

FEATURE

The Judicial Contribution to Constitutional Obligations to Deliver Basic Services in South Africa

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This paper seeks to critically analyse the nexus between human rights (hereinafter referred to as NBHR) and access to justice (hereinafter referred to as ATJ) as a means to promote greater access to justice in socio-economic matters in South Africa.

South Africa has been rebuilt on the strong foundations of a democratic legal system to ensure that the human rights violations of the past are not repeated. The Bill of Rights chapter 2 of the Constitution is a cornerstone of democracy that affirms the democratic values of human dignity, equality, and freedom (Liebenberg 2017: 1). In view of the many years of oppression that preceded contemporary South Africa, we must acknowledge everyone's rights and ensure they are upheld by the judicial system (Deegan 1999: 31). South Africa's Constitution legally enforces the vision of integrating social, economic and cultural rights with civil and political rights. Not only does it allow for citizens to vote and enjoy freedom of expression and right to fair trial, but they are able to hold the government accountable for infringing on their rights and freedoms (Gumede 2015: 252).

Background

In the South African justice system, socio-economic rights are accorded such importance that the country's constitution is one of the few national constitutions that expressly recognise socio-economic rights as justiciable rights. Unfortunately, countless citizens cannot count on the legal system to advance their socio-economic rights, either because of the cost and length of litigation or because victims of violations do not understand their basic rights (Dixon 2007: 390). In turn, the issue of inadequate free, quality legal services to the poor and marginalised has become

a topic which is especially important to consider in the light of the key interrelated challenges of high unemployment, extreme poverty, and gross inequality.

The poor and vulnerable citizens, who need the most protection, encounter difficulty when enforcing their constitutional right to have access to justice in terms of section 34, they are always faced with challenges such as lack of understanding of their basic rights. As a result, such persons often suffer under discriminatory laws since they lack the legal means necessary to enforce laws that should protect them. Though the government of South Africa has committed itself to realising the rights in section 7 and

27 of the Constitution in terms of its developmental goals but in practice there is still plenty that need to be done.

The goal is to further consider possible approaches, challenges, and opportunities with regard to the nexus between human rights (NBHR) and access to justice (ATJ). This paper argues that emphasis should be placed on using improved quality access to free, quality legal assistance as a stepping stone to greater social justice in South Africa and this contribute and counter serious socio-economic ills to a certain level. Unless this comes to pass, a significant portion of the population will continue to suffer from negligible access to justice and be denied the constitutional rights promised to them at the advent of South Africa's democratic dispensation (Moyo 2015: 13).

Access to justice in South Africa

The purpose of ATJ was to redress injustice among all classes of South Africans after the end of apartheid. ATJ is implemented through the public and private sectors in the judicial system. Socio-economic rights must be considered in all types of legal matters because they are the fundamental basis of the Bill of Right and ensure that the judicial system is accountable for maintaining the basic standard of living for the citizens of South Africa (McQuoid-Mason 1999: 3, 8 & 11).

South African civil procedure is dictated by two principles of fundamental or natural justice, namely *audi et alteram partem* ('hear the other side') and *nemo iudex in causa* ('no one should be a judge in his or her own cause') (Van der Walt 2010: 1).

The principle of *audi et alteram partem* has its origin in the custom that one had one's grievances heard by a neutral party. The idea of the right of access to court, as envisaged by section 34 of the Constitution, does not simply mean the right to litigate but includes the right to have a matter heard by someone impartial. The judicial authority of the Republic of South Africa is vested in the courts (section 34 of the Constitution).



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It is also constitutionally mandated that the courts must remain independent and be subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice (see section 165 of the Constitution). The impartiality of the judiciary is upheld when it remains independent and accountable for its decisions – this gives embodiment to the principle of *nemo iudex in causa*.

We live, however, in a society in which there are great disparities in wealth. Chaskalson noted that South Africans experience high levels of unemployment, inadequate social security, and limited access to clean water and adequate health services (Sobramooney 1998: 45). He added that these conditions existed when the Constitution was adopted and that the commitment to address them by transforming our society into one in which there is human dignity, freedom and equality lies at the heart of our new constitutional order. Chaskalson concluded therefore that as long as these conditions continue to exist, that aspiration will have a hollow ring (Sobramooney 1998: 45).

Criminal litigation protects socio-economic rights as well. According to section 35(2)(e) of the Constitution, 'Everyone who is detained, including every sentenced prisoner, has a right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.' As regards criminal procedure, a person who has been arrested and detained has

rights that must be upheld in terms of the Constitution (Van der Walt 2010: 1).

As Jessie Duarte (2020) remarks, corruption is deadlier than the coronavirus. It denies the people of South Africa, especially the poor, their enjoyment of socio-economic rights: in other words, access to socio-economic rights is a major problem because corruption has depleted resources that are needed for the state to comply with its obligation to deliver basic services. This reflects poorly not only on the credibility of the government but on the Constitution itself. Van der Walt (2010: 1) argues that the government cannot be the only party that is responsible for delivering justice and that community involvement is also important.

In respect of the Constitution, the government merely has to provide 'access' to the judicial system; thus, providing functioning institutions would suffice. However, in regard to implementing socio-economic rights, 'access' involves more than just functioning institutions but requires that the judicial system define all rights with reference to citizens' social and economic contexts (Ramotsho 2011: 1). South Africa's judicial system has functioning dispute-resolution institutions and processes, but conditions may prohibit vast numbers of citizens from utilising the legal system (Van der Walt 2010: 1). These conditions include poverty, illiteracy, geographical location and lack of information. The government lacks the resources to make the legal system more accessible, which is why it has to be selective in interpretations of socio-economic rights, as is illustrated in the case of *Soobramoney* (1998).

Contextualising the nexus between human rights in South Africa

In case of *Soobramoney* (1998) the socio-economic right at issue was the right to health care envisaged in section 27 of the Constitution. Section 27(3) gives everyone the right not to be refused emergency medical treatment, while section 27(1)(a) entitles everyone the right to access to health-care services. The question the court had to consider was whether

Mr Soobramoney ought to receive dialysis treatment at a state hospital in accordance with the provisions of the Constitution. The KwaZulu-Natal Department of Health's policy was to limit access to dialysis to persons suffering from acute renal failure or to chronic renal failure patients awaiting a kidney transplant. This was necessary to ensure that those whose kidneys could be completely cured were given the best chance of eventually living without dialysis.

The court took cognizance of the fact that the state has a constitutional obligation within its available resources to provide health care. It held, however, that should such treatment be provided to Mr Soobramoney, it would also have to be provided to all other persons in a similar position to him and that the resources available to the hospital could not accommodate such a demand (Soobramoney 1998: 23).

The cost of providing renal dialysis twice a week to a single patient is R60, 000 per annum, and to expand the programme to cover everyone who requires renal dialysis would make substantial inroads into the health budget and prejudice other obligations that the state has to meet.

The court concluded that it had not been shown that the state's failure to provide renal dialysis facilities for all persons suffering from chronic renal failure amounted to a breach of its constitutional obligations as it was not a condition that called for emergency remedial treatment. It found instead that the decision to limit access to dialysis in these circumstances was rational and that 'a court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters'.

The approach taken by the court was indicative of its reluctance to delve into a substantive account of what entitlements fall within the scope of the right of access to health-care services and how these might impact on the allocative decisions taken by the state. Therefore, ultimately, to be justifiable, a decision to limit access to health care need only be 'rational' and taken honestly by a lawful authority.

Chaskalson P, as he was then known, concluded that mere 'access' to health care and treatment services would suffice. The courts thus take a restrictive interpretation when determining access

to socio-economic rights because of the lack of availability of resources and funding. Thus, everyone has a right to socio-economic rights in terms of the Constitution, but the judicial system indirectly infringes on access to these rights because South Africa does not possess the infrastructure to maintain such rights.

The Constitution provides for equal rights but rights may be limited in terms of section 36 of the Bill of Rights at the discretion of the court. According to section 36(1), 'The rights in the bill of rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking all factors into account.' Section 36 provides that courts have the jurisdiction to limit rights where this is deemed reasonable and justifiable, as happened in *Grootboom*.

In this case, the court stressed that the rights in the Bill of Rights are interrelated and mutually supporting. Human dignity, freedom and equality are denied to those without food, clothing or shelter. The court held that the state must also foster conditions that enable citizens to gain access to land on an equitable basis, though this does not oblige the state to go beyond its available resources or to realise these rights immediately. Nevertheless, the state must give effect to these rights, and in appropriate circumstances the court can and must enforce these obligations.

The court rejected the contention that the right to housing in section 26(1) of the Constitution had any interpretive content independently of the duty to take reasonable measures under section 26(2) of the Constitution. It found that the state's positive obligation under section 26 was primarily to adopt a reasonable policy, within its available resources, to ensure access to adequate housing over time.

It is clear from both of the cases mentioned above that emphasis is placed on the state's available resources, irrespective of whether resources have been budgeted or not to a specific programme. Such budgetary constraints are placed on the realisation of constitutional rights and obligations performed by the state which have been constitutionally validated and upheld by the constitutional court.

Apart from budgetary constraints that prevent socio-economic rights from being realised for all South African citizens, the flexibility of the reasonableness standard makes success in any socio-economic rights claims difficult to predict. The reasonableness standard was adopted by the court in *Grootboom* and has been adhered to ever since. The reasonable test focuses on the ability or appropriateness of government action to give effect to the socio-economic rights contained in the Constitution. However, the specific goods and services guaranteed by the rights themselves are not taken into account.

South Africa's infrastructure needs to be improved in order to eliminate the use of section 36 of the Bill of Rights. However, the country has not evolved enough to allow strict interpretation when implementing the Bill of Rights and is still combating the atrocities that occurred in the past. Strict interpretation creates animosity towards the Bill of Rights because citizens lack the knowledge to understand the social and economic factors that affect the implementation of these rights. In order for the Bill of Rights to have more than formal value in society, it must be supported by government action promoting constitutional values.

As such, the contribution of the paralegal cannot be overemphasised, as it has helped to bridge the gap between the poor and the legal system and improved their access to justice. Without paralegals, most of South Africa's poor would not have access to justice, as legal services are too expensive and beyond their reach.

Conclusion

It is clear that socio-economic rights are more complex when interpreting. Social and economic conditions impact on these types of rights, while the judicial system is not equipped to redress the issues caused by a lack of access to courts. South Africa has failed to achieve a more just redistribution of resources that would allow a broader concept of 'accesses to justice to prevail. The government is hence not held fully accountable for failing to deliver justice to the people who need it.

Access to justice cannot be understood merely as the ability to gain access to legal and state services; it must encompass social, economic and environmental justice. What is thus necessary is improved and better co-ordinated provision of free legal services dealing with socio-economic matters. Expanding the mandate of free legal services to poor South Africans would enhance services that are already available, such as Legal Aid South Africa. Their mandate must be expanded to focus on socio-economic disputes and thereby guarantee access to justice for all.

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