

2006

The South African Constitution as a Mechanism for Redressing Poverty

Penelope Andrews

5

PENELOPE ANDREWS

The South African Constitution as a Mechanism for Redressing Poverty

JUSTICE Albie Sachs of the Constitutional Court of South Africa raised the following question in a lecture he gave at Harvard Law School in 2000: ‘What does it mean to live in a country with a wonderful constitution and an advanced comprehensive Bill of Rights, [when there is] such inequality, injustice, and poverty?’ (Sachs, 2000a).

The quotation came six years after South Africa’s most prominent citizen, President Nelson Mandela, set the tone for the first post-apartheid democratic government in South Africa by announcing very early on his government’s commitment to improving the conditions of the majority of South Africa’s population. In his Inaugural Address to a Joint Sitting of Parliament on 23 May 1994 he described the newly-elected government’s commitment as follows:

... to create a people-centered society of liberty binds us to the pursuit of the goals of freedom from want, freedom from hunger, freedom from deprivation, freedom from ignorance, freedom from suppression and freedom from fear. These freedoms are fundamental to the guarantee of human dignity. They will therefore constitute part of the centerpiece of what this government will seek to achieve ... (Liebenberg, 2001: 405)

This chapter will address the issue of the use of the Constitution as a vehicle to address poverty in South Africa. The topic is propitious. The South African Constitution’s embrace of a broad array of civil, political, cultural, and socio-economic rights sets it apart from most constitutional arrangements.¹ The Constitutional Court has in the past few years confronted the issue of the judicial enforcement of socio-economic rights, and has, in fact, begun to map out some strategies to give effect to the socio-economic rights listed in the Bill of Rights (De Vos, 2001: 258). The Court’s decisions, specifically the *Grootboom*² and *Treatment Action Campaign*³ decisions which dealt with the rights to housing and to health care, respectively, are in many ways landmark decisions, not just under South Africa’s constitutional paradigm, but also internationally. Although the Indian Supreme Court has on occasion imposed duties on the Indian government to enforce socio-economic rights listed in the Indian Constitution, most constitutions do not provide for the justiciability of socio-economic rights (Tripathi, 1993). As the UN Economic and Social Council strives to develop a methodology on the implementation of social and economic rights, the Constitutional Court’s decisions provide some useful pointers in this regard.

As many South Africans will attest to, and as many who have travelled to South Africa are aware, the country generates all kinds of contradictions – and in the process also stirs up contradictory emotions – of hope and despair, great personal warmth and tremendous sadness.

Shortly after one arrives in Cape Town, one is struck by several observations.

First, the miles and miles of informal settlements, until recently termed squatter camps. The second striking observation is the number of very expensive cars on the roads. Since the prices of luxury cars in South Africa are so very steep, the large numbers are really astounding. Closer to the city, one is struck by the number of notices on houses which warn of armed response in the event of a burglary.

These observations are not particularly novel, nor are they confined to South Africa. Similar images confront observers in Jakarta, Rio de Janeiro and Nairobi. Several historical, political, and economic factors have combined to produce a particular political geography of devastatingly poor communities existing amidst great wealth with a small buffer class in between (Sassen, 2002; Evans, 2002). Justice Kriegler, in an interview conducted in the 1980s, referred to the legal profession in South Africa at that time as ‘an enclave of privilege in a sea of misery’. These words, in many ways, apply to all sectors of South African society today.

But despite obvious similarities with other developing countries, and some would argue even in the developed world, South Africa is different. Fifteen years ago the world was mesmerized as the tall dignified figure of Nelson Mandela emerged from prison, where he had spent most of his adult life. The world continued to be transfixed as he shepherded the country to an agreement on the most comprehensive constitution of the late twentieth century, including a detailed listing of rights (Friedman and Atkinson, 1994), and together with the ANC steered the country towards its first ever democratic elections in 1994 (Sparks, 1995).

South Africa provides the most compelling case study for considering the question of constitutional adjudication and review of social and economic rights. The legacy of colonialism and apartheid has resulted in a dualized or hybrid society both peculiar to South Africa, and also typical of many poor countries. Those countries may not have been blighted by the scourge of racism, but the ravages of other criteria utilized for dispossession, abuse, disenfranchisement, and exploitation have rendered similar consequences. It is widely known that the dualism or hybridity in South Africa has resulted in the heights of affluence and the depths of poverty sharing the national space – often amid huge tension. The grand narrative of reconstruction is in many ways unfolding on a global stage and at the center of the narrative is the core question of economic reconstruction (see Sachs, 2000b: 1381).

This chapter will address the following questions:

- What are the specific directives in the Constitution that provide for social and economic rights and what methods are in place with respect to their enforcement?
- How has the Constitutional Court given effect to these rights?
- What are the structural and extra-constitutional impediments to redressing poverty that the Constitution cannot address?
- What are the possibilities other than litigation for redressing poverty?

Social and Economic Rights: Constitutional Provisions

Both liberty and equality are among the primary goals pursued by human beings through many centuries; but total liberty for wolves is death to the lambs, total liberty of the powerful, the gifted is not compatible with the rights to a decent existence of the weak and the less gifted ... Equality may demand the restraint of the liberty of those who wish to dominate; liberty ... may have to be curtailed in order to make room for social welfare, to feed the hungry, to clothe the naked, to shelter the homeless, ... to allow justice or fairness to be exercised. (Berlin, 1990: 12–13)

The South African Constitution displays an appreciation of the tensions between liberty and equality. Hence the listing of socio-economic rights is extensive. Included are environmental rights, the rights of access to land, housing, health care services, food, water and social security rights. Also included are rights to education and children's socio-economic rights.

What is particularly profound about social and economic rights in the Constitution is that they are subject to judicial review and enforcement. This makes the South African Constitution unique. Whereas most constitutions provide for the justiciability of classic civil and political rights – the right to vote or free speech – the South African Constitution rejects this bifurcated approach to rights. What the framers of the Constitution recognized is that all rights are interconnected and in fact depend on one another in mutually reinforcing ways (Sachs, 2000b). So, for example, the argument that access to food and shelter is more important than the right to vote rings hollow. As several commentators have pointed out and as demonstrated by the work of the Nobel laureate Amartya Sen, the existence of democratic institutions plays an indispensable part in the creation of access to life's basic necessities (Sen, 1999).

Subjecting socio-economic rights to judicial review and enforcement makes litigation an important tool. The Bill of Rights has jettisoned the historically stringent standing requirements in favor of more access to individuals and groups.⁴

Unsurprisingly, equality is at the core of the South African Bill of Rights. This principle, of course, is set against a backdrop of institutionalized racism, sexism, homophobia, and other forms of intolerance. The principle therefore is strongly associated with the norm of non-discrimination. In this sense the South African Constitution comports with global human rights developments since the passage of the Universal Declaration of Human Rights – the international endeavor to deal with the legacy of genocide, racial persecution and other egregious forms of rights denial based on race, ethnicity, religion, and other markers of identity.

But the Constitution also references human dignity, and states specifically 'everyone has inherent dignity and the right to have their dignity respected and protected' (Section 10). This adds a unique dimension to the rights endeavor and in particular traditional notions of equality; it links equality to dignity. This has been stated succinctly by Arthur Chaskalson, the Chief Justice of South Africa:

There is also a close link between dignity and equality. No society can promise equality of goods or wealth. Nor could it reasonably be thought that this is what our Constitution contemplates. It recognizes that at the basic level of basic needs such as housing, health care, food, water and social security, profound inadequacies require state intervention... (Chaskalson, 2000: 202)

This notion, the interlinking of equality and dignity, though fairly fluid, envisions not just individual freedoms in the classical sense, but also, in President Mandela's words, freedom from want, hunger and deprivation.

These references to socio-economic rights in the Constitution make clear that the state provides these rights 'within its available resources', and that they do not confer an entitlement to 'claim the right on demand' (Sections 24–9). As far as the rights of access to housing, health care, sufficient food and water, and social security for those unable to support themselves and their dependants are concerned, the state is not obliged to go beyond available resources or to realize these rights immediately.⁵ With respect to land reform, and particularly the pressing question of access to land, the Constitution acknowledges 'the nation's commitment to land reform, and to reform to bring about equitable access to all South Africa's natural resources' (Section 25(4)(a)). The Constitution requires the state to 'take reasonable legislative and other measures within its available resources to foster conditions which enable citizens to gain access to land on an equitable basis' (Section 25 (5))

Here other points may be worth noting about the South African approach to constitutionalism as compared with other models, particularly the American one. The first is, obviously, the respective points of departure. The underlying premise in South Africa is that South Africa is 'an unjust society in which inequality is built in systematically and deeply into the universe of constitutional adjudication' (Sachs, 2000a). In most constitutional democracies, and this is obviously the case in the United States, the assumption is that society is arranged fairly and that any derogation from the status quo has to be justified. The reverse pertains in South Africa: 'any defence of the status quo has to be justified, because the South African reality has been structured in a systematically unfair way'.⁶

The second point worth noting is that the South African Constitution obliges the government to provide a panoply of socio-economic rights. The Constitution therefore embodies both the negative model of constitutional law, that is, a proscription on state intrusion, as well as the positive listing of rights (see Klare, 1998: 146).

This positive duty imposed on the government and the constitutional access to the judiciary to enforce the rights create an identifiable role for the Constitutional Court. The Court is required 'not just to protect the status quo from undue unjustifiable intrusions by the state on people's rights, but it also has to ensure that the rights promised in the Constitution are actually achieved'.⁷

Another feature of the South African Constitution is the mandate to consider international and foreign jurisprudence. A cursory perusal of American jurisprudence suggests that US courts are self-contained and self-referential. Ironically, this mandate to consider international and foreign jurisprudence has not yielded much for the Court in its adjudication of socio-economic rights. In South Africa, to a large extent the script is being written at the outset by the Constitutional Court judges themselves, with very little to draw from in comparative jurisprudence.⁸ Although the UN Economic and Social Council has articulated a global approach to the enforcement of socio-economic rights globally, it has done so not as a court of law, instead relying on compliance by member states (UN Economic and Social Council, 1987).

Constitutional Court's Interpretation of Social and Economic Rights

Since its establishment in 1995 the Constitutional Court has carved out a jurisprudence which clearly breaks from South Africa's ignominious legal past to pursue a legal future forged on principles of dignity, equality, and non-discrimination. To illustrate this point, I shall discuss the two most significant and recent cases of the Constitutional Court, which dealt respectively with the right to housing and the right to health care. In both cases the court rulings demonstrate that socio-economic rights can bring meaningful relief to the poorest in the country.

THE GROOTBOOM DECISION

In 2000 the Constitutional Court considered the enforcement of socio-economic rights provided for in the Constitution.⁹ The case concerned an application for temporary shelter brought by a group of people, including a number of children, who were without shelter following their brutal eviction from private land on which they were squatting. The community lived in the most intolerable conditions; they had access to one tap and no sanitation facilities.

The Court considered the scope of the obligations imposed on the government to provide housing in terms of section 26 of the Constitution. Section 26 provides as follows:

- (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.
- (3) 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. No legislation may permit arbitrary evictions.

This case is widely regarded as an international test case of the enforceability of social and economic rights. The Court affirmed that the government had a duty to adopt reasonable policy, legislative, and budgetary measures to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions. The judgement also dealt in detail with the implications of children's socio-economic rights enshrined in Section 28, which provides, *inter alia*, for every child the right of nutrition and shelter.¹⁰

It is worth noting that the Court order provided no individual relief to the applicants, although the national government and the Western Cape government had agreed to provide them with various kinds of relief. It so happened that both the national and Western Cape governments failed to honour these agreements. Thus, several months later the Constitutional Court was forced to order them to do so.¹¹

THE TREATMENT ACTION CASE

The *Treatment Action* case appeal to the Constitutional Court was directed at reversing orders made in a high court against the government, addressing perceived shortcomings in the government's response to an aspect of the HIV/AIDS challenge. The Constitutional Court found that the government had not reasonably addressed the need to reduce the risk of HIV-positive mothers transmitting the disease to their babies at birth. More specifically the finding was that

the government had acted unreasonably in, first, refusing to make an antiretroviral drug called nevirapine available in the public health sector where the attending doctor considered it medically indicated, and, second, not setting out a timeframe for a national program to prevent mother-to-child transmission of HIV.

The case started as an application to the High Court in Pretoria on 21 August 2001. The applicants were a number of associations and members of civil society concerned with the treatment of people with HIV/AIDS and with the prevention of new infections. The principal actor among them was the Treatment Action Campaign (TAC). The respondents were the national Minister of Health and the respective members of the executive councils (MECs) responsible for health in all provinces except the Western Cape.¹²

The South African government, as part of an array of responses to the pandemic, had devised a program to deal with mother-to-child transmission of HIV at birth and identified nevirapine as its drug of choice for this purpose. The program imposed restrictions on the availability of nevirapine in the public health sector. This was challenged by the applicants who contended that the restrictions were unreasonable because the Constitution mandated 'the state and all its organs to give effect to the rights guaranteed by the Bill of Rights.'¹³ At issue was the public's right to access public health care services¹⁴ and the right of children to be afforded special protection.¹⁵

The second issue for the Court to consider was whether the government was constitutionally obliged to plan and implement an effective, comprehensive, and progressive program for the prevention of mother-to-child transmission of HIV throughout the country. The Minister of Health attempted to demonstrate to the Court the complexity of providing a comprehensive package of care throughout the country. The government's apparent reason for confining the provision of nevirapine in the public sector to the research sites was to develop and monitor the human and material resources nationwide for the delivery of a comprehensive package. This package consisted of testing, counselling, and dispensing nevirapine and follow-up services to pregnant women at public health institutions. The rationale was that the targeted research and training sites would provide important information, which would guide the government in developing the very best possible prevention program for mother-to-child transmission of HIV.

The immediate issue requiring the Court's attention, however, was what to do about those mothers and their babies who could not afford private health care and who did not have access to the research and training sites.

In a comprehensive judgement, the Court found that the government had not reasonably addressed the need to reduce the risk of HIV-positive mothers transmitting the disease to their babies at birth. More specifically, the finding was that the government had acted unreasonably, first by refusing to make an antiretroviral drug called nevirapine available in the public health sector where the attending doctor considered it medically indicated and, second, by not setting out a timeframe for establishing a national program to prevent mother-to-child transmission of HIV. The Court ordered the government to do so.

Structural and Extra-Constitutional Impediments to Redressing Poverty

The 'rights revolution' in South Africa in many ways represents an important yardstick in the chronology of human rights activism of the twentieth century. The Constitution and its expansive Bill of Rights have arguably vindicated fifty years of global human rights endeavors that followed the establishment of the United Nations and the promulgation of the Universal Declaration of Human Rights and its progeny (Makau Wa Mutua, 2002). The South African Constitution contains the most comprehensive listing of rights in any national rights document. The drafters of the Bill of Rights were not coy about the aims of the document – to generate a transformative agenda with human rights at the core. The Constitution was designed to be a key instrument in moving the country from being one steeped in minority privilege to one embracing rights for all, and a symbol of the possibilities of human rights as a mode of political transformation (Liebenberg, 2001: 408–9). Sandra Liebenberg has noted thus:

The apartheid legacy of social and economic deprivation is a major structural source of inequality in South African society. It also undermines human dignity and the freedom to participate fully in the democratic institutions and processes. South Africa has one of the worst records among comparable middle-income developing countries in terms of social indicators (health, education, safe water, fertility) and income inequality. Poverty in South Africa also has strong racial, gender, age and rural dimensions. (ibid.: 408)

The human rights project in South Africa is therefore extremely ambitious. The Portuguese scholar, Boaventura de Sousa Santos, has commented on the primacy of human rights as 'the language of progressive politics,' confidently providing an 'emancipatory script' (de Sousa Santos, 1997) for those seeking redress from unjust and abusive regimes, and increasingly for those who insist that there exists a state duty to address economic inequalities. Upendra Baxi, the Indian legal scholar and human rights activist, refers to the discourse of human rights as 'seeking to supplant all other ethical languages' (Baxi, 1998). This focus has to a large extent replaced the discourse of economic equity and redistribution. It is worth noting that this global project on rights has been analyzed and subject to quite thoughtful critique by international legal scholars (see, for example, Klug, 2000; Gathii, 2000).

The new constitutional dispensation, laudable and ambitious as it is as a model of transformation, is significantly impeded by the broader context of political transformation in South Africa. In other words, the economic legacy of apartheid and its hierarchy has essentially been frozen in the post-apartheid era. During the period of negotiations, which led to the drafting of the interim Constitution and the first democratic elections, it was apparent that a wider program of economic redistribution, an ideological staple of the African National Congress, was no longer possible. The property and other economic rights of whites had to be guaranteed in order to secure stability for the new government. In addition, the politics of economic redistribution had largely been discredited by the end of the 1980s with the collapse of the Eastern European governments and the widespread rejection of communism.

The African National Congress initially adopted a free market paradigm, but

with considerable government input through the Reconstruction and Development Program. However, this policy was jettisoned for the Growth, Economic and Redistribution Program (GEAR), one more attractive and more 'market-friendly' to local and foreign investors. South Africans under GEAR are made to believe that this global economic paradigm embracing free markets and privatization is geared to accommodating the free flow of capital and to making South Africa more attractive to foreign investors. But the cumulative consequences for workers and economically marginalized groups are quite deleterious.¹⁶

In a context in which respect for human rights has historically been an alien tradition, as it was during the apartheid years, to be cavalier about the significance of the codification of rights may appear somewhat misguided. But the formal edifice of law often obscures the underlying structural dimensions which law cannot cure. For example, in the United States, where civil and political rights enjoy constitutional primacy (now being sorely tested by the new war on terrorism), the right to vote remains hollow. A huge proportion of the population, disproportionately people of color, have effectively disregarded the formal electoral process, which is seen as having no relevance to their lives (Bell, 1990). The challenge, therefore, is marrying substance and symbolism.

Extra-Legal Strategies for Reducing Poverty

While economic growth contributes to poverty reduction, it may not necessarily reduce inequality. Further, there is evidence that countries starting off with significant inequality experience lower growth rates than others because lack of access to physical, financial and human assets constrains poor people from participating effectively and efficiently in the economy.¹⁷

A vast body of literature continues to illustrate and analyze the structural patterns or practices that result in economically marginalized people being trapped in a spiral of poverty (see, for example, Bhalla, 2002; Taylor, 2000). These patterns include the lack of access to education, health, and other resources that create the possibility of basic subsistence and upward mobility. In addition, the condition of poverty often precludes poor people from access to information about pursuing legal and other rights, and information about credit and access to government services, particularly social services. Another profound pattern is the legacy of internalized inferiority, resulting in, for example, diminished expectations and aspirations.

Despite heated controversies about the structure, role, and consequences of globalization, it is clear that globalization in the form of structural adjustment programs and the primacy of the market has generated inequalities and poverty on a global scale (Stiglitz, 2002; Friedman, 2000).

The post-apartheid democracy in South Africa emerged from a history of extreme economic inequality, one of the highest in the world. Despite South Africa's categorization in the UNDP's *Human Development Report* as a middle-income country, most South Africans can be classified as poor by all economic indicators, and many straddle the fine line between subsistence and vulnerability to poverty. Rural poverty is particularly pronounced in South Africa, and since the majority of residents in rural areas are women, poverty in South Africa

has a particularly gendered flavour.¹⁸ The challenge for South African democracy is therefore to reduce poverty by promoting opportunity, income and wealth and, at the same time, reduce economic inequality.

When faced with this challenge of Sisyphean proportions, constitutional imperatives appear somewhat ineffective. But the reality in South Africa is that the embrace and enforcement of social and economic rights through the Constitution are part of an overall package of transformation in the country. South Africa, through the constitutionalizing of social and economic rights, effectively chose a particular model of democracy unique not only just in the African continent but also globally. This stands in stark contrast to the prevailing orthodoxy in Africa at the time of independence as demonstrated by the late President Kwame Nkrumah's oft-cited aphorism: 'Seek ye first the political kingdom and all else will follow.'¹⁹ South Africans could benefit from the lessons learned from the experience of successive forms of government adopted in post-colonial Africa, almost all of which failed to improve the economic lot of their citizenry. The lessons from these societies teach that the political kingdom must be predicated on changing both the political and economic realities of the citizenry.

In the absence of a redistributive economic paradigm, constitutionalizing social and economic rights creates the possibilities for holding governments accountable and imposing duties on them to provide for life's basic necessities. The South African Constitutional Court has demonstrated its willingness to do exactly that.²⁰ But as is the case with all rights enshrined in a constitution, their enforcement is limited by the ability and willingness of civil society to pursue the implementation of these rights and by the government's willingness to give effect to the orders of the Constitutional Court.

South Africa boasts an energetic civil society as evidenced by the large number of non-governmental organizations in the country. Arguably the innovation and determination of the vast range of NGOs contributed substantially to the demise of apartheid. Many of the tactics utilized during the struggle against apartheid are now being used by NGOs to pursue rights in this new constitutional era. The national and provincial governments have inherited an enormous backlog of economic needs and inequalities; they have an unenviable task in addressing these needs and redressing the inequalities. Addressing these problems will require fortitude, foresight, good planning, effective administration and a clear commitment to success. Even with strong commitment and planning, ultimately it is the organ of civil society that will ensure that the socio-economic rights in the Constitution remain more than symbolic.

Notes

¹ Constitution of Republic of South Africa Act 108 of 1996 (hereinafter 'Constitution'); see also Dugard (1996: 13).

² *Government of the Republic of South Africa and Others v. Grootboom and Others* 2000 (II) BCLR 1169 (CC).

³ *Minister of Health and others v. Treatment Action Campaign and Others* 2002 (5) SA. 721 (CC).

⁴ Section 38 of the Constitution provides as follows: 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.

⁵ The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of these rights. *Ibid.*

⁶ *Ibid.* Indeed the Constitutional Court has noted that equality is ‘premised on a recognition that the ideal of equality will not be achieved if the consequences of those inequalities and disparities caused by discriminatory laws and practices in the past are not recognised and dealt with’. *Pretoria City Council v. Walker* (1998) 2 (SA) 363 (CC).

⁷ Albie Sachs, (2000a) The late Justice Ismail Mahomed set out clearly the transformative goals of the Constitution, and by implication the role of the Constitutional Court, in giving effect to those rights. In *S v. Makwanyane* 1995 (3) SA 391 (CC) he noted:

In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution...

⁸ There has not been much litigation on socio-economic rights in constitutional democracies. India provides an exception. See Seth (1995, 97). The Court has also drawn from the constitutional jurisprudence of Germany and Canada, particularly with respect to the notion of dignity.

⁹ This was not the first time that the Court had to consider the interpretation of social and economic rights in the Constitution. In 1998 the Court had occasion to consider the issue of the right to health brought by a man who had suffered kidney failure and who sought an order compelling the Kwa-Zulu Natal Health Department to provide him access to expensive dialysis treatment. The Court found against the applicant, stating that it would be ‘slow to interfere with rational decisions taken in good faith by the political organs and medical authorities’. *Soobramoney v. Minister of Health, Kwa-Zulu Natal* 1998 (1) SA 765 (CC).

¹⁰ Section 28 provides in part as follows: (1) Every child has the right –

- a. to a name and a nationality from birth;
- b. to family care or parental care, or to appropriate alternative care when removed from the family environment;
- c. to basic nutrition, shelter, basic health care services and social services;
- d. to be protected from maltreatment, neglect, abuse or degradation;
- e. to be protected from exploitative labour practices

¹¹ When I visited South Africa in September 2002 I was informed by community activists in Cape Town that many of the *Grootboom* applicants had still not obtained the relief promised them by the Western Cape and national governments.

¹² The Western Cape government had not been brought in as a party because it had in place a program at public hospitals to distribute nevirapine to HIV-positive pregnant women.

¹³ This duty is articulated in Sections 7 (2) and 8 (1) of the Constitution respectively: 7 (2): The state must respect, protect, promote and fulfil the rights in the Bill of Rights; 8 (1): The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

¹⁴ Section 27 of the Constitution provides that everyone has the right to have access to health care services, including reproductive health care, Section 27 (1) (a). Section 27 (2) provides that the state must take reasonable legislative and other measures, within its

available resources, to achieve the progressive realisation of each of these rights.

¹⁵ Section 28 (1) states that every child has the right to basic nutrition, shelter, basic health care services and social services. See note 10 above.

¹⁶ For a detailed and passionate description of the negative impact of the post-apartheid economic paradigm on marginalized groups, see Desai (2002).

¹⁷ 'Poverty and Inequality in South Africa', Report Prepared for the Office of the Executive Deputy President and the Inter-Ministerial Committee for Poverty and Inequality, 13 May 1998.

¹⁸ This situation reflects the patterns of rural poverty in much of the rest of Africa. See Armstrong (1987). What is different about South Africa has been the migrant labor system which existed for several decades and which prohibited African women from gainful employment in the cities, thereby cementing the unequal economic status of African women. See Andrews (2001:326).

¹⁹ For a thoughtful exploration of the ideology espoused by Kwame Nkrumah, see Williams (1984).

²⁰ The Constitutional Court is not the only body empowered to enforce the rights outlined in the Bill of Rights. The Constitution empowers both the Human Rights Commission and the Gender Commission to pursue the implementation of these rights. Specifically Section 184 (3) provides as follows:

Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

The obligation imposed on the Gender Commission is less specific, but the Constitution states in Section 187 (2) that:

The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.