

WHERE HUMAN RIGHTS LAW AND DEVELOPMENT POLITICS MEET: HOUSING RIGHTS IN SOUTH AFRICA

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I. INTRODUCTION

We live in ‘a time when legal rights and the rule of law are increasingly being propounded as the panacea for emerging and ailing democracies’.¹ Academics hail the coming of a ‘constitutional age’,² where constitutionalism ‘stands on the brink of world hegemony’.³ Written constitutions are now credited with wielding power in a whole new sphere of rights.⁴ Where traditional constitutionalism focused on protecting ‘first generation’ civil and political rights,⁵ written constitutions are now being cast as ‘proactive instruments of societal change’.⁶ The UN promotes the inclusion of social and economic rights in written constitutions as ‘one of the strongest national statements’ regarding such rights, claiming they provide ‘valuable tools for those wishing to enforce’ them.⁷ In a re-conceptualisation of development politics into a rights framework, governments are seen as having a duty to advance the social and economic status of the population. Proponents

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¹ P Smith, ‘Introduction’ in P Smith (ed), *Making Rights Work* (Dartmouth Publishing Company Limited, Aldershot 1999) xii.

² J Lane, *Constitutions and Political Theory* (Manchester University Press, Manchester 1996) ix.

³ B Ackerman was quoted in GW Anderson, *Constitutional Rights after Globalization* (Hart Publishing, Oxford 2005) 4.

⁴ V Gauri, ‘Social rights and Economics: Claims to Health Care and Education in Developing Countries’ in P Alston and M Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (OUP, Oxford 2005) 82.

⁵ MN Rendel, *Whose Human Rights?* (Trentham Books, Stoke on Trent 2005) 13.

⁶ A Sachs was quoted in S Ingber, ‘Rapporteur: Perspectives on “Making Rights Work”’ in P Smith (ed), *Making Rights Work* (Dartmouth Publishing Company Limited, Aldershot 1999) 230.

⁷ United Nations Housing Rights Project: Habitat and the Office of the High Commissioner for Human Rights, ‘Housing Rights Legislation: United Nations Housing Rights Programme Report No.1’ (2002) 104 <http://www.unhabitat.org/downloads/docs/3667_74890_HS-638.pdf> accessed 5 November 2007.

of this 'rights-based approach to development' or 'RBA',⁸ including the UN, claim wide-ranging benefits to their approach, including the empowerment of civil society within the development process, greater citizen participation and increased accountability and transparency.⁹ However, critics note increasing pressure on states to commit to this approach by integrating social and economic rights into their constitutions, based on the widespread view 'that the more human rights that are listed in the constitution, the more it meets international criteria.'¹⁰ However, this view rests on the assumption that the inclusion of social and economic rights in a written constitution has a significant impact on development.¹¹ This study will challenge that assumption by examining the impact of the inclusion of a socio-economic right in a constitutional document on development outcomes, using the case study of housing in South Africa.

A. *Why South Africa?*

Proponents of socio-economic constitutional rights frequently point to South Africa as the best example of a country that has fully signed up to the rights-based approach. Academics laud South Africa's constitution as 'one of the most progressive constitutions in the world',¹² the 'leading example of a transformative constitution',¹³ 'a benchmark in terms of the constitutional protection and judicial enforcement of socio-economic rights'¹⁴ and even 'the most admirable constitution in the history of the

⁸ P Twomey, 'Human Rights-Based Approaches to Development: Towards Accountability' in MA Baderin and R McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (OUP, Oxford 2007) 49.

⁹ *ibid.* See also M Robinson, 'What Rights Can Add to Good Development Practice' in P Alston and M Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (OUP, Oxford 2005) 8.

¹⁰ H van der Maarseveen and G van der Tang, *Written Constitutions: A Computerised Comparative Study* (Oceana Publications Inc., New York 1978) 190.

¹¹ Lane (n 2) 188.

¹² V Govender, 'Economic, Social and Cultural Rights in South Africa: Entitlements, Not Mere Policy Options' in BK Goldewijk, AC Baspinciro and PC Carbonari (eds), *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (Hart Publishing, Oxford 2002) 75.

¹³ C Sunstein was quoted in E Berger, 'The Right to Education under the South African Constitution' (2003) 103 *Columbia Law Review* 628.

¹⁴ JC Mubangizi and BC Mubangizi, 'Poverty, Human Rights Law and Socio-economic Realities in South Africa' (2005) 22 *Development Southern Africa* 277.

world'.¹⁵ The UN uses South Africa as an example of best practice in its literature on socio-economic constitutional rights.¹⁶ These claims are based on both the emphasis on socio-economic rights within the constitution¹⁷ and the subsequent jurisprudence developed by South Africa's Constitutional Court.¹⁸ By choosing the case of South Africa, this study challenges the UN and other RBA advocates by questioning the exemplar illustration of their model.

B. *Why housing?*

Where South Africa is named the RBA benchmark internationally, developments in housing rights are heralded as the leading example within South Africa. The housing rights case of *Republic of South Africa v Grootboom*,¹⁹ discussed throughout this study, is said to be among the most important examples of effective enforcement of development rights²⁰ and is reported to have 'raised hopes...regarding what litigation can achieve'.²¹ Following his recent mission to South Africa, the UN Special Rapporteur on the Right to Housing called *Grootboom* a 'landmark judgment', noting its wide-reaching impact around the world.²² Further the South African Government's housing strategy featured in the UN Habitat 'scroll of honour'²³ in recognition of the progress made in South African housing provisions.

¹⁵ C Sunstein *Designing Democracy: What Constitutions Do* (OUP, New York 2001) 261.

¹⁶ United Nations Press Office 'United Nations Expert on Adequate Housing Concludes Visit to South Africa' (7 May 2007) <<http://www.unhchr.ch/hurricane/hurricane.nsf/view01/677CD0B04A46B831C12572D400412717?opendocument>> accessed 5 November 2007. See also UNHRP (n 7) 104.

¹⁷ Govender (n 12) 75. See also N Malan, 'Civil Society and the Right to Have Access to Social Security in South Africa' (2005) 22 *Development Southern Africa* 553.

¹⁸ Mubangizi (n 14) 277. See also S Gloppen, 'Social Rights Litigation as Transformation: A South African Perspective' (2005) CMI Working Papers, Working Paper 3, 3 <<http://www.cmi.no/publications/file/?1965=social-rights-litigation-as-transformation>> accessed 14 October 2007.

¹⁹ (CCT11/00) (2000) ZACC 19.

²⁰ R Dixon, 'Creating Dialogue about Socio-Economic Rights: Strong v. Weak-form Judicial Review Revisited' (2007) 5 *International Journal of Constitutional Law* 391, Abstract.

²¹ Gloppen (n 18) 3.

²² United Nations Press Office (n 16).

²³ UN Habitat '2003 Scroll of Honour' (2003) <<http://www.unhabitat.org/content.asp?typeid=19&catid=388&cid=333>> accessed 5 November 2007.

C. Structure of the case study

After a justification of the research design (chapter 2) and a review of relevant literature (chapter 3), I will consider the impact of the constitutional right to access adequate housing on two major areas of development politics in South African housing. Both will relate to the situation of people in informal housing. Chapter 4 will examine the provision of new formal housing through the one-off subsidy scheme²⁴ and Chapter 5 will consider practice surrounding evictions. These chapters will open with an overview of the major developments in these areas and a review of claims made by RBA theorists regarding the impact of the constitutional right on these developments. In each case documentary analysis assessing the plausibility of these claims will follow. I will consider both the policy creation and implementation stages of the development process using scholarly accounts of events and primary texts such as Governmental statements, legislation and campaigning materials from civil society. I will assess whether the evidence indicates that the constitutional mechanism had an impact as a legal, symbolic or political tool by considering the following indicators: the chronology of events, the rhetoric used by state and non-state actors and whether nature of subsequent actions taken by these actors reflects this rhetoric. I will then argue that the impact of the inclusion of a 'right to access adequate housing' in the 1996 South African Constitution has been limited in the areas of policy examined here, though it seems to have played a more significant role in securing negative rights against eviction than in fulfilling positive rights by driving forward the provision of new houses. On these grounds, I will show that the importance of constitutional mechanisms in South African development politics appears far more limited than the UN and other RBA advocates have implied, and that it has been highly dependent on the traditional powers of the judiciary to intervene in positive and negative rights.

II. METHODOLOGY

A. Limiting the scope of the study

1. Development outcomes

If the entire range of development outcomes in South African housing were considered, the scope of this study would be excessively wide and

²⁴ MR Tomlinson, 'South Africa's New Housing Policy: An Assessment of The First Two Years, 1994-96' (1998) 22 *International Journal of Urban and Regional Research* 137, 140.

complex. The highly segregated housing system has left social groups in different positions, with policies addressing their problems in different ways.²⁵ I will follow scholars who focus on inhabitants of urban 'informal housing' or 'townships', identified as one of South Africa's chief development challenges following apartheid.²⁶

2. Policy

Just as it is necessary to limit the scope of this study to development outcomes relating to the inhabitants of informal housing, it would also be unfeasible to attempt to conduct a deep, causal impact analysis by assessing every programme and initiative introduced to aid that group. Instead, I will focus on trends identifiable in the introduction and implementation of two key areas of policy: the provision of newly constructed formal housing through the one-off subsidy scheme, and the policy surrounding evictions in informal settlements. These areas provide a logical focus for two reasons. Firstly, they are the most salient in the South African context due to their dominance amid an otherwise complex and fragmented array of housing policies.²⁷ Secondly, these two areas facilitate a useful distinction between the key obligations on the state identified by RBA theorists: to respect, protect and fulfil citizens' rights.²⁸ Respect for and protection of the right to housing, seen as 'negative rights' in international human rights discourses,²⁹ can be examined through the consideration of eviction policy. Fulfilment can be assessed through the analysis of policy on provision of new housing through subsidies, as these constitute the 'positive' elements of the state's

²⁵ A Goebel, 'Sustainable Urban Development? Low-cost Housing Challenges in South Africa' (2007) 31 *Habitat International* 291, 294.

²⁶ GA Jones and K Datta, 'Enabling Markets to Work? Housing Policy in the 'New' South Africa' (2000) 5 *International Planning Studies* 393, 393. See also R Goodlad, 'The Housing Challenge in South Africa' (1996) 33 *Urban Studies* 1629, 1633.

²⁷ K Lalloo, 'Arenas of Contested Citizenship: Housing Policy in South Africa' (1999) 23 *Habitat International* 35, 41. See also CJ Mackay, 'Housing Policy in South Africa: The Challenge of Delivery' (1999) 14 *Housing Studies* 387, 390; P Wilkinson, 'Housing Policy in South Africa' (1998) 22 *Habitat International* 215, 226.

²⁸ B Toebe, 'The Third Abraham Horwitz Lecture: Human Rights, Health and Nutrition' (1999) SCN (UN Standing Committee on Nutrition) News No 18, <<http://www.unsystem.org/scn/Publications/HorwitzLecture/lecture3.pdf>> accessed 29 July 2007.

²⁹ SP Marks, 'The Human Rights Framework for Development: Seven Approaches' in A Sengupta, A Negi and M Basu (eds), *Reflections on the Right to Development* (Sage Publications Pvt. Ltd., India 2005) 45-47.

obligation.³⁰ This distinction between ‘negative’ and ‘positive’ elements will help identify areas where the constitutional right may have had a more significant impact on development politics.

B. Judging the impact of the constitutional mechanism

Burnham *et al* identify the ‘problem of causal inference’ as fundamental in political science.³¹ They stress that when considering causal links, ‘without experimental control it is impossible to say with complete certainty that one’s conclusions are correct’.³² Recognising this, the methodological approach of this study is designed to increase its validity and reliability in the following ways:

1. Case study approach:

Researchers have attempted to assess the causal impact of rights legislation through direct comparative studies across countries.³³ As well as being unmanageable within the constraints of this study it would, arguably, not constitute a sensible approach for the case of South Africa. Due to the unique political and social environment created following Apartheid,³⁴ I would suggest that South Africa represents a problematic subject for geographical comparison.

Others have used temporal comparisons to isolate the impact of legal rights as independent variables. Examples include Morton’s³⁵ analysis of the effects of the Canadian Charter of Rights and Beltrão *et al*’s³⁶ study of the Brazilian Constitution. Again, I would argue that this is not a valid model in this case. In the words of Mackay,³⁷ ‘South Africa

³⁰ *ibid.*

³¹ P Burnham, K Gilland, W Grant and Z Layton-Henry (eds), *Research Methods in Politics* (Palgrave MacMillan, Hampshire 2004) 60.

³² *ibid.*

³³ LC Keith, ‘The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behaviour?’ (1999) 36 *Journal of Peace Research* 95. See also O Hathaway ‘Do Human Rights Treaties Make a Difference?’ (2002) 11 *Yale Law Journal* 1935.

³⁴ M Barry, ‘Formalising Informal Land Rights: The Case of Marconi Beam to Joe Slovo Park’ (2006) 30 *Habitat International* 628.

³⁵ FJ Morton, ‘The Political Impact of the Canadian Charter of Rights and Freedoms’ (1987) 20 *Canadian Journal of Political Science / Revue canadienne de science politique* 31.

³⁶ KI Beltrão, SS Pinheiro and FE Barreto de Oliveira, ‘Rural Population and Social Security in Brazil: An Analysis with Emphasis on Constitutional Changes’ (2004) 57 *International Social Security Review* 19.

³⁷ CJ Mackay, ‘The Development of Housing Policy in South Africa in the Post

has undergone a revolution' at the fall of Apartheid. Since the introduction of the new constitution coincided with this massive upheaval, it would be impossible to isolate the impact of the constitutional right through a comparison of 'before and after' its introduction.

Therefore, with this study, I will conduct my analysis as an in-depth exploration of this single case, enlightened and informed by comparisons with trends and theories identified by academics working in development politics and rights theory.

2. Qualitative analysis:

Amongst the existing research attempting to determine the causal impact of rights legislation, a majority of the literature is based on a quantitative approach. Examples include Hathaway's³⁸ and Cross' 1999 studies of the impact of international human rights treaties³⁹ and Keith's study of the effect of the International Covenant on Civil and Political Rights.⁴⁰ These analyses often only allowed the author to identify a chronological correlation between the introduction of rights legislation and a particular outcome. This correlation was in each case framed as a causal link by identifying the existence of the correlation across a number of different countries. As previously argued, a geographical comparison appears inappropriate in this case. Furthermore, even with the benefit of geographical comparisons, repeated correlations cannot always be conflated with the identification of a causal link, as stressed in Goodman and Jinks' critique of Hathaway's study.⁴¹ A qualitative analysis will therefore be used here to produce a more nuanced consideration of the impact of the constitutional right.

3. Considering one independent variable

In order to gauge the impact of the constitutional mechanism on development outcomes, it would be tempting to try and weigh it against other independent variables identified by scholars. For example,

Apartheid Period' (1995) 11 *Housing Studies* 133, 133.

³⁸ Hathaway (n 33).

³⁹ FB Cross, 'The Relevance of Law in Human Rights Protection' (1999) 19 *International Review of Law and Economics* 87.

⁴⁰ Keith (n 33).

⁴¹ R Goodman and D Jinks, 'Measuring the Effects of Human Rights Treaties' (2003) 14 *European Journal of International Law* 171, 173-4.

Huchzermeyer has explored the effects of pressure exerted on South Africa by its international partners.⁴² Others place importance on South Africa's contemporary economic performance.⁴³ Others still emphasise the effects of reforms to South African administrative structures.⁴⁴ This study will use Jan-Erik Lane's formulation for considering the impact of constitutions. He asks: '[a]re constitutional mechanisms at all important... *taking into account that we know that other factors matter?*'⁴⁵ This highlights the fact that many independent variables will be at play whenever we consider the causes of a political phenomenon. It would be impossible to weigh accurately the impact of all of these variables against that of rights legislation.

Alternatively, it might be tempting to select several key variables to weigh against the constitutional mechanism. However, without attempting a comprehensive map of the causation process, independent consideration of these select variables would only serve to show what we already know; that when considering the causes of social, political and economic change, 'other factors matter'.⁴⁶ Therefore, this study will be limited to an in-depth analysis of evidence indicating that the constitutional mechanism may have impacted on development outcomes. By focusing on this single variable, I will be able to provide a rigorous consideration of the merits of this evidence. Analysis of its plausibility and implications will naturally be informed by studies that focus on other independent variables. However, my analysis will maintain a clear focus on what this evidence adds to our understanding of the impact of constitutional rights.

4. Indicators

Discussing the measurement of the impact of political factors, Gloppen argues that we should trace "ripple effects" in law, policies and

⁴² M Huchzermeyer, 'Housing for the Poor? Negotiated Housing Policy in South Africa' (2001) 25 *Habitat International* 303, 323.

⁴³ See Wilkinson (n 27) 227; E Schwella, 'Public Sector Policy in the New South Africa: A Critical Review' (2001) 24 *Public Performance & Management Review* 367, 368; P Jenkins and H Smith, 'An Institutional Approach to Analysis of State Capacity in Housing Systems in the Developing World: Case Studies in South Africa and Costa Rica' (2001) 28 *Housing Studies* 485, 494.

⁴⁴ Tomlinson (n 24) 143. See also Schwella (n 43) 381.

⁴⁵ See Lane (n 2) 189.

⁴⁶ *ibid.*

implementation'.⁴⁷ Stohl *et al* stress that this process will inevitably involve speculations over 'the motives of various segments of governments'.⁴⁸ While conceding that 'such inferences lack ideal "objectivity"', Stohl *et al* argue that 'by dealing with them explicitly' and using 'scholarly judgement,' the validity and reliability of the research is maintained.⁴⁹ This study's approach will combine these models. Following Epp,⁵⁰ it will establish a list of indicators by which to assess evidence of the impact of the constitutional right to housing:

- **Indicator 1:** The **chronology** of the introduction or implementation of a policy. A simple chronological correlation between an event relating to the constitutional right and a development outcome would be insufficient to posit a causal link. However, if the outcome is clearly shown to have preceded the proposed cause, then we can eliminate that cause from further consideration.
- **Indicator 2:** Rhetoric indicating the **motivations** behind the introduction or implementation of policy. This will involve qualitative documentary analysis of government statements, legislation, and campaigning materials from civil society groups to identify language indicating an impact of the constitutional right. This approach mirrors Epp's analysis of the language of legal judgements as an indicator of motivations derived from a constitutional text.⁵¹
- **Indicator 3:** The **nature** of a particular policy during its implementation stages. Following Stohl *et al*'s advice to use 'scholarly judgement' when inferring motivation, this final indicator is a check to the second.⁵² It will use documentary accounts of the implementation of policies to assess whether motivations professed in rhetoric were reflected in subsequent actions.

⁴⁷ Gloppen (n 18) 7.

⁴⁸ M Stohl, D Carleton, G Lopez, and S Samuels, 'State Violation of Human Rights: Issues and Problems of Measurement' (1986) 4 *Human Rights Quarterly* 592, 605.

⁴⁹ *ibid.*

⁵⁰ CR Epp, 'Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms' (1996) 90 *The American Political Science Review* 765, 789.

⁵¹ *ibid.*

⁵² Stohl (n 48) 605.

III. LITERATURE REVIEW

A. *The rights-based approach to development*

The 'rights-based approach' to development is promoted by theorists and lawyers seeking to combine 'the strengths, resources, and support of the international human rights and development communities'⁵³ towards 'mutual reinforcement'⁵⁴ between the two approaches. They suggest that legal rights frameworks can stimulate development⁵⁵ and enhance development processes by ensuring 'enhanced accountability high levels of citizens' empowerment... increased transparency ...[and] integrated safeguards'.⁵⁶

This framework seeks to break down traditional divisions in theoretical understanding of human rights into 'first generation' (political and civil rights) and 'second generation' (social, economic and cultural rights).⁵⁷ For decades, 'first generation' rights were accorded a higher status.⁵⁸ These were viewed as practical legal instruments, whereas socio-economic rights, which are dependent on governments' budgetary constraints, were thought of as non-justiciable - and therefore unenforceable⁵⁹ - and political.⁶⁰ Secondly, 'second generation' rights were thought of as representing positive rights - e.g. the right to be given an education - as opposed to negative 'first generation' rights - e.g. the right not to be tortured.⁶¹ RBA theorists reject the concept of generations of rights and consider all human rights to be equally important.⁶² All rights are framed as having positive and negative elements as the state is compelled to 'respect, protect and fulfil' each right, i.e. by not violating the right, preventing other actors from

⁵³ Alston and Robinson (n 4) 1.

⁵⁴ *ibid* 3.

⁵⁵ H Steiner, 'Speech on Economic and Social Rights and the Right to Health' in *Economic and Social Rights and the Right to Health: An Interdisciplinary Discussion, September 1993, Harvard Law School* (Harvard Law School Human Rights Program, Cambridge 1993) 1. See also Gauri (n 4) 72.

⁵⁶ *ibid* 8.

⁵⁷ J Fitzpatrick and RC Slye, 'Republic of South Africa v. Grootboom Case No. CCT 11/00. 2000 (11) BCLR 1169 and Minister of Health v. Treatment Action Campaign Case No. CCT 8/02' (2003) 97 *The American Journal of International Law* 669, 676.

⁵⁸ Marks (n 29) 25.

⁵⁹ Lane (n 2) 127.

⁶⁰ Twomey (n 8) 46.

⁶¹ Anderson (n 3) 123.

⁶² World Conference on Human Rights, Vienna Declaration and Programme of Action (1993) <<http://www2.ohchr.org/english/law/vienna.htm>> accessed 15 July 2007.

violating it and taking measures to ensure universal access to it.⁶³

Despite these claims to potential practical benefits of socio-economic rights, the associated literature remains dominated by legalistic and theoretical debate.⁶⁴ RBA theorists have been pre-occupied by questions of legitimacy and constitutional principles, making few attempts to measure practical or political outcomes.⁶⁵ Twomey suggests that this dominance of legalistic approaches may be symptomatic of ‘the historic monopolization of human rights by lawyers.’⁶⁶ Former UN High Commissioner for Human Rights Mary Robinson supports this analysis, arguing that this ‘monopolization’ has alienated development politics scholars from the field. Notable exceptions can be found in studies by Piovesan⁶⁷ and Beltrão *et al.*⁶⁸ These Brazilian case studies provide valuable insight into the development politics of human rights, but remain isolated examples.

B. *The gap between legal and international development analyses in the South African case*

The existing literature on South African development reflects this lack of engagement between the development politics and human rights schools. It seems to be divided into two strands: theoretical analyses of rights discourses, legislation and jurisprudence, conducted by human rights lawyers, and practical analyses of government policy in its political, social and economic context, conducted by development politics scholars.

Wesson’s study on ‘Grootboom and Beyond’⁶⁹ provides a clear example of the former strand. It primarily deals with the internal logic of

⁶³ Twomey (n 8) 47.

⁶⁴ Govender (n 12) 88-9. See also M Wesson, ‘Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court’(2004) 20 *South African Journal on Human Rights* 284, 253.

⁶⁵ See Ingber (n 6); Anderson (n 3) 5; K Hansen, ‘Speech on Economic and Social Rights and the Right to Health: Session 1 – Applying Rights Rhetoric to Economic and Social Claims’ in *Economic and Social Rights and the Right to Health: An Interdisciplinary Discussion, September 1993, Harvard Law School* (Harvard Law School Human Rights Program, Cambridge 1993) 5-7.

⁶⁶ Twomey (n 8) 46.

⁶⁷ F Piovesan, ‘The Implementation of Economic, Social and Cultural Rights: Practices and Experiences’ in BK Goldewijk, AC Baspineiro and PC Carbonari (eds), *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (Hart Publishing, Oxford 2002).

⁶⁸ Beltrão (n 36).

⁶⁹ Wesson (n 64).

the court's judgment in *Grootboom*. It concludes that, theoretically, the case 'establishes a relationship of collaboration between the state and the judiciary' in the field of socio-economic development, but does not consider whether any evidence of this relationship actually exists.⁷⁰ This legalistic approach is echoed in the work of Dixon,⁷¹ Berat⁷² and Bilchitz.⁷³

Throughout the latter strand of literature, academics have considered a plethora of causes for South African development outcomes, including changes within the civil service,⁷⁴ the organisation of civil society⁷⁵ and the balance of power between interest groups.⁷⁶ These scholars occasionally mention constitutional rights relating to their area of study.⁷⁷ However they rarely go on to consider whether these rights have affected development outcomes.

In several notable exceptions to this trend, academics have commented on the results of specific court cases involving socioeconomic rights.⁷⁸ These comments will act as important sources for this study. However, their focus is limited to direct compliance with specific judgments and does not engage with Maarseveen and Tang's conception of constitutional rights as 'multivalent political instruments'.⁷⁹ Paremoer and Jung's recent study attempts to broaden this limited focus on compliance by arguing that socio-economic rights have opened 'up

⁷⁰ *ibid* 295.

⁷¹ Dixon (n 20).

⁷² L Berat, 'Constitutional Court Profile: The Constitutional Court of South Africa and Jurisdictional Questions: In the Interest of Justice?' (2005) 3 *International Journal of Constitutional Law* 36.

⁷³ D Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *The South African Journal on Human Rights* 1.

⁷⁴ Jenkins (n 43) 495.

⁷⁵ Goodlad (n 26) 1642.

⁷⁶ Lalloo (n 27).

⁷⁷ Huchzermeyer (n 42) 12; F MirafTAB, 'The Perils of Participatory Discourse: Housing Policy in Postapartheid South Africa' (2003) 22 *Journal of Planning Education and Research* 226, 226.

⁷⁸ M Huchzermeyer, 'Housing Rights in South Africa: Invasions, Evictions, the Media, and the Courts in the Cases of Grootboom, Alexandra, and Bredell' (2003) 14 *Urban Forum* 80, 88-9; Gloppen (n 18) 15-16; A Skuse and T Cousins, 'Spaces of Resistance: Informal Settlement, Communication and Community Organisation in a Cape Coast Township' (2007) 44 *Urban Studies* 979, 982.

⁷⁹ Maarseveen (n 10) 273.

the political space of oppositional politics in South Africa'.⁸⁰ Despite their valuable analysis on the effects of constitutional cases in encouraging political opposition from judges and civil society,⁸¹ their study remains restricted to activities within the court-room and their immediate consequences, and does not consider whether constitutional rights have any direct impact on policy formation and implementation.

Thus, it appears that little work has been undertaken to bridge the gap between these two strands of literature in the South African context. In an attempt to rectify this, this study will assess the impact of constitutional rights on development outcomes, acting as both legal mechanisms and 'multivalent political instruments'.

IV. THE IMPACT OF THE CONSTITUTIONAL RIGHT TO HOUSING ON HOUSING PROVISION

A. Introduction

1. Context and background

The South African housing situation over the past decade is seen as a highly visible and significant legacy of the apartheid era.⁸² '[R]ace and class-based spatial inequalities'⁸³ were cemented through decades of housing policy that favoured white people and confined most black Africans to ghettos in urban peripheries.⁸⁴ At transition to democracy, estimates indicate that approximately '80 per cent of the population was confined to 20% of the land'.⁸⁵ Upwards of 13.5% of the population were thought to be living in informal settlements, known as 'squatter camps' or 'townships'.⁸⁶ 1.5 million were thought to have no form of shelter.⁸⁷

Against this back-drop, the 1996 Constitution was introduced,

⁸⁰ L Paremoer and C Jung, 'The Role of Social and Economic Rights in Supporting Opposition in Post-Apartheid South Africa' 4 <http://www.newschool.edu/gf/polsci/faculty/jung/CourtneyJung_RightsandOpposition.pdf> accessed 10 November 2007.

⁸¹ *ibid* 22, 24-7.

⁸² See Mubangizi (n 14) 281; Goodlad (n 26) 1633; S Mthembu-Mahanyele, 'Part 4: New Developments: Supporting Rental Housing in South Africa: Minister's Statement' (2000) *The Housing Code* <<http://www.housing.gov.za/Content/The%20Housing%20Code/Part%204/Part%204.htm>> accessed 7 November 2007.

⁸³ Huchzermeyer (n 42) 325.

⁸⁴ See Mubangizi (n 14) 281; Goebel (n 25) 2.

⁸⁵ Mubangizi (n 14) 281.

⁸⁶ *ibid*.

⁸⁷ Goodlad (n 26) 1633.

including the right of every South African 'to access adequate housing'.⁸⁸ The Government was obliged to ensure the 'progressive realisation' of this right.⁸⁹

Policy has focused on the provision of one-off housing subsidies to those in informal housing, 'sufficient to purchase a small serviced site with a rudimentary 'starter unit'⁹⁰ for all households with an income of under R3500 per month.⁹¹ Despite the construction of approximately 2 million starter homes by 2006, this policy has suffered many criticisms.⁹² The criticism most relevant to this study has been that the allocation of houses did not consider urgency of need, meaning that homeless South Africans would receive houses no quicker than South Africans living in established serviced shacks.⁹³

This issue became the subject of a landmark court ruling in 2001 in *Grootboom*, when the Constitutional Court ruled that it was not 'reasonable' for the government not to include emergency provision of housing within its programme.⁹⁴ The court made no direct ruling on the plight of Mrs. Grootboom and other claimants, and did not dictate any details of how government policy should be changed. Thus the court was seen to have 'kicked' the issue 'back' to government to implement as it saw fit.⁹⁵ Legal theorists have debated this judgment at length, but a general consensus has been established that the decision was a product of respect for the separation of powers.⁹⁶ National and international precedent worldwide has established a constitutional principle that allocation of budget and policy formulation is the prerogative of the executive.⁹⁷ Indeed, the *Grootboom* judgment explicitly stated that

⁸⁸ Republic of South Africa, Constitution of the Republic of South Africa No. 108 of 1996.

⁸⁹ *ibid.*

⁹⁰ Lalloo (n 27) 41.

⁹¹ South African Human Rights Commission '6th Economic and Social Rights Report Series: 2003-2006 Report' <http://www.sahrc.org.za/sahrc_cms/publish/article_215.shtml> accessed 14 October 2007.

⁹² Goebel (n 25) 1.

⁹³ See Berger (n 13) 634; G Budlender, 'The Constitution and Socio-economics Rights: The Nevirapine Case' a speech given at the Harold Wolpe Memorial Trust forum meeting (Cape Town 2001) <http://www.wolpetrust.org.za/dialogue2002/CT082002budlender_notes.htm> accessed 10 November 2007.

⁹⁴ Berger (n 13) 634.

⁹⁵ Paremoer (n 80) 5.

⁹⁶ See Gloppen (n 18) 11; Berger (n 13) 634; Wesson (n 64) 294-5.

⁹⁷ Sunstein (n 15) 123.

budgetary ‘allocation is for national government to decide’.⁹⁸ Thus, the court case enabled pressure to be exerted on the government, but did not necessitate a direct response.

2. Claims by RBA theorists

Despite these criticisms, rights theorists continue to laud the South African case as evidence of the power of socio-economic rights.⁹⁹ Three key claims taken from RBA theories will now be assessed.

First, theorists suggest that formal commitment to a right can cause *prioritisation* of that issue by political elites within their agenda, as Minow argues, ‘Rights rhetoric... is a commitment to some degree of action’.¹⁰⁰ This echoes Dr. Ambedkar’s argument,¹⁰¹ made during the drafting of the Indian Constitution, that since India’s priority should be establishing ‘economic democracy’, constitutional socio-economic rights would ‘prescribe that every Government... shall strive to bring about economic democracy’. Applying this logic to housing, the UN Housing Rights Project claims that ‘establishing clear norms at the national level may serve as an important agent of social change, by raising the profile of housing issues’.¹⁰²

Second, rights theorists claim an effect that Maarseveen and Tang term ‘*canalization*’, whereby a constitution may ‘indicate that problems should be solved by reference to certain aims, such as the principle of equality’ and thus, ‘the constitution opens up channels in a

⁹⁸ J Yacoob, ‘Constitutional Court of South Africa: Case CCT 11/00’ 45 <<http://concourt.law.wits.ac.za/files/grootboom1/grootboom1.pdf>> accessed 12 November 2007.

⁹⁹ See M Olivier, ‘Constitutional Perspectives on the Enforcement of Socio-economic Rights: Recent South African Experiences’ (2002) 33 *Victoria University of Wellington Law Review* 117, 149-150; Malan (n 17) 553.

¹⁰⁰ M Minow, ‘Speech on Economic and Social Rights and the Right to Health: Session 1 – Applying Rights Rhetoric to Economic and Social Claims’ in *Economic and Social Rights and the Right to Health: An Interdisciplinary Discussion, September 1993, Harvard Law School* (Harvard Law School Human Rights Program, Cambridge 1993) 3.

¹⁰¹ BR Ambedkar, Speech given at the Proceedings of the Constituent Assembly of India (1948) <<http://parliamentofindia.nic.in/debates/vol17p9.htm>> accessed 20 October 2007.

¹⁰² United Nations Housing Rights Project: UN Habitat and the Office of the High Commissioner for Human Rights ‘UNHRP Working Paper No.1: Monitoring Housing Rights: Developing a set of indicators to monitor the full and progressive realisation of the human right to adequate housing’ (2003) 104 <http://www.unhabitat.org/downloads/docs/3674_40241_UNHRP-WP-01.pdf> accessed 5 November 2007.

particular direction, problems are canalized'.¹⁰³ Amongst rights theorists, it is suggested that rights discourses can canalize policy towards a focus on the most vulnerable.¹⁰⁴ In the South African case, this effect is said to be illustrated by *Grootboom*, where the constitutional right is claimed to have forced the government to focus on those whose need for housing constitutes an 'emergency'.¹⁰⁵

Thirdly, numerous analyses claim that formalised rights can cause the *empowerment* of communities and civil society to call for change more vocally and frequently, by encouraging a sense of entitlement and giving advocacy 'an authoritative basis'.¹⁰⁶

3. Structure of the study

In this chapter, I will test these three claims. In each case, I will use three indicators identified in Chapter 2 to consider whether each claim is justified in the South African case, or whether it should be rejected.

B. CLAIM 1: The constitutional right causes PRIORITISATION of housing provision

1. Indicator 1: The chronology of policy development

The timing of housing policy development wields the first blow to the idea that the constitutional right played a role in the prioritisation of housing. Although the Housing Act of 1997 represents the 'key legislation in the housing sphere',¹⁰⁷ it is widely acknowledged that this act and nearly all housing policy since 1996 was based on the Housing White Paper of 1994, which established the one-off subsidy scheme.¹⁰⁸ Indeed the White Paper itself stresses that 'the time for policy debate is now past'.¹⁰⁹ The formulation of this document was concurrent with the

¹⁰³ Maarseveen (n 10) 280.

¹⁰⁴ Twomey (n 8) 49.

¹⁰⁵ See Berger (n 13) 456; Gloppen (n 18) 2-3.

¹⁰⁶ See Twomey (n 8) 67-8; J Drèze, 'Democracy and the Right to Food' in P Alston and M Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (OUP, Oxford 2005), 59; UNHRP (n 7) 103.

¹⁰⁷ K Pillay, R Manjoo and E Paulu, 'Rights, Roles and Resources: An Analysis of Women's Housing Rights – Implications of the Grootboom Case' (2002) 15 <http://www.capecgateway.gov.za/Text/2003/womens_housing_rights.pdf> accessed 30 September 2007.

¹⁰⁸ See Huchzermeyer (n 42) 304; Mthembu-Mahanyele (n 82).

¹⁰⁹ Department of Housing 'Housing White Paper: A New Housing Policy and Strategy for South Africa' (1994) <<http://www.housing.gov.za/Content/planned/Docs/>

drafting of the constitution. This chronology seems to support Duchacek's argument that constitutions only reflect 'the national elite's view of the world' at the time of drafting, rather than shaping future decision-making.¹¹⁰

2. Indicator 2: Rhetoric indicating motivations behind policy

Rhetoric used by Government since the introduction of this policy also provides little indication of housing policy being prioritised due to the constitutional right. Throughout archived speeches, legislation and documents, rights are rarely mentioned. Although the constitution is mentioned, this tends to occur in formal explanations of legal bases for institutions and law.¹¹¹ Notably, at the current Housing Minister's recent address to mark UN World Habitat day, she did not mention 'rights' once,¹¹² despite the emphasis of UN Habitat on housing rights.¹¹³ On the few occasions where public addresses have referred to housing rights, one can easily identify motives other than a commitment to rights. For example, although a statement by Minister Sisulu in August 2007 dealt with socio-economic rights and their foundations in the constitution, the statement was written for a rights-based lobby group, the Organisation of Civic Rights, and Sisulu did not even attend the meeting to read her statement.¹¹⁴

Further, instead of articulating housing provision as the fulfilment of a right and therefore an end in itself, public statements tend to conceptualise housing as a means to other ends. Most commonly,

Housing%20White%20Paper.pdf> accessed 8 October 2007.

¹¹⁰ ID Duchacek, 'National Constitutions: A Functionalist Approach'(1968) 1 *Comparative Politics* 91, 93.

¹¹¹ See Republic of South Africa, Social Housing Bill (2007); Department of Housing 'History of the Department' <<http://www.housing.gov.za/>> accessed 20 October 2007; Department of Housing 'Mandate, Vision and Mission of the Department' <<http://www.housing.gov.za/>> accessed 20 October 2007.

¹¹² L Sisulu, 'Keynote address at the conference to mark the United Nations World Habitat Day' (The Hague 1 October 2007) <<http://www.info.gov.za/speeches/2007/07100116151004.htm>> accessed 7 November 2007.

¹¹³ UN Habitat, 'Housing Rights' <<http://www.unhabitat.org/categories.asp?catid=282>> accessed 5 November 2007.

¹¹⁴ L Sisulu, 'Speech at the Annual General Meeting of the Organisation for Civic Rights' (25 August 2007) <<http://www.info.gov.za/speeches/2007/07090411151001.htm>> accessed 7 November 2007.

housing provision is cited as a means of combating the legacy of apartheid by eradicating 'one of the most visible and destructive legacies' and thus paving the way for South African stability.¹¹⁵ Frequent reference is made to housing provision as a means of making the 'economy grow'.¹¹⁶ This thinking permeates the current Minister's phraseology, as she refers to houses using the term 'asset', taken from a distinctly economic lexis, rather than 'rights'.¹¹⁷ This attitude is evident in the 2005 'Housing Atlas', which locates housing strategy squarely within economic development, stating that the 'highest priority should be given to localities where high levels of economic opportunity, livelihood opportunity and need overlap. Lower priority should be given to areas where only high levels of sustainable potential and need overlap'.¹¹⁸

Despite the absence of official rhetoric showing rights as motivators behind prioritisation of housing, it is worth highlighting the most significant recent mention of housing rights in a public address. In June 2007, Minister Sisulu used the constitutional right to housing to lobby parliament to vote for her new housing budget.¹¹⁹ This may

¹¹⁵ Mthembu-Mahanyele (n 82). See also J Slovo quoted in Goodlad (n 26) 1629; L Sisulu, 'Speech at the National Home Builders Regulation Council' (November 2007) <<http://www.housing.gov.za/>> accessed 7 November 2007; L Sisulu, 'Speech at the Handover Ceremony of Houses at the Olievenhoutbosch Housing Project, Olievenhoutbosch, Centurion' (30 March 2007) <<http://www.info.gov.za/speeches/2007/07040212451001.htm>> accessed 7 November 2007; J Slovo, 'Speech at the Opening of the Community Bank in Benoni' (23 July 1994) <<http://www.sacp.org.za/people/slovo/sp940723.html>> accessed 7 November 2007; Department of Housing, Preamble to the Social Contract for Rapid Housing Delivery (2005) 2 <<http://www.housing.gov.za/Content/Social%20Housing%20Contract/Social%20Contract.pdf>> accessed 10 November 2007.

¹¹⁶ S Mthembu-Mahanyele, 'Foreword' (1997) *Urban Development Framework* i <http://www.housing.gov.za/Content/legislation_policies/leg_pol/UrbanDevelopmentFramework.pdf> accessed 7 November 2007. See also Department of Housing (n 109); L Sisulu, 'Keynote Address at the 12th Western Cape Business Opportunities Forum 2007 Business Person of the Year Awards' (2007) <<http://www.housing.gov.za/>> accessed 7 November 2007; L Sisulu, 'Speech at the Cape Town Press Club Hotel Catering School, Granger Bay, Cape Town' (30 August 2007) <<http://www.info.gov.za/speeches/2007/07090413451001.htm>> accessed 7 November 2007; Department of Housing (n 115) 4.

¹¹⁷ See also L Sisulu (n 115) (November 2007); L Sisulu (n 115) (March 2007).

¹¹⁸ Department of Housing 'Housing Atlas 2005: National Spatial Investment Potential for Housing' (2005) <<http://www.housing.gov.za/Content/Housing%20Atlas%2005/document.htm>> accessed 26 October 2007.

¹¹⁹ L Sisulu, 'Speech given at the Department of Housing Budget Vote 2007/08' (13 June

indicate a belief that despite the general governmental emphasis on housing as a means to other ends, rights would be a valuable currency within the South African Parliament, perhaps indicating some impact of rights on parliamentary discourse. However this appears to be an isolated incident, outweighed by the absence of examples of rights-based rhetoric elsewhere.

3. Indicator 3: The nature of the policy when implemented

In chapter 2 this indicator was established to act as a check to the second, to assess whether rhetorical commitments to rights were reflected in practice when the policy was implemented. Since neither the timing of policy development, nor the rhetoric used by Government since has revealed significant evidence of such commitments, this third test is redundant here. It is already possible to conclude that the constitutional right to access adequate housing appears to have had little demonstrable impact on the government's prioritisation of housing.

C. CLAIM 2: The constitutional right causes CANALIZATION of housing provision towards catering to the most vulnerable

1. Indicator 1: The chronology of policy development

There are two points at which one could argue that post-apartheid housing developed a particular focus on vulnerable groups, which here will be defined as those with the most extreme and urgent need. The first was at the genesis of housing policy in 1994. Supporting this analysis, Goebel has argued that emphasis on the most vulnerable predated the enactment of the constitution, stating that the 1994 White Paper 'prioritized the needs of the poor'.¹²⁰ This conclusion is supported by the fact that the 'cornerstone' of the housing programme,¹²¹ the one-off subsidy scheme, was aimed at providing housing to those too poor to have access to formal homes.¹²² However, since this policy applied to upwards of 13% of the population,¹²³ including both those in serviced shacks and the homeless, I would follow Budlender in arguing that it

2007) <<http://www.info.gov.za/speeches/2007/07061515451003.htm>> accessed 7 November 2007.

¹²⁰ Goebel (n 25) 1. See also Pillay (n 107) 15.

¹²¹ Lalloo (n 27) 40.

¹²² Mackay (n 27) 392.

¹²³ Mubangizi (n 14) 281.

failed to distinguish between the vulnerable and the *most* vulnerable.¹²⁴ It was not until 2003, after *Grootboom*, that the government announced a specific 'Emergency Housing Programme'.¹²⁵ This chronology supports the claim that *Grootboom* provides a clear example of a constitutional right, legally enforced by the courts, canalizing policy towards particular aims.¹²⁶

2. Indicator 2: Rhetoric indicating motivations behind policy

The next question is whether the introduction of the 'Emergency Housing Programme' was linked to the constitutional right to housing in rhetoric. Two answers present themselves. When discussing the introduction of the 'Emergency Housing Programme', officials not only refer to the constitutional right, but make direct reference to *Grootboom*.¹²⁷ Furthermore, the language of *Grootboom* concerning 'reasonable legislative and other measures' is used both in the text of the Emergency Housing Programme¹²⁸ and associated public statements.¹²⁹ One housing minister even appeared in a television documentary on *Grootboom*, declaring that it had pushed government 'back to the drawing board' regarding policy on informal settlements.¹³⁰ This supports the RBA claim that 'courts may shape the terms in which pressing social

¹²⁴ Budlender (n 93) 1.

¹²⁵ B Mabandla, 'Parliamentary Media Briefing of September 2nd, 2003' (2 September 2003) <<http://www.pmg.org.za/briefings/briefings.php?id=38>> accessed 7 November 2007.

¹²⁶ Budlender (n 93) 2-3; Olivier (n 99) 148.

¹²⁷ B Mabandla (n 126); Government Communication and Information System, South Africa Yearbook: 2006/7 (2007) 381 <<http://www.gcis.gov.za/docs/publications/yearbook/chapter14.pdf>> accessed 24 November 2007; Province of the Eastern Cape, Department of Housing, Departmental Draft Policy on Emergency Housing Assistance, 3 <<http://www.ecpg.gov.za/dhlgta/Latest%20updates%20Policies%20Housing/Policy%20on%20Emergency%20Housing.doc>> accessed 10 November 2007.

¹²⁸ Republic of South Africa, Housing Code: Part 3: National Housing Programmes: Chapter 12: Housing Assistance in Emergency Housing Situations (2003) 4 <http://www.housing.gov.za/Content/legislation_policies/_Emergency%20%20Housing%20Policy.pdf> accessed 14 December 2007.

¹²⁹ See Pillay (n 107) 24; South African Human Rights Commission '5th Economic and Social Rights Report Series: 2002/2003 Report' (2004) 12 <http://www.sahrc.org.za/old_website/esr_report_2002_2003.htm> accessed 14 October 2007.

¹³⁰ M Huchzermeyer, 'From 'Contravention of Laws' to 'Lack of Rights': Redefining the Problem of Informal Settlements in South Africa' (2004) 28 *Habitat International* 333, 335.

questions are conceived and discussed'.¹³¹

On the other hand, despite these clear associations with the Constitutional Court's ruling, the constitutional right itself and the Emergency Housing Programme, official statements on broader housing policy show few signs of a redirection or 're-canalization'. For example, in the year that the Emergency Housing Programme was enacted, the government's new 'Housing Atlas', designed as a guide to the basic principles behind current housing policy prioritised 'localities where high levels of economic opportunity, livelihood opportunity and need overlap'.¹³² This presents a clear contradiction with the rhetorical emphasis on high levels of need and vulnerability expressed in reference to the 'Emergency Housing Programme'. This may suggest that instead of the constitutional right inspiring a broad re-canalization of the government's strategy, it may have pushed the government to introduce one specific 'add-on' scheme as a minimalist response to the court's judgment.

3. Indicator 3: The nature of the policy when implemented

As noted above, when making their judgment in *Grootboom*, judges respected the separation of powers and allowed government to formulate a response to the court's criticisms. Therefore, an analysis of the government's implementation of *Grootboom* should show which of these conclusions is correct: Did *Grootboom* push the Government 'back to the drawing board' to focus on the most vulnerable, or did it engender a tokenistic response accompanied by a lot of rhetoric? Documentary accounts seem to support the latter. In 2005, an 'Emergency Housing Programme', was introduced at both the national level and in a number of local authorities.¹³³ However accounts show direct compliance with *Grootboom* were delayed and limited, with development of the new policy not put out to tender for nearly two years and the Treasury refusing to provide centralised funding.¹³⁴ Perhaps more significant is that the government responded to the judgment by introducing a limited policy targeting individuals in particular emergency situations, rather than redirecting strategy across the board to accommodate the most

¹³¹ L Rosen, 'Law and Social Change in the New Nations'(1978) 20 *Comparative Studies in Society and History* 3, 26.

¹³² Department of Housing (n 118).

¹³³ Pillay (n 107) 21; GCIS (n 127) 381.

¹³⁴ See Budlender (n 93) 3; Huchzermeyer (n 42) 88-9; Pillay (n 107) 21.

vulnerable. Practically speaking, this has led to situations where single homeless people in desperate need have been denied access to housing, on the grounds that *Grootboom* specifically mentioned that those with certifiable dependents cannot be denied shelter.¹³⁵ This supports Wesson's argument that 'the chief difficulty with the state's implementation of *Grootboom* has been a 'lack of clear understanding that the judgment requires systematic changes to national, provincial and local housing programs to cater for people in desperate and crisis situations'.¹³⁶ Consequently, I would argue that although *Grootboom* has prompted the creation of a new policy, this policy is more of an 'add-on' to established strategy than evidence of the constitutional right canalizing government strategy towards catering to the most vulnerable.

D. CLAIM 3: The constitutional right causes EMPOWERMENT of civil society to call for housing provision

1. Indicator 1: The chronology of the development of civil society activities

The first two claims concerned the impact of the constitutional right on government policy from the top down. This third claim facilitates an examination of its impact from the bottom-up by considering its effects on civil society. Undoubtedly, an active South African civil society predated the enactment of the constitution.¹³⁷ The strong grassroots civic movement had been pivotal in the downfall of apartheid and began the post-apartheid era demanding 'houses for all'.¹³⁸ Civil society groups had established structures and were experienced in both direct action and negotiation strategies.¹³⁹ However, I would argue that after transition to democracy, it was not inevitable that civil society would maintain these levels of activity; Thomson has noted how civil societies across Africa have lost momentum since achieving independence.¹⁴⁰ Yet in South

¹³⁵ Skuse (n 78) 990.

¹³⁶ *ibid.*

¹³⁷ Miraftab (n 77) 226; L Pikholtz, 'Managing Politics and Storytelling: Meeting the Challenge of Upgrading Informal Housing in South Africa' (1997) 21 *Habitat International* 377, 380; J Abbott, 'Approaches to Urban Infrastructure Provision: Experiences from South Africa' (1996) 20 *Habitat International* 595, 596.

¹³⁸ See Pikholtz (n 137) 380; Abbott (n 137) 596; Goodlad (n 26) 1642.

¹³⁹ See Miraftab (n 77) 226; Pikholtz (n 137) 387; S Oldfield, 'The Centrality of Community Capacity in State Low-Income Housing Provision in Cape Town, South Africa' (2000) 24 *International Journal of Urban and Regional Research* 858, 865.

¹⁴⁰ A Thomson, *An Introduction to African Politics* (2nd edn Routledge, London 2004) 238.

Africa both direct action and lobbying activities continued unabated, and were supplemented by increased use of the court system to affect change, exemplified by cases such as *Grootboom*.¹⁴¹ Therefore it would be hasty to discount the impact of the constitutional right on civil society, simply because civil society was already well established before the constitution was enacted.

2. Indicator 2: Rhetoric indicating motivations behind activities

Documentary accounts of civil society action and documents released by civil society groups reveal frequent rhetorical use of the constitutional right. Many lobbying documents refer extensively to the constitutional right and *Grootboom*,¹⁴² including papers produced by South Africa's main opposition party.¹⁴³ Further, Skuse and Cousins' account of land invasion in Nkanini suggests that the language of *Grootboom* was adopted by those involved in direct action movements.¹⁴⁴ They argue that *Grootboom* has engendered a 'familiarity and literacy with rights in South Africa' and acts

¹⁴¹ S Oldfield and K Stokke, 'Building Unity in Diversity: Social Movement Activism in the Western Cape Anti-eviction Campaign: Centre for Civil Society and School of Development Studies Research Report' (2004) 9-12, 24 <www.ukzn.ac.za/ccs> accessed 30 September 2007; Skuse (n 78) 980.

¹⁴² South African Human Rights Commission '4th Economic and Social Rights Report: 2000-2002 Report' (2002) <http://www.sahrc.org.za/old_website/esr_report_2000_2002.htm> accessed 14 October 2007; K Hall, 'Accommodating the Poor? A Review of the Housing Subsidy Scheme and Its Implications for Children' in A Leatt and S Rosa (eds), *Towards a Means to Live: Targeted Poverty Alleviation to Make Children's Rights Real* (Children's Institute, University of Cape Town, Cape Town 2005) <<http://www.ci.org.za/depts/ci/pubs/pdf/poverty/facts/006.pdf>> accessed 20 November 2007; Lawinfo 'Your Fundamental Rights' <<http://www.lawinfo.org.za/yourfamily/rights.asp>> accessed 10 December 2007; J Streak and L Kgamphe, 'Budget Brief No. 141: Government spending on Children in MTEF 2004/05: Spotighting Social Development Programmes' (2004) <<http://idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=587>> accessed 30 September 2007; Centre on Housing Rights and Evictions 'Any Room for the Poor? Forced Evictions in Johannesburg, South Africa: Draft for Discussion' (2005) <www.cohre.org/store/attachments/COHRE%20Johannesburg%20FFM_high%20res.pdf> accessed 20 September 2007; Children Count 'Facts about Children' (2007) <<http://www.childrencount.ci.org.za/content.asp?PageID=9>> accessed 5 December 2007.

¹⁴³ T Leon, 'We have rights on paper, but not in practice' (2004) <http://www.polity.org.za/article.php?a_id=48547> accessed 10 December 2007.

¹⁴⁴ Skuse (n 78) 982-3.

as a 'key stimulus' to protest.¹⁴⁵ Unsurprisingly, the language of constitutional rights dominates in the legal campaigns waged by community members such as *Grootboom*.¹⁴⁶ Furthermore, legal cases have been accompanied by large-scale public information campaigns conducted by civil society, transferring the language of rights from the courtroom to the public arena.¹⁴⁷

However, this evidence of rights-based rhetoric should be understood as only one of a number of rhetorical strategies employed by civil society. Outside the courtroom, where rights language is a necessity, discourses based on the apartheid legacy remain dominant.¹⁴⁸ For example, Oldfield and Stokke's interviews with activists from Cape Town's District 6, the site of notorious evictions during Apartheid, reveal a sense of entitlement firmly grounded in apartheid experiences: '[t]he people of District 6 equates to the apartheid struggle... [l]ook after us first, the rest can go to hell'.¹⁴⁹ These examples may indicate that although civil society has engaged with constitutional rights as tools, particularly in court, their underlying sense of entitlement may still be derived from their experiences under apartheid.

3. Indicator 3: The nature of activities

On the basis of this evidence, it would be impossible to say for certain whether civil society's demands for housing have been motivated by a belief in the constitutional right, or whether rights have only been used as strategic tools. However, one impact of the constitutional right on civil society activities seems clear: constitutional rights have enabled civil society to make use of the legal system. Alongside *Grootboom*, several other cases have been brought to court by civil society groups demanding provision of housing using constitutional rights.¹⁵⁰ The aftermath of these cases show some increase in lobbying, press coverage and public engagement with the issue concerned.¹⁵¹

Thus I would conclude that although it is unclear whether the constitutional right has been responsible for providing a 'sense of

¹⁴⁵ *ibid* 983.

¹⁴⁶ Oldfield (n 141) 25.

¹⁴⁷ Huchzermeyer (n 78) 102; Paremoer (n 80) 24-8.

¹⁴⁸ Skuse (n 78) 988-9; Oldfield (n 141) 14.

¹⁴⁹ *ibid*.

¹⁵⁰ Gloppen (n 18) 11-2; Olivier (n 99) 145.

¹⁵¹ Huchzermeyer (n 78) 89; Paremoer (n 80) 24-8.

entitlement' over and above that engendered by the apartheid legacy, it appears to have had an impact through providing an 'authoritative basis' to advocacy. The new enthusiasm for court battles claiming socio-economic rights presents a clear shift in the nature of civil society activity. Further, increased lobbying activity following these cases suggests that legal battles may also be fuelling an increase in demands for change outside the courts.

E. Conclusions

In this chapter I have examined the impact of the constitutional right to access adequate housing on the fulfilment of the positive right to a house. I have identified a distinct difference from the top-down and from the bottom-up. First, I rejected the claim that the constitutional right to housing had caused prioritisation of housing policy by government, on the basis that such prioritisation predated the constitutional right and subsequent government statements on implementation of housing policy show little indication that it was motivated by the right. In response to the claim that the constitutional right has caused a canalization of housing policy towards catering to vulnerable groups, I argued that although Government has made a rhetorical show of responding to *Grootboom*, there is little practical evidence that the strategic direction of policy has changed. The third claim appears more plausible. Although it was not clear whether the right has motivated civil society activity, it has channelled it into the justice system in the form of several court cases. Analyses of the aftermath of relevant court cases indicated that they may also be inspiring increased campaigning outside the courtroom. If these three strands of analysis are understood together, they provide weak support for the broader hypothesis that the constitutional right has altered the practical reality and development politics of housing provision: Civil society's strategy may have altered, but their new 'authoritative basis' for advocacy seems to have produced a minimal impact on the realities of the fulfilment of the positive right to access housing. Its one substantive achievement seems to be the belated introduction of the poorly-funded Emergency Housing Programme. This policy is no insignificant victory for rights-based activism, but as Wesson argues, its limited scope disqualifies it from representing a systematic change in approach to socioeconomic development, or a clear 'impact not only in South Africa, but around the

world'.¹⁵²

V. THE IMPACT OF THE CONSTITUTIONAL RIGHT TO HOUSING ON EVICTIONS

A. Introduction

Where chapter 4 examined the Constitution's role in realising 'positive' housing rights through provision of new housing, this chapter examines the 'negative' rights implied by the right to access adequate housing through addressing the field of evictions. Thus, where Chapter 4 dealt with the right to receive a house, Chapter 5 will deal with the right not have it taken away. I will argue that the constitutional right has had a far more significant impact here, largely due to the greater direct powers of the court.

1. Context and background

The informal status of many South African households in squatter settlements has made their inhabitants vulnerable to eviction. As Goebel notes, 'informality tends to go with insecurity of tenure'.¹⁵³ Mass evictions have frequently occurred as landowners have reclaimed their property from mass informal occupations.¹⁵⁴ Government policy on 'upgrading' slums has increased the number of these evictions, as before informal settlements could be 'upgraded', inhabitants must be removed from the site.¹⁵⁵ Often, evictees have been offered no alternative housing and no compensation for their displacement.¹⁵⁶ In addition, attempts to end over-crowding mean that new formal settlements offer fewer homes than the informal ones they replaced, leaving many former inhabitants without prospect of return.¹⁵⁷

South Africans have repeatedly brought cases both in the constitutional and lower courts arguing that their right to adequate housing should trump the ownership rights of private or government landowners.¹⁵⁸ However, the legal context of these negative rights cases was significantly different from that of the positive rights cases examined

¹⁵² United Nations Press Office (n 16).

¹⁵³ Goebel (n 25) 4-5.

¹⁵⁴ Huchzermeyer (n 130) 342.

¹⁵⁵ Huchzermeyer (n 78) 103.

¹⁵⁶ *ibid* 91.

¹⁵⁷ Huchzermeyer (n 130) 338.

¹⁵⁸ Budlender (n 93) 5; Gloppen (n 18) 11-2; Oldfield (n 141) 16.

previously, allowing more direct implications for ordinary South Africans. As noted previously, in *Grootboom*, the constitutional court 'kick[ed] the issue back' to the government rather than dictating exactly how policy should change or how claimants should be helped. This restraint was based on the constitutional principle that the judiciary may not dictate the executive's policy and expenditure. In eviction cases, the court is not seen as being asked to encroach upon these powers. Whereas it would be considered a radical step for a judiciary to dictate housing policy to a government, standard practice in South Africa and around the world establishes clear judicial powers to grant or deny eviction orders in specific cases.¹⁵⁹ Thus the legal context of the cases meant that the courts hold direct powers over the implementation of negative rights, whereas in the field of positive rights, they could only make recommendations to government, which the government may ignore.

2. Claims by RBA theorists

I will now test the same RBA hypotheses considered in Chapter 4, but in relation to evictions. This time, I will not consider canalization towards focus on the most vulnerable. I would argue that this claim is less relevant here, as all households threatened with eviction are by definition highly vulnerable.

In Chapter 4 I presented the hypothesis that a constitutional right to adequate housing can lead to *prioritisation* of housing rights within the political agenda. Regarding evictions, this naturally translates into the claim that the protection of evictees' rights to access should be prioritised by political elites. As Huchzermeyer says, 'by legally recognising first the lack of protection of their rights, rather than only their contravention of property laws and land use regulations, mechanisms may be introduced to reduce exploitation.'¹⁶⁰ This suggests that by emphasising the right to housing, the Constitution can potentially swing the focus of housing disputes towards the fundamental needs of inhabitants and away from property rights of landowners.

Secondly, according to RBA theories of community *empowerment*,

¹⁵⁹ S Djankov, R La Porta, F Lopez-de-Silanes and A Shleifer, 'Courts: The Lex Mundi Project: National Bulletin of Economic Research' Working Paper No. 8890 (2002) <<http://www.nber.org/papers/w8890.pdf>> accessed 5 January 2007.

¹⁶⁰ Huchzermeyer (n 130) 344.

the creation of a formal right to access adequate housing should lead to a stronger resistance to evictions, flowing from inhabitants' sense of entitlement and 'authoritative basis' for advocacy.¹⁶¹

3. Structure of the study

As in Chapter 4, I will test each of these hypotheses using the three indicators identified in Chapter 2.

B. CLAIM 1: The constitutional right causes PRIORITISATION of protecting evictees

1. Indicator 1: The chronology of policy development

The key legislation enacted to protect evictees' rights was the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998 (PIE).¹⁶² PIE balances the rights of landowners and land occupiers.¹⁶³ Within this balance, it requires particular consideration of 'the rights and needs of the elderly, children, disabled persons, and households headed by women', encouraging judicial discretion in these cases.¹⁶⁴ Further, it demands that judges 'consider all relevant circumstances', strengthening powers of judicial discretion across the board, and leaving judges free to support their decision by reference to other legislation.¹⁶⁵ This would naturally encourage judges to consider not only the rights of specific groups mentioned in PIE, but all constitutional rights. The timing of the introduction of this Act, two years after the enactment of the Constitution, clearly does not preclude the Constitution having influenced its development.

2. Indicator 2: Rhetoric indicating motivations behind policy

Roux has praised PIE for its innovative protections of evictees' rights, stating that 'judicial constraints on arbitrary eviction create a form of tenure' for those vulnerable to eviction.¹⁶⁶ However, there is little

¹⁶¹ Twomey (n 7) 67-8; Drèze (n 106) 59; United Nations Housing Rights Project: Habitat and the Office of the High Commissioner for Human Rights (n 7) 103.

¹⁶² Huchzermeyer (n 78) 84.

¹⁶³ *ibid.*

¹⁶⁴ Republic of South Africa, Prevention of Illegal Eviction and Unlawful Occupation of Land Act No. 19 of 1998.

¹⁶⁵ *ibid.*

¹⁶⁶ Huchzermeyer (n 78) 85.

evidence that PIE was developed with the Constitutional Right to housing in mind. Unlike the 1997 Housing Act, PIE¹⁶⁷ makes no specific reference to the constitutional right. Indeed, its focus on the rights of specific groups runs directly contrary to the universalistic language of the Constitution.¹⁶⁸ Skuse and Cousins suggest other factors that might have motivated a progressive ANC stance on evictions, such as the personal experience of ANC leaders of living in informal townships and the political threat posed by the many South Africans still in this situation.¹⁶⁹ If the government was motivated by these personal and political concerns, then limited concessions to key groups might have seemed a sensible compromise. I would argue that this kind of compromise better explains the limited concessions to specific groups evident in PIE, than influence of the Constitution, which is explicitly grounded in the principles of universal rights.

3. Indicator 3: The nature of the policy when implemented

Even more damning evidence against the claim that the constitutional right has caused the government's prioritisation of evictees' rights is evidenced by the government implementation of PIE. Contrary to the progressive intentions manifested in the Act, the government has repeatedly taken a tough stance on informal settlements, including conducting mass evictions at settlements including Bredell,¹⁷⁰ Nkanini¹⁷¹ and Wallacedene¹⁷² as part of its attempts to 'eradicate slums by 2014'.¹⁷³ In each case, the government used PIE to seek eviction orders rather than protect tenants from eviction. Documentary accounts of resulting evictions show instances of the government failing to give the required notice period before conducting forced removals.¹⁷⁴ Further, the South African Human Rights Commission¹⁷⁵ highlights cases where the government has carried out evictions without applying for a court order,

¹⁶⁷ Prevention of Illegal Eviction and Unlawful Occupation of Land Act No. 19 of 1998.

¹⁶⁸ *ibid.*

¹⁶⁹ Skuse (n 78) 986; Barry (n 34) 629.

¹⁷⁰ Huchzermeyer (n 130) 335.

¹⁷¹ Skuse (n 78) 990.

¹⁷² Fitzpatrick (n 57) 669.

¹⁷³ Department of Housing, 'The Department of Housing aims for practical solutions to meet 2014 deadline for eradication of slums' <<http://www.housing.gov.za/>> accessed 20 October 2007.

¹⁷⁴ Huchzermeyer (n 78) 85.

¹⁷⁵ South African Human Rights Commission (n 142) 56.

breaking its own legislation.

When examining the prioritisation of evictees' negative rights from the top-down, it is equally important to consider judicial implementation of the legislation and constitution. This is because of the direct role in implementation of negative rights afforded to judges by the legal context of eviction orders explored above. In contrast to governmental use of PIE, judicial protection of evictees' rights demonstrates clear impact of the constitutional right to adequate housing. Since the enactment of PIE and the Constitution, the South African judiciary have developed extensive case-law rejecting eviction orders due to the constitutional rights of the evictee to 'access adequate housing', clearly referencing the Constitution in their judgments.¹⁷⁶ The power of these eviction orders has meant that these judgments have protected thousands of South Africans from eviction,¹⁷⁷ a clear impact of the constitutional right to housing on development outcomes, working from the top-down, but as a legal, rather than political tool.

C. CLAIM 2: The constitutional right causes EMPOWERMENT of civil society to challenge evictions

1. Indicator 1: The chronology of activity

Political scientists have noted the emergence of numerous highly publicised eviction resistance movements since the enactment of the Constitution.¹⁷⁸ However, this increase appears to be proportionate to the increase in government attempts to evict, resulting from the policy on upgrading of informal settlements.¹⁷⁹ Evictions that were initiated prior to the enactment of the Constitution also met fierce resistance from civil society,¹⁸⁰ indicating that resistance to eviction is not new. However, as in the previous chapter, the nature of this activity seems to have evolved following high-profile court cases, with potential evictees turning with greater frequency to the courts as a forum for resistance.¹⁸¹ Therefore although willingness to challenge eviction may not have increased, a chronological correlation is evident between highly publicised victories in cases such as *Mquokomiso* and the proliferation of

¹⁷⁶ See Budlender (n 93) 4; Gloppen (n 18) 11-2; Oldfield (n 141) 25.

¹⁷⁷ *ibid.*

¹⁷⁸ Huchzermeyer (n 78) 85; Oldfield (n 141).

¹⁷⁹ Oldfield (n 141) 9, 22.

¹⁸⁰ Barry (n 34) 1934; Goodlad (n 26) 1632.

¹⁸¹ Skuse (n 78) 981.

legal resistance movements.¹⁸²

2. Indicator 2: Rhetoric indicating motivations behind activity

As a flourishing sector of legal non-governmental organisations (NGOs) grows, supporting these legal resistance movements, it is unsurprising to find an increasing wealth of NGO documentation using the legal rights lexicon in relation to evictions.¹⁸³ Throughout these documents, NGOs speak to government and the public using references to the Constitution, the language of fundamental rights and detailed accounts of court victories.

As groups lobbying for housing provision were shown to use both legal rights rhetoric and reference to apartheid, community groups resisting eviction also appear to utilise multiple strategies to articulate their demands. For example Skuse and Cousins describe crowds of squatters at Nkanini facing removal trucks chanting ‘Youth of “76”’ in reference to the Soweto uprising.¹⁸⁴ This is particularly significant not only as Nkanini is geographically distant from Soweto, but also because many of the youths leading the crowd could not have remembered 1976. Skuse and Cousins describe this response to the threat of eviction in terms of necessity, stating that ‘connections are forged when they need to be forged’ so that ‘the present is imbued with a sense of the spirit of the past’.¹⁸⁵ This analysis suggests that rights rhetoric may again not indicate motivation, but instead reveal the sophisticated rhetorical strategies being employed by South African civil society, able and willing to summon the language of either the courts or their history of resistance as need dictates.

3. Indicator 3: The nature of activity in practice

In chapter 4 I showed how key cases in housing provision sparked

¹⁸² Huchzermeyer (n 78) 81-2; Gloppen (n 18) 11-2.

¹⁸³ South African Human Rights Commission (n 142) 56; Community Law Centre ‘South African Cases’ (2006) <<http://www.communitylawcentre.org.za/Socio-Economic-Rights/case-reviews-1/south-african-cases/>> accessed 10 December 2007; Legal Resources Centre ‘Housing and Local Government’ <http://www.lrc.org.za/Focus_Areas/housing.asp> accessed 10 December 2007; Centre on Housing Rights and Evictions (n 142) 95-6.

¹⁸⁴ Skuse (n 78) 988.

¹⁸⁵ *ibid* 988-9.

several related cases in lower courts. This effect appears to have been far more pronounced in eviction cases. The rapid increase in people choosing to protect themselves through the courts is illustrated by Oldfield and Stokke's study on the Western Cape Anti-Eviction campaign, where a 'Legal Coordination Committee' was established to cope with the rapid proliferation of cases.¹⁸⁶ As the campaign's lawyer explained, 'Every single day there would be another case'.¹⁸⁷

Perhaps more significant is evidence of the practical impact of victories of constitutional rights cases on extra-judicial direct action strategies. In addition to *Grootboom's* implications for the government's approach to housing provision, the judgment also established evictees' rights: Skuse and Cousins argue that a principal repercussion was that 'any informal structure that has been in place for longer than 48 hours invokes the state's responsibility to provide ultimately both alternative and suitable shelter'.¹⁸⁸ This strengthening of evictees' rights appears to have led to a new pro-active strategy for securing housing, employed by the homeless. Skuse and Cousins document a flood of newcomers into the Nkanini settlement to establish make-shift shacks, based on their belief that if they could protect these shacks by force for the first 48 hours, they would not be evicted or would be provided with a new home if they were.¹⁸⁹ Further, they note greater investment in existing make-shift housing, based on a belief in the effective tenure created by *Grootboom*.¹⁹⁰ This response is remarkable in light of continuing attempts by officials to destroy shacks in Nkanini. Its potential effect on the urban landscape represents a clear, practical impact of constitutional rights on development outcomes.

D. Conclusions

As in the last chapter, this analysis has revealed a far stronger impact of the constitutional right on civil society than on prioritisation of housing rights by the government. Here, the government was shown to have introduced one piece of legislation to protect evictees' rights, to have made no reference to the constitution in the enactment of this legislation and to have used that legislation to undermine evictees' rights. In

¹⁸⁶ Oldfield (n 141) 22.

¹⁸⁷ *ibid.*

¹⁸⁸ Skuse (n 78) 985.

¹⁸⁹ *ibid.*

¹⁹⁰ *ibid.*

contrast, civil society was shown to have been motivated to develop extensive legal resistance movements to claim their constitutional rights in court, bringing vast numbers of cases to all levels of the court system.¹⁹¹ Further, due to the traditional power of judges to make directly applicable decisions in eviction cases, these court victories were able to make a tangible impact on development outcomes. Firstly, rejections of applications for eviction have directly protected large numbers of South Africans from eviction. Secondly, the sense of security provided by these frequent and public court victories has encouraged inhabitants of informal settlements to invest in their own properties. It is perhaps not surprising that civil society has engaged so actively with the constitutional right with regard to evictions, because here the constitutional right to access adequate housing has been publicly shown to have the power to change the lives of South Africans.

Thus it appears that rights-based claims hold significantly more water in the field of negative rights than in the field of positive rights. The reasons for and implications of this will be discussed as part of my overall conclusions.

VI. CONCLUSION: THE DIFFERING IMPACT OF POSITIVE AND NEGATIVE CONSTITUTIONAL RIGHTS

This study was written in response to increasing claims that constitutions can act as ‘valuable tools’ in driving development.¹⁹² I assessed the South African case as the supposed exemplar of these claims,¹⁹³ examining both housing provision - the positive right to be given a house - and eviction - the negative right not to have it taken away. In each case, I found that the analyses of rights theorists have over-estimated the power of the South African Constitution to affect development outcomes.

Throughout both parts of this study, claims regarding the impact of the constitutional right on government were resoundingly rejected. However, there were signs that the constitutional right had influenced civil society by channelling activity into the courts. In both instances, results suggested that rather than affecting the way that government prioritises and canalizes socio-economic issues, formal constitutional

¹⁹¹ Oldfield (n 141) 22.

¹⁹² United Nations Housing Rights Project: Habitat and the Office of the High Commissioner for Human Rights (n 7) 104.

¹⁹³ Mubangizi (n 14) 277.

rights have their greatest impact when highly publicised court cases encourage communities and civil society to engage in legal battles that may alter development outcomes and inspire further lobbying. Thus, rather than changing the mindset of policy-makers, the Constitution was shown to alter the landscape of power within development politics, drawing the courts into the development process and strengthening the hand of civil society groups.

One of the most significant findings was that the impact on civil society activity surrounding negative rights has been far more pronounced than those surrounding positive rights. Not only has civil society brought a far greater number of court cases challenging evictions than demanding provision, but also the impact of these cases outside the courts was far more tangible. I argued that court cases demanding provision have prompted one belated and badly-funded add-on to government policy, and may be inspiring some increased campaigning outside the courtroom. However, I revealed two clear practical impacts of the constitutional right on the realities of eviction. First, frequent judicial rejections of eviction applications have directly prevented many South Africans from being evicted from informal settlements. Second, constitutional court victories have encouraged inhabitants of informal settlements to invest in their properties. This development has the capacity to change the landscape of informal settlements, perhaps even leading to their gradual formalisation.

The differing impact of the constitutional right on the negative and positive strands of the right to housing was traced back to the differing legal contexts dictating the power of the judiciary to enforce the right. In each case, civil society attempted to use the constitutional right to secure development ends. However, in each case the legal context meant that a different institution had the power to respond to their demands. Worldwide legal precedent establishing discretionary judicial powers over eviction orders enabled South African judges to respond directly to civil society's claim to their negative right not to be evicted. Here, judges could use the written constitution to make a practical and direct impact on the lives of South Africans through informal settlements without challenging executive powers. With this power in the hands of judges, the constitution has had a significant, tangible impact on development politics. However, faced with casting judgement upon the government's approach to housing provision, judges were quick to emphasise that their hands were tied. The separation of powers principle

would have rendered any judgment highly radical if it dictated to whom the government should provide housing. Acknowledging this legal context, even supposedly 'innovative' judgments,¹⁹⁴ such as *Grootboom*, left the government free to interpret how the Constitution should impact on housing policy. As my analysis showed, in the hands of the government, this impact was minimal.

Since the South African case is framed as the exemplar of the potential impact of formalised human rights on development politics, these results have significant implications for rights-based claims. They suggest that although constitutional rights can change development outcomes, their impact largely relies on the power of judges to use them directly. This case provides little evidence of their impact as 'multivalent political instruments',¹⁹⁵ changing the way in which governments formulate and implement policy. Instead, it indicates that only where formalised socio-economic rights complement and re-enforce the pre-existing, predominantly negative, powers of the judiciary can they act as powerful legal tools. Logically then, it seems that for socio-economic constitutional rights to force governments to change the path of development across the board, a radical shift in the separation of powers would be required, enabling judges to rule directly on governments' records on development and demand specific alterations to policy. This would make the courts a check to any executive that neglected the socio-economic condition of the nation, and make judges champions of development within the political system. However, it would challenge an age-old axiom of western democracy: 'Politicians legislate; judges adjudicate'.¹⁹⁶ The question of whether this monumental constitutional shift would be justifiable falls to another study. This study paves the way for that next challenge: it exposes the obstacles to be overcome before socio-economic constitutional rights can truly be lauded as 'proactive instruments of societal change',¹⁹⁷ wielding the power to transform the future of development politics.

¹⁹⁴ Olivier (n 99) 149.

¹⁹⁵ Maarseveen (n 10) 273.

¹⁹⁶ R Hodder-Williams, 'Six Notions of 'Political' and the United States Supreme Court' (1992) 22 *British Journal of Political Science* 1, 15.

¹⁹⁷ A Sachs was quoted in S Ingber (n 6) 230.