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CONSTITUTIONAL PANEL DISCUSSION

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Introduction: A crises of organisation and representation

In a midst of deep poverty and wide inequality in South Africa, we are facing the dual crises of organisation and representation. There are many factors which suggest a more serious weakening of the institutions of representative democracy – national, provincial, but particularly local government. The prevalence of service delivery protests throughout SA signal a growing distrust of institutions to deliver clean, accountable and responsive government as required by Constitution.¹ There is also a vast chasm between the incomes and lifestyles of the top echelons of corporate South Africa and the living conditions of workers and consumers.

This crisis extends to civil society with the Marikana Massacre showing up the widening gap between workers and the established trade union movement. As Jay Naidoo wrote in his open Letter to COSATU yesterday:

“The growing majority of this dispossessed youth cannot see anyone representing their interests... COSATU needs to ask the critical question: whether leaders have lost touch with the membership and the poorest in our country. But the fact is that there is a deep and growing mistrust of leaders in our country, and the expanding underclass feels it has no voice through legitimate formal structures. Violence becomes the only viable language.”²

Turning to the Constitution

In the absence of effective mechanisms for addressing their socio-economic needs and aspirations, it is understandable that impoverished communities and the civil society organisations also turn to the courts. The Constitution provides arguably the most favourable textual framework in the world for pursuing such claims with its ringing commitment to achieving social justice, improving the quality of life of all³; an

¹ See, for example, Centre for the Study of Violence and Reconciliation (CSVR) and Society, Work and Development Institute (SWOP) *The Smoke that Calls: Insurgent Citizenship, Collective Violence and the Struggle for a Place in the New South Africa* (2011).

² 4 September 2012. On-line at <http://dailymaverick.co.za/opinionista/2012-09-04-an-open-letter-to-cosatu>

³ Preamble.

equality clause designed to achieve equality of outcomes (substantive equality)⁴; provisions explicitly mandating land restitution and reform⁵; a generous panoply of socio-economic rights⁶; the application of rights not only against the State, but also against private parties that violate rights⁷; and the wide remedial powers of the Courts to strike down legislation and policy which is inconsistent with the Constitution and to grant just and equitable relief.⁸

Socio-economic rights and the courts: The retreat from substance

How have the courts responded to these claims? Although, in many respects the Courts has developed a significant and internationally admired body of jurisprudence on many of the abovementioned constitutional rights, they have also given clear signals that they are institutionally constrained and that there are limits to what can be expected from them. This is evident, for example, in the Court's consistent refusal to interpret the socio-economic rights in sections 26 and 27 to impose an obligation on the State to provide a minimum core level of the relevant socio-economic rights.⁹

Instead it has preferred to endorse a model of reasonableness review which allows the State a wide latitude to adopt socio-economic policies and programmes, interfering only when the relevant programmes fail to meet the key criteria of reasonableness developed by the Court in various landmark socio-economic cases. These benchmarks were succinctly summarised by Justice O'Regan in her judgment in the *Mazibuko* case, involving a challenge to the constitutionality of the City of Johannesburg's free basic water policy on the basis that it did not provide a sufficient quantity of water to meet basic needs in the circumstances in which members of the Phiri community in Soweto found themselves. Reasonableness review envisages judicial intervention in four primary situations:

- a) If government takes no steps to realise the rights, the courts will require government to take steps;
- b) Where a government programme in the sphere of socio-economic rights makes no provision for those in desperate need, the programme will be judged unreasonable.
- c) The adoption of policies with unreasonable limitations or exclusions (this illustrates the overlap between socio-economic rights and the right against

⁴ Section 9.

⁵ Section 25.

⁶ Sections 26, 27, 28(1)(c) and (d), 29.

⁷ Section 8(2) read with (3); Section 39(2).

⁸ Section 38; Section 172(1).

⁹ Refer to *Grootboom*, *TAC*, *Nokotyana* and *Mazibuko*.

unfair discrimination so powerfully in the case of *Khosa & Mahlauli v Minister of Social Development*).

- d) The failure by government to continually review its policies and adapt to changing socio-economic circumstances and needs. This latter duty is derived from the obligation in sections 26(2) and 27(2) “progressive realisation” of socio-economic rights.

In essence, the Court views its role as prodding government to respect human rights principles in policy-making processes, whilst taking care not to substitute the government’s substantive policy choices with those of the court. The latter strong forms of judicial intervention are reserved for cases of egregious violation of rights, or where the facts indicate that “many paths” to constitutionally compliant decision do not exist. The latter situation is perhaps well-demonstrated by the TAC case where government either provided the tested, internationally approved anti-retroviral drug, Nevirapine throughout the public health sector so to substantially reduce the risk of mother-to-child transmission of HIV in childbirth or millions of infants would die a painful death after contracting the HI-virus in childbirth. Even then the Court explicitly made provision in its mandatory orders against government to roll out Nevirapine in the public health sector for substituting Nevirapine with alternative but equally effective measures for preventing mother-to-child transmission should they become available.

For sure reasonableness review does offer tools for holding government to account and can be used effectively by civil society organisations in certain cases. However, the message is clear, the Court sees its role as a circumscribed one, and is reluctant to define the substantive content of the various socio-economic rights lest they intrude too far into the socio-economic policy-making terrain which is viewed as the primary responsibility of the elected institutions of government.

The turn to participatory democracy in constitutional jurisprudence

However, recent eviction jurisprudence has pointed to another possible constitutional avenue which is opening up in seeking redress for denials of socio-economic rights. This is the endorsement in various forms by the courts of citizen participation in the processes that give meaning to rights such as designing and implementing social programmes and legislation. To give a few examples, in the *Doctors for Life* case, the Constitutional Court required public participation in legislative processes holding that such participation promotes the ‘civic dignity’ of citizens, enhances government accountability, increases the legitimacy and effectiveness of legislation, and servicing as “a counterweight to secret lobbying and influence peddling.”

Where administrative action materially or adversely affects the rights or legitimate expectations of any person or the rights of the public, the Constitution read with the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') requires that procedural fairness must be observed.¹⁰ This general requires notice of the nature and purpose of the administrative action and a reasonable opportunity to make representations.¹¹ The observance of procedural fairness in the administration can be seen as a form of participatory democracy in which the voices of those affected by the decision can be heard and receive serious consideration in decision-making processes. An application of this principle in the context of municipal service delivery is the Constitutional Court judgment in *Joseph & Others v City of Johannesburg and Others* where the Court held that low-income tenants in an apartment block in Johannesburg were entitled to procedural fairness in terms of PAJA prior to the disconnection of the electricity supply to their landlord by City Power, a wholly owned utility of the City of Johannesburg. This duty to give a pre-termination notice to the tenants and to engage with them in good faith with a view to finding a sustainable solution¹² applied irrespective of the fact that no direct contractual relationship existed between the City and the tenants. It was derived from the public law right of citizens to receive basic municipal services from local authorities in terms of the Constitution.

This principle of procedural fairness was similarly affirmed in the context of the allocation of mining rights in an important recent judgment of the Constitutional Court in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd & Others*.¹³ In this case the Court reviewed and set aside a prospecting license granted by the Department to a private corporation on land belonging to the Bengwenyama Community on the grounds that the community were not accorded the basic rights of procedural fairness – notice, reasons and a hearing – prior to the award of the license. The Community's express interest in obtaining a prospecting license in respect of their land was effectively side-lined by the Department of Mineral Resources in favour of the private company despite the fact that the Act gives preference in considering applications for prospecting rights to historically disadvantaged communities and communities on communal land.

The principle of hearing the voices of those affected by decisions has even been extended to executive action in certain circumstances. Thus in *Albutt v Centre for the Study of Violence and Reconciliation*¹⁴ the Court held the victims of gross human

¹⁰ Section 33 of the Constitution read with sections 3 and 4 of PAJA.

¹¹ In the case of administrative action affecting the public, procedural fairness should ordinarily take the form of a public inquiry and/or a notice and comment procedures in terms of s 4 of PAJA.

¹² On the flexible, context-sensitive application by the Court of the requirements of procedural fairness in terms of s 3 of PAJA, see *Joseph*, paras 58 – 64.

¹³ 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC).

¹⁴ 2010(3) SA 293 (CC); 2010 (5) BCLR 391 (CC)

rights violations under apartheid were entitled to be afforded an opportunity to make representations in the special dispensation process initiated by former President Mbeki to deal with pardon applications from persons convicted for offences they claimed were politically motivated, but who did not participate in the TRC process. The concurring judgment of Froneman, Van der Westhuizen and Cameron JJ pointed out that participatory decision-making had deep roots in pre-colonial society and therefore found a special resonance under our constitutional dispensation.

The Court has also turned to participatory democracy in a number of socio-economic rights cases, primarily those involving the eviction of unlawful occupiers from their homes. Early in its jurisprudence on Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (“PIE”), the Constitutional Court held that a key factor in determining the fairness of an eviction is whether “proper discussions, and where appropriate, mediation have been attempted.”¹⁵ The Court held that in seeking to resolve the conflict between property and housing rights in eviction cases, ‘the procedural and substantive aspects of justice and equity cannot always be separated’.¹⁶

This evolved into the rich concept of meaningful engagement in the case of *Occupiers of Olivia Road v City of Johannesburg*.¹⁷ Here the Court affirmed that in situations where people face homelessness due to an eviction, public authorities should “engage meaningfully” with the affected occupiers with a view to finding humane and pragmatic solutions to their dilemma. In this case, the occupiers of a number of so-called ‘bad buildings’ in the Johannesburg inner city faced eviction as a result of ‘notices to vacate’ issued by the City in terms of the National Building Regulations and Standards Act 103 of 1977 on the grounds that the building constituted a threat to their health and safety. The occupiers faced eviction with nowhere to go and the prospect of losing their base in the inner city which were central their livelihoods. A number of the key features of meaningful engagement in the context of an eviction can be distilled from the judgment, including serious consideration of the alternative accommodation needs of the particular occupiers.¹⁸ The Court emphasised that the nature and extent of the engagement must depend on the context. Thus “the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement.”¹⁹ In a small municipality where the numbers of people affected by evictions are much smaller, *ad hoc* engagement may

¹⁵ *Port Elizabeth Municipality*, para 43.

¹⁶ *Port Elizabeth Municipality*, para 39.

¹⁷ 2008(3) SA 208, 2008 (5) BCLR 475 (CC).

¹⁸ *Olivia Road* para 18.

¹⁹ *Olivia Road* para 19.

be appropriate.²⁰ The Court summarised the purposes and requirements of meaningful engagement as follows:

Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.²¹

Proactive solutions must be pursued and civil society organisations have an important role to play in facilitating the engagement process.²² Finally, the engagement process must be characterised by transparency as secrecy would be counter-productive to the process of engagement.²³

The limits of engagement

Meaningful engagement has subsequently been invoked in a number of other eviction cases such as *Residents of Joe Slovo v Thubelisha Homes*²⁴ and in *Abahlali Basemjondolo Movement SA v Premier of the Province of KwaZulu-Natal*.²⁵ Although it has rich promise in facilitating poor people's participation in socio-economic decision-making, it is also not a panacea in terms of a constitutional response to poverty. Thus in a situation of profound power-imbalances in public and private sectors, the danger exists that poor people will simply end up negotiating away their constitutional rights. Many cases will not involve judicial oversight and supervision of the fairness of the engagement process. In addition, the reality is that many communities and groups will be without strong civil society and legal support when they interact with relevant authorities.

Second, we still need the courts to give us substantive markers or benchmarks regarding what the obligations of public and private sector actors are in relation to

²⁰ *Olivia Road* para 19.

²¹ *Olivia Road* para 15.

²² *Olivia Road* para 20.

²³ *Olivia Road* para 21. This gives expression to transparency as a relevant criterion in the assessment of reasonable action by the State in realising socio-economic rights. See *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) para 123.

²⁴ 2009 (9) BCLR 847 (CC).

²⁵ 2010 (2) BCLR 99 (CC).

socio-economic rights. In the absence of this substantive guidance there is no guarantee that meaningful engagement will be consistent or promote constitutional goals. In this regard, I believe that the courts can play a more active role in developing the content of socio-economic rights so we have clear normative parameters for guiding policy-making processes. These guidelines are necessary if constitutional rights and values are to serve as our lodestar in holding government to account.

Finally, meaningful engagement can easily descend into a technocratic, “top-down”, “tick-box” process of consultation, which arguably characterise a number of public participation processes at local government level in SA. In the *Joe Slovo* case, the Court itself endorsed a formalistic process of engagement characterised by Justice Sachs in his separate concurring judgment as involving “the frequent employment of a top-down approach where the purpose of reporting back to the community was seen as being to pass on information about decisions already taken rather than to involve the residents as partners in the process of decision-making itself.”²⁶

Concluding reflections

So where does this leave us in the constitutional quest to support the various struggles against poverty and inequality in South Africa? There is much work to be done in developing the normative content of socio-economic rights and in defining context-sensitive benchmarks and indicators for designing policies and monitoring their implementation. Emerging rights-based struggles for quality education in South Africa is a promising avenue for developing the content of a constitutionally entrenched socio-economic right. The mechanisms of procedural fairness and meaningful engagement (despite all their limitations) also have rich potential to give meaning to rights from the bottom-up. There is much fruitful work to be done in designing participatory mechanisms within all spheres of government as well as the private sector that affords marginalised communities a meaningful voice in decisions that affect their socio-economic well-being.

This brings me full-circle to the twin crises of organisation and representation I briefly alluded to in my introductory remarks. Without honest, capable institutions of state genuinely committed to improving the lives of the poor; without a corporate sector which views its responsibilities as extending beyond a narrow focus on profit maximisation to improving the lives of the workers and consumers on whom its business depends; and without effective organisations of civil society able to support and represent the interests of marginalised groups, both the abovementioned constitutional projects I have outlined are doomed to ultimate failure. At the end of

²⁶ *Joe Slovo I*, para 378 (per Sachs J, footnotes omitted).

the day the survival of our constitutional democracy depends on building capable, accountable and responsive institutions and organisations, and in this respect we are failing our founding political and legal pact as a nation.