

ESR

REVIEW

Economic and Social Rights in South Africa

Volume 14
No. 1 2013

Ensuring rights make real change

CONTENTS

Feature

Right to clean and safe water under the Kenya Constitution 2010 **3**

Interview

Interview with the office of the United Nations Special Rapporteur on Extreme Poverty and Human Rights on the Guiding Principles on Extreme Poverty and Human Rights **6**

Updates

Developments in the African Region **8**

Developments at the United Nations **9**

Conference review

Colloquium on the Application of the African Charter on Human and People Rights by South African Courts **10**

Tribute poem

I hear your cry **12**



ESR REVIEW

ISSN: 1684-260X

A publication of the Community Law Centre
(University of the Western Cape)

Editor: Dr Ebenezer Durojaye

Co-editor: Gladys Mirugi-Mukundi

Contact the Socio-Economic Rights Project

Community Law Centre
University of the Western Cape
New Social Sciences Building
Private Bag X17, Bellville, 7535

Tel: (021) 959 2950

Fax: (021) 959 2411

Email: serp@uwc.ac.za

Website: www.communitylawcentre.org.za

ESR Review online

www.communitylawcentre.org.za/clc-projects/socio-economic-rights/esr-review-1

ESR Review

The ESR Review is produced by the Socio-Economic Rights Project of the Community Law Centre, with the financial assistance of the Ford Foundation. The contents of the ESR Review are the sole responsibility of the Socio-Economic Rights Project and can under no circumstances be regarded as reflecting the position of the Ford Foundation.

Production: Page Arts

Copyright © Community Law Centre (University of the Western Cape)

Editorial

This is the first issue of the *ESR Review* for 2013. As the set date for the eight Millennium Development Goals draws near, recent debate has focused on the post-2015 agenda. For many developing countries, particularly those in Africa, the need to sustain the fight against poverty and disease remains pivotal. Therefore, any discussion for the post-2015 agenda must necessarily include how African countries can adopt measures that will improve the living conditions of their people.

While progress has been made in reducing the number of people living in poverty worldwide, a significant number still wallow in abject poverty in Africa. Moreover, access to basic amenities such as water, sanitation and housing remains unrealisable for many people in the region. This calls for a holistic approach from African governments that must involve reforming laws and policies to respond to the needs of vulnerable and marginalised groups.

In line with the post-2015 agenda, this edition of the *ESR Review* features an article on the realisation of the right to clean and safe water as guaranteed under the Bill of Rights of the Kenyan Constitution. The 2010 Constitution of Kenya explicitly provides for justiciable socio-economic rights, for the first time in the country's history. Seth MuchumaWekesa examines the content of the right to water under international law and calls on the Kenyan government to ensure that everyone has access to clean and safe water, in fulfilment of new Constitutional obligations.

The issue also features an interview with the office of the United Nations Special Rapporteur on Extreme Poverty and Human Rights, examining the Guiding Principles on Extreme Poverty and Human Rights. It further provides an overview of the content of the Guiding Principles and their significance for poverty reduction across the world.

Updates on developments in Africa and at the United Nations on socio-economic rights are also provided.

The Editorial team is grateful to the contributors and calls on experts and researchers, as well as practitioners working in the area of socio-economic rights, to send contributions to the *ESR Review* for forthcoming issues.

Ebenezer Durojaye
Editor



Right to clean and safe water under the Kenyan Constitution 2010

Seth Muchuma Wekesa

Water is essential for the survival of all human beings. However, in Kenya access to safe drinking water and sanitation facilities is limited: an estimated 41% of the population relies on unprotected wells, springs or informal water providers (WHO & UNICEF, Progress on Sanitation and Drinking-Water, 2010) while 69% do not have access to safe and hygienic toilets or latrines. Types of water uses vary, based on the individual customs of communities: while all communities need water for drinking, cooking, hygiene, agriculture and livestock, some communities also use it for religious ceremonies. The importance of water and its primacy for many cultures has prompted debates on recognising the right to water as a self-standing and independent human right.

International and regional framework

The right to water is not specifically mentioned in the International Covenant on Economic Social and Cultural Rights (ICESCR). It is also not mentioned in regional instruments such as the African Charter on Human and Peoples' Rights, Inter-American Convention on Human Rights and the European Convention on Human Rights. However, this has not stopped the Committee on Economic Social and Cultural Rights (CESCR) from focusing on the right to water.

The CESCR has been mandated to monitor the implementation of the ICESCR. The CESCR's recent attention to the right to water has been the catalyst for significant momentum in the area. The CESCR initially addressed the question of water and sanitation in its General Comments on housing, health and education. General Comments are released to clarify the scope of the rights provided in the ICESCR to assist State Parties in implementing them. Moreover, the CESCR reporting guidelines asks states to provide information on access to both water and sanitation under the right to water and housing. Many of the concluding observations therefore simply addressed the lack of access to basic water supply and recommended improvement.

The CESCR adopted General Comment No 15 (2002) on the right to water under articles 11 and 12 of ICESCR. Article 11 states that everyone has the right to 'an adequate standard of living, including food, clothing and housing' and the CESCR has argued that the use of the word 'including' indicates that this catalogue of rights was not in-

tended to be exhaustive. Further, the CESCR stated that the right to water falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental requirements for survival.

The General Comment No. 15 provides significant detail on the content of the right, and addresses what is perhaps the most difficult issue to resolve: what is alienable entitlement? The CESCR has resolved this question by following a universalistic approach, reducing the right to cover household water use only (personal consumption, cooking, hygiene and, where necessary, sanitation). The CESCR also follows its own 'standards recipe' of availability, accessibility, acceptability and quality. With regard to states' obligations, the CESCR refers to the duty of government to confront the obstacles faced by an extensive range of groups in accessing water, including women, persons with disabilities, children, refugees, prisoners and marginalised communities as part of the requirement of guaranteeing non-discrimination and equality under Articles 2(2) and 3. The CESCR also sets out the duty to respect, protect and fulfil.

In the African context, the right to water is not specifically provided for in the African Charter, the African Charter on the Rights and Welfare of the Child (African Children's Charter) or in the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol). However, in both the African Children's Charter and the Maputo Protocol, safe and clean water is mentioned as a condition that enhances the realisation of the right to health of children and women respectively. These documents direct states to take appropriate means to provide adequate, safe and clean drinking water to combat diseases and malnutrition among children. Additionally, the right to water is expressly provided for in the African Commission's Guidelines on Economic, Social and Cultural Rights. The Guidelines impose an obligation on states to ensure the realisation of the right to water by ensuring the availability, affordability and accessibility of clean and safe water to all (Part II). However, the guidelines form part of 'soft law', and are not binding on State Parties.

Water as a human right in Kenya

Kenya has ratified the ICESCR. Article 2(6) of the Constitution provides that any treaty or convention ratified by Kenya forms part of Kenyan law. This automatically incorporates the application of ICESCR into the laws of the country. Kenya is among the few countries in the world that have explicitly recognised the right to water as a con-

Water must be of adequate quality, safely accessible to people, accessed without discrimination, and it must be affordable

stitutional right. Other countries include South Africa and Uruguay. Article 21(1) of the Constitution places an obligation on the State to respect, protect, promote and fulfil the rights contained in the Bill of Rights. This establishes that all the rights in the Bill of Rights impose a combination of negative and positive duties on the state. A set of socio-economic rights are protected in article 43 of the Constitution. Article 43(1)(d) of the Constitution recognises the right to water. It provides that 'every person has the right to clean and safe water in adequate quantities'.

However, this right must be read together with Article 21 (2), which calls on the State to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the right to water. Therefore, Article 43(1)(d) delineates the scope of the right, and incorporates at the very least a negative obligation on the State and all other entities and persons to desist from preventing or impairing it. On the other hand, Article 2(2) speaks to the positive obligation imposed on the State. It both defines and qualifies the State's positive duties by referring to three key elements: (a) the obligation to take legislative, policy and other measures; (b) to achieve the progressive realisation of the right; and (c) to do so within available resources.

Scope of the right

There are two primary issues that arise in relation to the scope of the right to access water in Article 43(1)(d). Firstly, the right to water refers to 'clean and safe water'. This is a water quality requirement. The question is: what constitutes clean and safe water? This question remains a subject of debate and is commonly determined in legal systems by balancing exposure-based health assessments with economic cost-benefit analyses. These are difficult questions that normally are normally resolved through administrative/regulatory processes that may be inconsistent with the more rigid jurisprudence of constitutional law. The quality requirement attempts to ensure that the water is free of disease-causing contaminants. However, according to the CESCR in its General Comment 15 (2002), water must be of adequate quality (WHO Guidelines noted), safely accessible to people within or in close proximity to their homes, accessed without discrimination, and must be affordable, though free in some circumstances.

Secondly, Article 43 has created an equal amount of uncertainty for water quantity. For example, what is an 'adequate quantity' of water per person and how would it

be determined? What is the relationship, if any, between access to that quantity from an urban water utility system and payment of a share of the expenses of the system? How would an adequate quantity be guaranteed to rural residents who are not connected to an urban water utility system? How would the constitutional right to water impact on the conflicting claims of different water users within and between agriculture, cities and industry? General Comment No. 15 defines quantity by listing the World Health Organisation (WHO) minimum water requirement but allows for flexibility depending on specific local circumstances. The CESCR does not give a magic number for an adequate or minimum amount, though it references WHO documents indicating it should be a minimum of 50 litres of water per person per day.

In the judicial interpretation of the right by courts in Kenya, it is instructive to examine the interpretation of a similar provision in Section 27 of the Constitution of South Africa. That country's Constitutional Court has decided in a series of cases that Section 27 requires the government to take reasonable measures to progressively realise water access, within available resources, but does not create a directly enforceable right to immediate delivery of water. On 8 October 2009, the Court decided its most recent case (*Mazibuko case* CCT 39/09), regarding whether the constitutional right to water was violated by the decision of the City of Johannesburg to limit the free basic water supply to 6 kilolitres per connection per month in certain areas. Citing the context-specific nature of 'sufficient water' supplies, the primary responsibility of the legislature for implementation of Section 27, and the overall reasonableness of the city's water allocation, the Constitutional Court refused to overturn the city's water utility policies.

The South African cases demonstrate, at a minimum, that the recognition of the right to water in the Kenyan Bill of Rights might pose significant administrative and legal challenges in the interpretation and implementation of that provision. If courts in Kenya were to interpret Section 43 as a statement of the government's dedication to improving water access, it may be beneficial, but if it were interpreted as a requirement to supply a firm quantity or quality of water as determined by the courts, it would likely constitute a barrier to progressively improving water access. The inclusion of Article 43, it could be argued, is meant to increase attention to water resource issues, but that attention may be slowed by continuing economic constraints. Kenya's citizens may be better off if the Constitution focuses less on the rhetoric of a right to water and more on efficient water management and improving the conditions for public and private investment in the nation's water infrastructure.

As far as progressive realisation is concerned, measures to be adopted by the State must be geared towards the progressive realisation of the right to water. Improving access to clean and safe water is thus inherent in the concept of progressive realisation. Water must be accessible not only to those living in urban areas and cities but also in rural and marginalised areas. Article 56 provides specific rights to minorities and marginalised groups. The

State is required to put affirmative action programmes in place that are designed to ensure that marginalised areas have reasonable access to water. Certain areas have been victims of long-standing discrimination, marginalisation and exclusion. The affirmative action programmes and policies should be aimed at addressing past discrimination by state policy or practice. This might improve the availability and accessibility of water in such areas.

In terms of available resources, extending access to water to everyone in the country will have significant resource implications. The state's positive obligations to fulfil the rights in Article 43 of the Constitution are qualified by reference to its available resources. Thus the availability of resources is an important factor in ensuring accessibility of water to every Kenyan. The court will have a role to play in assessing the availability of resources. This is because all socio-economic rights, including the right to water, would be deprived of their meaning if the government was allowed to determine the extent of its own obligation through its budgetary policies. The Kenyan courts have had an opportunity to enforce the right to water. The High Court has determined that everyone in Kenya has a right to safe and clean water in adequate quantities. In the case of *Ibrahim Sangor Osman v AG* (Constitutional petition No. 2 of 2011), 1123 people were evicted from their land by government officials to make way for road construction. The petitioners, among them women, children, and elderly persons, had occupied the lands since the 1940s. In spite of this, they were not given a notice of eviction or consulted by the Government. They were rendered homeless when the government evicted them with armed policemen and bulldozers. The police used tear gas on the petitioners and resorted to physical violence when they tried to resist the demolition of their homes. As a result, some of the petitioners were forced to live in the open and others in makeshift structures, all exposed to the elements of nature and health risks and without access to basic necessities like food, water, and sanitation. Several children dropped out of school. In addition, 26 of the evicted individuals were over 60 years of age and were forced to endure unbearable conditions.

In the decision, the High Court of Embu concluded that this style of eviction violated the dignity of the petitioners and their human rights. According to the Court, the

petitioners are entitled to the rights to adequate housing, reasonable standards of health care, and to clean and safe water in adequate quantities under the Constitution of Kenya. In addition, it also ruled that the government violated the right to clean and safe water, among other socio-economic rights. The Court also mentioned that Kenya has ratified the ICESCR, which means that the government is bound to respect, protect, and enforce the rights recognised in the Covenant, including the rights to water and sanitation. In conclusion, the Court awarded each person the sum of KSh200,000 in damages and ruled that the petitioners should be allowed to return to their land so that they are able to enjoy their socio-economic rights, including the right to water.

The decision is a landmark victory for socio-economic rights in Kenya. The decision represents the beginning of efforts by civil society to ensure socio-economic rights are not just in the books, but are implemented and respected by the government. Hopefully, the Government of Kenya will comply with the Court's decision and make sure the people affected are returned to their homes and adequately compensated.

Conclusion

Water is critical to the survival of all living things, yet a large proportion of Kenyans do not have access to sufficient quantities of clean and safe water for drinking and personal use. Lack of water has severe consequences, including dehydration and hygiene-related disease. The inclusion of the right to water in Kenya's Constitution is a way of ensuring that Kenyans' right to adequate and clean water is realised, and has placed an obligation on the State to ensure access to clean and safe water in adequate quantity. In addition, Kenyans can now enforce this right against the Government in a court of law.

Seth Muchuma Wekesa is law lecturer at Riara University Kenya, and an LLD candidate at University of Pretoria.

References

African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, (1982) 21 *International Legal Materials* 58.

African Charter on the Rights and Welfare of the Child (1990/1999).

Hardberger, A 2005. Life, liberty, and pursuant of water: Evaluating water as a human right and the duties and obligations it creates, *Northwestern Journal of International Human Rights* 4:332.

International Covenant on Economic, Social and Cultural Rights, G.A. Res 2200A (XXI), (1966/1976).

Langford, M 2003. *Litigating economic, social and cultural rights: Achievements, challenges and strategies*. Geneva: COHRE.

Langford, M 2008. *Social rights jurisprudence: Emerging trends in international and comparative law*. Cambridge: Cambridge University Press.

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, AHG Res. 230 (XXX) (1998/2004)

Protocol to the African Charter on the Rights of Women in Africa (2003/2005).

UN Committee on Economic, Social and Cultural Rights

(CESCR). General Comment No. 15, 'The right to water'.

UN CESCR. General Comment No. 14, 'The right to the highest attainable standard of health'.

UN CESCR. General Comment No. 4, 'The right to adequate housing'.

Viljoen, F 2012. *International Human Rights Law in Africa*. London: Oxford University Press.

Interview with the Office of the United Nations Special Rapporteur on Extreme Poverty and Human Rights

On the Guiding Principles on Extreme Poverty and Human Rights

Interview with Lidia Rabinovich conducted by Ebenezer Durojaye

What are the Guiding Principles on Extreme Poverty and Human Rights?

The Guiding Principles on Extreme Poverty and Human Rights are a set of human rights standards recently adopted by the United Nations Human Rights Council. They provide the first global policy guidelines applying states' human rights obligations to the specific situation of people living in poverty.

The Principles respond to the significant social, cultural, economic and structural obstacles that people living in poverty face, which prevent them from enjoying their rights and put them at increased risk of discrimination, stigma, violence, ill health and lack of education, further entrenching and exacerbating the cycle of poverty through successive generations. Based on international human rights norms and standards, these Principles will serve as a practical tool for policy-makers to ensure that public policies (including poverty eradication efforts) reach the poorest members of society, recognise the obstacles that they face to enjoy their rights and respect and uphold all their rights.

When did you start promoting the Guidelines?

The elaboration of these Principles began more than a decade ago when, in 2001, the former United Nations Commission on Human Rights requested the Sub-Commission on the Promotion and Protection of Human Rights to consider the need to develop guiding principles on the implementation of existing human rights norms and standards in the context of the fight against extreme poverty. In response, the Sub-Commission entrusted an ad hoc group of experts to prepare a draft of the Guiding Principles.

From 2001 to 2006 the Sub-Commission consulted widely to prepare the first draft. At the time, I had the opportunity to be informally involved in the process. In 2008 I was appointed the United Nations Special Rapporteur on Extreme Poverty and Human Rights. I decided to give high priority to these principles in my mandate's work. Thus, when in 2009 the Human Rights Council invited me to do further work on the draft Guiding Principles I was glad to do so. As requested by the Council, I prepared and presented an outline for a revised draft of the Principles in 2011, integrating the contributions that many stakeholders had made in several consultations carried out by the Office of the High Commissioner for Human Rights. This new outline document was again the subject of wide consultations. I took all these contributions into account when preparing the final draft, which was adopted by the Human Rights Council in September 2012. Now, it is my utmost priority to disseminate them widely.

Were people living in extreme poverty consulted or did they participate in the drafting of the Guidelines?

I think it is fair to say that the situation of people living in poverty was the main trigger of the idea that there was a need for the United Nations to develop these principles. We must not forget that Joseph Wresinski himself pushed for the UN to develop mechanisms to protect the rights of people living in extreme poverty.

Then, through the efforts of International Movement ATD Fourth World, people living in poverty were involved in the consultations regarding what the content of the Guiding Principles should be, directly as well as through NGOs that represent them. Among the consultations un-

dertaken by the Sub-Commission, the most important ones were draft regional seminars held in Bangkok (Thailand), Pierrelaye (France), Pune (India) and Sao Paulo (Brazil) with people living in poverty, convened by ATD. After that, ATD as well as other NGOs were consulted on various drafts, playing a key role in ensuring that the voices of the poor were heard in the process. I must say that for me, the formal and informal contributions of people living in poverty were essential in the development of these principles. I will also say that in drafting the Guiding Principles I was able to take into account the views of people living in poverty whom I have met on my country missions as Special Rapporteur, who shared with me their experiences and ideas on a whole range of issues, ranging from discrimination to social protection to housing to livelihoods.

Why do we need the Guiding Principles?

People living in extreme poverty are often neglected or overlooked by politicians, service providers, policy-makers and others. Their lack of political voice, financial or social capital and their chronic social exclusion ensures that they are an almost invisible segment of the general population for the purposes of politics and policy.

While all human rights apply to all people, due to the significant obstacles that people living in extreme poverty face in accessing their entitlements and enjoying their human rights – obstacles related to stigma, discrimination, financial constraints, social structures and others – it is necessary to clarify the implications of States' obligations with regard to their situation. Many human rights violations affect people living in poverty more than any other group. Discrimination against the poor is widespread and widely tolerated. Poverty is a major cause of vulnerability to discrimination and other human rights violations, and moreover people living in poverty are often the victims of multiple and overlapping discrimination (for example on the basis of their ethnicity, gender or disability), increasing their disadvantage. Thus, States need guidance on how to put into practice their obligations to respect, protect and fulfil the rights of persons living in extreme poverty.

Are the Guidelines relevant in developed countries?

Yes, the Guiding Principles are necessary and can be of use in both developed and developing countries. Poverty is a relative and multidimensional phenomenon and exists in all countries of the world. The rights of the poor are not effectively protected anywhere; many would argue that poverty itself (certainly extreme poverty) is a terrible violation of human rights in itself. In many different countries, there exist common prejudices that stereotype persons living in poverty as lazy, irresponsible, indifferent to their children's health and education, dishonest, undeserving and even criminal. These are so deeply entrenched that they often inform public policy-making, preventing the resulting policies from tackling the systemic factors that obstruct persons living in poverty from overcoming their situation.

● ● People living in extreme poverty are an almost invisible segment of the general population for the purposes of politics and policy ● ●

For example, in developed countries, recipients of social assistance are portrayed as happy living on apparently generous government 'handouts' without any intention of seeking work, taking responsibility for their well-being or providing a better life for their children. These popular prejudices and stereotypes are often reinforced by biased and sensationalist media reports that particularly target those living in poverty who are victims of multiple forms of discrimination, such as single mothers, ethnic minorities and migrants. These prejudices against the poor go directly against the idea of dignity that human rights norms seek to protect. The Guiding Principles aim to tackle these prejudices and stigma by informing policy makers of the real obstacles that impede people from lifting themselves out of poverty without the support of sensitive, responsive and appropriate social policies. The objectives of these Principles are to ensure that the poor are reached by public policies and are granted a voice in public life as full and respected members of society. The final goal is to empower them to lift themselves out of poverty.

Do gaps not always exist between guaranteeing rights and their effective realisation?

Absolutely. That is the reason why the work of civil society organisations and human rights bodies in monitoring states' behaviors and pressuring them to uphold the realisation of rights is essential.

Do you think the Guiding Principles will help the post-2015 development goals to envisage the full realisation of human rights for all?

I really hope so. This is our common challenge. We have to work together to ensure that the post-2015 agenda truly includes the voices of the poorest and most excluded of our societies. This is a major task; many obstacles confront us, but I believe that if we really have the will we can act together to see this aspiration translated into practice. I am convinced that the adoption of these Principles is an important milestone in the international community's position on national and international efforts to protect and promote the human rights of those living in poverty. These Principles could play a key role in protecting and empowering those living in poverty worldwide.

The Guiding Principles on Human Rights and Extreme Poverty are available in English, Spanish, French, Chinese, Russian and Arabic.

For further information on the Guiding Principles on Human Rights and Extreme Poverty visit: <http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIIntroduction.aspx>

Ebenezer Durojaye is the coordinator of, and senior researcher in, the Socio-Economic Rights Project, Community Law Centre, University of the Western Cape

Developments in the African Region

African Commission issues General Comment on Women's Health and HIV

In October 2012, during its 52nd Ordinary Session in Yamoussoukro, Ivory Coast, the African Commission on Human and Peoples' Rights adopted its first ever General Comment on Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). The General Comment seeks to clarify the nature of states' obligations regarding women's right to protection from HIV and to information about their own health status and that of their partners.

Article 14 (1) (d) and (e) focuses on health and reproductive rights and states:

1. States parties shall ensure that the right to health of women, including sexual and reproductive health, is respected and promoted. This includes:
 - d) The right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;
 - e) The right to be informed on one's health status and on the health status of one's partner particularly if affected with sexually transmitted infections, including HIV/AIDS.

Article 14(1)(d) and (e) is unique in that it specifically recognises women's right to reproductive health in the context of HIV/AIDS. The General Comment was a result of concerted efforts by the African Commission's Special Rapporteur on Rights of Women in Africa, the Centre for Human Rights at the University of Pretoria, the Committee on the Protection of the Rights of People Living with HIV (PLHIV)

and those at risk, vulnerable to and affected by HIV, in conjunction with the Solidarity for African Women Rights Network and UNAIDS.

The Maputo Protocol stresses that state parties have an obligation to create an enabling legal and policy framework and a social environment that allows women to control their sexual and reproductive choices, which will in turn strengthen control over HIV prevention and protection choices. The African Charter recognises that all people, including women in Africa, have the right to the highest attainable standard of health, which includes sexual and reproductive rights. The African Commission (para 3) acknowledges that, for women to meaningfully claim and enjoy freedom from violence, abuse and discrimination, there is a need to address and transform societal attitudes on gender inequalities, power imbalances and male dominance.

According to the UNAIDS progress report of 2011, sub-Saharan Africa is home to about 59% of people living with HIV. The General Comment recognises that the limitation of women's rights in the context of sexual and reproductive health increases their susceptibility to HIV exposure and transmission and related rights abuses. It is envisaged that the General Comment will guide the African Commission in its consideration of communications and states' reports in relation to Article 14(1)(d) and (e). More importantly, it is hoped that the General Comment will serve as a standard-setting document, which will guide states in fulfilling their obligations under Article 14(1)(d) and (e) of the Maputo Protocol.

In a continent that is still prone to numerous human rights abuses, particularly gender-based abuses, the General Comment is a welcome development that will give voice to the reproductive health needs and rights of women in Africa. It is hoped that states parties to the Protocol will implement the General Comment in its entirety.

For further information, visit the African Commission website at <http://www.achpr.org/news/2012/11/d65/>

Resolution on the right to adequate housing and protection from forced evictions

During the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights in Yamassokrou, Ivory Coast, the Commission adopted a resolution on the right to adequate housing and protection from forced evictions. The resolution, the first of its kind in Africa, recalls the provisions of the African Charter on Human and Peoples' Rights that are relevant to the right to housing relative to property, health and family as the legal foundation for its adoption.

The resolution urges states parties to refrain from breaching the right, which is expressly provided for under Article 16 of the Maputo Protocol. The Commission further recalls its recommendation in *Social and Economic Rights Actions Centre and the Centre for Economic and Social Rights (SERAC) v. Nigeria* Communication 155/96, which reaffirmed states' obligations in relation to the right to housing.

The resolution is significant in that it calls on states parties to:

- put an end to all forms of forced evictions, in particular evictions carried out for development purposes;
- ensure that evictions are only carried out as a last resort after all alternatives to eviction have been provided and that all evictions comply with international and regional standards;
- adopt legislative and other measures to ensure that legal procedures are complied with prior to any eviction and making available remedies that are likely to result in the right to reparation either in the form of *restitutio in integrum* or monetary compensation;
- take concrete measures to confer security of tenure to all people lacking such protection, with prior and informed consent of the affected peoples; and
- ensure that any alternative housing provided to people complies with international and regional standards on the right to adequate housing.

For further information, visit the African Commission website at: <http://www.achpr.org/sessions/52nd/resolutions/231/>

Developments at the United Nations

Report of the UN Special Rapporteur on Extreme Poverty and Human Rights on access to justice for people living in poverty (2012)

In October 2012, the UN Special Rapporteur on Extreme Poverty and Human Rights released a report analysing the main obstacles impeding people living in poverty from access to justice.

Some of the obstacles highlighted include:

- lack of access to information;
- lack of awareness of legal rights;
- fear of reprisal or further stigmatisation; and
- lack of financial resources, which are directly related to

the costs of legal advice, administrative fees and other collateral costs that hamper access to justice.

The report acknowledges that one of the core pillars of the rule of law is access to justice for the poorest and most marginalised members of society. The rule of law is mean-

ingless for people living in poverty or social exclusion without effective access to justice. The report emphasises that access to justice is essential for tackling poverty and protecting the human rights of persons living in poverty, for a number of reasons.

First, owing to their vulnerability, persons living in poverty are more likely to fall victim to criminal or illegal acts including sexual or economic exploitation, violence, and torture. Second, access to justice is important because justice systems can be a tool to overcome deprivation, for example, by developing jurisprudence on social and economic rights. Third, when vulnerable people cannot access justice systems, they are sometimes forced to take justice into their own hands through illegal or violent means, or to accept unjust settlements. Fourth, the inability of the poor to pursue justice remedies through existing systems increases their vulnerability to poverty and violations of their rights.

In this important report, the Special Rapporteur refers to many laws that are inherently biased against persons living in poverty, particularly those that do not recognise or prioritise the abuses they suffer regularly or that may have a disproportionately harsh impact on them. When encountering the criminal justice system, they are deprived of the means to challenge the conditions of their arrest, remand, trial, conviction, detention and release.

Under international human rights law, states have a legal obligation to ensure that all individuals are able to access competent and impartial judicial and adjudicatory mechanisms equally, without discrimination.

The Special Rapporteur emphasises that improving access to justice requires states to tackle a range of legal and extra-legal obstacles existing within and outside of the formal justice system, including socio-economic and structural obstacles. In conclusion, the report provides some useful recommendations to overcoming social and cultural obstacles to access to justice for the poor. For example, states should actively disseminate legal and judicial information on legislation, legal decisions and policy decisions to all, without charge and in multiple formats and languages; and they should build the capacity of poor and disadvantaged groups to ensure that they have a full understanding of their rights. To address the legal and normative obstacles, states should ensure that laws give due weight and consideration to the interests of persons living in poverty.

For further information, visit the OHCHR website at: <http://www.ohchr.org/EN/Issues/Poverty/Pages/Accessstojustice.aspx>

Colloquium on the application of the African Charter on Human and Peoples' Rights by South African Courts

November 2012

In November 2012 the Socio-Economic Rights Project of the Community Law Centre at the University of the Western Cape (UWC) convened a colloquium on the application of the African Charter on Human and People Rights by South African Courts. The colloquium brought together scholars across Africa, members of the African Commission, advocates and judges including justices of the South Africa Constitutional Court, government officials and other stakeholders.

The colloquium was conducted in the form of a panel discussion on the following themes.

- the African regional human rights system;
- the South African Constitution and jurisprudence of Constitutional court;

- the relationship between international law and domestic law; and
- the intersection between the African Charter and South African jurisprudence.

The colloquium opened with a welcoming address delivered on behalf of Prof. Julia Sloth-Nielsen, Dean of UWC's Faculty of Law. The keynote address was delivered on behalf of the Hon. Commissioner Alapini Gansou, African Commission Special Rapporteur on Human Rights Defenders in Africa. The Commissioner began by asserting that the obligations to respect, protect, promote and fulfil human rights are part of the doctrine of state sovereignty. She noted that having ratified the African Charter, all states parties to the African Union have made a commitment to fulfil their human rights obligations contained in the Charter.

Among the highlights was a presentation by Prof. Frans Viljoen, who gave an overview of the African human rights

system since its inception over 30 years ago with the adoption of the African Charter on Human and Peoples' Rights, and emphasised recent developments in the form of the Additional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, as well as the Rules of Procedure of the African Commission on Human and Peoples' Rights, among others.

Judge Dennis Davis emphasised that although the Constitution envisages a situation where all three spheres of government, although distinct and independent entities, ought to work together interdependently and inter-relatedly, case law reveals that tensions in this relationship

mean some executive departments perceive themselves as being at war with the courts. In effect this often results in situations where these departments act in disregard of judicial pronouncements. Building a viable and sustainable relationship among the spheres therefore requires what Judge Davis described as moving from 'warfare' to 'lawfare'.

A total of 17 presentations were made at the colloquium. They will be published as journal articles in a special issue of the *Law, Democracy and Development Journal* (2013). For further information, visit the Community Law Centre website at www.communitylawcentre.org.za.

Presentations

Prof Wessel le Roux: Welcoming Address

Dr Ebenezer Durojaye: The background to the colloquium

Hon Commissioner Alapini Gansou, African Commission Special Rapporteur on Human Rights Defenders in Africa: Keynote address

Prof Frans Viljoen: Overview of the African Human Rights System

Horace Adjolohoun: Application of the African Charter in Francophone countries

Judge Dennis Davis, High Court of the Western Cape, South Africa: The relationship between courts and the other arms of government in promoting and protecting human rights in South Africa

Anthea van de Burg: The role of National Human Rights Institutions (NHRIs) in monitoring the promotion and protection of human rights at the national level

Vincent Nmehielle: Six years in business: The African Court on Human and Peoples' Rights

Magnus Killander: How international law influences domestic law: Experiences/examples from other African countries

Kathleen Hardy: Litigating human rights cases in South Africa: Experience from Centre for Applied Legal Studies (CALs)

Bright Theu: Litigating human rights cases at the regional level: The IHRDA experience

Allan Wallis: Litigating human rights cases within southern African region: Experiences from the Southern Africa Litigation Centre (SALC).

Sibongile Ndashe: Litigating before the African Commission

Prof Lilian Chenwi: Right to housing under the African human rights system: Convergence or divergence with the South African approach

Dr Ebenezer Durojaye: The right to health under the African Charter: Lessons for South African Courts

Mr Samuel O Oke: Jurisprudence of the African Charter on the right to a clean environment: Lessons for South Africa

Dr Jamil Mujuzi: Fair hearing principle of the African Commission: How relevant are they to South African courts?

Dr Lukas Muntingh: Guidelines on imprisonment and the prevention of torture under the African Charter: How relevant are they for South Africa?

Ms Josephine Odikpo: Litigating health rights issues: Experiences from Nigeria

Jotham O Arwa: Litigating socio-economic rights cases before domestic courts: The Kenyan experience

Jacinta Nyachae: Using international and regional human rights instruments to advance right to health cases in Kenya: The Patricia Asero case

I hear your cry

Ebenezer Durojaye

I hear your cry from nigh and beyond
Laden with sorrowful sweetness
A reminiscence of a happily sad day
When the gleeful rising sun heralds a gloomy noon

I hear your cry reverberating from tiny huts to palatial
mansions
Echoing the pain of servitude and subjugation
It is the cry of one craving to be heard
It bears with it an agitation like an angry sea

I hear your cry from the four walls of a room
It is the cry of an injured heart
It speaks of a broken, battered and bruised spirit
Longing for care, warmth and respectability

I hear your cry speaking in diverse tongues
But united by its melancholic melody
It ministers to our hearts of stone
Taunting us of our complicity

I hear your cry ringing restlessly
Like a school bell, reminding us of our ageless apathy
To your age-long appeals
For justice, equality and dignity