage with policy issues” (emphasis added).*

# Preliminary findings and key trends

- Recognise complexities entailed in establishing the substantive content of a minimum core for each SER – content changes over time with fluctuations in national prosperity.
- Almost all believe that it is not the responsibility of the courts to determine content.
- Agreed therefore that ‘minimum core’ is an inadequately flexible approach and that the ‘reasonableness’ test is more appropriate - prevents the courts becoming too involved in policy-making.
- *BUT* SA recently acceded to the ICESCR...



- Constitution adopts a particular formula: govt must take reasonable steps to ensure progressive realisation of SERs within available resources. Courts cannot ignore this.
- Most agree that, in a constitutional democracy, the legislature and the executive bear the primary responsibility for delivering on SERs. If they do not do so, the most appropriate remedy is removal at the next election.
- But, overwhelming support for the understanding that, once it is accepted that SERs are justiciable, which the Constitution does, “then manifestly it is the Court’s prerogative to involve itself in this debate”.

- *Constitution Certification* judgment 1996 upheld in subsequent decisions. How SERs were to be enforced was expected to be a difficult issue, which had to be carefully explored on a case-by-case basis, considering the terms and context of the relevant constitutional provision and its application to the circumstances of the case (para 20).
- Restrained judiciary complemented by assumption of an 'energetic executive'.
- General support for the courts playing a more 'activist' role in extreme and urgent cases, and when government persists in failing to act 'reasonably' – eg service delivery.
- In the absence of detailed and inclusive debate or discussion ['dialogue'], the CC could step in to order specific performance – as in *TAC* for example.

# Impact of SER jurisprudence

One view:

*“The courts’ decisions on socio-economic rights have undoubtedly shown how rights-directed litigation can improve the conditions of many socially vulnerable people, in ways that would have not been possible without these rights. The decisions also show how rights claims can be practically translated into material improvements to people’s lives”.*

- Justice Edwin Cameron (2014: 270)

# The journey is best undertaken together

*“[T]he breakthrough that the TAC made with AIDS was a combination of public opinion, advocacy, public demonstrations, media exposure, and litigation, and the law working hand-in-hand ... You’ve got to use the law and public awareness at the same time.”*

*- Former CC Justice*

# Implementation of SER judgments

- Section 237 of the Constitution *Diligent performance of obligations* - ‘All constitutional obligations must be performed diligently and without delay.’
- Section 10 *Human dignity* – ‘Everyone has inherent dignity and the right to have their dignity respected and protected.’
- “There is no greater frustration than being born in a place, and to grow up and old still without rights.” (Nokotyana)
- “... they themselves...they came, these humble people, and they realised that my voice counts, and that is something that is [on its] own beautiful”. (SERI)

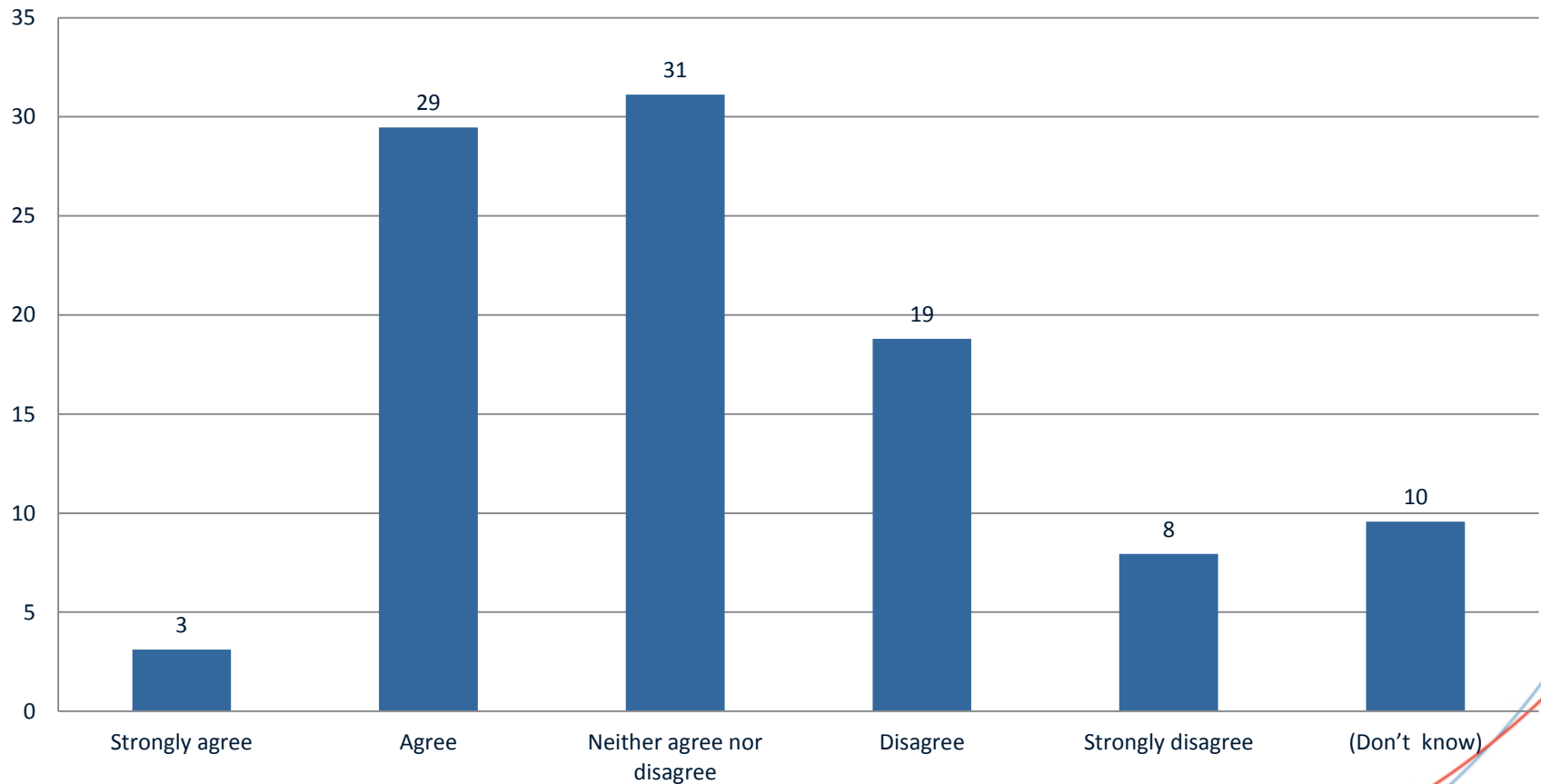
# Preliminary findings and key trends

- Evidence of implementation and failure by government officials to implement court decisions. Problems include -
- Internal communication breakdown: between State Attorney and depts, and within depts (eg staff turnover).
- Intergovernmental relations issues and systemic bureaucratic inefficiencies - national, provincial and municipal actors concerned do not always agree on an integrated plan to implement court decisions.
- Lack of proper consultation with / participation by affected communities in how best to implement judgments.
- In isolated situations, communities have made it difficult for government to implement court decisions.

## Findings and trends (contd)

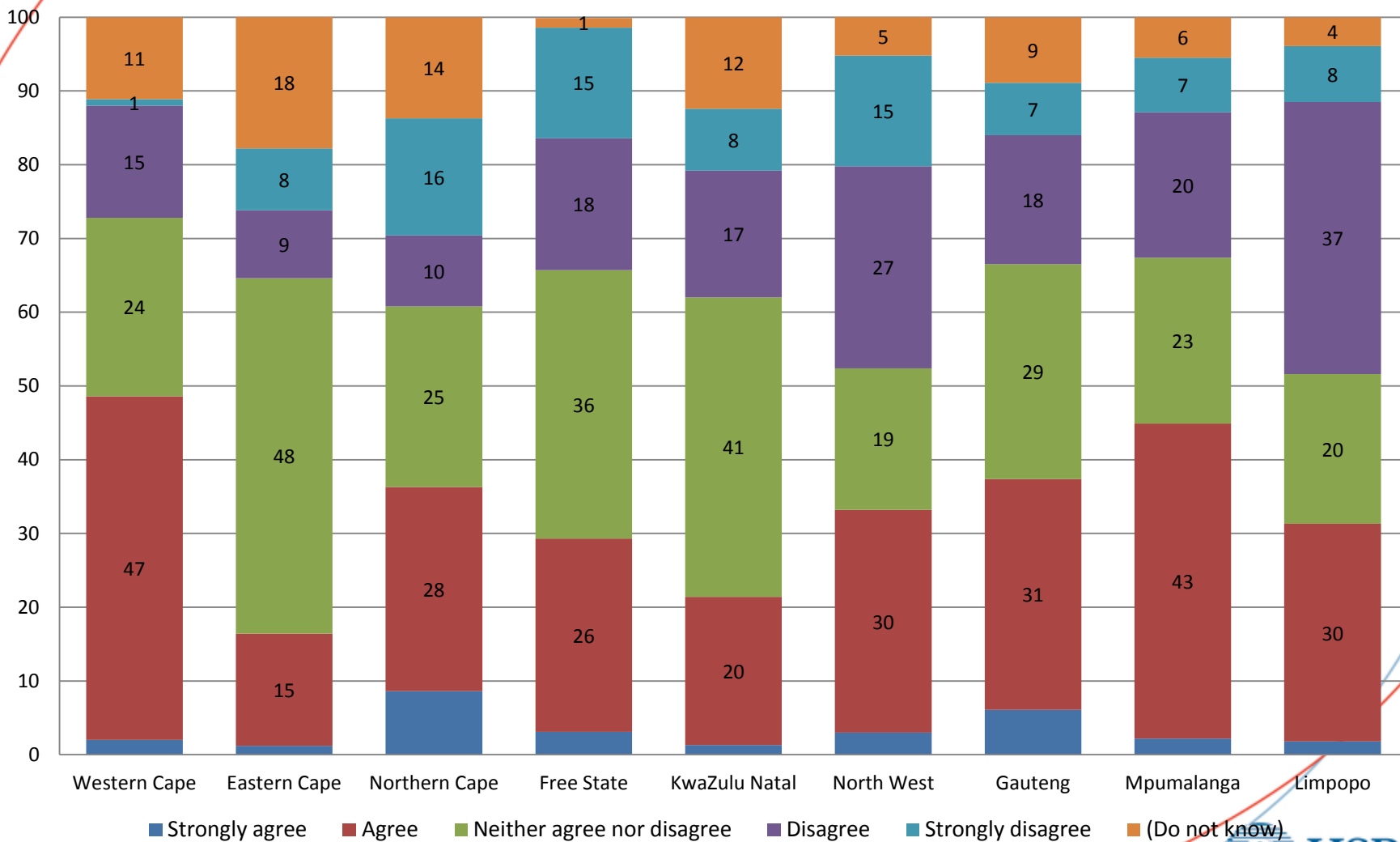
- Government is not always aware of community experiences and views about their dire situation.
- Equally, communities are not always aware what authorities are doing to resolve their problems and challenges.
- Limited public understanding of official procedures.
  
- *Although the people are hopeful that government will ensure that their socio-economic rights are realised, transformation of lived experiences may not occur any time soon.*

# Do government departments including municipalities successfully implement court decisions that improve people's lives? (SASAS 2014)

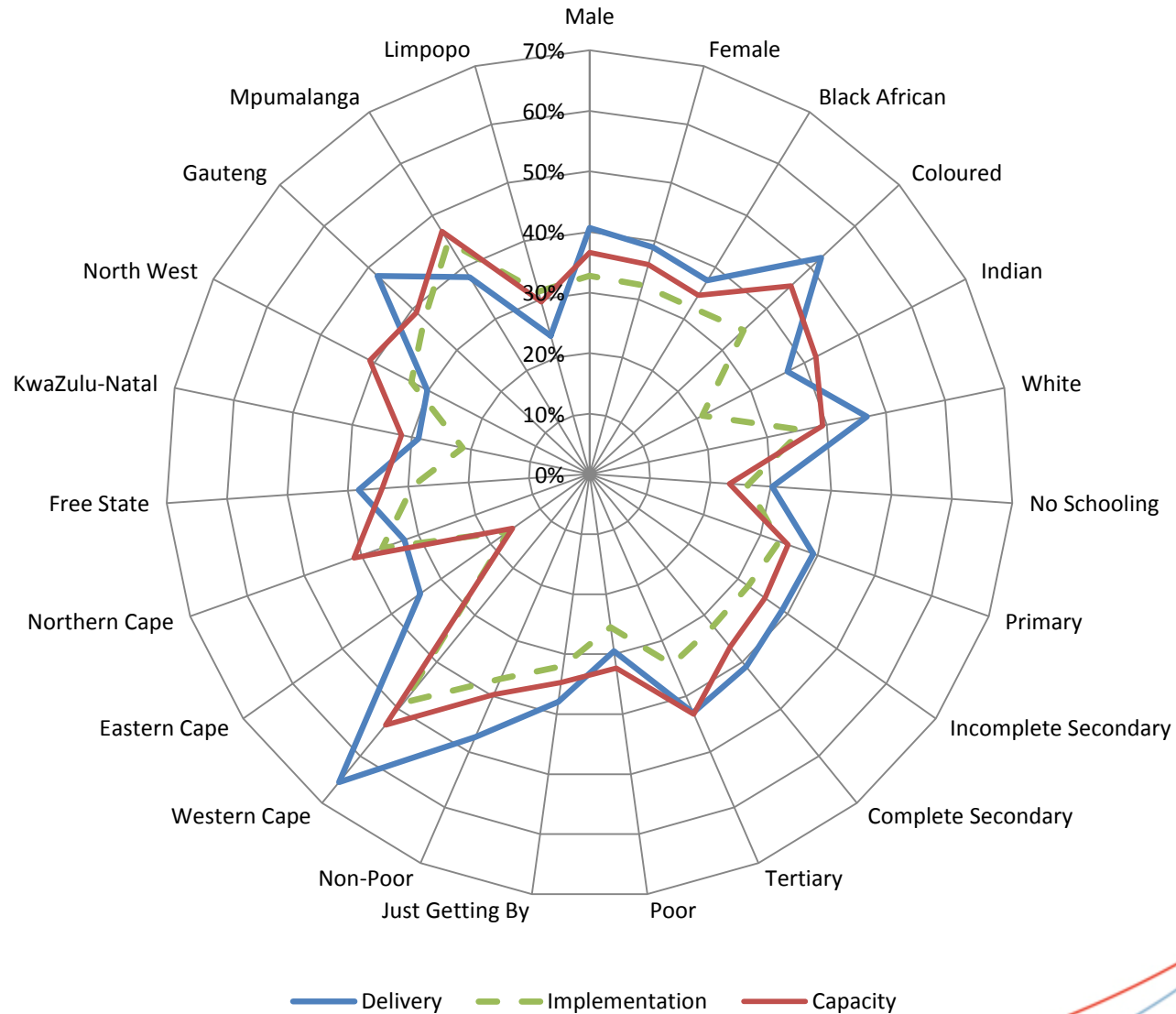




# Do govt depts (incl municipalities) successfully implement court decisions that improve people's lives? (By province)



# Successful implementation of court orders by govt and capacity to implement successfully (sub-groups) - SASAS 2014



# Transformation of the law

- *Grootboom; PE Municipality; Occupiers of 51 Olivia Road; Blue Moonlight Properties; Joe Slovo Community, WC; Modder East Squatters v Modderklip Boerdery*
- Meaningful engagement
- Alternative accommodation

“The rule of law is not simply about institutions but about creating particular types of subjects, i.e. citizens who see themselves as judicial subjects, as makers and agents of law.”

# Customary law of marriage, divorce and succession: & gender equality

- *Bhe*: CC invalidated s 23 of the Black Administration Act 38 of 1927, which applied the principle of male primogeniture to estates subject to customary law.
- Court held that s 1 of the Intestate Succession Act 81 of 1987 (ISA) / the common law, would henceforth apply also to estates of black people until the legislature enacted legislation giving effect to the principle of equality and non-discrimination in customary succession law.
- The court also amended the ISA, especially to accommodate polygyny (more than one female partner).
- *Gumede, Ngwenyama, Shilubana, Bezuidenhout, Visser, Henery*

# Housing, Water, Sanitation and Electricity

- Service delivery - an *increasing number of protests and law suits* concerning socio-economic rights.
- *Nokotyana & Others v Ekurhuleni Metro* - Community blamed for stalling implementation because they have their own preferences on how upgrading must be done.
- Gauteng Housing and Human Settlement Dept. had proposed high rise flats to accommodate informal settlers.
- Harry Gwala settlement residents rejected the proposal - preferred single storey houses - privacy of their own back yards which would enable any cultural rituals.
- Despite local authority's claim to want to improve the area, community unhappy over inadequate consultation about upgrade.

# Housing, Water, Sanitation and Electricity

- *Joseph* - Chiawelo community's electricity disconnected as CoJ, City Power, Eskom failed to consult the tenants due to intergovernmental failure to include tenants in meaningful citizen engagement process.
- Officials admit difficulty implementing court decisions, largely due to poor communication between departments, municipalities and affected communities.
- *Mazibuko* - Phiri residents received notice of a prepaid water system, but Lindiwe Mazibuko did not, and lived without water on her property for about six months. Adequacy of 6 kilolitres of free basic water allowance from City of Jhb?
- Lack of communication and proper consultation between the state and society had adverse impacts on service delivery.

# Environment

- *Director: Mineral Development, Gauteng Region & Another v Save the Vaal Environment (SAVE) (1999)*
- A senior public official: “[We know that] mining ... would have created jobs and boosted the economy, as there were measures in place to sustain the environment given the after-effects of mining”.
- Then-Minister Shabangu acknowledged that, while mining contributes to growth and development, enviro impact can be detrimental.
- Judgment: Need to balance competing environment and commercial interests.
- Immediate change in official policy to implement judgement.
- One Environmental System – ensures public consultation from early in integrated mining and development planning.

# Primary Health Care

- *Treatment Action Campaign v Min. of Health* – a landmark decision with relatively successful implementation.
- Contrast *Soobramoney v Min. of Health*.
- Impact of judgment is evident – today, SA has the largest anti-retroviral treatment programme in the world.
- Current Health Minister Motsoaledi:
  - *“We have scored significant achievements. Whereas a decade ago, 70,000 children in South Africa were born HIV-positive every year, now we have 8,000 annually due to massive and successful PMTCP programme”*.
- Mark Heywood: political will counts in the implementation of court decisions.
- TAC member: united, grassroots approach to lobbying for free treatment was critical to legal victory.



# Social welfare

- Beneficiaries of 2004 *Khosa* judgment: judgment has made it possible for more Bushbuckridge community members than before to access social assistance.
- Evidence of progress in accessing welfare services it is still marred by permanent residents still waiting for DHA to issue their SA ID documents.
- Without IDs they cannot register for social assistance and now face a different kind of exclusion – for administrative reasons.
- The DHA and DSD should co-ordinate efforts to ensure high levels of efficiency and accuracy to register persons eligible for grants.
- A DHA official argued: verification checks are essential.

**Table: Number of beneficiaries of Adult Grants by Citizenship as at 31 March 2014 as evidence of implementation of court decisions**

	<b>Citizenship Status</b>	<b>OAG</b>	<b>WVG</b>	<b>DG</b>	<b>CDG</b>	<b>FCG</b>	<b>CSG</b>	<b>Total</b>
<b>2013/14</b>	South African	2,932,390	421	1,111,613	116,932	350,426	6,053,519	10,565,301
	Permanent residence	14,337	1	1,080	208	422	11,543	27,591
	Refugees	148	0	157	63	17	3,455	3,840
	<b>Total</b>	<b>2,946,875</b>	<b>422</b>	<b>1,112,850</b>	<b>117,203</b>	<b>350,865</b>	<b>6,068,517</b>	<b>10,596,732</b>
<b>2014/15</b>	South African	3,084,016	326	1,114,288	124,126	347,996	6,450,896	11,121,648
	Permanent residence	15,852	1	1,124	222	408	12,039	29,646
	Refugees	180	0	237	99	18	5,558	6,092
	<b>Total</b>	<b>3,100,048</b>	<b>327</b>	<b>1,115,649</b>	<b>124,447</b>	<b>348,422</b>	<b>6,468,493</b>	<b>11,157,386</b>

*OAG= Old Age Grant; WVG=War Veteran's Grant; DG= Disability Grant; Care Dependency Grant; FCG=Foster Care Grant; CSG= Child Support Grant*

Source: Statistics provided by SASSA Legal Department from the SASSA, Annual Statistical Report (2014/15) (statistics remain confidential as per request of the SASSA legal department and only with written consent can they be published.)

**Table: Number of children by citizenship as at 31 March 2014 as evidence of implementation of court decisions**

		South African	Permanent residence	Refugees	Total
<b>2013/14</b>	CDG	507,576	712	25	508,313
	FCG	119,280	217	67	119,564
	CSG	10,974,407	27,137	8,337	11,009,881
	<b>Total</b>	<b>11,601,263</b>	<b>28,066</b>	<b>8,429</b>	<b>11,637,758</b>
<b>2014/15</b>	CDG	126,601	232	104	126,937
	FCG	500,845	658	27	501,530
	CSG	11,685,757	28,037	12,788	11,726,582
	<b>Total</b>	<b>12,313,203</b>	<b>28,927</b>	<b>12,919</b>	<b>12,355,049</b>

*CDG= Care Dependency Grant; FCG= Foster Care Grant; CSG= Child Support Grant*

Source: Statistics provided by SASSA Legal Department from the SASSA, Annual Statistical Report (2014/15) statistics remain confidential as per request of the SASSA legal department and only with written consent can they be published.

# Constitutional Dialogue

- A sensitive issue in the context of separation of powers.
- But it could help move us towards a determination of the content of SERs, and a determination of what would be needed to ensure that all South Africans live in dignity.
- It may also aid more effective and expeditious implementation of court decisions.
- A former CC justice: Need for engagement to effectively implement / enforce court orders – as part of constitutional dialogue.
- Dialogue between the courts, executive and legislature is absolutely necessary, and engagement of this nature is not unusual in South Africa, for example, during deliberations on the Legal Practice Bill.

Constitutional dialogue can be a positive process -

*“... our [Kenyan] Constitution provides very clearly that the three arms are robustly independent, they have independent mandates. But there is a provision for consultation, for dialogue, for interdependence under collaboration, and that’s a tall order because at the moment there’s a lot of debate as to how you can [have] independence and how you can also have dialogue ... In fact, in our Constitution that culture is becoming open. I think in Africa we’re basically saying, it’s good to do it transparently, and I think that’s a good development”.*

*Willy Mutunga, Chief Justice of Kenya, UFH 2014*

# Constitutional dialogue

- An important opportunity exists for a concerted joint effort by various combinations of the executive, the legislature, academics and civil society, possibly led by the SAHRC, in order to identify the substantive content of a minimum core for each SER – as part of a **constitutional dialogue**.
- This approach would support both the democratically elected and accountable government, as well as the courts' constitutionally mandated oversight role.

Thank you for your attention  
Comments and questions are welcome