

Socio-Economic Rights Project, CLC, UWC

**The link between development, and social and
economic rights:
Are socio-economic rights developmental rights?**

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by Sibonile Khoza¹

Development and poverty eradication are some of the major human rights challenges facing South Africa today. These challenges lie at the heart of the South African Constitution². Committed to addressing these, the Constitution includes, within its framework, a wide range of economic, social and cultural rights along side civil and political rights, and affirms the democratic values of human dignity, equality and freedoms. These show a far-reaching commitment in creating a society based on social justice, in improving the quality of life of everyone, and in freeing the potential of its society.

In an attempt to respond to the topic, this paper examines the following key areas: Do constitutional values and the interdependence of rights have any basis for development? Do socio-economic rights and developmental rights entail similar things? How does the evolving jurisprudence on socio-economic rights affect development?

Development, constitutional values and the interdependence of rights

Development is viewed as a comprehensive economic, social, cultural and political process that aims to improve the well-being of communities and individuals³. Human development is defined as a process of enlarging a range of choices through expanding human functioning and capabilities⁴. The goal of development is to create an environment that enables people to exercise such choices thereby enjoying a long, healthy and creative life⁵. Central to this basic goal is that people should be empowered to actively participate to their development and benefit from such participation⁶.

Having such a cross cutting dimension, development suggests that there has to be a sustainable improvement of the life of the generation of today and lay a foundation for that of the future. It is a means and an outcome or process as well as end in itself. It is concerned with the process through which choices are enlarged and focuses on the outcomes thereof. People can exercise choices if they have access to the things that they value. For example, choices of those without access to basic education are limited in terms of employment, including self-employment and other forms of income generating mechanisms⁷. Not to mention those without roofs over their heads whose lives are excluded from the social, political and economic activities of the society. The list of limited or lack (thereof) of these choices is endless. Therefore, essential amenities of life that lay a foundation for these choices include health care, food, nutrition, water, adequate housing, education, participation, information, freedom of expression and so on, which are all found in the integrated human rights framework that our Constitution recognises and protects – especially socio-economic rights.

The underpinning motivation for development, just like human rights, is to establish a society founded on values of human dignity, equality and freedom. Development is concerned with ensuring access to resources, services and opportunities necessary for a decent standard of living⁸. Access to these necessities is essential for a person to lead a life with dignity⁹. It is untenable, for example, how those without sanitary infrastructure can enjoy their right to

privacy and dignity. Freedom of all kinds – economic, social, political, cultural – enables people to develop their potential, to make particular choices and participate in the activities that shape their lives.

Further, in a society characterised by deep inequalities resulting from historical neglect, deprivation and exclusions, access to these amenities of life should not only be equal, but should also address the urgent needs of those in desperate situations¹⁰. Thus where systemic inequalities exist, formal equality cannot result in the meaningful development of disadvantaged groups. Efforts aimed at achieving substantive equality would uplift those who live in poor and intolerable conditions. Therefore, eradicating poverty, providing access to basic services and attending to the urgent needs of those in desperate situations are integral approaches to the goal of achieving equality as much as they are essential indicators for development.

Clearly, basic necessities are as essential for these values as they are for development. In a landmark judgment of *Government of South Africa v Grootboom*¹¹, the Constitutional Court said: “there can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter”. (para 23). The dignity of the poor is shattered by multi-faceted poverty trends, including income poverty. As observed by the Talyor Committee Report, evidence shows that poor people have difficulties in accessing health care and primary education because they do not have the most basic income for transport, food and clothing and even to seek employment¹². It is recommended that the introduction of a basic income grant will enable the poor to access and take advantage of other government services and developmental programmes¹³.

Ultimately, poverty or inaccessibility of basic services limit people’s choices, perpetuate inequalities in society and deprive people of a dignified life. This succinctly observed in this illustration:

“Poverty and traditional roles lead to black women in rural areas being disadvantaged more than men and white women by lack of basic services. They spend long hours collecting water and fuel to meet households needs, making it difficult for them to find time to take advantage of employment and development opportunities. Because of their expected gender roles and extra burden of poverty, they do not participate equally in the political, economic and social structures of society”¹⁴. (p18)

Because development and poverty are multi-dimensional terms requiring an integrated social, economic, political and cultural approach, they largely depend on an integrated framework of a human rights approach. This conceptual framework of development and poverty finds support in and reinforces the interrelatedness, indivisibility and mutually supporting notion of rights. The fulfillment or violation of a right often amounts to the advancement or infringement of one or more rights. As illustrated in Liebenberg and Pillay (2000), to mention but a few examples, ‘without the right to food and health care services, your right to life as a poor person is threatened; and without the right to an education, it is difficult to effectively exercise your civil right to express an opinion and to present a petition’(p16). Clearly, piecemeal developmental approaches are not consistent with this conceptual understanding of development. In addition to an integrated economic, social, economic and political approach, a similar integrated human rights approach to development should be taken.

Socio-economic rights and developmental rights

As has been noted above, the Constitution recognises a wide range of socio-economic rights. These include the right of everyone to labour relations [s23], a healthy and sustainable environment [s24], land and property [s25(5) – (9)], to adequate housing and protection from arbitrary evictions [s26], to health care services and protection against refusal of emergency treatment and the right to education, [s27]¹⁵. In addition, separate and specific protections are provided to children¹⁶ and prisoner's¹⁷ socio-economic rights. Government has a duty to 'respect, protect, promote and fulfill'¹⁸ all the rights in the Bill of Rights. Some of these rights impose an obligation on the State to immediately realise¹⁹ them and some oblige government to take measures, within available resources, to realise the rights progressively (over time). These duties mean that government must formulate and implement reasonable legislative and policy (and programme) measures to, amongst other things,

- remove the barriers that make it difficult for people to access these rights;
- protect people against violations of their rights;
- create an 'enabling environment' to access; and
- assist people to meet their basic needs²⁰.

During the drafting process of the constitution, a coalition of civil society organisations, including human rights and development NGOs, church groups, trade unions, campaigned for the inclusion of socio-economic rights. They argued that these rights are essentially 'development rights'. It was also argued that these rights would assist the new democratic government in realising its reconstruction and development programme.²¹ Perceived in this manner, socio-economic rights mandate a fair distribution of resources and opportunities, prioritisation of and addressing the needs of the vulnerable and disadvantaged groups.

In essence, socio-economic rights aim to ensure that people have access to those resources, opportunities and services that would support their development. As already indicated above, in quantifying poverty and development, focus is not only on a wide range of infrastructural services such as access to water, to sanitation, to health care services, to electricity, to education, to adequate housing, to food and so on. But also on policies that give effect to these rights should be accompanied by a sustainability plan which aim to ensure that poor people are empowered to self-sustain these services. These would include income generating initiatives such as job creation and plans to improve services. All of these amenities are embodied in socio-economic rights' basket.

As shown above, lack of basic services and living in disempowering environments are barriers to development. They limit people's scope of participation in their own development since they spend more time striving for existence. Protecting these primarily, and many other rights such as 'process rights' – right to participation and information – are essential pillars of development. There is no reason why socio-economic rights should not be considered developmental rights.

Evolving jurisprudence of socio-economic rights and its implications on development

Socio-economic rights and development share a common denominator – they are both concerned with 'essential services, resources and opportunities for a adequate/decent standard

of living concomitant with a dignified human existence'. Socio-economic rights complement development by creating legal entitlements to these amenities. Through imposing obligations on the State to fulfill these rights, people are able to challenge government – through various means including litigation – to take reasonable measures within their available resources to progressively realise the right. It therefore follows that the interpretation of these rights should be driven by the developmental and transformative goals and values that our Constitution seeks to achieve.

On three occasions, in *Soobramoney*²², *Grootboom* and *TAC MTCT*²³ cases, the Constitutional Court had to decide on whether the government policies and programmes were in line with the constitutional duty to realise socio-economic rights. On the last two occasions, the Court found that the government's programmes were not reasonable and therefore fell short of its constitutional obligations because:

- the housing programme, in *Grootboom*, inter alia – failed to provide for those in desperate need of access to housing.
- the prevention of mother-to-child transmission programme, in *TAC MTCT*, amongst other things – confined access to Nevirapine to those pregnant women with HIV who had access to the pilot sites thus depriving a majority of women in similar conditions access to health care services.

Development and human rights activists have welcomed these judgments as vitally important for holding government accountable for the provisioning of basic services with the aim to restore human dignity²⁴. These judgments are significant indicators of the court's commitment to socio-economic rights, albeit, to the speedy improvements of the lives of the poor and most vulnerable groups. In *Grootboom*, the Court elaborated quite extensively on the meaning and the relationship between the right of everyone to adequate housing [s26] and children's right to shelter [s28(1) (C)]. Fundamental to this judgment is the Court laid down 'constitutional principles' that are instructive of whether the government policy or programme measure is reasonable and therefore in compliance with the constitutional duties. According to these principle, the policy [or programme or legislation] will pass the reasonable test if:

- it is a co-ordinated and comprehensive policy that is capable of facilitating the realisation of the right²⁵;
- it clearly allocates responsibilities and tasks to the different spheres of government, and ensure that human and financial resources are available²⁶;
- in addition to the short, medium and long term plan, it provides immediate relief for those in desperate need²⁷;
- it is reasonably formulated and implemented²⁸, and
- it progressively facilitates accessibility of the right both to a large number and to a wider range of people²⁹.

The Court also said that in determining reasonableness of the policy measure, the availability of resources will be an important factor³⁰. In *TAC MTCT* judgment where these principles were applied, the Court added another principle that the policy must also be transparent to its beneficiaries³¹. Without doubt these principles are a catalysts in determining progress in respect of the policies and programmes that aim to give effect not only to housing, but other socio-economic rights as well.

However, the Constitutional Court's strict focus on the overall availability of resources without inquiring into the adequacy of resources is not without skepticism. The Court argued that it does not have the institutional capacity to determine wide ranging factual and political enquiries as to how public revenues should be most effectively spent³². It is argued that the issue of resources is not only about whether they are available, but also whether efforts have been made to raise additional resources for socio-economic services. The Court's approach results in a marginal impact on the prioritisation and allocation of resources to meet basic services³³.

Finally, the Court's rejection of the minimum core obligation is disappointing for the poor and the most needy. It attenuates socio-economic rights into 'reasonable policy entitlements'. In simple terms this means that people cannot claim a right, but only a reasonable policy that aims to give effect to their rights. Unless a person falls within those in 'desperate need', which in itself does not exist without ambiguities, a person must wait until their rights are realised. While the Court's approach may have merits in some respects, the minimum core obligation would have an effect of speeding up the process of addressing the needs of the poor and those in desperate need. It would have a more pressing effect to the prioritisation and allocation of resources to meet these needs. This Court's rejection of the minimum core approach has negative effects on development.

FOOTNOTES

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² Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution)

³ Declaration on the Right of Development, Adopted by the General Assembly of the United Nations resolution 41/128 of 4 December 1986

⁴ Human Development Report 2000, United Nations Development Programme, p19

⁵ Ibid, p19

⁶ Declaration on the Right of Development, (see note (ii))

⁷ This statement does not ignore the fact that there are many matriculants and tertiary education graduates who have no job nor any income generating source.

⁸ Human Development Report (2000) p20

⁹ See Liebenberg and Pillay, *Socio-Economic Rights in South Africa, A Resource Book* (2000), p16

¹⁰ In the *Government of Republic of South Africa and others v Grootboom and others* 2000 (11) BCLR 1169 (CC), Yacoob J set the standard in holding that for a programmes to be

reasonable it must address the urgent needs of those in desperate situations. This holding is in line with the substantive equality that the Constitution seeks to achieve.

¹¹ See footonote (viii)

¹² The Report of the Committee of Inquiry into the Comprehensive Social Security System (the Report) chaired by Prof V. Taylor produced in May 2002, p56. Also see Liebenberg, Submission on the Report to the Department of Social Development available on www.communitylawcentre.org.za

¹³ See Liebenberg in footnote (xi) above. Rightly so, the advocates of the introduction of a Basic Income Grant (the BIG Coalition) argue that this grant approach serves a developmental goal of the poor communities and households.

¹⁴ Liebenberg and Pillay, *Socio-Economic Rights in South Africa, A Resource Book* (2000), p16

¹⁵ See Chapter 2, Bill of Rights, of the Constitution.

¹⁶ Section 28(1) (c)

¹⁷ Section 35(2) (e)

¹⁸ Section 7(2)

¹⁹ These relate to those that are unqualified by the obligation to progressively realise the right such as the right to basic education, labour rights, children's and prisoner's rights.

²⁰ Some of these obligations are outlined in Liebenberg and Pillay (2000), p27.

²¹ Petition to the Constitutional Assembly by the Ad Hoc Committee for the Campaign for Social and Economic Rights reproduced in Liebenberg and Pillay (2000) p19. Also see Govender (ed), *HRC Quarterly Review – Social and Economic Rights* (2000), p1

²² *Soombamoney v Minister of Health, KwaZulu Natal* (1997) (12) BLCR 1696 (C)

²³ *Minister of Health and Others v Treatment Action Campaign and others*, 2002 (10) BCLR 1033 (CC)

²⁴ Chetty, *supra*

²⁵ *Grootboom* para 40

²⁶ *Grootboom* para 39

²⁷ *Grootboom* para 44

²⁸ *Grootboom* para 42

²⁹ *Grootboom* para 45

³⁰ *Grootboom* para 46

³¹ *TAC MTCT*, para 123

³² *TAC MTCT*, para 37

³³ Liebenberg highlighted these in her paper entitled '*Evolving jurisprudence of socio-economic rights in South Africa* (unpublished as yet).