

# Social Inclusion and the Constitution: A Deconstruction



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*South Africa's Constitution is our highest law. It is the framework within which other laws must be accommodated. Given our prescriptively socially inclusive Constitution, with imperatives for both Freedom and Equality, the question arises as to why South Africa is not a more inclusive society? There are perhaps two lines of inquiry that could prove helpful in evaluating potential causes for unrealised rights, and the consequent absence of social inclusion:*

- The first relates to the interpretation of the Bill of Rights (BOR) and its enforcement. This concerns how to understand the BOR, and the role it should play in society. Interpretation is important when considering social inclusion in the context of the Constitution.
- The second relates to the type of society envisaged by the BOR and just how inclusive that society is supposed to be. This involves looking at a combination of rights in order to understand the obligations placed on the State, and whether these rights (specifically those relating to achieving Freedom and Equality) lead to social inclusion.

## Interpretation

### Section 7

Section 7 of the BOR introduces the core constitutional rights that all citizens should expect to enjoy. The rights to Human Dignity, Equality and Freedom<sup>1</sup> promote a socially inclusive, human-centric basis for social life. Furthermore, the State “must respect, protect, promote and fulfil the rights in the bill of rights”<sup>2</sup>. This places a positive obligation on the State to realise citizens’ rights in the BOR. The use of the word ‘must’ means that this is a mandatory provision, indicating the central role that the BOR is to have in our society. At the same time, these obligations must be viewed within the parameters of the State’s available resources.

The majority judgement in the case of *Glenister v President of the Republic of South Africa*<sup>3</sup> (in which the HSF was amicus) relied on Section 7 in finding that there is a positive obligation on all organs of the State to promote the BOR. Even if no specific right has been infringed, the BOR must be read holistically. It creates a general obligation on the State to develop the type of society contemplated in the BOR.

### Section 39

Section 39 is the “interpretation clause”. It provides that when interpreting the BOR, a court or tribunal must promote the values that underlie an open and democratic

society<sup>4</sup>; and “must promote the spirit, purport and objects”<sup>5</sup> of the BOR. Like Section 7, this creates strong positive obligations and is evidence that the BOR must be viewed as part of the type of democratic society that the Constitution envisages.

There are a number of court cases that have used Section 39 to infuse our common law with constitutional values.<sup>6</sup> These cases confirm that the BOR is not a static instrument but something that mediates all relations between the State and citizens.

### Section 38

Section 38 provides that citizens can approach the court where violations of their Constitutional rights are feared<sup>7</sup>. It allows for people acting in the public interest to enforce the BOR in court – evidence of an intention to ensure a prominent place for the BOR in the lives of all citizens. This is an important change from the common law position which required a “direct and substantial” interest in order to do so.<sup>8</sup>

## Where Does Interpretation Leave Us?

The society our BOR envisions is, arguably, one where each citizen knows their rights and responsibilities, is presented with a wide variety of options from which to choose and, has the means and support to go about choosing a life path. The society we expect to see is one where Freedom, Equality and Human Dignity are equitably advanced. This is not the society we face.

A failure to realise rights may, in part, be due to the failure to understand and pragmatically consolidate constitutional prescriptions, and, in part, due to whether it is possible for these rights to be practically advanced in terms of what is stated in the BOR. More specifically, does the way in which the rights are stated allow for their realisation? Furthermore, how the State deals with contradictions that may arise is important. As is an understanding for the different degrees and characteristics within each right itself.

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## The BOR and an Inclusive Society?

### Equality

Section 9(1)'s focus is on citizens' being equal before the law in terms of equal benefits and protection of the law<sup>9</sup>. However, where citizens are unaware of what the law offers them and how it protects them; do not have immediate access to courts and; cannot afford legal representation, it cannot convincingly be said that all citizens are equal before the law. It is a concern when our constitutional rights do not translate to practical, realised rights and, more so that we are not actively and pragmatically looking for ways to change this.

There are, perhaps, two difficulties with Section 9 as it is stated:

it is not explicit enough. Does it denote the enhancement of rights or more loosely, the creation of a space where there are no laws preventing people from having access to opportunities? Further explanation is required so that the responsibilities of the State, to ensure these rights, are understood in detail.

how would we go about reaching such Equality in a society as unequal as our own? Do we attempt to reduce the polarised socio-economic status of citizens to create a

more equal society, by taking from those who have in order to give to those who do not? This immediately runs into difficulties concerning the right to Freedom.

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Questions about the nature of Equality and its subsequent constitutional right have been interpreted by our highest courts in light of the abovementioned ambiguity. South African courts have understood section 9 to imply the achievement of substantive equality. There are a number of judgments that indicate a willingness to adopt a contextual approach in the realisation of the right to Equality, with disadvantage being identified as a core principle in the enforcement of section 9.<sup>10</sup> The nature and importance of equality was summed up by Krieger J<sup>11</sup> when he stated:

“The South African Constitution is primarily and emphatically an egalitarian Constitution... in the light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre.”

Despite the endorsement of substantive equality, there are underlying tensions between the values of Freedom, Equality and Dignity in section 9’s application. The Constitutional Court has interpreted the right to equality by placing dignity at its centre.<sup>12</sup> The leading case in this regard is *Harksen v Lane* in which the Court clarified that discrimination is unfair when the “potential to impair fundamental human dignity” exists. This formulation defines Equality in terms of its effect on dignity. This approach has been criticized by a number of authors as inconsistent with substantive equality.<sup>13</sup> Importing Dignity into the heart of Equality shifts the emphasis away from a group-based, contextualised understanding of equality where redress of disadvantage is prioritised.

Our courts’ interpretations of the right to Equality are indicative of the complex relationship between the values of Equality, Freedom and Dignity. The issue becomes even more complex when one considers not only the interpretation of an individual right but also the relationship between potentially conflicting rights.

## Freedom

Section 13 addresses Freedom from “slavery, servitude and forced labour”<sup>14</sup>. This is seemingly simple, disallowing any force when it comes to the means by which people make their living. There are however, views that forced labour includes being underpaid for work, where there are no other or better jobs available<sup>15</sup> – something we see regularly in South Africa. Our unions, no doubt, do what they can to protect this right, but are often only marginally or not at all successful. Thus, this freedom, as seen by some, does not translate into the lived experience of those who are left with little or no choice. It is therefore necessary to explicitly state whether the constitution intended this right to denote only the lack of force, or the presence of viable choices.

Section 16 stipulates freedom of “artistic creativity”<sup>16</sup> and “academic freedom and freedom of scientific research”<sup>17</sup>. We are to understand that every person has the right to their own ideas and the Freedom to translate these ideas into whatever form they may take provided this does not infringe upon the freedoms of others.

Such Freedom would allow people to protect their ideas, get paid for them, and even

keep them to themselves, should they wish. This permits developers/manufacturers of cures for diseases, water purifiers or alternative electricity sources, to restrict the reach and use of their products, potentially restricting access to healthcare, warmth and drinkable water. Those who can afford such products are free to buy them, and those who invented them, are free to profit. However, other members of society are excluded from them, and what is worse is that it is likely the excluded members who need them most. This generates further socio-economic distinctions between members of society and can be seen to contravene rights to equality.

Again, we are confronted by the incompatibility between Freedom and Equality and confusion as to how we find a practical synergy between the two. This antinomy/irreconcilable sociable dilemma needs to be explicitly addressed in our Constitution, in order for both Freedom and Equality to be practically realised in an acceptable manner.

The limits and reach of Section 19 (political rights) are, too, problematic. The stipulations that anyone can vote, form a political party, or hold office may protect people against being intentionally excluded, but is not explicit enough to enhance the realisation of the full extent of political rights. In order to realise the full extent of political rights people require: information on political parties, an understanding of their rights and how their government is responsible for and accountable to them and, an understanding of the election process. Simply, citizens must be equipped to make informed decisions.

*It is both gross inequality and lack of freedom to make life choices that exclude people from their rights and from meaningfully participating in society.*

In South Africa, with such socio-economic extremes, many citizens are not politically empowered or aware,<sup>18</sup> and are thus marginalised from real involvement in the decisions that affect them. This right, as it stands, is therefore, only protecting people from being excluded from voting. It does not necessarily create the space for citizens to realise this right.

Having the right to something is only relevant when we are in a position to realise that right. Since it is the State's responsibility to aid citizens in realising their rights, perhaps more clarity is required as to how they may go about it. Before this can occur, clarity on denotation in terms of the wording and intended references of the rights in our Constitution, needs to be addressed. Without such clarity, we may be unable to move forward from our current position, where prescribed Freedom and Equality are, at times, at odds, making it difficult to achieve either. It is both gross inequality and lack of freedom to make life choices that exclude people from their rights and from meaningfully participating in society. The two make our Constitution something that is theoretical – until we find a way to configure the social antinomies and practically realise the values of our Constitution.

Section 22's "freedom of trade, occupation and profession"<sup>19</sup> expresses citizens' rights to choose, but does not account for lack of actual choices. To reiterate an above point – being unchained, does not guarantee freedom. Many South Africans may not be lawfully prevented from choosing a trade or vocation, but the options from which they have to choose, are often limited. Only a small minority are in positions where they can choose their futures – normally the middle/upper income citizens. Thus, to say that all citizens are free, where it is only some who are free, is practically untrue, unless what was meant by Freedom was merely the absence of lawful prevention. It is

only when all people are offered the same calibre of information and education; they all know their options; are fed and clothed and; have desks, chairs and stationary, that they are free to choose one or more of the options available to them. Simply, in this instance, when all people have equal capacity to access the means through which choices are presented, only then are they free to choose.

## Conclusion

Perhaps the greatest evidence of just how inclusive a society our Constitution envisages comes from the inclusion of socio- economic rights in the BOR. It is rare for constitutions to include justiciable socio-economic rights. That we guarantee people the right to a healthy environment (section 24), the right to housing (section 26), the right to health, food and social security (section 27) and the right to education (section 29) is strong evidence that we prescribe an inclusive society.

However, if we do not include explicit explanations of how freedom and equality are meant to be understood or how we endeavour to find a balance that celebrates both or what steps for the State to take in realising these somewhat incompatible rights, our socio-economic rights could continue to be, for the most part, theoretical.

Nevertheless, we cannot assume that this antinomy nullifies our Constitution. Within many of these rights, perhaps we arguably need to create a deeper understanding of both Freedom and equality and how they may be achieved in unison. Thus far, in our striving for both, we cannot and have not achieved either.

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### NOTES

- 1 SA Constitution, Chapter 2 (Bill of Rights)
- 2 SA Constitution Section 7 (2)
- 3 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) Para 177 – 195
- 4 SA Constitution (Bill of rights) Section 39 (1) (a)
- 5 SA Constitution (Bill of Rights) Section 39 (2)
- 6 *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); *Barkhuizen v Napier* 2007 (5) SA 323 (CC)
- 7 SA Constitution, (Bill of Rights) Section 38
- 8 *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC)
- 9 SA Constitution Section 9
- 10 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC);
- 11 *The President of the RSA v Hugo* 1997 (4) SA 1 (CC) para 74
- 12 *Harksen v Lane NO* 1998 (SA) 300 (CC); *The City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC)
- 13 For an analysis of this fundamental contradiction see Fagan (1998) *Dignity and Unfair Discrimination: a Value Misplaced and a Right Misunderstood* (14) SAJHR 220 pp. 235; *Albertyn & Goldblatt* (1998) *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality*. 14 SAJHR 248; *Currie & De Waal* (2001) *The New Constitutional and Administrative Law*. Volume 1. Juta law. PP 347 – 352
- 14 SA Constitution, Chapter 2 (Bill of Rights) Section 13
- 15 Steinfeld (1991) *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870*. UNC Press Books. See also *Forced Labour is about Politics and Economics as much as Crime*. Thinkafricapress. 13 November 2013.
- 16 SA Constitution, Chapter 2 (Bill of Rights) Section 16 (1) (c)
- 17 SA Constitution, Chapter 2 (Bill of Rights) Section 16 (1) (c)
- 18 Lotter (2013) *Poverty, Ethics and Justice*. University of Wales Press
- 19 South Africa's Constitution, Bill of Rights, Section 22