

Reflections on Teaching Human Rights Law to Foster Deliberative Democracy

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The 1996 South African Constitution is the supreme law of the country. All laws and all conduct which is inconsistent with the constitution can be declared invalid, and all obligations imposed by the Constitution must be performed.¹ But the Constitution is not simply a set of rules for governing the exercise of public and private power, it also fundamentally shapes the nature and quality of South Africa's democracy. The interim and 'final Constitutions' facilitated a peaceful transition from, in the words of the postamble of the interim Constitution, of "a deeply divided society characterised by strife, conflict, untold suffering and injustice." But as important is the Constitution's role in establishing the fundamental norms, values and institutions which shape the nature and quality of South Africa's democracy and society.

The Constitution proclaims the following founding constitutional values² –

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;
- (b) Non racialism and non-sexism;
- (c) Supremacy of the constitution and the rule of law;

¹ The Constitution of the Republic of South Africa, 1996, s 2.

² Section 1.

(d) Universal adult suffrage, a national common voters roll, regulation elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

In addition, the Bill of Rights of the Constitution contains a comprehensive catalogue of civil, political, economic, social and cultural rights which make it one of the most progressive and far-reaching human rights instruments in the world. These rights must be respected, protected, promoted and fulfilled through the adoption of legislation, policies and programmes, and can be enforced in the courts. The rights in the Bill of Rights are the fundamental normative commitments of our democracy. The Constitution establishes a range of other institutions, such as the Human Rights Commission, the Commission for Gender Equality, the Electoral Commission, the Auditor-General, and the Public Service Commission, with wide-ranging powers to monitor, promote and support the realisation of the various constitutional commitments.

The Constitution is frequently described as 'transformative'. It seeks to catalyse and guide the transformative of South Africa's political, social and economic institutions and power relationships 'in a democratic, participatory and egalitarian direction.' As famously described by Karl Klare, '[t]ransformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.'³ However, what precisely the normative values and transformative commitments of the Constitution entails is not self-evident or uncontested. Their meaning and implications are subjects for continual and on-going debate and deliberation.

³ K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146-188 at 150.

As explained by former Chief Justice Pius Langa in the University of Stellenbosch's annual human rights lecture:

'Transformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services... . Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable, but the idea of change is constant.'⁴

This epitomises a deliberative model of democracy which I have argued elsewhere lies at the heart of South Africa's Constitution.⁵ Deliberative democracy represents a particular form of participatory democracy which is grounded in a belief that participation in public debate and dialogue can transform people's initial views and preferences. In so doing it enhances the possibility of the participants reaching agreements (even if only provisional) on various contentious issues of public policy. An important requirement of deliberative democracy is that all participants retain an open mind and a willingness to transform their own initial perceptions of their interests and preferences in the deliberative process. This implies, as Iris Young states, that participants 'cannot come to the discussion of a collective problem with commitments that bind them to the authority of prior norms or unquestionable beliefs'.⁶

In order to approximate the ideals of fairness and justice, deliberative processes and forums should be open to a plurality of interests and reflect the full diversity of groups and communities in a society.⁷ In addition, all groups

⁴ P Langa 'Transformative constitutionalism' (2006) 17 *Stell LR* 351 – 360 at 354.

⁵ S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta & Co, 2010), chapter 2.

⁶ I M Young *Inclusion and Democracy* (2000) 24.

⁷ *Ibid* 23.

should be able to participate in deliberative processes as peers or political equals.⁸ This requires more than a formal opportunity to participate, but that all in society, particularly disadvantaged groups, have the substantive means of participating effectively.⁹ Ensuring the substantive conditions for equal participation, in turn requires that attention be paid to the institutional obstacles impeding parity of participation for certain groups.¹⁰ As is well known poverty and multiple forms of inequality marginalise large sections of South African society. Systemic forms of discrimination on grounds such as race, gender, sexual orientation and HIV status exist alongside inequality in people's access to social services and economic resources. It is evident that we are far from creating the more equitable distribution of resources necessary to facilitate parity of participation in a range of public and private institutions. A commitment to a process of transformation that values equitable participation in the shaping of our new democracy cannot therefore fail to address the material conditions that impede such participation.

Deliberative democracy operates at a variety of different levels and through a range of institutions. It coexists with the mechanisms for citizen participation in the institutions and processes of representative democracy. However, deliberative democracy enriches and deepens representative democracy by expanding the opportunities for people's active participation in decision-making processes. It thus represents a more substantive conception of

⁸ This requirement is expressed by Nancy Fraser's notion of 'participatory parity'. See Fraser 'Social justice in the age of identity politics: Redistribution, recognition, and participation' in N Fraser & A Honneth *Redistribution or Recognition? A Political-Philosophical Exchange* (2003) 7–109.

⁹ J Cohen 'The economic basis of deliberative democracy' (1989) 6 *Social Philosophy & Policy* 25–50. See also J Cohen 'Procedure and substance in deliberative democracy' in S Benhabib (ed) *Democracy and Difference: Contesting the Boundaries of the Political* (1996) 95–119.

¹⁰ Fraser (note 8 above) 44 argues that fair democratic deliberation 'requires parity of participation for all actual and possible deliberators'. This in turn implies just distribution and reciprocal recognition. In other words, she rejects formal notions of democracy and equal autonomy as inadequate for ensuring that all groups have a substantively fair chance of influencing public deliberation around social policy.

democracy than participating in periodic elections and in the formal mechanisms created for allowing citizens input in the institutions of representative democracy. Through creating multiple sites of dialogue and avenues of participation, the aim is to encourage greater participation in the public and private institutions which affect various aspects of people's lives.

Top-down processes in which information regarding decisions already taken is communicated to people represent the antithesis of deliberative democracy. As expressed by the American constitutional scholar, Frank Michelman, deliberative democracy envisions a form of politics that is based 'on reason, not just of will, of persuasion not just of power.' It resonates well with the famous description by the late Etienne Mureinik of the fundamental change in political culture wrought by the South Africa's constitutional transition as a shift from 'a culture of authority' to a 'culture of justification' in which 'every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command.'¹¹

There seems to be a greater acknowledgement of the importance of cultivating the ethical and critical qualities of engaged citizenship on which deliberative democracy depends for its vibrancy. I was interested to note that in his Harold Wolpe lecture, Jay Naidoo described the demobilising of civil society post 1994 as one of the 'biggest mistakes' made post 1994. He concedes that he 'as Minister for the RDP was part of that grave mistake, because in saying we had a legitimate government and that the government was there to deliver on the goals of the RDP; that the government would deliver houses, schools,

¹¹ E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *SAJHR* 31.

hospitals, clinics, jobs and just about everything else the new South Africa needed, our own people became bystanders in the process. And that was when the real engine of our struggle for freedom came to a grinding halt... . He calls on those involved in formal politics, civil society organisations and business to 'find their voices again' while warning that '[c]onsensus-making is not easy. It is a pain-staking process. It is time consuming and many times troublesome. But it comes with the terrain. There is no short cut.'¹²

This kind of active, empowered democracy requires that are education system cultivates a special kind of ethos and skill in our graduates. These include strong ethical values and a commitment to the core constitutional principles of dignity, equality and freedom. But they also require an ability to adopt a critical stance towards established doctrine, dogma and hierarchies and to be able to expose them to searching, critical scrutiny and reasoned debate. This has particular relevance for law students as they will have a special role to play in future in the claiming, interpretation and enforcement of the constitution. But legal education in general is particularly hierarchical in its orientation and tends towards conveying the formal rules applicable in different areas of law, in other words, teaching the law as it is instead of what it ought to become so as to be consonant with the normative value system of the Constitution. As the critical legal scholar in a celebrated article on legal education in the US, Duncan Kennedy observed, legal education is aimed at teaching a special, arcane type of skill called 'legal reasoning' which is frequently nor more than 'arguments from authority, with the validity of the authoritative premise put outside

¹² J Naidoo 'South Africa today: From freedom to transformation: Deepening the voice of the people' Harold Wolpe Memorial Lecture, [date, 2010] on line at (accessed on 18 November 2010).

discussion by professional fiat.”¹³ He goes on to observe that law schools “routinely embed skills training in mystificatory nonsense and devote much of their time to transmitting masses of ill-digested rules.” A more rational system, argues Kennedy, would emphasize the way to learn law rather than rules, and skills rather than answers.”¹⁴

In teaching a large group (around 280 – 300) second year students the human rights law component of constitutional law, I am constantly faced with the challenge of how to align the content and methodologies of teaching with the types of engaged, ethical and critical citizens and legal practitioners envisaged by the Constitution. This is an important course as it constitutes the foundational course in constitutional law which must inform shape students’ understanding of all other legal subjects they will take in their undergraduate law degree. The Constitution expressly requires the entire legal system to be aligned with the normative value system of the Constitution and to ensure that the law is developed so as to be consonant with this value system.¹⁵ So I feel that this course bears a weighty responsibility in cultivating the attitudes and attributes of our law graduates. I count myself as fortunate to be able to share experiences, ideas and to experiment with different teaching and assessment methodologies with my colleagues who co-teach the constitutional law course with me, Geo Quinot, Henk Botha and Phoebe Bolton.

I am painfully conscious that much more needs to be done and my own understanding of hopeful and helpful pedagogies deepened. I will, however, highlight three areas in which I have experimented with fostering the

¹³ D Kennedy ‘Legal education as training for hierarchy’ in D Kairys *The Politics of Law: A Progressive Critique* (Basic Books, 1998) 54 – 75 at 60.

¹⁴ Ibid, 64 – 65,

¹⁵ Constitution, s 39(2).

attributes outline above for meaningful participation in a deliberative democracy.

The first is to strive towards relevance of the human rights curriculum to current political, social and economic challenges facing South Africa. In this way, I hope to convey that human rights norms are not simply formal, abstract rules or ethical constructs, but are shaped by and in turn influence our understanding of social problems and contextual manifestations of injustice. I thus strive to raise contemporary human rights problems or issues in class and through hypotheticals set in tutorials, tests and exams. In this way, I also hope to cultivate the skills of effectively using and integrating normative concepts and values in legal reasoning. This is a skill which is vital to lawyers in a constitutional democracy in which the force of all law and the validity of all conduct depends on its conformity with the constitution.

A key outcome of this course, for which my colleague Prof Quinot must take the credit, is a major writing component where we not only aim to cultivate the basic skills of researching and constructing an argument in the field of constitutional law. In this way students are encouraged to develop the skills of critical thinking and written forms of argumentation, justification and persuasion.

Thirdly, I strive, but frequently fail due to the large class size, to employ a Socratic method of teaching which encourages active class participation. In this regard, I frequently tell my students that there are no (or, at least, very few) 'right or wrong answers' only 'better or worse reasons for the answers provided.' However, this is a constant challenge for me and I feel I am also up

against a culture where students believe that they are not getting 'value for money' if the 'correct answers' are not provided as the omniscient 'Lecturer'. I also try and encourage students to adopt the perspectives of groups who are systemically marginalised in our society whether by factors such as poverty, HIV/AIDs, nationality, or gender. In this way try to encourage them to see law as more than simply a mechanism for facilitating commercial transactions or personal career advancement, but as being fundamental to the shaping of a more just society. As lawyers, I believe we all bear special ethical responsibilities to ensure that the law does not simply entrench and perpetuate an unjust *status quo*. We try and explore ways in which constitutional law can question and challenge rules which are barriers to certain groups participating as equals in our society.

In this regard, I believe it is vitally important to challenge students to attempt to emphasise with the experiences and perspectives of those from, sometimes radically different life experiences and backgrounds. In this way they can learn to learn to listen and engage meaningfully with a range of different 'voices'. This is vital to enabling them to participate effectively and constructively in a diverse society. It also provides them with the tools with which to interrogate dominant institutional and cultural patterns, in the classroom, the University as a whole, and our broader society. And this is where Stellenbosch University faces particular challenges because of a general lack of diversity in both its student population and academic staff, particularly with regard to African black students and staff.

It seems fairly obvious to me that we cannot cultivate an understanding of diverse perspectives, learning and views if our staff and student body is not

diverse. A 'pedagogy of hope' for a better future in South depends on real opportunities to encounter and engage with a diversity of voices in grappling with the key values and concepts of a transformed legal system. As Addis writes:¹⁶

"A genuine sense of shared identity, social integration, in multicultural and multiethnic societies will develop only through a process where minorities and majorities are linked in institutional dialogue. Shared identity, like justice itself, is defined discursively."

Research shows that without the attainment of a 'critical mass' of marginalised and under-represented groups, genuine participation in institutional dialogue and learning cannot be achieved. This has certainly been my own classroom experience where underrepresented racial groups tend to be overwhelmed by the majority views and institutional culture, particularly on 'hot' topics of human rights law such as affirmative action.

The educational benefits of diversity and the attainment of a critical mass of under-represented students were presented as expert testimony in the landmark American Supreme Court decision of *Grutter v Bollinger* (2003) which upheld the affirmative action admissions policy of the University of Michigan Law School. The decision is remarkable as it is one of the few contexts and cases where the American Supreme Court has upheld an affirmative action policy against a Fourteen Amendment Challenge (the right to equal protection of the laws under the US Constitution). The Supreme Court noted the educational benefits of diversity in higher education 'are substantial'.

The Court highlighted the following benefits of the law school's affirmative admissions policy:

¹⁶ Addis 'On human diversity and the limits of toleration' in Shapiro and Kymlicka (eds) *Nomos XXXIX: Ethnicity and Group Rights* (New York Press, New York, 1997), 128.

‘...[It] promotes “cross-cultural understanding”, helps to break down racial stereotypes, and enables students to better understand persons of different races...These benefits are important and laudable because classroom discussion is livelier, more spirited and simply more enlightening and interesting when the students have the greater possible variety of backgrounds.’¹⁷

The Court went on to note that the expert studies and reports admitted into evidence at the trial demonstrated that student body diversity promotes better learning outcomes as well as preparing students better for an increasingly diverse workforce and society.¹⁸ The Court underscored that ‘[t]hese benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints.’¹⁹

These are some of the challenges which I face in my teaching at Stellenbosch University in developing a hopeful pedagogy, a pedagogy which fosters and nurtures graduates who are able to participate effectively in shaping a transformed society. Such participation must aim to give substance to the foundational values of human rights and democracy and reach across the deep divisions of our society to build a more hopeful future for all of us. All suggestions on how to better meet these challenges are welcomed.

¹⁷ Ibid 13

¹⁸ Referring to the Brief for American Educational Research Association et al as amici curiae; Bowen & Bok *The Shape of the River* (1998); *Diversity Challenged: Evidence on the Impact of Affirmative Action* (2001).

¹⁹ Ibid 13.