

*The Importance of Including
Social and Economic Rights in
the South African Constitution*

A Canadian Perspective

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My particular interest and experience in social and economic rights derives from my work in Canada as a human rights advocate for poor people and for those in need of decent housing. Like South Africa, Canada is a relatively new "constitutional democracy"- now barely fifteen years old. Some of the lessons we have learned in these few years from the struggle for the recognition of the rights of the poor in Canada may be useful to South Africans engaged in the important debate over whether to include social and economic rights in the final Constitution of South Africa.

The Canadian Charter, unlike South Africa's Interim Constitution, makes no explicit reference either to property rights, on the one hand, or to social and economic rights, on the other. Our Supreme Court has interpreted this silence as meaning that property rights are not constitutionally protected but has left open the possibility that at least some of the social and economic rights to which Canada is bound in international law may be implicit in such rights such as the right to "life, liberty and security of the person" and the right to equality.

While poor people have won some important victories under the Charter in Canada, and hope for more, the general trend so far has been for the courts to rule against the constitutional claims of poor people, often on the ground that social and economic rights are not constitutionally protected. Indeed, the failure of a number of lower courts in Canada to provide appropriate remedies to violations of social and economic

rights has been identified as a concern by the United Nations Committee which monitors compliance with the International Covenant on Economic, Social and Cultural Rights.

From the standpoint of poor people claiming their rights under domestic and international law, some of the more academic debates about social and economic rights tend, frankly, to miss the point. These debates focus on the appropriate role of the courts in relation to elected representatives, on the importance of deference to parliament in social policy, on "negative rights" compared to "positive rights" and on protecting the authority of parliament over fiscal matters. Rarely heard in these debates is the voice of those who claim social and economic rights - those who are homeless, who are deprived of an adequate income, or denied access to basic health care or educational opportunities.

I would suggest that South Africans should avoid becoming entangled in the conceptual conundrums surrounding social and economic rights. The essential question is what social and economic rights mean to the people who claim them and what it means to a constitutional democracy if these claims are ignored or rejected.

The question of social and economic rights is fundamentally about equal citizenship for the most disadvantaged. Most of what are called civil and political rights may be claimed by all types of citizens, including the affluent, and some rights, such as property rights, may apply exclusively to those with property to protect. Social and economic rights, on the other hand, are likely to be claimed only by those who are actually deprived of access to adequate food, clothing, housing, income, education or health care. The claimants of these rights are predominantly poor.

In constitutional litigation on behalf of poor people, we invariably find ourselves referring in some manner to fundamental social and economic rights, at least as interpretive principles for other rights. Even when people living in poverty claim civil and political rights, such as the right to vote, to legal counsel, to a fair trial, to liberty or equality, their claims invariably address some aspect of the social and economic deprivation in which they live. A constitutional regime which excludes social rights thus tends to be unfriendly even to civil and political rights claims advanced by the poor.

The idea that courts should defer to parliament in social and fiscal policy, well intentioned as it may be, often serves in the Canadian context as a convenient excuse for dismissing the rights claims of the poor. The injustices affecting the most disadvantaged groups in society are predominantly social and economic in nature. To exclude all issues with a social and economic dimension from the purview of

constitutional rights is surely to deny protection to those most in need of these rights in the sphere in which they are most vulnerable to violations of rights.

It is also clear that the principle of deference to parliament is not equally applied to issues affecting the more affluent. The protection of property rights, for example, has significant social and fiscal dimensions, but this role is accorded to the courts and accepted by them with relish, even where, as in Canada, property rights are not the subject of explicit constitutional protection.

Surely, if we wanted the courts to defer to parliament with respect to all issues with implications for fiscal or social policy, we should not have opted for constitutional democracies. As the Canadian courts have acknowledged, most rights claims, of whatever stripe, have fiscal implications. To exclude social and economic rights from a constitution does not, in fact, keep the courts out of fiscal or social policy. It simply excludes those rights claims, both positive and negative, which are brought forward by the poorest citizens.

A major purpose of a constitution is to ensure that democracies do not ignore the rights of their most vulnerable citizens. Rights enhance democracy by creating enabling processes for those least likely to have an effective political voice. To deny constitutional status to the social rights claims of the most disadvantaged citizens seems to thwart the very purpose of having a constitution in the first place.

Social and economic rights are sometimes referred to as "second generation rights" and considered as a kind of optional addendum to a constitution. From the standpoint of poor people, however, these rights are most certainly "first" generation rights, as old as the notion of community itself and at the very core of any set of fundamental human rights. As is well known in South Africa, social rights have emerged from long histories of struggle by oppressed groups. They were front and centre in the struggle against apartheid.

The question of whether to include social and economic rights is not whether the courts will deal with the rights claims of poor people or with social and economic issues, but how they will deal with them. When fundamental social rights are violated, poor people will seek remedies, both legally and politically. They will challenge policies and practices which deny their rights to adequate food, clothing and housing, to decent income, to access to health care, and education whether or not these rights are explicitly recognized in the Constitution.

Excluding social and economic rights from the Constitution invites the courts and the

legislators to adopt an approach to social and economic issues which is primarily oriented around the rights of property owners and ignores issues of poverty and homelessness. Including these rights, on the other hand, encourages a more balanced approach to social and economic issues, both legally and politically. It recognizes the need to respect the rights of the most disadvantaged citizens in the development of all social and economic programs and in the interpretation and application of all laws.

The challenge for South Africa is to design a constitution which corrects the historic imbalance in the scales of justice that made the courts a hostile terrain for poor people. It is to give equal standing to those who in the past have been powerless to claim their rights and to give constitutional legitimacy to social rights claims that have been an integral part of the struggle for social justice and equality. This new paradigm of rights will not, as some fear, transfer social policy from parliament to the courts. Rather it will better focus the courts on the most important issues of inequality and injustice, and on the courts' proper role within a constitutional democracy of protecting the rights of the most vulnerable.

The question is whether, when the most disadvantaged in South African society try out their new constitutional rights, they will receive a fair hearing. If, in response to bringing forward their social rights claims, these citizens are told that their rights, though recognized in international law, enjoy no recognition within South African law, they will feel fundamentally betrayed by the new constitutional democracy.

Ultimately, a constitution which excludes social and economic rights betrays its own principles. It fails to safeguard the rights of disadvantaged groups and undermines the integrity of the democratic process. As the Indian Supreme Court said on one occasion, social and economic rights, and civil and political rights are like "two wheels of a chariot". Vulnerable minorities are no less in need of protection in the social and economic sphere than in the civil and political realm. An incomplete set of rights, a chariot missing a wheel, cannot help but veer off course. Now, more than ever, we need participatory democracies which hear the voices of their most disadvantaged citizens and address the injustice of social and economic deprivation as issues of fundamental human rights.