The Normative Context for Evictions and Primary Drivers for Meaningful Engagements

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ABSTRACT

In Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg 2008(3) SA 208 (CC), the Constitutional Court held that no court should uphold an application for eviction without "meaningful engagement". This jurisprudential doctrine clearly foresees a change in the approach and practice of the involvement of unlawful occupiers during eviction. This article reflects on the normative context for evictions in South Africa and the implications of transformative constitutionalism on evictions. Six principal drivers are identified on which the notion of meaningful engagement is predicated. The article argues that consideration of the six principal drivers for meaningful engagement is central to a better conceptualisation and application of the substantive safeguards of meaningful engagement, which include equitable participation. Improved application of the substantive safeguards by the courts will accord better protection and empower unlawful occupiers to be part of the decision-making process during evictions, thereby reversing the disempowering trajectory of apartheid-style evictions.

Keywords: meaningful engagement, socio-economic rights, evictions, transformative constitutionalism

INTRODUCTION

One of the central features of urban apartheid in South Africa was the eviction of millions of black people from their homes without their involvement in determining the conditions of such evictions. Within urban areas, freehold settlements were destroyed, and black people were forced to move to townships on the periphery of the largely white cities and towns. This was done through coercive means, such as destroying property, through arrests, and by deportations under the pass law system. The experience of eviction was common at one time to all informal settlement communities in South Africa and legislation was used to disempower the occupiers (then called squatters). From the early 1970s, these communities were consistently engaged in struggles against attempted removals, threats of demolition, and attacks.

The Constitution of the Republic of South Africa, 1993 (the interim Constitution) and the Constitution of the Republic of South Africa, 1996 (the Constitution) marked a fundamental break with the apartheid-style evictions that disempowered the occupiers of informal settlements. The hallmark of the democratic dispensation is the empowerment of the unlawful occupiers through a human right's culture that includes a right that precludes unlawful evictions. In its early jurisprudence on section 26 of the Constitution in Government of the Republic of South Africa v Grootboom and Others 2001 (1) SA 46 (CC) and Port Elizabeth Municipality v Various Occupiers 2005 (1) SA (CC), the Constitutional Court (the ConCourt) established that the right against unlawful eviction is not a stand-alone right as it is guaranteed under the right to adequate housing in section 26(1) of the Constitution. The right of access to adequate housing and the right against unlawful eviction are categorised as socio-economic rights and place an obligation on the state and private individuals to refrain from any activities that render people homeless. The inclusion of these rights in the Constitution attracted an extensive debate on their nature and justiciability.

In adjudicating the right against unlawful evictions, the ConCourt in Occupiers of 51 Olivia Road, Berea

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Township and 197 Main Street, Johannesburg v City of Johannesburg 2008(3) SA 208 (CC), para. 77 made an injunction that no court should issue an order for eviction if the eviction application is not preceded by "meaningful engagement" (ME) of all parties involved. Since then, there has been some conceptual dissonance and varied application of ME in eviction applications. This is partly due to the inadequate conceptualisation of this jurisprudential doctrine.

To elucidate a deeper meaning of ME, this article briefly reflects on the current debates on the justiciability of socio-economic rights, examines the post-1994 normative context for evictions in South Africa, and critically evaluates the implications of transformative constitutionalism on ME. In so doing, the article identifies primary drivers underpinning a more substantive understanding of ME.

THE INCLUSION AND IMPACT OF SOCIO-ECONOMIC RIGHTS

Despite the dominance of the pro-justiciability views in the literature on socio-economic rights thus far, it is important for this article to address some central debates on the topic without running the risk of regurgitating old arguments. The logic underlying this approach can be found in Phillipe's (1998) argument that the content of socio-economic rights, including the right against unlawful eviction, is dependent on how these rights are defined and implemented. Socio-economic rights are justiciable in South Africa but concerns about the capacity of the courts to deliver judgements on these rights has an ongoing impact on how judges approach their task to give full effect to this generation of rights. Accordingly, this article provides a brief exposition on the background to the adoption of socio-economic rights in the Constitution and some key debates on the justiciability and nature of socio-economic rights.

The adoption of a constitution that entrenched a Bill of Rights with all categories of human rights reinvigorated the debate on the nature of socio-economic rights, the capacity of the courts to enforce such rights, and whether this category of rights are rights at all. However, Christiansen (2007, p. 38) views the inclusion of socio-economic rights as a revolutionary and heroic stance. The primary concern of this article is the application of the notion of ME in the adjudication of eviction cases. As mentioned above, the right to housing and its ancillary right against unlawful eviction are categorised as second-generation rights, and that renders it necessary for this article to briefly reflect on the prevailing debate about the judicial review and enforcement of this generation of rights. Three specific debates on socio-economic rights will be briefly dealt with here: the actual inclusion of socio-economic rights in the Constitution; their justiciability; and their impact on addressing socio-economic injustice in the country.

The 1996 Constitution marked a significant shift from parliamentary supremacy to constitutional supremacy that is embedded in a strong human rights tradition. Roux (2013, p. 123) asserts that the Bill of Rights in the Constitution binds all organs of the state, private persons, and legal entities. To address the unjust apartheid past, the Bill of Rights contains a right to equality that explicitly encapsulates a substantive model that seeks to address the unequal impact of law and conduct. This substantive equality may be applied against the state and private parties (Pillay, 2011). The Bill of Rights contains both civil and political rights, commonly known as first-generation rights, and socio-economic rights, commonly known as second-generation rights. Of importance for this article is the fact that section 26 of the Constitution contains a judicially enforceable right of access to adequate housing, which includes the right against unlawful eviction.

During the different phases of the drafting of both the interim and final Constitutions, the inclusion of civil and political rights in the Constitution was never a contentious matter. However, there was significant and extensive debate among legal scholars, lawyers, and drafters about the constitutional status of socio-economic rights. The South African Law Commission (SALC) opposed the inclusion of socio-economic rights on the grounds that they are not fundamental rights and did not give rise to enforceable legal obligations (SALC, 1991, p. 13) The governing party, the African National Congress (ANC), argued against this position and held that the inclusion of socio-economic rights would reflect South Africa's "new vision and aspiration for the future" (ANC, 1994, p. 27). While recognising that these rights posed certain difficulties in enforcement, the ANC argued that these difficulties could be overcome and that the important point was to place the state under a positive obligation to "redress the imbalances of the past" (ANC, 1994, p. 31).

At the same time, the Technical Committee responsible for advising the CA on socio-economic rights held the view that there were certain advantages to be derived from following the ICESCR formulation in the inclusion of socio-economic rights in the Constitution. On the one hand, adopting the ICESCR formulation would help to harmonise South Africa's international and domestic obligations. On the other hand, the UN General Comments would provide a ready source of guidance on the interpretation of socio-economic rights. The advice of the Technical Committee strengthened the position of the ANC, which resulted in sections 25 and 26 of the Constitution. These sections have a close resemblance to Articles 2.1 and 11.1 of the ICESCR, although they differ from the ICESCR in several respects. First, the rights themselves are qualified by the addition of the words "have access to", and secondly, the states' duties in respect of the rights are qualified by the omission of the word "maximum" from the phrase "to the maximum of its available resources", and by the rephrasing of the formulation "all appropriate means" to read "reasonable legislative and other measures".

The text of the draft 1996 Constitution was reviewed by the ConCourt in Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (1997) (2) SA 97 (CC). In this case, there were only three organisations that challenged the inclusion of socio-economic rights in the Constitution. This offered the ConCourt a unique opportunity to evaluate the various legal arguments against the inclusion and adjudication of socio-economic rights. The first objection raised was that socio-economic rights were not universally accepted, as required by Constitutional Principle II. The ConCourt dismissed this argument as it had already ruled on the property clause.

The second objection was that the enforcement of socio-economic rights would inevitably infringe on the separation of powers. In dismissing this objection, the ConCourt held that there was emerging academic consensus that there was really no difference between the first- and second-generation rights in this respect. The enforcement of both generations of rights would have budgetary implications. Accordingly, the ConCourt held that there was no basis to object to socio-economic rights once the court's power to review civil and political rights had been conceded. The final objection was that socio-economic rights were not justiciable. This objection was also dismissed as the ConCourt held that socio-economic rights are, to some extent, justiciable and at the very minimum, socio-economic rights can be negatively protected from improper invasion.

The way the ConCourt in The First Certification dealt with the three objections to the inclusion of socio-economic rights serves as authority to justify the constitutional inclusion of justiciable socio-economic rights. Roux (2013) asserts that the inclusion of socio-economic rights in the 1996 Constitution was directly linked to the struggle to eradicate the socio-economic legacy of apartheid. Mubangizi (2007, p. 89) agrees with Roux and further contends that the inclusion of these rights had to be seen within the unique history of South Africa and the context of widespread poverty occasioned by an historically unfair and unjust political and socio-economic system. Similarly, Durojaye (2008, p. 556) observes that the recognition of socio-economic rights renders the South African Constitution "very progressive".

The courts in South Africa have adopted an integrative approach to the interpretation of human rights and rejected the post-World War II rigid binary conceptualisation of rights, which is predicated on immediate/progressive realisation, positive/negative obligation, or resource high intensive/low intensive. The commitment to an integrative approach is repeatedly demonstrated by the courts in many judgements. For instance, in The First Certification, Grootboom and Motswagae and Others v Rustenburg Municipality and Another 2013 (2) SA 613 (CC), the Court held that the right of access to adequate housing includes, at a minimum level, the negative obligation on the state not to embark on any activities that will render people homeless or disrupt their peaceful and undisturbed possession or occupation. Accordingly, the question regarding socio-economic rights in South Africa is not whether these rights are justiciable or not, but how best to go about achieving the transformative potential of the Constitution in the enforcement of this category of rights.

THE NORMATIVE CONTEXT OF THE RIGHT AGAINST UNLAWFUL EVICTIONS

As explained above, this section will specifically reflect on aspects of the Constitution, legislation, and international norms that shows the importance of substantive safeguards of meaningful engagement.

Access to adequate housing as a fundamental right

The right of access to adequate housing is entrenched in the Constitution. The increased litigation on the right of access to housing led to the development of a progressive housing and eviction jurisprudence. Wilson (2009, p. 274) describes this legal framework as the "new normality in property law". He further argues that the new normality requires that evictions from immovable property, which might lead to homelessness, must be treated differently from all other litigation for repossession of property (Wilson, 2009, p. 288).

Section 26 of the Constitution and the Prevention of Illegal Eviction from Unlawful Occupation of Land Act, 1998 (known as PIE) provide a legal framework that entails a number of significant substantive and procedural safeguards for unlawful occupiers. According to Wilson (2009, p. 288), at the heart of this new normality is the notion that land should be viewed as a resource, which may be possessed or occupied without ownership. The possession or occupation would result in a right of access to adequate housing, which is protected in the Constitution, and that deprivation of such possession or occupation could constitute an incursion on the right to adequate housing.

The new normality also provides a framework that seeks to reconcile the opposing legal right of ownership and the rights of occupiers to adequate housing, which includes the right against unlawful evictions. This resulted in a shift away from the common law jurisprudence that revered the property right as "sacrosanct and untouchable" (SERI, 2013, p. 3). Accordingly, this section examines the scope of the right of access to adequate housing and the implications of PIE.

The right of access to adequate housing is unsurprisingly the most frequently litigated right in the context of South Africa's highly unequal society in which a large proportion of the population has no or limited access to adequate housing. In Grootboom, the ConCourt contrasted the formulation of the right in the Constitution with that of Article 11(1) of the ICESCR and concluded that the formulation in section 26 of the Constitution is distinct. Section 26(1) of the Constitution provides for the "right to have access to adequate housing" and Article 11(1) provides for the "right to adequate housing". The Court considered this difference to be highly significant as the drafters of the Constitution were fully aware of the ICESCR phrasing at the time of drafting the Constitution and they opted to include "access to" (SERI, 2013, p. 4).

In PE Municipality para. 27, the ConCourt held that "access to" reflects the intention that the right amounted to "more than bricks and mortar" and includes acquisition of land and the provision of municipal services such as water, energy, and sanitation. This interpretation was fully aligned with the view of the United Nations Committee on Economic, Social and Cultural Rights (CESCR) that the right should not be interpreted in a narrow and restrictive sense. In General Comment No. 4 para. 7, CESCR adopted the interpretation of "adequate housing" propounded by the Commission on Human Settlements and the Global Strategy for Shelter, which have stated that adequate housing means "adequate privacy, adequate space, adequate security, adequate lighting, adequate basic infrastructure, and adequate location with regard to work and basic facilities – all at a reasonable cost".

Section 26(2) of the Constitution imposes a positive obligation on the state to "adopt reasonable legislative and other measures to achieve the progressive realisation" of the section 26(1) right. In Grootboom para. 37, the ConCourt indicated that section 26(1) is not independent of section 26(2) and that the two subsections must always be read together. The section 26(2) formulation of "reasonable legislative or other measures" implies that there should be some standard against which government programmes are measured. Derived directly from section 26(2) formulation was the model of reasonableness.

The core enquiry is whether the measures taken by the government are reasonable in facilitating the realisation of the socio-economic right in question. Liebenberg (2010, p. 151) argues that this approach is designed to give the government a margin of discretion relating to the specific policy choices adopted to give effect to socio-economic rights. The Court indicated that it would assess the reasonableness of the government's conduct in the light of the social, economic, and historical context, and that consideration would be given to the capacity of the institutions responsible for implementing the programme.

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Section 26(3) enshrines the right against unlawful eviction and imposes both negative and positive obligations on the state and private individuals. The negative obligation on the state or private individuals is to desist from preventing or impairing the right of access to adequate housing. The positive obligation on the state is to ensure that it enacts and enforces laws that would prevent unlawful evictions, demolition of people's homes, or arbitrary evictions. This positive obligation on the state must be viewed within the historical context of apartheid-style evictions and demolitions that degraded and disempowered squatters in the country. This further required the state to develop a legal framework on evictions and demolitions that sought to reach a fine balance between the common law interest of the owners and the precarious position of the unlawful occupiers. In response to this positive obligation, PIE was enacted to give effect to section 26(3) of the Constitution and, as a result, PIE constitutes the primary source of protection for unlawful occupiers of land against the abuse of power and arbitrary evictions.

Prevention of unlawful evictions in South Africa

Section 26(3) of the Constitution, as well as PIE, provide several essential procedural protections to unlawful occupiers who face eviction. As the basic point of departure, section 26(3) provides that no one may be evicted from their home or have their home demolished without a court order authorising such eviction after having due regard to "all the relevant circumstances". In sections 6 and 7, PIE expands on this requirement by stating that a court may not grant an eviction order unless it would be "just and equitable to do so, after considering all the relevant circumstances".

The objectives of PIE are to prohibit unlawful evictions, to further provide procedures for the eviction of unlawful occupiers, and to repeal PISA and other obsolete apartheid laws. From these objectives it is easy to establish that PIE seeks to prevent both illegal evictions and unlawful occupations. PIE also decriminalises unlawful occupation and provides a framework to operationalise section 26(3) of the Constitution to restore rights that were undermined during the apartheid-era evictions.

Van der Walt (2005, p. 327) is of the view that since PIE only applies to unlawful occupiers, with no right of occupation, the purpose of PIE is limited to stabilising existing unlawful occupation of land by giving a guarantee that evictions may only take place when they are just and equitable. This marked a significant departure from the common law position, where the supreme right of ownership entitled the owner to demand eviction regardless of the contextual or personal circumstances of the unlawful occupiers. In the new constitutional dispensation as reinforced by PIE, ownership is no longer a supreme right that automatically trumps the housing interest of the unlawful occupier. Instead, the eviction enquiry is subjected to substantive fairness and strict due process requirements (Van der Walt, 2005, p. 419).

Apartheid PISA strengthened common law remedies for landowners, while disempowering occupiers by removing the common law protection at their disposal, such as the mandament van spolie remedy. PIE effectively reverses this position, replacing the common law remedies with strong procedural and substantive safeguards. As contained in sections 2 and 7(1) of PIE, these include extra-judicial mediation of the dispute between unlawful occupiers and landowners by persons with expertise in dispute resolution. Muller (2011, p. 105) argues that these safety measures establish threshold requirements for eviction in accordance with the principles laid down in section 26(3) of the Constitution.

Section 26 of the Constitution marked a decisive break with the past. The legal framework on evictions experienced a dramatic paradigm shift from a position where eviction orders were issued without any regard to the personal circumstances of the unlawful occupiers or the exceptional difficulties in respect of their livelihoods that may arise because of the evictions. At the forefront of the enquiry whether to issue an eviction order is the requirement of justice and equity. What would be just and equitable is largely determined by the circumstances of each case. The new legal framework gives the courts wide discretion as opposed to the pre-1994 dispensation when courts were expected to apply the law to the facts of the case in a mechanical manner without any further enquiry as to the needs of the occupiers.

The PIE requirement that evictions must be just and equitable is at the heart of the substantive safeguard provided by PIE to unlawful occupiers. This requires careful consideration of the rights and needs of the unlawful

occupiers. Courts are further required to ascertain whether land or alternative accommodation is available or can reasonably be made available to the unlawful occupiers upon their eviction. Courts are also required to consider whether the local authorities with jurisdiction or the Member of the Executive Council (MEC) responsible for housing made any mediation attempts to resolve the dispute between the unlawful occupiers and the owners. These substantive safeguards arguably represent the most significant development in the law of eviction.

The international norms on evictions

Section 39(1) of the Constitution obliges the courts to interpret the Bill of Rights to promote the values that underlie an open and democratic society and also requires courts to take international law and foreign law into account in interpreting the rights. Furthermore, section 233 of the Constitution requires the courts to interpret legislation as far as possible to be consistent with international law. In S v Makwanyane 1995 (6) BCLR 665, which was the first ConCourt judgement, the ConCourt observed that international law provides a framework within which the rights in the Constitution can be evaluated and understood. Interestingly, the ConCourt held that public international law would include non-binding, as well as binding law, both of which can be utilised as instruments of interpretation (S v Makwanyane 1995, para. 35). The South African courts do not fail to refer to international law and standards when interpreting the right to adequate housing in eviction cases.

Chenwi (2008, p. 5) asserts that Parliament and government are also obliged to incorporate these international standards into their domestic policies relevant to eviction. The right to adequate housing is included in several international human rights instruments, some of which South Africa has signed or ratified. Chenwi (2008, p. 6) asserts that international instruments treat the right against unlawful eviction either as a "derivative right or as an integral component of the right to adequate housing". As a result, various bodies have developed detailed standards on eviction. This article will briefly reflect on the relevant General Comments issued by the CESCR; the resolutions on eviction by the United Nations Commission on Human Rights (UNCHR); the Basic Principles and Guidelines issued by the UN Special Rapporteur (2007) on Adequate Housing; and the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (African Commission Principles and Guidelines) issued by the African Commission on Human and Peoples' Rights (African Commission).

CESCR

About the right to adequate housing during evictions, the CESCR issued two crucial interpretive mechanisms: General Comment No. 4 and General Comment No. 7. General Comment No. 4 was adopted on 12 December 1991 and primarily focused on the right to adequate housing and sets out three standards that are relevant for forced evictions. First, all people shall enjoy a degree of security of tenure that guarantees legal protection against forced evictions. In terms of General Comment No. 4 para. 8(a), State Parties should consequently take immediate measures "in genuine consultation with affected people and groups" to give legal security of tenure to those people and households currently lacking such protection. Secondly, the right to not be subjected to arbitrary, unlawful interference with one's home is a very important element in defining the right to adequate housing, which is contained in General Comment No. 4 para. 9. Lastly, General Comment No. 4 para. 18 makes forced evictions justifiable only in exceptional circumstances and in accordance with the relevant principles of international law.

General Comment No. 7 was adopted on 16 May 1992 and primarily focuses on forced evictions. It goes further than General Comment No. 4 by clarifying what governments, landlords, and institutions must do to prevent forced evictions. It contains detailed procedural and substantive safeguards pertaining to forced evictions. Para. 4 of the General Comment requires State Parties to introduce legislative and other measures, with appropriate safeguards, to prevent and punish forced evictions; and that all feasible alternatives are explored in consultation with the affected people. General Comment No. 7 further requires "genuine consultation …, adequate and reasonable notice, adequate information on the proposed evictions…". All of this offers substantive safeguards to the affected people.

United Nations Commission on Human Rights (UNCHR)

The UNCHR monitors and publicly reports on human rights issues and violations. The UNCHR adopted a range

of resolutions on forced evictions. Resolution 1993/77 adopted on 10 March 1993 affirmed that the practice of forced evictions is a gross violation of human rights, particularly the right to adequate housing. The Resolution requires State Parties to take immediate measures at all levels to eliminate the practice of forced evictions and requires that where such evictions take place they must be based on "mutually satisfactory negotiations with those affected and be consistent with their wishes, rights and needs".

The UNCHR adopted another Resolution on the prohibition of forced evictions on 16 April 2004. This Resolution requires State Parties to take immediate measures to prevent forced evictions and to "ensure effective participation, consultation and negotiations with affected people in any eviction process that is otherwise deemed lawful". The use of words such as "mutually satisfactory negotiations" and "effective participation, consultation" seek to offer substantive safeguards to the affected people.

United Nations Special Rapporteur on Adequate Housing

The UN Special Rapporteur (2007) developed Basic Principles and Guidelines on Development-Based Evictions and Displacement (UN Basic Principles and Guidelines) in 2007. The UN Basic Principles and Guidelines constitute soft international law and could develop into binding customary international law obligations for South Africa. The UN Basic Principles and Guidelines define development-based evictions as including evictions that are often planned or conducted under the pretext of serving the 'public good'. Examples of such evictions include those linked to the development and implementation of major infrastructure projects like dams and large-scale industrial or energy projects. The Basic Principles and Guidelines provides detailed steps to be taken by states before, during, and after evictions.

The steps prescribed by the UN Basic Principles and Guidelines are like those proposed in General Comment No. 7, except that the expression "genuine consultation" is not used, but rather "holding of public hearings that provide the affected people and their advocates with opportunities to challenge the eviction decision or to present alternative proposals and to articulate their demands and development priorities". Para. 8 of UN Basic Principles and Guidelines provides for engagement with the affected people "before an eviction" phase.

African Commission's Principles and Guidelines

The African Commission adopted Principles and Guidelines on the implementation of socio-economic rights in the African Charter in November 2010 where the primary objective is to assist State Parties to comply with their obligations under the African Charter. The right to housing is not provided for under the African Charter. However, in SERAC & CESR v Nigeria Com No. 155/96 (2001) in para. 44, the African Commission held that the right to housing is protected in the African Charter through a combination of provisions protecting the right to property (Article 14), the right to enjoy the best standard of mental and physical health (Article 16), and the protection accorded to the family (Article 18(1)).

Para. 79(xxx) of African Commission Principles and Guidelines prescribes a minimum core obligation for the right to housing during evictions. The Principles and Guidelines encourage the State Parties to ensure, as a minimum core standard, that evictions "only occur in exceptional circumstances… (a) authorised by law; (b) carried out in accordance with international human rights law; (c) undertaken solely in the public interest; and (d) regulated so as to ensure full and fair compensation and rehabilitation". Furthermore, para. 79(xxiii) of the Principles and Guidelines also prescribes as a minimum core standard of "fair hearing and participation for affected people to challenge the eviction decision or present alternatives".

The Implications of the International Norms

The international norms prescribe some form of involvement of the affected people during the eviction process. General Comment No. 7 requires that there should be "genuine consultation", the Resolutions of the UNCHR require that there should be "effective participation" and "mutually satisfactory negotiations", the UN Special Rapporteur (2007) requires that there should be "public hearings", and the African Commission requires "fair hearing and participation". The international framework regards the involvement of the affected people during the eviction process as crucial.

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All these instruments do not merely require "consultation", "participation", or "hearing". Adjectives such as "genuine", "mutually satisfactory", and "fair" are added to dictate the nature of the involvement of the affected people. The use of these adjectives seeks to ensure that the involvement of the affected people is not a mere formality but a substantive part of the engagement process on several issues, such as the conditions of the affected people before and post the eviction, while also considering a possible alternative solution to eviction. The international norms require that evictions should be the last resort and should take place only in exceptional circumstances.

THE IMPLICATIONS OF TRANSFORMATIVE CONSTITUTIONALISM FOR THE RIGHT AGAINST UNLAWFUL EVICTIONS

The understanding of the implications of the courts' commitment to transformative constitutionalism is necessary as evictions are inherently characterised by unequal power relations between the unlawful occupiers and landlords. The courts in South Africa appreciate the transformative potential of the Constitution; however, the extent of judicial commitment to its full realisation is a highly contentious matter. This section examines the scholarly debates on transformative constitutionalism and the implications thereof for the interpretation and application of the right against unlawful evictions.

There is a wealth of scholarly work on transformative constitutionalism in South Africa. Karl Klare sparked this extensive and sometimes convoluted debate in 1998 in his article titled "Legal culture and transformative constitutionalism" published in the South African Law Journal. According to Google Scholar (n.d.), Klare's article is cited in 1213 journal articles. This excludes thousands of books, chapters in books, academic theses, unmediated articles, case law, and non-academic commentaries. This highlights how dense the literature on transformative constitutionalism is and that its contours are constantly shifting. The work of Klare and the subsequent contributions by Langa (2006), Moseneke (2002), Roux (2013), and Pieterse (2005) will suffice to capture the essence of the argument in this article.

Klare's conceptualisation of transformative constitutionalism

The notion of transformative constitutionalism originates from Klare's article in which he describes the 1996 Constitution as transformative in content and vision. In a sincere attempt to justify the usage of the term "transformative", Klare (1998, p. 156) contrasts the usage of "transformative" with "reform" and "revolution". He argues that the term "reform" will not adequately capture the magnitude of the transformation envisaged by the Constitution, and that "revolution" goes far beyond the scope of the social changes contemplated by the Constitution. For Klare (1998, p. 157), transformative constitutionalism connotes an undertaking of "inducing large-scale change through non-violent political processes grounded in law".

Klare makes an incisive examination of some constitutional provisions, which include the foundational values, the inclusion of justiciable socio-economic rights, and the powers of judicial review. Klare (1998, p. 153) then describes the Constitution as "post-liberal" and therefore committed to "wide-raging egalitarian social transformation". By describing the Constitution as post-liberal, he suggests that the South African Constitution went beyond the normal and standard requirements of liberal democracy, such as in the United States, as it is envisioned as an "empowered model of democracy" (Klare 1998, p. 153). For Klare (1998, p. 158), the empowered model of democracy seeks to eradicate all past injustices and unequal distribution of power in society. It is a model of democracy that protects the poor and vulnerable from abuse of power and enjoins the state with a positive obligation to ensure the improvement of the socio-economic profile of the people. In short, the Constitution has an anti-oppression vision, which favours vulnerable and poor citizens.

Klare argues for a post-liberal reading of the Constitution, which he believes will give meaning to its egalitarian provisions that seek to achieve a caring and participatory society that transcends the historical setting of the Constitution. It is recognised that the historical setting of the Constitution is the abuse of state power, harassment, racial segregation, and arrests during forced evictions. According to Klare, the Constitution is "self-conscious" about this history. From the self-consciousness in the Constitution on the historical injustices flows the transformative vision. This transformative vision of the Constitution is enveloped in its foundation values of human dignity, equality, and freedom.

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Klare (1998) further argues that judges and lawyers have a role in shaping the social order by using the interpretive and adjudicative tools to promote and uphold the democratic principles of openness and accountability. In the field of socio-economic rights, the debates have been dominated by arguments of negative/positive obligation, the separation of powers doctrine, and judicial deference. Preoccupation with technical details and doctrinal approaches by the courts could derail the efforts towards transformative constitutionalism; hence, Klare (1998, pp. 167–168) calls for the critical examination of the prevailing legal culture and its influence on adjudication. Klare developed this argument by asserting that a democratic South Africa requires a transformed legal culture that is responsive to the transformative potential of the Constitution in order to achieve equality, advance social justice, and promote the empowerment of vulnerable people. The transformative potential of the Constitution is instructive about addressing the ills of the past through the empowerment of the disadvantaged, which is based on the right to equality, as the premier foundational value and requires appropriate adjudicative tools that go beyond the usual realm of liberal legalism.

Responses to Klare's transformative constitutionalism

The general orientation of Moseneke (2002), Langa (2006), Roux (2013), and Pieterse (2005) on the transformative potential of the Constitution is congruent with that of Klare (1998). They agree with Klare on the inadequacy of liberal formalism to enable courts to contribute to the transformative potential of the Constitution. However, there seems to be disagreement, particularly from Roux (2013), concerning some propositions from Klare on how the courts should execute their adjudicative function.

Moseneke (2002) argues that the Constitution enjoins the judiciary to uphold and advance its transformative design. Moseneke (2002, p. 314) explains that a "momentous constitutional imperative" binds not only the judiciary but also all organs of the State and asserts that transformative constitutionalism is about achieving substantive equality. In support of Klare, he suggests that substantive equality renders imperative the conceptualisation of a new legal order for the creation of a society different from the apartheid past that was socially degrading (Moseneke, 2002, p. 315). He poignantly argues that the legal content of the rights in the Constitution is derived from the foundational values of the Constitution. Thus, the enquiry for substantive equality commences with the right to equality, which is the "Constitution's focus and its organising principle" (Moseneke, 2002, p. 316). Moseneke (2002, p. 317) argues that the equality espoused by the transformative Constitution is not a mere formal but a substantive equality, and that transformative jurisprudence must commit to substantive equality. Based on his argument on substantive equality, Moseneke (2002, p. 316) advances the central pillar of his argument, which strikingly converges with the statements by Klare, as follows:

An egalitarian society would not be possible unless there is total reconstruction of the power relations in society, with the consequence that human development is maximised and material imbalances redressed.

Langa (2006, p. 352) is of the view that the constitutional changes underpinned by the Constitution comprise a "social and economic revolution". Unfortunately, Langa does not elaborate in defining the nature of the changes as revolutionary. The assertion by Langa was not a throwaway statement but suggests that he was highly conscious of the implications thereof. The different characterisation of the transformation process by Klare (1998) and Langa (2006) reflects the diversity of the views and understandings of the scale and depth of the change envisaged by the Constitution.

Langa (2006, p. 351) further cautions that there is no single stable understanding of transformative constitutionalism; and similarly highlights three conceptions of transformative constitutionalism. First is substantive equality predicated on improvement in the socio-economic profile of the poor and vulnerable to eradicate the legacy of apartheid, which involves a conscious effort to promote equity in all spheres. He argues that the Constitution should not become a tool for the rich and owners of the means of production. Second is acceptance of the politics of law, in which there is no longer a place for the assertion that law and politics must be kept apart. Langa (2006, p. 353) refers to the transition from what he calls "apartheid legal culture" to "constitutional legal culture". Third is transformative constitutionalism that is not a temporary event but a permanent idea whereby new ways are constantly being explored, and vulnerable people are uplifted and empowered (2006, p. 354). Thus, Langa adopted a more radical stance in his conceptualisation of transformative constitutionalism.

Pieterse (2005, p. 156) argues that transformation is grounded in the constitutional text. He sets out the constitutional provisions and an impressive list of references that support his argument that transformation is constitutionally sanctioned. Pieterse (2005, p. 157) agrees with Klare (1998) and Moseneke (2002) on two specific aspects that are worth mentioning in this article: first, that transformation is predicated on the foundational values of the Constitution, namely human dignity, equality, and freedom; and secondly, that the transformation envisaged by the Constitution was infused both by a commitment to ensure that "the wrongs of its apartheid past are never repeated and an undertaking to eradicate the legacy of the past". Accordingly, Pieterse (2005, p. 156) argues that the democratic understanding of transformative constitutionalism mandates achievement of both substantive equality and social justice. He elucidates that substantive equality is about the eradication of the severe patterns of social and economic vulnerability and deprivation caused by apartheid (Pieterse, 2005, p. 157). Pieterse (2005, p. 159) argues that the realisation of the transformative potential would require: an explicit engagement with these vulnerabilities by all the arms of the state and by the empowerment of the poor and otherwise historically marginalised sectors of society through proactive and context sensitive measures that affirm human dignity. Pieterse (2005, p. 160) explains that empowerment within the context of substantive equality would include the "actual upliftment of the vulnerable groups" to be stakeholders in the fulfilment of their socio-economic rights.

Roux (2009, p. 271) agrees with Klare (1998) that the new constitutional order requires a change from a formal to a substantive vision of law, although he is of the view that Klare's article is riddled with "conceptual flaws". He agrees with Klare's characterisation that the substantive vision of the Constitution is towards an empowered model of democracy with emphasis on participation (Roux, 2009, p. 271). Based on these features, Roux agrees with Klare that the South African Constitution should be read as a transformative constitution. Roux (2009, p. 270) makes a similar observation to Klare that South African legal culture is conservative, not in the sense of political conservatism but in the sense that it is based on a "cautious tradition of analysis common to South African lawyers of all political outlook".

The implications of transformative constitutionalism for meaningful engagement

From the above engagements with transformative constitutionalism, there are three aspects that are particularly important for the interpretation of the right against unlawful eviction. First is the description of the Constitution as seeking to achieve substantive equality as opposed to mere formal equality. Secondly, the inclusion of justiciable socio-economic rights was a sincere endeavour by the drafters of the Constitution for the empowerment of the vulnerable groups by enjoining the state with a positive obligation to address the legacy of apartheid. Thirdly, for the courts to contribute towards achievement of substantive equality and empowerment of the vulnerable groups, there is an imperative for adjudicative strategies, which are sensitive to the vulnerabilities of the poor.

There is convergence of views among scholars that at the cutting edge of constitutional transformation is substantive equality to protect the vulnerable groups and not mere formal equality. The argument underpinning this convergence is the recognition that formal equality is not sufficient to ensure that the vulnerable groups in society enjoy the same rights as the socially advantaged groups. Transformative constitutionalism requires that initiatives for the realisation of the rights of the vulnerable groups in society must substantively compensate for the position of disadvantage in which they find themselves. Durojaye (2006, p. 205) aptly states that the direct product of substantive equality is affirmative action aimed at correcting injustices in society that hindered equitable participation of the vulnerable groups.

SIX PRIMARY DRIVERS FOR SUBSTANTIVE INVOLVEMENT OF OCCUPIERS DURING EVICTIONS

From the above exposition of the normative context for evictions and the implications of transformative constitutionalism, the study identifies six primary drivers for substantive involvement of occupiers during evictions in the post-1994 dispensation. The primary drivers are those factors in both the legal and political environment that are directed at transforming the disempowering apartheid-style evictions by restoring the rights of unlawful occupiers to human dignity, equality, and freedom. Therefore, a primary driver is any constitutional,

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legal, political, or international norm that emphasises meaningful engagement based on equitable participation of unlawful occupiers during evictions.

The first key primary driver is the justiciable socio-economic rights. This study demonstrates that the arguments against the justiciability of socio-economic rights are flawed. The South African courts have adopted an integrative approach in their adjudication of rights, which entails that all rights pose both positive and negative obligations. The fact that full realisation of socio-economic rights might require more resources due to the greater degree of positive obligation that they might impose on the state than civil and political rights does not render them unsuitable for judicial review. All rights are polycentric, though to a varying degree, and courts are required to develop and adopt innovative adjudicative tools to ensure full realisation of the more polycentric socio-economic rights. The inclusion of socio-economic rights in the Constitution underlines the need for the redress of past imbalances.

The second primary driver is the foundational values in the Constitution. The foundational values of human dignity, equality, and freedom give substantive meaning to the rights in the Bill of Rights. Judges must be conscious of the context of the Constitution to address the historical injustices and reconstruct the skewed distribution of power in society. The power imbalances between the unlawful occupiers and the landlords are an inherent feature of evictions not only in South Africa but worldwide. The foundational values require that judges, in executing their adjudicative role, should not only be conscious of the reality of the power imbalances, but, through adjudicative strategies that empower the vulnerable groups, should actively find ways to mediate and reconstruct the unequal distribution of power. The purpose of the empowerment of the affected people is to ensure equitable participation as envisioned by substantive equality in the Constitution.

The third primary driver is section 26(3) of the Constitution, which enshrines the right against unlawful eviction and enjoins the courts to consider all relevant circumstances before making an order for eviction. The occupiers are required to be actively involved, and they should provide an exposition of all the relevant circumstances to assist the courts in their determination of whether the issuing of an eviction order is "just and equitable". This includes active involvement of the occupiers in the determination of the pre- and post-eviction conditions – looking at possible alternatives to eviction, when and how the eviction should take place, the location of the alternative accommodation, the conditions of relocation, and any other condition to mitigate hardships during an eviction. The requirement to consider all relevant circumstances mediates the power imbalance between the occupiers and the state and introduces a new normality in the property relations by qualifying the right to ownership.

The fourth primary driver is PIE, which prescribes that courts can only issue an eviction order if it is "just and equitable". PIE also makes provision for mediation by professional mediators. This is indicative of the intention to balance the competing interests of the landowners and the occupiers. Section 4(6) of PIE prescribes the relevant circumstances to be considered in determining whether it is "just and equitable" to issue an eviction order. These circumstances include the circumstances under which the unlawful occupation took place, the availability of suitable alternative accommodation or land, and the rights and needs of the elderly, children, disabled persons, and, particularly, households headed by women. This demonstrates a commitment to empower the most vulnerable in society by giving them preference.

The fifth primary driver is the adjudicative imperatives entailed by transformative constitutionalism. There is consensus amongst the five scholars on the meaning of transformative constitutionalism, namely that it entails approaches to transform unequal power relations and to reverse the past injustices. For this to happen, policies, laws, adjudicative tools, and programmes must aim to provide two aspects. First is enabling conditions, in the form of social and cultural contexts within which the vulnerable groups may be able to lead their lives with dignity. Secondly, affirmative action is required in the form of temporary special measures where the vulnerable groups' needs are specifically recognised and catered for through equitable participation and the removal of oppressive measures. The objective of an egalitarian and anti-oppressive society is predicated on the empowerment of the vulnerable people to reconstruct the unequal distribution of power. This reconstruction seeks to ensure that there is a people-centred approach to addressing the challenges of the unlawful occupiers.

The sixth primary driver is the international norms. The international instruments and interpretive mechanisms

provide a normative framework within which the right against unlawful eviction must be understood and interpreted. Collectively, these instruments and interpretive mechanisms emphasise participation and involvement of the affected people as fundamental during evictions. The State Parties are required to take immediate measures to provide adequate procedural and substantive safeguards against abuses of power during evictions. The safeguards should be aimed at promoting equity, which, amongst others, includes mediating unequal power relations.

CONCLUSION

The six principal drivers constitute a foundation for the introduction of the new normality in the property regime in South Africa as they impose positive obligations on the state and landowners to ensure equitable participation of the occupiers during meaningful engagement.

The new normality seeks to make the apartheid-style evictions something of the past by ensuring a departure from the common law position, which placed disproportionate emphasis on the right of ownership, which entitled the owner to demand eviction regardless of the context and personal circumstances of the unlawful occupiers. In the post-1994 normative context, ownership is no longer a supreme right that automatically triumphs over the housing interest of the unlawful occupier. Instead, the eviction enquiry is subjected to strict due process requirements and substantive safeguards that include equitable participation.

The primary drivers ostensibly require that the involvement of occupiers should not be a mere formality to report back decisions but should be marked by equitable participation by the occupiers in the decision-making process. Through equitable participation, the involvement of the occupiers should be seen as a corrective action of the past abuses and should be accompanied by the adoption of temporary positive measures to increase opportunities for their advancement. Accordingly, this should entail the recognition of the transformative need to mediate the inherent power imbalance during evictions. This transformative approach contrasts with proceduralised participation that serves as an empty ritual or a mechanical function that results in manipulation and, effectively, the non-participation of the vulnerable occupiers.

As demonstrated above, the six primary drivers for ME also require that systematic and empowering strategies should be developed to improve the participation of the unlawful occupiers during eviction. These strategies should be informed by the need to affirm the right to dignity, equality, and freedom of the unlawful occupiers. This would entail adopting egalitarian approaches for equitable participation of unlawful occupiers during the engagements to find organic solutions to their challenges of finding shelter. These solutions should be people-centred and not be the product of placation and manipulation of the unlawful occupiers.

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