Access to JUSTICE fundamental to social change

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As the supreme law of the land, the Constitution of the Republic of South Africa provides both the framework and foundation for the transformation of state, law and society. The preamble of the Constitution and the socio-economic rights entrenched in the Bill of Rights - including health, housing, water, social assistance and education - reflect the characteristics of South Africa as a developmental state. At the centre of the transformation agenda is a need to establish a united, non-racial, non-sexist, democratic and prosperous society founded on human dignity, the achievement of equality and the advancement of human rights.

Despite interventions at all levels of government, inequality and poverty still persist. This challenge is summarised in three main concerns emerging from the National Planning Commission draft plan (Vision 2030) in that South Africa needs to grow its economy; reduce poverty; and improve the quality of lives of all South Africans.

It is within this broader context of socio-economic transformation that the Department of Justice and Constitutional Development's (DoJCD) discussion document entitled The Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State should be viewed.

The discussion document highlights the department's mandate for further research and investigation into the impact of judgments by the Constitutional Court (CC) and the Supreme Court of Appeal (SCA), including assessing the role of the CC in advancing transformation and promoting access to justice as a fundamental value in attaining social change.

In an opening address at the 2011 Access to Justice Conference former Chief Justice Ngcobo stated:

'We owe the people of South Africa a justice system that is just in the results that it delivers; that is fair to all litigants regardless of their station in life; that is inexpensive; that delivers results in the shortest possible time; that people who use it understand; that responds to their needs and that is effective'.

The Cabinet statement of 23 November 2011 announced the 'review of the courts' which, read together with the Minister's discussion document, provides for government's review of the judicial system and an assessment of its ultimate objectives and whether they have been achieved.

The DoJCD tender invitation of 23 March 2012 is narrower in focus and calls for research to assist with the assessment of the impact of the two apex courts (CC and SCA), particularly related to socio-economic rights within the context of the developmental state.

In a media statement released on 2 May 2012, the DoJCD emphasised that the research request related to the impact of court decisions - and the implementation of directives by the other branches of government - on South African society and did not constitute a review of the courts, which would not fall within the mandate of the department.

MEDIA AND PUBLIC COMMENTARY

Since the Cabinet announcement in November 2011 there has been much public debate related to the process and in response to the DoJCD discussion document. The reactions have been mixed. In a speech at UCT in March, Justice Zak Yacoob stated that there is 'absolutely nothing wrong with an evaluation of the work of the Constitutional Court or any other court. I would take results of evaluations of this kind extremely seriously'. He also cautioned against encouraging an approach that requires too much co-operation between the judiciary, the legislature and the executive. However, his cautionary note seems to be limited to discussions with the judiciary directly and outside a court hearing, 'in an effort to influence it'. One would assume that conversations can take place between the three branches of government as to how to attain constitutional objectives in order to secure a better life for all, but that there should be no attempts to influence the work of the judiciary in respect of specific cases.

Usually a severe critic, UCT academic Prof Pierre de Vos sees no problem with the terms of reference as set out by the department. His only concerns were related to the methodologies of measuring levels of 'service delivery' at national, provincial and local levels of government; as well as whether it would be practically possible to achieve the objectives.

In a similar vein, Steven Friedman has reiterated his stance that the reform agenda should be broader. His position, articulated at an Institute for Security Studies' seminar on the transformation of the judiciary on 26 April, remains that ' ... we ought to judge our judiciary and our justice system by its legitimacy among the citizenry, not by the peer review of the legal profession'. In order to increase public trust, the system should be more efficient, accessible and transparent. Friedman questions the notion that lawyers and the judiciary should be left alone to apply their knowledge unhindered as judges

make moral choices and these choices can be questioned.

Some commentators, among them Sandra Liebenberg from the Centre for Socio-Economic Rights and Justice (SERAJ), have remained critical. Liebenberg states that it is not appropriate for the legislative or executive branches of government to prescribe or even recommend to the court how it should exercise its responsibility to adjudicate disputes in terms of the Constitution.

Loammi Wolf strongly criticised the current attempt to 'judge the judiciary and emasculate the courts', stating that '[t]he mere idea that assessment of judgments of the highest courts in the country should be granted to a tenderer by way of a state contract is probably the ultimate slap in the face of the judiciary'. A better position in terms of post-1994 jurisprudence is that judges and courts are accountable to the people for the consequences of their decisions.

TRANSFORMATIVE CONSTITUTIONALISM

Transformative constitutionalism, a term developed by Prof Karl Klare, describes 'a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law'.

Despite misgivings about this research project, an endeavour to measure the impact of judgments is by no means unique or unusual. A World Bank report by Gauri and Brinks illustrates that law can be used to achieve social change through what they call the 'judicialisation' of policy-making.

The World Bank study analyses the results of healthcare and education litigation in five countries (South Africa, Brazil, Nigeria, India, and Indonesia) and shows that courts are generally pro-poor, with South African courts faring very well. Although South Africa only has a small number of cases, the effects of the cases have been felt widely through the modification of public policy as a result of court orders. South African judgments, through adopting a philosophy of transformative constitutionalism, reach a large number of the relevant policy area beneficiaries, including the poor.

Former Justice Pius Langa has described 'transformation' as 'a social and an economic revolution'. South Africans have to contend with unequal and insufficient access to housing, food, water, healthcare and electricity and it has become necessary to level the economic playing fields that were so drastically skewed by the apartheid system.

The establishment of an equal society and the provision of basic socio-economic rights to all is a necessary part of legal transformation. Langa argues that legal culture must change in order to facilitate the role of courts in creating a better life for all.

What is required is a change in legal mindset. In terms of the new value-oriented approach to interpretation, courts must ensure a just outcome of the legal process. As such, constitutional values are meant to serve a transformative role in the sense that the values, goals, and analytics of social change must inform the process of adjudication. Transformative constitutionalism places emphasis on attaining socio-economic justice and has been described as having a 'pro-poor' orientation that focuses on addressing inequalities within the post-apartheid context.

Measuring the socio-economic impact of court decisions would be a way of facilitating debate in order to engage in the ongoing conversation to improve the lives of all South Africans.

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A number of post-1994 cases have shown that some judges are reluctant to deviate from traditional legal reasoning and fail to be sensitive to the context, and potential and real consequences, of their judgments. Many judges tend to stick to the comfort of old methodologies (taught to them in law faculties) and this results in three problems:

1. A reluctance to interrogate the distributive consequences of private law rules on lived experiences;
2. The emergence of a neo-liberal strand in the application of the constitution; and
3. A lack of critical sharpness when it comes to issues related to the separation of powers.

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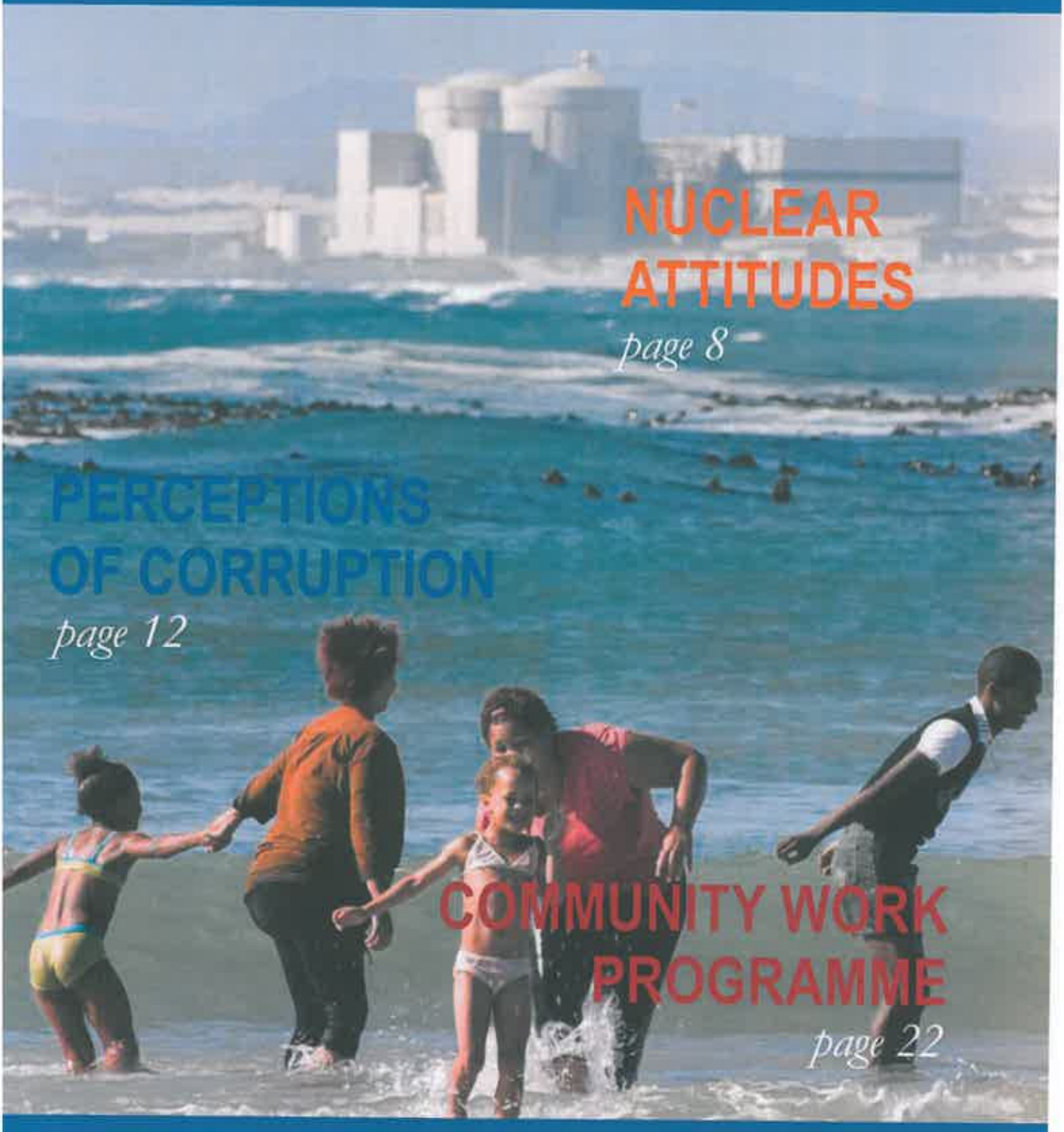

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