

Eliminating poverty and inequality by realising socio-economic rights: The role of the courts

South Africa's Constitution is one of the most progressive in the world and HSRC research shows that our court decisions genuinely promote the realisation of socio-economic rights. Unfortunately, these decisions are not always implemented, write *Prof. Narnia Bohler-Muller, Adv Gary Pienaar, Dr Michael Cosser and Dr Gerard Hagg.*

Twenty-three years after South Africa's political transition, general public opinion reflects a downturn as people have grown increasingly discontented with continuing deep socio-economic inequality. Despite a Constitution that is hailed as one of the most progressive globally and the implementation of numerous policy programmes and initiatives, many feel that not enough has been achieved to realise the promise of fundamental human rights and to reduce income inequality, poverty, human underdevelopment, and uneven access to services. At the same time, the country's democratic institutions appear increasingly fragile and disrespected.

The key role-players in South Africa's project to achieve the Constitution's vision of transformation are the three arms of the state – the executive, the legislature, and the judiciary. We also need to consider the role of other critical actors, such as ordinary citizens, communities, civil society, organised labour, academia, and the private sector.

The role of the courts

In 2013, the Department of Justice and Constitutional Development commissioned the HSRC and the University of Fort Hare to investigate the extent to which decisions of the Constitutional Court and Supreme Court of Appeal contributed to the realisation of socio-economic rights and promotion of equality.

The research, which included 43 court cases, found that in general court decisions genuinely promote the realisation of socio-economic rights. However, the implementation of these decisions varied widely. Even years after the conclusion of the cases, litigants in several instances did not find recourse. The research revealed several reasons for non-implementation. In many cases, state departments do not have, or claim not to have, the resources to fully implement court decisions.

The state's ability to get away with minimum implementation is strengthened by the fact that the courts have repeatedly declared themselves reluctant to define the minimum core content of socio-economic rights. They do not want to be perceived as breaching the boundaries of the separation of powers doctrine and stray too far into what they view as exclusively executive or legislative policymaking and budget allocation terrain.

Remedies for socio-economic rights litigation have avoided conferring individual rights on demand as a result of the pressures of limited state resources. Instead, they have defined the rights as collective and to be realised in a progressive manner through a government programme assessed by the courts as being reasonable.

Based on our research, we submit that the three arms of the state need to collaborate more deliberately to

achieve the transformative objectives of the Constitution.

Wary of dialogue

Within the context of separation of powers, some interesting ideas emerged during the research about the need for a more deliberate, concerted, inclusive and sustained "constitutional dialogue". Although there is wariness about whether this might interfere with the independence of the judiciary and compromise the doctrine of separation of powers, Chief Justice Mutunga of Kenya has illustrated how Kenyan constitutional development has benefited from such a process that is transparent and inclusive, thanks to political will:

"... our [Kenyan] Constitution provides very clearly that the three arms are robustly independent, they have independent mandates. But there is a provision for consultation, for dialogue, for interdependence under collaboration..."

Former justices interviewed for the Constitutional Justice Project support the idea of such a constitutional dialogue. One former Constitutional judge highlighted the need for engagement also to effectively implement and enforce court orders, noting that: "...in my view, courts are not in opposition to the executive and the legislature. I think [that] ... sometimes that dialogue creates a coordinated role for all of them to ensure [that], in that particular case, ... rights are implemented."



A redesigned constitutional dialogue would reduce the need for extensive and time-consuming litigation.

The TAC example

Two former justices of the Constitutional Court, Albie Sachs and Johann Kriegler echoed insights by Justice Zak Yacoob and others regarding a possible model that might be derived from the civil society campaign, litigation, and decision of the Constitutional Court in the Treatment Action Campaign (TAC) matter. Brought on by the absence of an effective policy response to the socio-economic devastation and human tragedy caused by the HIV/AIDS pandemic, a broad coalition emerged to develop the necessary state response.

Civil society, led by the TAC, undertook a nationwide education, awareness and advocacy campaign. It harnessed medical research that established the efficacy of anti-retroviral medication, medical professional support for a treatment rollout campaign including counselling and dispensing, as well as an offer by a pharmaceutical company to make available affordable antiretroviral drugs.

In addition, court evidence clearly spelled out the budgetary impact of the proposed course of action. This coalition thus ensured the provision

of adequate evidence and information to the Court, enabling it to take a decision to clearly direct government to implement a particular course of action. In this instance, the Court was able to identify the ‘minimum core’ content of the right to access to adequate healthcare. In this way, the Court was able to overcome its institutional limitations and its ordinarily deferential stance towards the executive and take an otherwise ‘polycentric’ decision. The ongoing beneficial socio-economic impact of this landmark decision is now a matter of public record.

Dialogues and recommendations

A redesigned constitutional dialogue would clarify the entire state’s shared responsibility to act with determination to realise South Africa’s full democratic dividend. Ideally, such a dialogue would reduce the need for extensive and time-consuming litigation that further delays meeting the desperate and pressing needs of the poor and vulnerable.

This kind of dialogue needs to be complemented by a broader dialogue involving the public, private and volunteer sectors, as well as academia.

Against the backdrop of the criticism levelled at the government for its apparent inability to effect substantial socio-economic change and at the private sector for failing to be more inclusive, create employment and reduce poverty, the HSRC in 2016 initiated a project to create a Transformative Governance Index. This project seeks to assemble a body of evidence to support 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 collectively track efforts to address the overarching challenges of poverty, inequality and exclusion in South Africa.

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