

The Constitution, Human Rights and Transformation

The EU Inspiring Thinkers Series and the Wits School of Governance Development & Rights Series collaborated in presenting **Dialogue 3** of the **Development & Rights Series** to mark International Human Rights Day, which is celebrated internationally on the 10th of December.

Dialogue 3 examined the extent to which South Africa has transformed during its 22 years of democracy, assessed the practice of human rights in a rapidly changing world, reflected on the role of an active citizenry as the bedrock of a constitutional democracy, and considered the role of the Constitution as a vehicle for continuous transformation.

This article is a selection of major themes and highlights from the dialogue, aimed at giving readers a taste of perspectives and concerns from both the panellists and the audience.

The Panellists: Framing Comments



Hanif Vally
[Moderator]



Stavros
Lambrinidis



John Jeffrey



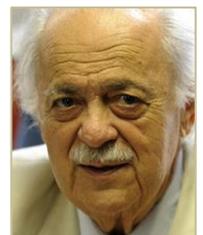
Pierre de Vos



Mondli Makhanya



Fasiha Hassan



Adv George Bizos
[Special Guest]

The panellists, in their individual and professional capacities, are intimately involved with elements of the dialogue topic.

Pierre de Vos: the Professor and deputy dean of constitutional law at the UCT and Claude Leon Foundation Chair in Constitutional Governance discussed the importance of a broad understanding of transformation that includes a range of values and respect for diversity, and role of the judiciary in supporting transformation.

Stavros Lambrinidis: the European Union's Special Representative for Human Rights spoke to the underpinning nature of human rights, their ability to change power structures, the need for independent human rights institutions with real power, and the need to defend human rights against a number of challenges.

Mondli Makhanya: Editor-at-large at City Press noted our emergence as a society with a strong human rights culture, and the need for leadership and an active citizenry to honour their obligations and defend these rights and the institutions which support them.

John Jeffrey: the Deputy Minister of Justice discussed the reasons for the rise of an empowered citizenry in our country, the relationship between government and the judiciary, and the persistence of inequality in society and the need to address this.

Fasiha Hassan: the Wits SRC Secretary General spoke to the lack of real transformation, the need for substantive, structural change, the liberating power of education, and the readiness of students to challenge an unjust system coupled with their readiness to use their skills for the country.

Framing remarks about the role of the Constitution in facilitating transformation:

"The constitution – which abolished the colonial-inspired system of parliamentary supremacy and established a constitutional democracy with a justiciable bill of rights – is both backward-looking and forward-looking.

"It is said to be a transformative document aimed at facilitating a change in the legal culture as well as in the material conditions of the population of South Africa. In judgments by the constitutional court, in the extra-curial writings of former and present constitutional court judges and in the work of progressive legal academics, the virtues of the 'transformative' aspects of the constitution are often praised.

"Potentially, one of the most 'transformative' (and forward-looking) aspects relates to the application of the bill of rights. The constitution enjoins every court, tribunal or forum in South Africa to 'promote the spirit, purport and objects of the bill of rights' when 'interpreting any legislation, and when developing the common law or the customary law' (the latter being a system of indigenous law under which many South Africans living in rural areas still function).

"... in a country in which the law used to be deployed as an instrument of racial oppression, the transformative and pro-poor judgments of the constitutional court are arguably helping to rebuild trust in the legal system and promoting the legitimacy of the law – surely a prerequisite for the proper functioning of a society emerging from a period of lawlessness."

[Extract from The constitutional, innovative face of South African law, by Professor Pierre de Vos, published on The Guardian's website, 25/11/2011]

The Dialogue: Highlights and Key Themes

The meaning of transformation

Transformation is not only about race and gender representivity. It is also about values, about the kind of society we want to build and how we treat people. Respect for diversity is embedded in the constitution but often not upheld in our interactions.

As a society we have not dealt with transformation at a fundamental level. Inequality remains a major challenge. We need conversations about transformation and what it actually means.



Members of the panel and audience listening to questions from the floor

The media's role in promoting human rights and transformation is significant. Yet, to what extent is reporting free of bias? Positive reporting on the student fee protests only came about when historically white universities joined the protests.



Sibongile @msdesbo · 19h

@pierredevos's values for transformation at #DevDialogues include non-discrimination, respect for individual dignity, diversity & difference



Ntai Norman Mampane @NNMampane1 · 16h

#devdialogues #Transformation of the economy to benefit all the citizens;only a few benefit from the economic activities;poor are suffering



kgomotso_Makinta @Excel21Gp · 18h

"Black universities have long been in the fighting high fees, but SA Media decided to Give Wits the spot light" #DevDialogues

An active citizenry

South Africa can rightly celebrate its hard-won human rights culture, which has its roots in the community based movements of the 80's. But rights go together with responsibility. Citizens also have obligations and duties: to respect our institutions and to be active in building our society. While citizens have the right to protest, their actions should not be detrimental to the causes they champion.

Civil society can be a powerful force against those who don't want power structures to change. A free, independent, empowered civil society plays its part in both supporting government and in holding government accountable.

The National Development Plan notes the importance of building an active citizenry and highlights its role as a driving force for transformation and development.



Posing a question to the panel



Anne @McLennanAnne · 18h
#devdialogues Do we have an empowered citizenry? Or a 'we are tired of waiting' citizenry? @Wits_WSG



Sibongile @msdesbo · 19h
"It is our obligation as SA to spread the human rights culture that we enjoy to our neighbouring countries" M Makhaya #DevDialogues

Transformative power of education

Education has the ability to transform society but because quality education remains inaccessible to many, it is in itself a barrier to transformation.

The higher education space is based on race and class, where students are discriminated against based on their economic standing. The issues of transformation must be dealt with, as they cannot be removed from education and effectively the law. The youth want substantive and structural change – the recent student protests have highlighted how far we still have to go before the democratic project is fully realised.



Fasiha Hassan at the podium



Sibongile @msdesbo · 19h
@BridgeProjectSA "What's so scary about smart, educated girls? They change the power structure in any society" @SJLambrinidis #DevDialogues



Bridge Project @BridgeProjectSA · 18h
A united and mobilised youth have the power to shake an unjust system to it's knees - Hassan @WitsSRC #devdialogues



Sibongile @msdesbo · 18h
@WitsSRC Students are still asking "where is free education? The commodification of higher education must stop" #FeesMustFall #DevDialogues

“...we have to acknowledge and address the totally different experience of the working class student and the privileged student...”
Fasiha Hassan

Human rights, transformation and the justice system

In order for the rule of law not to become ‘rule by law’, it needs to be clear, consistent, in line with international standards and implemented. The discussion on implementing laws is one of the major elements of the human rights dialogue.

Governments make both good and bad policies – it is the judiciary’s role to test these. But it is a misconception that courts can effect change. Courts are being used by those who lack faith in political processes, but it is not helpful if courts enter into highly politicised disputes. This risks delegitimising the courts and diminishing their power to protect the marginalised and vulnerable.

The courts alone cannot hold government accountable – there are other avenues for resolving political questions.

The accessibility and affordability of the courts is also an important consideration for transformation and the defence of human rights.



Advocate George Bizos

“...the very core of human rights is subjecting power to laws...” Hanif Vally

 **Mario Compagnoni** @marioc2020 · 18h
#devdialogues Dep.Min. of Justice: laws can be a tool of suppression. Hence the importance of respect for the Constitution. Nobody above law

 **Bridge Project** @BridgeProjectSA · 17h
Should access to the Constitutional Court not be free - Question from the Floor #devdialogues

 **Bridge Project** @BridgeProjectSA · 18h
There seems to be a dis-juncture between equality before the law and equality before the court - Statement from the floor #devdialogues

HOT TOPIC: Student fees

- Free education was promised in 1994. Students will continue to call for higher education to be free.
- Does free education mean across the board, even for those who are privileged? Or is it only for those who are from poor backgrounds, marginalised and vulnerable? [Question from the floor]
- Historical debt is a crucial issue, which speaks to the greater financial exclusion of students. There is a conversation both at national level and at universities around allowing students with historical debt to continue studying, to enable them to complete their degrees so they can be employed and pay off the debt.
- The issue of fees is being looked into by a coalition including the Legal Resources Centre. This includes looking into what is being done internationally, where there is poverty, and where solutions have been found.
- In a constitutional democracy the people are sovereign, and the Constitution is sovereign. Yet, when the #FeesMustFall campaign took this issue to the doorstep of power, for parliament it was business as usual. [Comment from the floor]

“We have omitted to have regard for the poor ...” Adv Bizos



Members of the audience

Challenges to human rights

Internationally, there are challenges to the practice, protection and promotion of human rights. The key challenge is the shrinking space of civil society. Where civil society reveals violations of human rights, it may be seen by those in power as a threat. Conversely, human rights can't be imposed by force – human rights must be owned by the people, if they are to take root.

A second challenge to the rule of law is the attack on the universality of human rights. Without universality, powers can choose which rights to preserve and which to violate. This puts the entire human rights system at risk.

A third challenge lies in the weakening or even 'capturing' of institutions meant to support and protect society. There is a real risk to the integrity of human rights where institutions do not act in accordance with their pre-set rules, and where factional interests and political considerations come into play. We need strong institutions that can withstand such contestation. This was a key theme, with several panellists pointing to the need for an active citizenry to hold those with power to account.

We all have a duty to protect human rights and the institutions of democracy – if we do not protect them, they will not be there when we need them (Advocate Bizos).



Mario Compagnoni @marioc2020 - 19h

#devdialogues: guard against attempts by politicians to shrink Civil Society's space in public debate, eg by labelling them as subversives.

"There is no bloody conflict in the world today that does not have at its roots the serious violation of human rights – or that doesn't require for its resolution, the addressing of these human rights violations." Stavros Lambrinidis

