

CREATING A TRANSFORMATIVE GOVERNANCE INDEX: MEASURING PROGRESS IN THE ATTAINMENT OF SOCIAL JUSTICE

Continued poverty, inequality and exclusion have led South Africans to doubt the adequacy of our Constitution, its institutions, its ability to realise social change and the legitimacy of the underlying constitutional settlement. HSRC research shows that while decisions by the Constitutional Court and Supreme Court of Appeal promote the realisation of socio-economic rights, these decisions are not always implemented. *Adv Gary Pienaar, Prof Narnia Bohler-Muller and Dr Michael Cosser* describe an HSRC project that aims to encourage a multi-stakeholder process to assemble a body of evidence in support of the development of a multi-year index to help spur social accountability and responsiveness.

Government has been criticised for its apparent inability to effect substantial change to the social and economic arrangements that characterised our apartheid past.

The economy has struggled to be more inclusive, to create employment and reduce poverty, and large companies have been singled out for blame as '(white) monopoly capital'.

Despite the constraints imposed on it by the constitutional requirement of a separation of powers between the branches of the state, the judicial system, as the protector and upholder of the Constitution, has also been accused of failing to ensure that government delivers on the socio-economic rights promises in the Bill of Rights.

The courts have responded that our Constitution envisages a democratically elected government led by an 'energetic' executive leading the debate on policy and legislative reform and making associated budget allocations.

An appropriate role for the courts is to monitor and to guide — except in extreme circumstances.

A recent example is the case of *Black Sash Trust v Minister of Social Development and Others* (Freedom Under Law NPC Intervening) (CCT48/17).

The Constitutional Court intervened to instruct and supervise government on the steps to timeously conclude a contractual agreement to ensure the continued payment by the South Africa Social Security Agency of social grants after 31 March 2018.

Evaluating landmark judgements

In 2013, the Department of Justice and Constitutional Development commissioned the HSRC and the University of Fort Hare to undertake the Constitutional Justice Project.

Researchers evaluated several landmark judgments by the Constitutional Court and the Supreme Court of Appeal and found that these decisions confirmed the Constitution's normative framework of values and principles, and also identified the vital contributions that each sector of society can make to a collective effort to realise social justice in our unequal country.

This collective effort, the Constitutional Justice Project envisaged, could take the form of a reconceptualised and more inclusive 'constitutional dialogue'.

The Constitution requires informed, participatory, responsive and accountable governance, and its Bill of Rights applies to relationships both between government and all people in South Africa as well as to relationships between individuals and private companies.

Creating an index

Against this backdrop, the HSRC in 2016 initiated a project to create a Transformative Governance Index (TGI). The TGI project encourages a multi-stakeholder process that uses mixed methodologies to identify and assemble a body of evidence in support of the development of a multi-year index that can help spur social accountability and responsiveness.

One of the key objectives of the project is to enable stakeholders to track efforts to address the overarching challenges of poverty, inequality and exclusion in our country.

The project will also identify, commission and undertake collaborative research to inform evidence-based policies that target the transformation of economic and social relationships. Such evidence will help to provide clear guidance regarding the 'minimum core' content of socio-economic rights intended to address fundamental human rights, needs and well-being.

Minimum core standards

While slow progress in achieving the Constitution's vision of a transformed society is one impetus for the project, another is the policy vacuum around the responsibility for developing minimum core standards.



The Constitutional Court of South Africa, Constitution Hill, Johannesburg.
Photo: Adziwili Nematandani

The Studies in Poverty and Inequality Institute (SPII), an independent nonprofit research organisation, has said that the Constitutional Court's reluctance to define the minimum core content of socio-economic rights had contributed to the absence of agreed norms and standards in government policy for making these rights real.

As a result, poor and vulnerable people living in South Africa do not know what their rights mean in practice.

Reporting to the United Nations

South Africa has ratified the International Covenant on Economic, Social and Cultural Rights and this ratification requires the country to report to the United Nations (UN) Committee on the progress made to realise socio-economic rights.

The UN requires that parties to the Covenant recognise the right of everyone to an adequate standard of living for themselves and their family, including adequate food, water and sanitation, housing and healthcare, and to the continuous improvement of living conditions.

To report on South Africa's progress in realising socio-economic rights, we need to establish the baseline we work from.

This is the minimum set of resources to which people are entitled to improve their living conditions and to free their potential.

The TGI is designed to help us grapple with these complex questions in a local context.

Developing an appropriate instrument

The TGI has adopted a framework comprising the following four domains:

Domain	Focus areas
Social accountability	transparency, citizen participation, inclusion
Social justice	human dignity and equality, human development and sustainability within a socio-economic rights framework
Rule of law	procedural and substantive respect for fundamental constitutional rights, access to justice implementation / enforcement of court orders
Effective institutions	representative, responsive, efficient, effective

Identifying the minimum core content of socio-economic rights

A practical example of what might constitute a constitutional minimum core content for the right to healthcare can be found in the National Health Insurance White Paper adopted in June 2017. It identifies, for example, a minimum level of service and more ambitious targets to be achieved over time.

The HSRC will start to identify available evidence of what currently is the minimum core content of each socio-economic right.

Using mixed methodologies, as indicated above, and a collaborative, facilitative and enabling approach, the HSRC will start to identify available evidence of what currently is the minimum core content of each socio-economic right and what it could or should be in five, ten and twenty years' time, given certain assumptions and scenarios.

We will engage in conversations with communities, officials, experts and civil society about their experiences, their expectations and their research about what is achievable through collaborative efforts.

We will scrutinise government policy, budgets and reports for current practice, and court decisions for any relevant guidance.

We will consider comparable good practice globally for examples of what is possible, and we will encourage energy and imagination to help realise the transformative impact of constitutional rights.

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