Expanding Access to Justice for Socio-Economic Rights Complaints in South Africa

Which Direction Should We Head in?

DAVID BILCHITZ — 24 July, 2017

The South African constitution has been lauded for its inclusion of justiciable socio-economic rights. Yet, making claims flowing from these rights remains inaccessible to many people across the country. This blog post (based on a paper being presented at a conference in Berlin on Constitutionalism in the Global South) seeks to consider the obstacles relating to access to justice for socio-economic rights claims in South Africa and potential solutions. I argue that South Africa should focus on two prongs of access to justice: empowering individuals to be in a position to make claims; and, institutionally, to expand upon its current model of dividing labour between special state institutions created for the vindication of individual complaints on the one hand, and courts on the other hand which largely should focus their energies on appeals and complaints of a more structural nature.

A crucial starting point is the idea that fundamental rights provide people with entitlements to general necessary conditions to live a life of dignity. An important inference from this idea is the notion that if people have entitlements, they must be able to make claims (or have someone do so on their behalf). Access to Justice is conceived of as the ability to make claims – but what conditions, institutions, or resources are necessary to enable individuals to make their claims?
Access to justice as capability

I suggest, following an interesting paper by Pramit Chatterjee and Sreerupa Chowdhury, that access to justice can usefully be seen as an important capability, drawing on the famous approach of Amartya Sen and Martha Nussbaum. Pramit and Chowdhury, importantly, point out that access to justice can be seen as a foundational capability in that it is often a necessary condition for the possession of other capabilities. The capabilities approach importantly places a focus both on the ability of individuals to do things but also the constraints on their ability to do so. For our purposes, the important distinction is the following: between internal capabilities – relating to states of the individual which render it possible for individuals to make claims – and external conditions – which relate to whether there are effective avenues for individuals to pursue in making claims.

With these thoughts in mind, let us first consider obstacles to the internal capabilities of individuals. A crucial component of this lies in knowing about one’s rights and the available complaints mechanism. Sadly, recent empirical work suggests that there is a high level of ignorance amongst the population in South Africa of their rights and the institutions in which to vindicate them. To address this, there needs to be a major expansion on nationwide education campaigns both for children and adults.

Costs – both in the outlay of time and finance – also hinder access for individuals. For many in South Africa, there are significant travel costs to reach institutions where they can lodge complaints and they may be unable to take off the time to do so. In a recent study by the South African Institute for Advanced Constitutional, Public, Human Rights and International Law in one of the better-off provinces (Gauteng), over 60% of people perceived it as difficult to access these institutions. Moreover, legal aid is available to those who are poorest but those in the working and middle classes could struggle to afford legal representation to vindicate their rights.

(Em)Powering access

Solutions to these problems can readily be found. Institutions could increase their geographical reach as well as allowing complaints to be triggered by social media, letters and other methods. Legal aid should be provided where there is any bona fide complaint of a fundamental rights violation. After-hours complaints mechanisms could be instituted for working people and a duty placed on employers to allow time off for complaints relating to rights violations.
Should these empowering measures be put into place, there is likely to be a large increase in complaints relating to socio-economic rights given the circumstances in which many individuals live and the failures of many institutions such as hospitals and schools. The question thus arises as to how existing institutions could deal with such an influx. In Colombia (and other Latin American countries), an easy-access procedure (known as a tutela) was created for individuals who complain of rights violations to approach courts. Judges must make decisions within 10 days. The number of tutela actions being lodged has exploded with thousands being lodged every month and courts having to adapt their procedures to cope with them. Would such an approach be desirable for South Africa?

Access to justice in South Africa

The South African Constitution appears to have envisaged a division of labour in addressing complaints relating to fundamental rights. It set up special institutions to support democracy (known as chapter nine institutions) which include the Public Protector (PP) and the South African Human Rights Commission (SAHRC). The PP's jurisdiction focuses on conduct of state institutions that is improper or results in impropriety or prejudice. It has powers to investigate complaints and issue remedies which may be binding after a celebrated Constitutional Court ruling last year. It deals mostly with small-scale complaints about the denial of benefits or inadequate service delivery though its profile has increased in relation to large-scale corruption investigations. Following the high profile and trust in the previous public protector, Advocate Thuli Madonsela, the number of complaints rose from over 12 000 in 2008/9 to almost 40 000 in 2013/14. The PP has 20 offices across the country and has a number of easy-access processes. Its major problem is that it is chronically under-funded (it was effectively insolvent in 2013/4) and to address its mandate fully will require a large amount of additional funding and human resources.

The SAHRC was set up to promote respect for human rights and the attainment thereof. It has a mandate to observe and monitor the fulfilment of fundamental rights, to conduct research and to educate about rights. It also is able to receive individual complaints and issue recommendations as well as to take these complaints to court. In 2016/7, it received just over 5000 complaints of which it accepted about half (the others did not lie within its jurisdiction). The SAHRC has only one office per province, and studies show a much lack of awareness of this body. It also lacks resources to investigate complaints in some areas. Solutions lie in increasing, once again, the
funding for this institution to enable it to have a wider reach and to meet its mandate. A sensible institutional design will, however, require a division of labour between the PP and SAHRC relating to individual complaints.

Any findings of the PP (particularly ones that are binding) and the SAHRC can be taken on review to courts. If there are a wider number of complaints, it is thus likely that demands on the courts will increase too. At present, the court structure is not capable of dealing with such an influx. Magistrates' courts do not have general jurisdiction over human rights cases even though they are closest to the people. The High Courts, which usually hear such cases, are already struggling to cope with their case loads with only approximately 250 judges in the whole of South Africa. Appeals generally go through multiple layers and the Constitutional Court currently hears all cases en banc with 11 judges sitting; this renders its capacity to hear many cases limited. The Constitutional Court's case load also remains small compared to courts in other countries of the Global South such as India and Colombia.

In socio-economic rights cases where individuals claim a benefit not provided already by the state, the Constitutional Court has also made things particularly difficult for individual claimants requiring them to show that the existing government programme is unreasonable. It is not entirely clear what is required in terms of this enquiry which also hinders individuals from knowing what they may claim. Such challenges though often involve expert evidence needing to be tendered and a strong affirmative case of unreasonableness being made out with no guarantee of success. It is not surprising that there have therefore been few major socio-economic rights cases claiming access to resources (which have not previously been granted) since it became possible to make such claims in 1997.

The way forward

To render access to justice a reality, a number of possibilities exist, a few of which are canvassed below. Specialist human rights courts could be created to address violations of all fundamental rights (as has happened successfully, for instance, in relation to the right to equality). This would require additional financial and human resources being devoted to these courts rather than simply utilizing the existing courts structure which is already struggling. The problem with this idea though is delineating purely human rights cases from other civil and criminal claims which often implicate these rights too.

The jurisdiction of the lower courts could be extended to cover human
rights matters, though there will need to be specialist training for magistrates. The number of judges should also be increased both in the High Courts and the Appellate Courts. In addition to this, it is necessary for procedural innovations to take place: to address shortcomings in the Constitutional Court’s approach to socio-economic rights litigation, the burden of justification should be placed on the government to justify the reasonableness of its programme once an individual has shown some evidence of a rights violation. The Court should itself attempt to clarify the content of these rights and what individuals may claim. There may be a need for more junior law clerks and for the Constitutional Court also to be prepared to hear some cases in smaller panels rather than en banc for all cases.

One possible manner of dividing the labour between these different institutions is for individual complaints relating to existing benefits (unfair treatment, for instance) to be directed in the first instance at the PP or SAHRC. Appeals would then lie to the courts in this structure. The High Courts and Appellate Courts could seek to focus mainly on complaints of a structural nature, where there are challenges to existing government programmes as not adequately meeting its obligations in relation to socio-economic rights. Individualised complaints may, at times, highlight some of these structural weaknesses in existing programmes and there should, of course, be possibilities for converting such cases into structural challenges. In this way, the individual complaints procedures and structural dimensions of the system can be complementary.

The reality in South Africa today is that most people would struggle to access processes to address violations of their socio-economic rights. Enabling them to do so would not only encourage active citizenship but help highlight deficiencies in existing programmes and institutions. That is something that democratically elected governments do not like to do. Generating the political will for the reforms suggested in this blog may thus be a difficult task. Yet, it is one that I hope to have shown is required if we are to take the socio-economic rights contained in the South African constitution seriously.

David Bilchitz is Professor of Fundamental Rights and Constitutional Law at the University of Johannesburg, Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC) and Secretary-General of the International Association of Constitutional Law. Currently he is a Visiting Research Fellow at Humboldt University.