Socio-economic rights under a transformative Constitution

The role of the academic community and NGOs

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A transformative Constitution

Following Karl Klare's seminal article in the 1998 *SA Journal on Human Rights*, South Africa's Constitution has been widely described by the courts and in academic literature as a "transformative Constitution". While finding deep resonances in the South African community, the concept has also remained tantalisingly elusive. At one level, it implies an undoing of the multifaceted injustices inflicted by four centuries of colonial and apartheid rule in the political, social, economic and cultural spheres. At another level, it also implies the construction of a new and better society for the future – one which is founded, as the preamble of the South African Constitution of 1996 states, "on democratic values, social justice and fundamental human rights".

This indicates that transformation is not exclusively about undoing the racial legacy of apartheid, although that is, of course, critical. It also requires us to examine all political, legal, economic, social and cultural institutions of our society in the light of the Constitution's commitment to establishing a more just society based on human dignity, equality and freedom. When these institutions operate in ways that disadvantage certain groups and deny them their right to participate as equals in our young democracy, it requires us to undertake the painstaking work of restructuring them.

Fundamental transformation thus requires exposing all sources of public and private power to critical scrutiny, and developing new mechanisms of political and legal accountability. No exercise of power can be insulated from critical re-examination and re-envisioning in the light of the transformative commitments of the Constitution.

Socio-economic rights and transformation

Socio-economic rights were included in the Bill of Rights because a lack of access to social and economic resources and services constitutes a major impediment to people's ability to participate as equals in a democracy. More than ten years into our new democracy, large parts of our population are still unemployed and lack access to decent services and productive assets such as land. Poverty and social marginalisation are intensified by the HIV/AIDS epidemic ravaging the country. Moreover, South Africa still has one of the highest levels of income inequality in the world.

The socio-economic rights in our Bill of Rights invite all organs of state, the courts, the private sector and civil society to give substantive content to the core constitutional values of human dignity, equality and freedom. These rights remind us that human dignity, equality and freedom are compromised when people are deprived of the essentials for survival such as food, when they are forced

into relations of dependence on others because of economic need, and when they are deprived of education and the other means to participate as equals in our new democracy.

Transformation and democratic debate

There is consensus that the socio-economic rights in the Bill of Rights oblige us to undo the social and economic legacy of the past and to build a new and better society. However, as soon as one gets to the nuts and bolts of giving meaning to these commitments in policies, programmes, legislation and court judgments, there is substantial debate and contestation.

As we know, there is much controversy about the underlying causes of poverty and inequality in South Africa, as well as the nature and pace of the changes to the legal, political and economic systems that are needed to give effect to the transformative goals of the Constitution. This is reflected, for example, in the heated debate concerning the government's macro-economic and distributional policies. Critical voices in civil society have argued that the government has adopted an essentially neoliberal macro-economic policy which has failed to prioritise the needs and interests of the poor or effect a fundamental redistribution of resources.

In the legal sphere, there has been contestation regarding the interpretation of the socio-economic rights provisions in the Constitution and whether the courts have done enough to protect the rights of the poor in their evolving jurisprudence on these rights. A review of the academic and NGO literature reveals a robust debate on questions such as whether the courts should adopt the concept of minimum core obligations, whether "reasonableness review" assists or hinders the poor in gaining access to economic and social resources, whether socio-economic rights have played a sufficient transformative role in relation to the common law and, finally, whether the courts have crafted imaginative and effective remedies to protect these rights.

There is substantial debate and contestation about how to give meaning to the socio-economic rights in the Bill of Rights.

How should we view these contestations and controversies? Do they hold us back from giving effect to the transformative promise of the Constitution?

In a prestige lecture last year at the Stellenbosch University Law Faculty, Chief Justice Pius Langa suggested the contrary. Justice Langa described the conception of transformation embraced by the Constitution as follows:

> ...[T]ransformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional Constitution. This is the perspective that sees the Constitution as not transformative because of its peculiar historical position or its particular socio-economic goals but because it envisions a society that will always be open to change and contestation, a society that will always be defined by transformation. (Langa, 2006: 354)

This passage suggests four dimensions of the relationship between the transformative ethos of the Constitution and democratic participation. First, it suggests that active debate and contestation concerning the nature of the society we wish to create and the political and legal reforms necessary for achieving it should not be viewed as antithetical to transformation, but rather as its animating force. This understanding of transformation affirms that democratic participation is central in the ongoing processes of transforming the current status quo.

Second, this vision of transformation requires us to engage in the debate and processes of transformation with an open mind and a willingness to explore new and innovative solutions to the various forms of injustice that still pervade our society and the problems of poverty and marginalisation that confront us.

Third, it implies a willingness to explore what the foundational constitutional values of human dignity, equality and freedom mean in practice in the current political, economic and social context of South African society.

Finally, underpinning all of the three prior points is the notion that the constitutional text does not have a fixed, settled and authoritative meaning. Instead the meaning of constitutional rights is made and remade in an ongoing process of

engagement between all the actors in our young democracy. The idea that the content of socio-economic rights can be finally and authoritatively settled does not gel with the idea of transformation as a process of change in which all participants remain open to new interpretations and applications in the light of changing contexts and needs.

The "open community" of interpreters

However, the openness and revisability of this vision of constitutional interpretation seems to be at odds with the notion that the courts are the authoritative and final arbiters of the meaning of the constitutional text as well as with the doctrine of precedent, which seeks to preserve legal certainty and stability. While it is true that the courts are the final guardians of the Constitution and that consistency with previous decisions is a value in a legal system, it remains important to recognise that there are multiple participants and processes that contribute to developing the meaning of socio-economic rights. These participants include:

- the executive, in adopting macro-economic and socio-economic policies and programmes;
- the legislature, in enacting legislation such as the Social Assistance Act, the South African Schools Act and the Water Services Act;
- government departments and officials in all three spheres of government that are involved in administering the legislation;
- the Human Rights Commission and the Commission on Gender Equality, which have constitutional and statutory mandates to monitor and investigate human rights and educate people about their rights;
- the legal profession, in the types of cases they agree to take on and the arguments they advance in litigation;
- the courts, in giving judgments arising from socio-economic rights litigation;
- the private sector, in their commercial and business institutional practices;
- social movements that mobilise people around struggles for decent services and access to economic resources;
- human rights NGOs engaged in human rights advocacy, monitoring and litigation;
- the media, in reporting on poverty and human rights issues; and
- the academic community, in their research and commentaries in academic and popular journals.

Each of these actors has a distinct but interrelated role to play in relation to socio-economic rights. For example, if the executive and legislature adopted economic and social policies that were responsive to the needs of the poor, this would take some of the pressure off the courts in enforcing socio-economic rights.

The Constitution also envisages a system of mutual accountability and responsiveness. This is exemplified by the legislation that has been adopted to regulate private service providers and actors such as banks, medical aid schemes and private land owners. These laws seek to ensure that private institutions do not unfairly deprive people of access to rights such as housing, health care services and security of tenure.

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The participants are not limited to the borders of South Africa. There are also transnational actors that influence the interpretation and implementation of socio-economic rights. These include regional and international human rights treaty bodies such as the African Commission on Human and Peoples' Rights (and the African Court on Human and Peoples' Rights, when it becomes operational), the UN Committee on Economic, Social and Cultural Rights, international financial institutions such as the World Bank and IMF, and transnational corporations.

To paraphrase Lourens du Plessis, my colleague at the Stellenbosch University Law Faculty, these all form part of the "open community" of interpreters of the socio-economic rights in the Constitution (Du Plessis, 1996: 214).

The meanings which we assign to the socio-economic rights in the Constitution have evolved and will continue to evolve through all of the institutions and processes set out above. For example, one need only reflect on the role of the Treatment Action Campaign in developing the meaning of the health rights entrenched in sections 27 and 28(1)(c) through a combination of mobilisation and education of people living with HIV/AIDS, advocacy directed both at

organs of state and at pharmaceutical multinational corporations, and litigation in relation to access to treatment (Heywood, 2005).

The Socio-Economic Rights Project has also contributed to the debate about what interpretations of socio-economic rights will best promote the interests of the poor. It has done so through its *amicus curiae* interventions in the *Grootboom, TAC, Modderklip* and, most recently, *City of Johannesburg* cases, as well as through its research and publications and its advocacy in areas such as social security, housing, food and water rights.

The concept of democratic transformation developed above also has implications for the role of the courts in interpreting socio-economic rights. It implies that the courts should develop the procedural aspects of litigation such as *locus standi* and the rules governing access to courts so that litigation processes can be more accessible to disadvantaged communities.

In addition, it implies that they remain open to new and innovative interpretations of socio-economic rights that better protect the interests and values underpinning these rights. This may entail a measure of sacrifice of the ideals of stability and certainty. However, the benefit of embracing a transformative adjudication of socio-economic rights claims is that the courts become active participants in deepening democratic participation by marginalised communities in our transforming society.

A transformative mode of adjudication of socio-economic rights claims also requires the judiciary to explain as clearly and comprehensively as possible the reasons and values that inform their decision to adopt a more or less stringent standard of scrutiny or a particular remedial approach in socio-economic rights cases. There is also much scope for court judgments to be debated more in the media by academics and NGOs, and for training initiatives that seek to make the jurisprudence more accessible to disadvantaged communities.

The resource book of the Socio-Economic Rights Project is an important initiative in this regard. Making our emerging jurisprudence on socio-economic rights more transparent and accessible enables the political branches and the public as a whole to become more involved in deliberating the implications of socio-economic rights for the formulation and implementation of social policy in South Africa.

The challenges of making socio-economic rights meaningful

Academics and NGOs are part of the community involved in giving meaning to the socio-economic rights in the Constitution. This implies that they also have responsibilities to help make these rights meaningful to a transforming society. Four areas pose special challenges to these organisations of civil society in the current South African context.

Engaging in strategic litigation and advocacy

The first challenge relates to strategic engagement in socio-economic rights litigation and policy advocacy by NGOs and research institutions. Many of us are guilty of focusing predominantly and somewhat uncritically on the courts as a forum for enforcing socio-economic rights at the expense of other institutions and processes that also have important roles to play in realising these rights.

It is important to recognise that while the courts' adjudication of socio-economic rights claims can enhance democratic participation by the poor, they also have the potential to undermine the participatory, deliberative model of democratic transformation promoted by the Constitution. This occurs in a number of ways. The courts can adopt overly narrow interpretations of the relevant provisions and an extremely deferential approach to decision-making by the legislative and executive branches of government. By interpreting certain needs as falling outside the scope of protection of the relevant provisions or excluding certain groups from access to the rights, the judiciary can undermine popular struggles to have these needs and groups included in social policies and programmes.

At the other end of the spectrum, democratic participation can also be impoverished when courts are inappropriately activist and dominate the conversation concerning the meaning and implications of socio-economic rights.

This undermines the institutional role and responsibilities of the legislative and executive branches of government, and may have the consequence that these branches abdicate their primary role under the Constitution of giving effect to socio-economic rights by adopting social policies and programmes.

In their interpretations of socio-economic rights, courts can also end up inadvertently disempowering claimants by positioning them as passive beneficiaries of social goods and services, instead of agents entitled to participate actively in the defining and meeting of their needs.

Moreover, litigation can reinforce

the public/private dichotomy by imposing strong duties of accountability on public actors for meeting socio-economic rights claims, while imposing weak or non-existent standards of accountability on private institutions.

Finally, by providing access to a limited set of social benefits, litigation can deflect attention away from the more fundamental reforms required to the underlying institutions and structures that generate poverty and systemic social inequalities.

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It is also important to keep in mind that courts can only respond to the parties before them, and to the facts and arguments presented to them in particular cases. This is, paradoxically, both their strength and their weakness. Courts are well placed in socio-economic rights litigation to detect the impact of particular policies on individual claimants and the groups they represent, and to grant individualised remedies if appropriate. In this respect, they can signal to the legislature or executive that it has overlooked people's rights, or that its opposition to a particular claim violates their constitutional rights.

This enhances the democratic responsiveness that our Constitution cherishes.

On the other hand, courts are not well positioned to see the "bigger picture" – that there may be other groups whose needs are as urgent as or more urgent than those of the litigants before them, and that there may be a complex balancing exercise involved in fulfilling the rights of all in society when resources are limited.

Unless all the participants in socio-economic rights litigation are conscious of the institutional limitations of the courts and consider the possibility that some claims may be more effectively addressed through another forum, such as parliamentary advocacy, there will be the danger of an untimely or inappropriate resort to litigation, and judgments that impede rather than facilitate transformation.

On the other hand, without a full appreciation of the transformative potential of socio-economic rights adjudication, many opportunities to improve the lives of the poor and keep alive the constitutional vision of a more just society will be missed.

Bold and innovative interpretations

The second challenge concerns the willingness of academics and NGOs to be bold and innovative in their interpretation of socio-economic rights and in the policies and programmes they advocate to give effect to these rights. The appearance of inevitability and normality which court judgments have can blind us to the fact that other interpretations and responses that will better advance the transformative potential of socio-economic rights are possible.

As I have argued above, the legal community is only one part of the community of interpreters of the Constitution, and the interpretations generated by this rather enclosed, privileged community are inevitably limited and constrained.

As academics and civil society we should not be afraid of criticising court judgments or advocating different interpretations and responses. Even if these are not accepted in policy or legislative response or in jurisprudence, they deepen and enrich the debate around socio-economic rights and create the space for better and more inclusive interpretations in the future. For example, democratic culture and transformation in South Africa have been deepened through the arguments of civil society in favour of a basic income grant and of increased security of tenure for the landless and homeless, and by the research and arguments in favour of free basic education. Although there has not been full acceptance of the policy proposals of civil society, there have been initiatives in response to this advocacy that will expand access to socio-economic rights. These include:

- the mandate given to the Department of Social Development to investigate forms of social support for children between the ages of 14 and 18 who do not currently benefit from the child support grant;
- the Constitutional Court's decision in *Khosa & Mahlaule* extending access to social grants to permanent residents;
- land reform legislation such as the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act and the Extension of Security of Tenure Act, and the emergency housing assistance programme adopted in response to the *Grootboom* judgment; and

- the decision by the Ministry of Education to abolish school fees in the poorest 40% of schools.

This illustrates that transformation is not a sudden, quick-fix event, but an on-going process of struggle and engagement in the quest for a more just society.

Forging alliances

The third challenge relates to the responsibility of academics and NGOs to strive to build closer links with disadvantaged communities and groups. The danger of not doing so is that our research, advocacy and litigation in relation to socio-economic rights can end up being at best irrelevant, and at worst harmful, to the needs and interests of the poor. If transformation is about broadening and deepening participation in all spheres of our democracy, then civil society organisations must also take seriously their responsibility to allow the voices of those actually affected by poverty and marginalisation to be heard.

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The Constitutional Court has also recently highlighted, in *Doctors for Life International v The Speaker of the National Assembly and Others*, the importance and value of participation by marginalised groups in legislative processes:

> It [participatory democracy] enhances the dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legiti-macy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist (at par 115).

There are many examples of NGOs and academic research institutions working in partnership with community-based organisations around local struggles to improve access to water services, electricity, decent housing and social security. By engaging with the state in all three spheres of government in this manner, civil society plays a vital role in making socio-economic rights meaningful.

It is also worth recalling the critical role played by a broad-based alliance of NGOs, community-based organisations, trade unions, church groups and academics during the drafting of the 1996 Constitution. Unimaginatively named the "Ad Hoc Campaign for the Inclusion of Socio-Economic Rights in the Constitution", this alliance was instrumental in mobilising political and public support for the inclusion of socio-economic rights in the Constitution as fully justiciable rights. These are positive traditions that we should build on and deepen in the next ten years.

Responding to the challenges of globalisation

Finally, I wish to comment briefly on the challenges that globalisation poses to the realisation of socio-economic rights. Constitutional and international law rests on the foundation of nation-state responsibility for human rights violations. However, this does not reflect the realities of a globalised world. The power of states to adopt social programmes is increasingly constrained by the international financial institutions, global capital flows, multilateral and bilateral trading regimes, and the privatisation and outsourcing of many formerly public goods and services. The global economic environment can have a major impact on people's access to and enjoyment of socio-economic rights, but many of these operations are beyond the reach of international and constitutionally guaranteed human rights norms and institutions. Globalisation thus creates unprecedented challenges for NGOs and academics. New ways must be found to hold institutions operating globally and transnationally accountable for human rights violations.

In this context, civil society must seek ways to persuade the South African government to ratify the International Covenant on Economic, Social and Cultural Rights (1966). This is the only major human rights treaty we have not ratified to date.

Becoming a full state party to the Covenant is important if South Africa is to play a meaningful role as one of the key advocates for socio-economic rights internationally. It could also serve as a powerful counterweight to the erosion of socio-economic rights through international agreements relating to trade and investment, and serve to strengthen the domestic protection of these rights through policy, legislation and jurisprudence.

Conclusion

We would do well to remind ourselves of Joel Handler's observation about rights:

> Rights talk can change beliefs and expectations, but this may or may not lead to concrete change, or change in the desired direction. Rights consciousness has constitutive and transformative possibilities, but they are possibilities only (Handler, 1990: 968).

Whether the possibilities that socio-economic rights have created in South Africa can be translated into concrete social and economic policies and programmes that make a real difference to those for whom poverty is a lived reality depends on all of us.

Ten years of a transformative Constitution, ten years of socio-economic rights litigation and advocacy, and ten years of the Socio-Economic Rights Project of the Community Law Centre: these are all causes for celebration, but not for complacency.

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