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Editorial

by Sandra Liebenberg and Karrisha Pillay

This is the final edition of ESR Review for 2000. We apologise for the delay in its publication which was due to the fact that the energies of project staff were consumed by the Resource Book on socio-conomic rights that is about to be published in November (see Publications). However, we are pleased to be in a position to produce this bumper edition of ESR Review, covering a broad range of topics relevant to socio-economic rights in South Africa.

Our feature article reviews South Africa's health policies against international standards, particularly the recently adopted General Comment of the UN Committee on Economic, Social and Cultural Rights on the right to health. The section on policy and legislation includes articles on the relevance of the recently passed Promotion of Access to Information Act and the Promotion of Equality and Prevention of Unfair Discrimination Act to socio-economic rights. The Cape High Court's judgment in the Grootboom case as well as the arguments raised during the hearing of the appeal in the Constitutional Court is discussed in our case review section. The South African Human Rights Commission's Second Economic and Social Rights Report was released on 15 September 2000. This report and the process followed in producing it is reviewed in our section on human rights institutions.

Finally, our international section focuses on children's socio-economic rights. It also includes information on the newly appointed UN Special Rapporteurs on the rights to adequate housing and food. The fact that South Africa has still not ratified the International Covenant on Economic, Social and Cultural Rights, 1966 is a matter of concern, and is difficult to understand given the fact that we have ratified all other major international human rights treaties. The reasons for and implications of South Africa's ratification of the Covenant are explored in our international section.

We would like to take this opportunity to thank all contributors to ESR Review during 2000.

South Africa's Commitment to Health Rights in the Spotlight:

Do We Meet International Standards?

ESR REVIEW

Karrisha Pillay

South Africa has adopted a broad range of measures in our endeavour to establish an appropriate, efficient and constitutionally sound framework for the realisation of health rights. We have sought to learn from international experience while attempting to develop an innovative and original approach to reflect the realities and needs of our country.

On 11 May 2000 the Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comment No. 14 on the Right to the Highest Attainable Standard of Health (UN doc. E/C.12/2000/4). This General Comment aims to provide guidance on the meaning of the right to the highest attainable standard of health protected in article 12 of the International Covenant on Economic, Social and Cultural Rights ('the ICESCR').

This article will focus on the content of General Comment No. 14 and some of its key recommendations. Special attention will also be given to the extent to which South Africa complies with some of these recommendations.

The relevance of General Comment No. 14 for South Africa

The recent adoption of General Comment No. 14 highlights the need for South Africa to ratify the International Covenant on Economic, Social and Cultural Rights, 1966, without further delay (see the article by L Mashava in this edition). However, this General Comment is also likely to be instructive in the interpretation of health rights in South Africa.

The socio-economic rights in the South African Constitution, including the right of access to health care services in section 27(1)(a), have been modelled on the the ICESCR. The following concepts in section 27(1)(a) have been imported from the Covenant: The duty on the State -

- to take reasonable legislative and other measures;
- to achieve the "progressive realisation" of the rights;
- within its available resources.

However, in spite of these similarities between the ICESCR and the South African Constitution, we should note that there are also some important differences. Most notable is the Covenant's recognition of a right to "the highest attainable standard of physical and mental health" and the South African Constitution's recognition of a right of access to health care services.

Despite these differences, the potentially valuable role of international law in the interpretation of the rights in the Bill of Rights is explicitly recognised in the Constitution. Section 39 of the Constitution obliges a court, tribunal or other forum to consider international law when interpreting the Bill of Rights. The Constitutional Court has further confirmed that regard maybe had to both binding and non binding international law (S v Makwanyane 1995 (6) BCLR 665 (CC) at para 35). Although South Africa has failed to ratify the International Covenant on Economic, Social and Cultural Rights, the interpretation given to health rights under this Covenant may nevertheless be considered in interpreting s 27 of the South African Constitution.

The adoption of this General Comment is an important international initiative to clarify the nature and scope of the right to health. General Comment No. 14 covers a wide range of issues, which include:

- the normative content of the right to health;
- State obligations engendered by the right;
- violations of the right; and
- the implementation of the right at national level.

What does the right to health mean?

The General Comment recognises that the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health.

It notes that the right to health contains the following interrelated and essential elements. The precise application of these elements will depend on the conditions prevailing in a particular State party:

- Functioning public health and health care facilities, goods and services, and programmes must be available in sufficient quantity within the State party.
- Health facilities, goods and services have to be accessible to everyone without discrimination. This includes physical accessibility, economic accessibility (affordability) and information accessibility.
- All health facilities, goods and services must be respectful of medical ethics and culturally appropriate.
- Health facilities, goods and services must be scientifically and medically appropriate and of good quality.

Special attention must also be given to the health needs of women, children and adolescents, older persons, persons living with disabilities and indigenous people.

The obligations of the State

The General Comment notes that there is an immediate obligation on State parties to the Covenant to guarantee that the right will be recognised without discrimination of any kind (para 18). It also reaffirms that the "progressive realisation" of the right to health should not be interpreted as depriving the obligation of the State of all meaningful content. Instead, State parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realisation of the right (para 31). It reiterates the strong presumption that retrogressive measures are impermissible (para 32; also see General Comment No. 3 on "the nature of States parties obligations", UN doc. E/1991/23, para. 9).

The Socio-Economic Rights Project and the ANC Women's Caucus made a submission in March 1998 in response to the White Paper on

The State has a legal duty to respect, protect and fulfill the right to health. These duties are echoed in section 7(2) of the South African Constitution. The illustrative list of exactly what these duties entail is useful in interpreting these duties in the South African context.

The duty to respect health rights requires States parties to refrain from interfering directly or indirectly with the enjoyment of the right to health. The duty to protect requires that States parties take measures that prevent third parties from interfering with the guarantees of the right to health. The duty to fulfill, according to the General Comment, requires States parties to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realisation of the right to health (para. 33).

Health. The Socio-Economic Rights Project and the Women's Legal Centre also prepared a joint submission opposing the proposed regulations on AIDS notifiability. Copies of both these submissions can be obtained from our project administrator, Gaynor Phigeland: Tel.: (021) 959 2950.

Core obligations

The attention given to the core obligations imposed by the right to health in this General Comment is particularly interesting. It confirms that States parties have a core obligation "to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care" (para. 43). General Comment No. 14 states in unequivocal language that "a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations which are non derogable" (para. 47).

According to the Commitee, the core obligations engendered by the right to health include at least the following:

- to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups;
- to ensure access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger;
- to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- to provide essential drugs, as from time to time defined by the World Health Organisation's (WHO) Action Programme on Essential Drugs;
- to ensure an equitable distribution of all health facilities, goods, and services;
- to adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population. The strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process. It should also include mechanisms, such as health indicators and benchmarks, by which progress can be closely monitored. The process by which the strategy and plan of action is devised, as well as their content, should give particular attention to all vulnerable or marginalised groups (para. 43).

This list of core obligations is fairly expansive. The list includes some of the underlying preconditions for health as well as the nature of the actual health care services that should be provided. Furthermore, compliance with these core

obligations is mandatory for all State parties to the Covenant regardless of their levels of development.

The core obligations outlined in the General Comment raise serious questions about the omission of certain health needs that are critical to many countries. The omission of treatment and programmes to deal with the growing HIV/AIDS catastrophe in sub-Saharan Africa (sometimes referred to as the medical holocaust) is particularly questionable. However, despite this shortcoming, the core obligations in General Comment No. 14 represent the essential measures needed to promote people's health and well-being, and ensure access to a functioning health care system.

In addition to these core obligations, the General Comment confirms certain "obligations of comparable priority". It is not clear why these were not included under the core obligations, given that they enjoy comparable priority. These include the following:

- ensuring reproductive, maternal (pre-natal as well as post-natal) and child health care;
- providing immunisation against the community's major infectious diseases;
- taking measures to prevent, treat and control epidemic and endemic diseases;
- providing education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;
- providing appropriate training for health personnel, including education on health and human rights (para. 44).

Fulfilling core obligations in South Africa

South Africa's legal framework for health rights complies with many of these core obligations, at least at a theoretical level. Though not comprehensive, and sometimes subject to criticism in their implementation, the following initiatives adopted by the South African government are illustrative:

- The principle of equality and non discrimination underpins the entire health system. Support for this can be found in the White Paper for the Transformation of the Health System in South Africa (April 1997) as well as the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000.
- Provision is made for the distribution of minimum essential foods through a range of policies and programmes. Two such programmes are the Primary Schools Feeding Scheme which provides food to children in primary schools, and the Infant and Young Child Feeding Scheme which provides nutritional aid to infants in hospitals.
- The Housing Subsidy Scheme is a key strategy through which the right of access to adequate housing is fulfilled.
- The National Water Act No. 36 of 1998 is an example of legislation giving priority to water required to satisfy basic human needs.
- The Essential Drug Policy as well as the White Paper's commitment to ensuring that there are safe, good quality essential drugs available in all health facilities also indicates compliance with core obligations in the General Comment.

- The White Paper on the Transformation of Health Servicescommits health services providers to an equitable distribution of all health facilities, goods, and services.
- The Choice on Termination of Pregnancy Act No. 92 of 1996 guarantees women's reproductive right to safe and legal abortions.

Violations of States parties obligations

The General Comment further provides an illustrative list of possible violations by States parties. These violations are formulated in respect of each of the specific obligations of State parties (paras. 46-52).

For instance, violations relating to the obligation to respect the right to health, may result from unfair discrimination in access to health services, facilities or goods.

Examples of violations of the obligation to protect the right include:

- the failure to discourage medical or cultural practices that endanger health;
- the failure to discourage the production, marketing, and consumption of cigarettes, alcohol and drugs; and
- the failure to protect women against violence or prosecute perpetrators.

Examples of violations of the obligation to fulfil the right include:

- the failure to adopt or implement a national health policy designed to ensure the right to health of everyone;
- insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups, particularly the vulnerable and marginalised;
- the failure to adopt a gender sensitive approach to health; and
- the failure to reduce infant and maternal mortality rates.

Tallying South Africa's scorecard

South Africa's scorecard against General Comment No. 14 cannot be totalled without first asking the question: Does General Comment No. 14 reflect and meet the health needs of South Africa? In response I would argue that, while General Comment No. 14 has certain limitations, its value in clarifying health rights cannot be underestimated. Its clear exposition of the content and duties imposed by health rights is particularly encouraging. However, caution should be exercised in not limiting priorities in a country like South Africa exclusively to those articulated in the General Comment. For instance, effectively addressing HIV/AIDS is an indisputable priority in the South African context.

The South African Government's inability to deal effectively with the HIV/AIDS crisis has been extremely disappointing and a severe constraint to the realisation of health rights. The ever-increasing statistics on HIV/AIDS are indicative of this ineffective preventative strategy. The confusion surrounding the President and Ministry's position on the link between HIV and AIDS undermines educative and preventative strategies in the fight against virus. Limitations in the Government's preventative strategy are also evidenced by the government's failure to provide anti-retorviral treatment to reduce mother-to-child transmission of HIV. In addition, the government's proposed policy to make AIDS a notifiable disease, if

adopted, would be a further set-back in efforts to effectively redress the AIDS crisis. Of particular concern is this proposed policy's violation of patients' rights to privacy and confidentiality as well as its potential to create an unsafe and threatening environment in which people are unlikely to voluntarily present themselves for HIV testing. The policy is also likely to have a particularly harsh impact on women due to their increased susceptibility to HIV on account of both biological and social factors.

The adoption of the White Paper on Health clearly outlines the overall policy governing the realisation of health rights in South Africa. However, the absence of an overarching legislative framework for health rights poses a severe constraint to the realisation of this right. Three years have lapsed since the adoption of the health policy, yet the National Health Act has still not been passed. The passage of this legislation is crucial as it is intended to give clear overall direction to health rights in South Africa.

However, despite these shortcomings, credit must be given to the Ministry of Health for its adoption of a wide range of other measures aimed at making health rights a reality for all in South Africa. The unequivocal commitment to equality and non-discrimination in the health sector lays a solid foundation for the realisation of health rights in South Africa. The emphasis on affordable health care (particularly through the policy of free health care to pregnant women and children under the age of 6), and the Ministry's efforts to provide access to more affordable medication are laudable. The emphasis on accessible health care through the adoption of the primary health care approach is also positive. The Government's progressive reproductive health laws relating to choice on termination of pregnancy and sterilisation are equally encouraging. Finally, South Africa's broader commitments to the realisation of all socio-economic rights is likely to create the underlying preconditions for a state of good health for all in South Africa.

Where to from here?

In spite of certain shortcomings, General Comment No. 14 provides a useful framework for the realisation of health rights in South Africa. Its attempts at being comprehensive, and providing clarity on a range of complex issues relating to health are particularly impressive. Whilst it is crucial that an overall health strategy for any country must be "home-grown," South Africa can certainly learn from and advance its realisation of health rights through international standards such as those articulated in General Comment No. 14. Whilst the content of this General Comment can aid in the interpretation of health rights in South Africa, its role in the advancement of these rights can be significantly enhanced through South Africa's ratification of the International Covenant on Economic, Social and Cultural Rights. Upon ratification, South Africa will be subject to the scrutiny of the Committee on Economic, Social and Cultural Rights through its reporting procedure.

Finally, it should be noted that the standards set out in General Comment No. 14 should inform the domestic monitoring of health rights in South Africa. The SA Human Rights Commission has a constitutional mandate in terms of section 184(3) to monitor the realisation of socio-economic rights, including the rights in the Bill of Rights concerning health care. It should use General Comment No. 14 in evaluating the measures taken by relevant organs of state towards the realisation of health rights in South Africa.

The policy and legislative framework for the realisation of health rights in South Africa has, to a large extent, been developed. However, the challenges posed by the implementation of these rights must be acknowledged and addressed. In tallying the scorecard, it is vital that international standards as well as domestic standards developed to reflect the particular health needs of South Africa be taken into account.

Promotion of Access to Information Act:

Prospects for the protection of socio-economic rights

Thabani Masuku

Introduction

The river near your town is overflowing with toxic pollutants. People and livestock nearby develop medical complications, get sick and die. A bank loan is refused. Your pension application is refused. You want information and you want reasons. Every door slams in your face, government officials ignore your requests for assistance and refuse to furnish you with reasons.

The Promotion of Access to Information Act has not yet come into force. Regulations are currently being drafted.

When the long-awaited Promotion of Access to Information Act No. 2 of 2000 comes into effect, it will provide an effective mechanism for accessing information and addressing situations like these. This Act has been drafted in terms of section 32(2) of the Constitution which mandates the passage of this legislation to give effect to the right of access to information.

The Promotion of Access to Information Act accordingly aims to provide a coherent legislative framework for the right of access to information held by public bodies, and to information held by private individuals that is necessary for the protection of rights. For a country emerging from a history of authoritarian secrecy exercised by both the State and the private sector, the culture of openness and accountability envisaged by this Act is likely to revolutionise the treatment and management of information in South Africa. Whilst the impact of this Act will permeate many sectors, it has the potential to have a particularly profound effect on the socio-economic rights of disadvantaged groups and individuals. This article will examine some of its implications for socio-economic rights. Particular attention will be given to how it can be used to advance and protect socio-economic rights.

Information held by public bodies

The right to access information held by the State or other public body is almost unqualified, provided the requester of the information meets the procedural requirements of the legislation. However, it should be noted that certain specified institutions such as the cabinet and its committees are exempted from the application of the Act.

Information held by private bodies

The right to access information held by private bodies is subject to the following requirements:

- The requester of the information must meet the procedural requirements set out in the Act.
- Information held by private bodies must be necessary for the exercise or protection of a right. The applicant must prove that the information held by a private body is necessary to protect a right.

This Act echoes the constitutional provisions on standing (s 38). The right of access to information can be exercised by an individual, the community or a group of people. The Act also makes it possible for interventions to be made on behalf of vulnerable communities.

The State as a requester of information

The inclusion of the State in the definition of "requester" of information is likely to enhance the protection of socio-economic rights. Though unusual in liberal constitutional democracies, it effectively enables the State to intervene on behalf of vulnerable communities by requesting information from powerful private bodies. This role of the State will be particularly important in protecting socio-economic rights against improper invasion from other private parties. The Act accordingly places the State in a position to actively protect individuals or communities from violations of rights by private bodies. For example, the State can request information from a manufacturing company in order to determine the effects on a local community of pollution caused by the company's activities. Such State intervention may be necessary to protect the right to a clean and healthy environment, the right to health care services and the rights to food and water. The information gathered by the State can therefore be used to advance the socio-economic rights of disadvantaged communities.

Knowledge as power

This Act has laid the ground rules for a human rights culture grounded on knowledge. For the State, the Act provides a tool to fulfil its obligations under the Constitution. It allows the State to gather the necessary information to advance socio-economic rights. The Act provides the courts with an opportunity to widen its inquiry on socio-economic rights through the additional information that can now be accessed, and to develop innovative remedies in the enforcement of these rights.

Most importantly for the public, knowledge is power. This Act can empower civil society to participate meaningfully in the measures adopted by Government towards the realisation of socio-economic rights. This Act can contribute to improving the quality of peoples' lives through being used to access information from Government and private bodies relating to the protection and advancement of socio-economic rights. For example, the Act can play a particularly useful role in accessing information relating to budget management and priorities. If this information indicates a disproportionately low spending on socio-economic rights, it may be used to challenge government spending. This Act accordingly provides the public and individuals with an important tool to monitor State spending priorities.

Exemptions

The Act allows for a number of exemptions in terms of which information held by the State (part 2, chapter 4) or a private body (part 3, chapter 4) may be legitimately withheld. Grounds for refusal of information held by the State or a private body include:

- the mandatory protection of privacy of a third party who is a natural person;
- the mandatory protection of commercial information of a third party;
- the mandatory protection of certain confidential information of a third party; and
- the mandatory protection of safety of individuals and protection of property.

These provisions relating to exemptions are unlikely to jeopardise the Act's role in advancing socio-economic rights. All these exemptions are subject to a general public interest override. In other words, even information which falls within the ambit of an exemption and is therefore prima facie protected, must be disclosed if the public interest warrants it.

Enforcement procedures

The procedures set out to enforce the provisions of the Act are weak. Firstly, appeals from internal decisions that refuse access to records must be made to the High Court. It is trite that the High Court is an inaccessible, expensive, slow, and adversarial forum. It therefore poses a barrier to ordinary people using the Act to enforce their socio-economic rights. Furthermore, High Court turf is a lawyer's terrain which is a further barrier to poor and disadvantaged individuals or groups. The power given to the State to request information on behalf of the vulnerable and poor communities is therefore particularly important.

Secondly, the internal procedures are only intended to facilitate access to information and do not have a direct bearing on socio-economic rights. Once accessed, the information must still be interpreted and analysed. The interpretation and analysis of complex information is often beyond the expertise of ordinary people and requires specialised services. Despite this shortcoming, the culture of openness and accountable governance envisaged by the Act will promote the realisation of socio-economic rights.

Making the content of the Act accessible

This Act adopts a very directive approach - obliging government to invest time, people, training and other resources in making "transparent and accountable government" work. The Act further obliges government to take into account the high illiteracy rate, the various official languages and the need for extensive outreach and education around the issues contained in the Act.

All governmental bodies are required to designate information officers who are responsible for facilitating information requests. They have a duty to assist requesters which includes a duty to redirect requests to appropriate bodies, to receive oral requests from illiterate requesters, to reduce oral requests to writing and to assist requesters whose requests do not fully comply with the prescribed format for requests.

All government bodies are also required to publish manuals describing the bodies' structures, functions, information officers, contact information, nature of

information held, and categories of records available to the public. The Director-General of Communications must ensure that the contact information for all information officers is published in every telephone directory. The heads of governmental bodies must disclose records revealing public safety or environmental risks, or other public interest concerns.

The Human Rights Commission must publish a guide describing the objects of the Act, contact information of the information officers of every government department, procedures for making information requests, the assistance available and the enforcement procedures. This guide must be published in each official language and made widely available.

These prescriptive measures will ensure that this Act is accessible, easy to comprehend and beneficial to the general public. In short, it will empower the public to participate meaningfully in the affairs of government and to influence the protection and advancement of socio-economic rights.

Consolidating democracy

Every democracy is unique and has it own defining qualities. In South Africa, breaking the culture of secrecy, empowering people with information and written reasons for the decisions that affect their lives is crucial to the consolidation of our democracy. Building and transforming broken lives requires the active participation of affected communities. This in turn requires information. The Promotion of Access to Information Act is an important tool through which disadvantaged communities can advance socio-economic rights. Finally access to information is like to foster greater accountability and result in better informed decisions.

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The New Equality Legislation:

Can It Advance Socio-Economic Rights?

Sandra Liebenberg

The *Promotion of Equality and Prevention of Unfair Discrimination Act* No. 4 of 2000 was passed in February 2000, although it has not yet come into operation.

The Act will take effect in the context of deep structural inequalities in our society. A recent report by UNISA's Bureau of Market Research has confirmed that inequalities in income distribution in South Africa are amongst the highest in the world. Income inequalities are likely to remain a key feature of South African society because of the trend towards employing more skilled labour, job-shedding in the formal economy and the low employment capacity of the economy ('Report confirms gulf between rich, poor',*Business Day*

, 25 July 2000). Among comparable middle-income developing countries, South Africa has one of the worst records in terms of social indicators such as health, education, safe water and fertility. Unemployment, the lack of access to productive resources such as land and to social services such as water, health care and education have increased the vulnerability of many households.

The President of the Constitutional Court has said that the socio-economic rights in our Bill of Rights represent a commitment to addressing conditions of poverty and inequality in our society (*Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC), paras 8 and 9). The right to equality in our Bill of Rights includes "the full and equal enjoyment of all rights and freedoms". This implies that vulnerable and disadvantaged groups should not experience unfair discrimination in accessing and enjoying their constitutionally protected rights, including socio-economic rights. In addition, the equality clause expressly recognises that in order to promote the achievement of equality, legislative and other measures designed to protect or advance individuals or groups who have been disadvantaged by unfair discrimination may be taken (s 9(2)).

The draft regulations to the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 are available on the website of the Parliamentary Monitoring Group: www.pmg.org.za/bills/bills.htm

According to the equality jurisprudence developed by the Constitutional Court, unfair discrimination does not mean identical treatment in all circumstances. The Court will closely examine the impact of the discriminatory provision on the complainant in order to ascertain whether it is in fact unfair. Of particular importance is the extent to which a measure entrenches or deepens patterns of disadvantage experienced by groups in our society (*Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC) at paras 50 - 51; *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC), para 44).

The new equality legislation was passed in order to give effect to the constitutional requirement that national legislation be enacted to prevent or prohibit unfair discrimination (s 9(4)). The Act is far-reaching in its application, binding both the State and all private parties. It has the potential to be a powerful tool to protect disadvantaged groups from unfair discrimination in accessing and enjoying socio-economic rights. It also includes positive measures to promote equality in all spheres, including those relevant to socio-economic rights. We highlight some of the ways in which the Act can be used to advance equal access to socio-economic rights.

Challenging systemic inequalities

It is clear that the Act is committed to a vision of equality that seeks to redress systemic, socio-economic inequalities. The opening paragraph of the preamble proclaims:

"The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people."

The guiding principles require that the existence of systemic discrimination and inequalities in all spheres of life should be recognised and taken into account in the application of the Act (s 4(2)(a)). "Equality" is defined in the Act to include equality both in law and fact, and the achievement of equal outcomes. Thus the Act is committed to ensuring equal outcomes for disadvantaged groups (so-called 'substantive equality') as opposed to insisting that privileged and disadvantaged groups be treated in an identical way in all circumstances ('formal equality'). The Constitutional Court has affirmed this interpretation by ruling that a different

system of charging for water and services tariffs in the former black group areas of Pretoria (a flat rate) as compared to the former white areas (consumption-based) did not amount to unfair discrimination. This was justified on the basis of the inferior services delivered under apartheid to the black areas, and the fact that the charging of a flat rate was a temporary measure while equality of facilities and resources was being phased in. The Court acknowledged that it was also the only practical solution in the circumstances, and had not impacted adversely on the respondent in any material way (City Council of Pretoria v Walker 1998 (3) BCLR 257 (CC)).

The broad definition of "discrimination" in the Act also clearly encompasses unequal socio-economic conditions or situations in the country arising from the prohibited grounds of discrimination. Thus "discrimination" is defined as any "act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly -

(a) imposes burdens, obligations or disadvantage on; or
(b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds."

Prohibited grounds of discrimination

The Act's potential to redress unfair discrimination in relation to socio-economic rights depends to a large extent on the definition of prohibited grounds of discrimination.

The definition of "prohibited grounds" includes two types of grounds:

(a) the 17 listed grounds in section 9 of the Constitution;
(b) any other ground where discrimination on that other ground -

(i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).

The significance of this split between listed and unlisted grounds lies in the burden of proof. In terms of the Constitution and the Act, a discriminatory measure is only unlawful if it is established that it amounts to "unfair" discrimination.

In terms of section 13 of the Act which deals with the burden of proof, there is an automatic presumption that the discrimination is unfair if it is on a ground in paragraph (a) of the definition of "prohibited grounds". The respondent then bears the burden of proving that the discrimination is fair. However, if the discrimination is in terms of paragraph (b) of the definition of prohibited grounds, then the applicant will have to prove the existence of one or more of the conditions set out in paragraph (b). If the applicant succeeds in doing so, the respondent bears the onus of proving that the discrimination is fair in order to avoid a finding of unfair discrimination.

"Socio-economic status" as a prohibited ground of discrimination

The Act takes the Constitution a step further by referring to five new prohibited grounds of discrimination: family responsibility; family status; HIV/AIDS status;

nationality and socio-economic status. The fact that these are recognised as potential grounds of discrimination in the Act was as a result of extensive research and advocacy by the Equality Alliance and its members (see Liebenberg, 1999*ESR Review*vol 2 no 1, 12).

"Socio-economic status" is defined in the Act as including, "a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level of educational qualifications." Socio-economic status as a prohibited ground of discrimination is a significant tool for challenging inequalities and disadvantage arising from poverty. We live in a market economy in which a number of public services are increasingly being privatised. Poverty is usually the main barrier to people being able to access socio-economic rights such as water services, quality health care services, housing and education. The other additional grounds on which discrimination is prohibited are also important for assisting disadvantaged groups such as people living with HIV or AIDS, women and non-nationals to challenge unfair discrimination in accessing socio-economic rights.

However, the recognition of these additional grounds of discrimination in the Act was a qualified victory. They are included in the form of a "directive principle" in view of the "overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination" of these additional grounds (s 34). The Act requires that the Minister give special consideration to the inclusion of these grounds in paragraph (a) of the definition of "prohibited grounds". The Equality Review Committee which is established under the Act to advise the Minister must, within one year, investigate and make the necessary recommendations on the inclusion of these additional grounds.

The Act expressly says that section 34 does not preclude a discrimination case being brought on these new grounds, or the courts from determining that these new grounds fall within paragraph (b) of the definition of "prohibited grounds" or are included within one or more of the grounds in paragraph (a). If a court finds that any of these additional grounds are included within a ground under paragraph (a), then the automatic presumption of unfairness will apply. If a magistrate's court finds that it falls within paragraph (b), it must be submitted to the High Court for review in terms of section 23(5)(a).

The inclusion of these new grounds in paragraph (a) of the definition of "prohibited grounds" of discrimination should be high on the advocacy agenda of human rights and social justice NGOs in the forthcoming year.

Determining "unfair" discrimination in the Act

Section 14 of the Act commences by declaring that it is not unfair discrimination "to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination." This section also sets out the factors that must be taken into account in determining whether the respondent has proved that the discrimination is fair. These factors include:

- the context;
- the impact or likely impact of the discrimination on the complainant;
- the position of the complainant in society and whether he or she suffers from patterns of disadvantage;
- whether the discrimination is systemic in nature;
- whether the discrimination has a legitimate purpose;

- whether there are less disadvantageous means to achieve the purpose.

These factors encourage the courts to interpret discrimination in a way that will promote equal outcomes for disadvantaged groups.

One factor in the determination of unfairness that is a cause for concern is whether the discrimination "reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned". This factor, depending on how it is interpreted by the courts, could undermine substantive socio-economic equality. Market related service fees and costs, particularly in the context of privatisation of many public services such as water, often makes these services economically inaccessible to poor people. This in turn entrenches unequal access to socio-economic rights, and patterns of systemic disadvantage. If market-generated inequalities are regarded as a reasonable and justifiable differentiation in all circumstances, the goal of substantive equality will become increasingly remote. The weight the courts give to this factor in relation to the other factors in subsections (2) and (3) is obviously critical.

Unfair discrimination on the grounds of race, gender and disability

In addition to containing a general prohibition of unfair discrimination, chapter 2 of the Act contains a number of specific examples of unfair discrimination on the grounds of race, gender and disability. While respondents may still seek to prove that the discrimination is fair in terms of the factors in section 14, many of these examples will assist complainants in establishing claims based on socio-economic inequalities. For example, section 7 prohibits unfair discrimination on the ground of race, including:

- the provision or continued provision of inferior services to any racial group, compared to those of another racial group;
- the denial of access to opportunities, including access to services.

Section 8 prohibits unfair discrimination on the ground of gender, including:

- any policy or conduct that unfairly limits women's access to land rights, finance, and other resources;
- limiting women's access to social services or benefits, such as health, education and social security;
- systemic inequality of access to opportunities by women as a result of the sexual division of labour.

Finally, section 9 prohibits unfair discrimination on the ground of disability, including:

- denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;
- failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

Remedies for unfair discrimination

Wim Trengove has argued that systemic violations of socio-economic rights cannot be remedied by a once and for all court order (1999 ESR Review vol 1, no

4, 8). The same arguments apply to court orders aimed at redressing patterns of systemic inequality inherited from our past. Court orders of this nature would usually have to be directed to long-term reforms of social structures and institutions. Section 21 of the Act gives the equality courts which will enforce the Act broad remedial powers. Many of these remedies are well-suited to redressing socio-economic forms of discrimination. For example, provision is made for the payment of preventative damages to "an appropriate body or institution". The equality courts can also make positive orders, requiring respondents "to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question." Other orders include:

- an order directing the reasonable accommodation of a group or class of persons by the respondent;
- an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court order;
- a directive requiring the respondent to make regular progress reports to the court or the relevant constitutional institution regarding the implementation of the court's order.

The promotion of equality

The Act recognises that effective equality cannot be achieved only through litigation. While litigation can establish important precedents and influence laws and practices in society, proactive measures are needed to ensure a thorough, systematic review of laws, policies and social practices. New standards, plans of action and codes of good practice need to be developed in both the public and private sector in order for the right to equality to permeate a broad spectrum of sectors and social relations.

The State is placed under a duty to take measures to develop and implement programmes to promote equality, and "where necessary or appropriate" develop action plans, codes of practice, and internal mechanisms to deal with complaints of unfair discrimination, hate speech or harassment. The South African Human Rights Commission and other relevant constitutional institutions (for example, the Commission for Gender Equality) may request information on the measures taken to achieve equality, including on legislative and executive action and compliance with legislation, codes of practice and programmes.

The Act also places a duty on all Ministers to implement measures within the available resources which are aimed at the achievement of equality by -

(a) eliminating any form of unfair discrimination or the perpetuation of inequality in any law, policy or practice for which those Ministers are responsible; and
(b) preparing and implementing equality plans.

These equality plans must be submitted to the South African Human Rights Commission within two years after the commencement of the Act.

Significantly, the Act also places a duty on private parties directly or indirectly contracting with the State or "exercising public power" to promote equality by adopting appropriate equality plans, codes, regulatory mechanisms and other appropriate measures for the effective promotion of equality in the spheres of their operation. They must also make regular reports to the relevant monitoring authorities or institutions as may be provided in regulations. Relevant Ministers may also develop regulations requiring private sector organisations (e.g.

companies, partnerships, corporate entities) "to prepare equality plans or abide by prescribed codes of practice or report to a body or institution on measures to promote equality." These sections provide important mechanisms of accountability for private entities that play a crucial role in the effective realisation of socio-economic rights such as private schools, health care facilities, providers of water services, agencies involved in the distribution of social grants, banks and insurance companies.

Finally, the schedule to the Act contains an illustrative list of unfair practices in certain sectors. In terms of section 29, the State must, "where appropriate, ensure that legislative and other measures are taken to address these practices." The purpose of this list is to ensure that these practices are addressed and eliminated, and to assist people in interpreting their experiences and practices. This is not an exhaustive list and may be revised and expanded on the recommendation of the Equality Review Committee. Many of the illustrative practices listed in the schedule are critical to the elimination of pervasive forms of unfair discrimination in relation to socio-economic rights.

For example, the list in the health sector includes unfairly denying or refusing any person access to health care facilities or failing to make health care facilities accessible to any person. In the sector of housing, accommodation, land and property, unfair practices include -

- 'Red-lining' on the grounds of race and social status;
- Unfair discrimination in the provision of housing bonds, loans or financial assistance;
- Failing to reasonably accommodate the special needs of the elderly.

In the sphere of insurance services, an unfair practice includes unfairly disadvantaging people, "including unfairly and unreasonably refusing to grant services, to persons solely on the basis of HIV/AIDS status."

The challenge of implementation

The Ministry's intention is to bring the Act into effect on 10 December 2000. Draft regulations have been prepared, but have not yet been promulgated. The Act will only be an effective tool to prevent unfair discrimination and promote substantive equality if the equality courts are accessible and 'user-friendly' to disadvantaged groups, and if sufficient resources are allocated for the effective implementation of the Act. The nature of the regulations and the budget for the implementation of the Act are thus critical to achieving its objectives.

The efficacy of the promotion measures will depend on the capacity of State institutions and civil society to implement and monitor them in a systematic manner. This is a major challenge facing both the public and private sectors in the years ahead.

Grootboom v Oostenberg Municipality and Others

Karrisha Pillay and Sandra Liebenberg

*Grootboom v Oostenberg Municipality and Others*2000 (3) BCLR 277(C) was decided by the Cape High Court in December last year. It represents a critical test case on the nature and scope of section 26 of the Constitution (the right of access to adequate housing) and section 28(1)(c) (children's rights to shelter)

The facts

The applicants (some 390 adults and 510 children) are squatters who lived in Wallacedene, Kraaifontein for varying periods of time. As a result of their poor living conditions, they moved to vacant, private land in the area of jurisdiction of the Oostenberg municipality. Following proceedings in the Kuilsrivier Magistrate's Court, they were eventually evicted from this land on 18 May 1999. In the course of the eviction, their structures were demolished and their building materials destroyed. The homeless applicants then attempted to erect temporary structures on the Wallacedene sports field. However, these proved to be wholly inadequate and provided no protection against the elements, particularly for their children. The applicants brought an urgent application seeking an order directing the respondents (which included the local, provincial and national spheres of government) to provide temporary shelter for the applicants and their children, pending them obtaining permanent accommodation. Further relief based on the other socio-economic rights of children in s 28(1)(c) of the Constitution was also sought, but these claims were not pursued. On 4th June, Acting Justice Mr. Josman granted an interim order directing the respondents to make the Wallacedene Community Hall available free of charge, for the accommodation of the children of the applicants and one parent/adult for each child requiring supervision. The application was argued in full before Justices Comrie and Davis on 7, 8 and 9 September 1999.

The arguments

The applicants relied on sections 26 and 28(1)(c) of the Constitution to support their contention that the respondents have a duty to provide them and their children with shelter.

The applicants contended that the right of access to adequate housing in section 26 must be interpreted to include a minimum core entitlement to shelter for people who are literally homeless while programmes are being implemented to achieve the "progressive realisation" of adequate housing for all. In support of this argument, they relied on international law, particularly the International Covenant on Economic, Social and Cultural Rights, 1966, and the Convention on the Rights of the Child, 1989. The respondents argued that they were in the process of implementing a rational housing programme to redress an acute housing shortage within a limited budget. This rational programme discharged their obligations under s 26.They also argued that an obligation to provide some form of temporary shelter would divert scarce resources away from their rational housing programme which in time would provide adequate housing to all.

For copies of the background research undertaken by the Community Law Centre for the purposes of the *amicus* brief in the *Grootboom* case, contact Gaynor Phigeland at (021) - 959 2950.

The applicants also relied on section 28(1)(c) of the Constitution. They argued that children have an unqualified right to shelter which must be fulfilled by the respondents. Relying on section 28(2) of the Constitution, the applicants also submitted that it is in the best interests of a child to remain with his or her parents. Children's shelter rights should accordingly be extended to their parents so that children could remain within the family unit.

The respondents countered that if shelter were interpreted to mean housing in a family context, it would render the provisions of section 26 nugatory. The implications would be that everyone who has a child would enjoy an enforceable claim against the State to be provided with housing on demand. This which would have a dramatic impact on the respondents' budget. According to the respondents, "shelter" in section 28(1)(c) meant a place of safety for children in especially difficult circumstances as contemplated in the Child Care Amendment Act, No. 96 of 1996.

The judgment

The Court rejected the applicants' arguments in terms of s 26 of the Constitution. Relying on the judgment in *Soobramoney v The Minister of Health, Kwazulu Natal* 1998 (1) SA 765 (CC), the Court concluded that the respondents had produced "had produced clear evidence that a rational housing programme has been initiated at all levels of government and that such a programme has been designed to solve a pressing problem in the context of scarce financial resources." Any evaluation of the government's housing programme must take into account that a period of less than three years is an extremely short time frame to solve South Africa's housing crisis (286H - J). The Court did not deal directly with the applicants' argument that section 26 imposes a "minimum core obligation" on the State to provide shelter to homeless people (see General Comment No. 3 of the UN Committee on Economic, Social and Cultural Rights, UN doc. E/1991/23, para. 9).

However, the Court did uphold the applicants' arguments in terms of s 28(1)(c). It held that the primary duty to provide shelter for children rests with their parents. However, in the event that parents are unable to provide shelter for their children, s 28(1)(c) places an obligation on the State to do so. The court further recognised that shelter is a more rudimentary form of protection against the elements than is provided by a house. Furthermore, the provision of shelter under section 28(1)(c) should be of such a nature that parents may live with their children in the shelter. It explained that this interpretation does not mean that parents then become the bearers of this right in section 28(1)(c) which expressly provides that the children have such a right. Instead, the court acknowledged that an order which enforces a child's right to shelter should take account of the need for children to be accompanied by their parents. Such an approach, it noted, would be in the best interests of the child as required by section 28(2), and the overall spirit and purport of section 28 of the Constitution. Section 28(2) of the Constitution provides that a "child's best interests are of paramount importance in every matter concerning the child." The Court also noted that if shelter rights in this case were provided only for children, it would be permitting the break-up of family life of a kind which the new Constitution is determined to prevent (291, para. G-H). The denial of shelter to the 276 infants in the present case as well as the other children, would be incongruent with a constitutional instrument which envisages the establishment of a society based on freedom, equality and dignity (291, para. G-H).

The respondents' argument that shelter meant a place of safety was rejected as this would "inevitably result in these children being wrenched from their family context and any form of parental control and placed in a state institution even in cases such as the present one where there is no suggestion that the parents have neglected their children" (288 H).

The floodgates argument

The Court also paid some attention to the potential consequences of this interpretation of section 28(1)(c). In particular, it referred to the possible flood of applications by other squatters that shelter be provided for their children, and also for themselves as parents. The Court noted the concern that the respondents may be forced to provide inadequate housing under the guise of shelter, thereby disrupting the housing programme and "delicate decisions" already made about allocation of scarce resources (289 H). Some limitations implicit in its judgment were outlined:

- The children of the applicants in the present case are homeless (or will be when the temporary order is lifted) and are thus in need of shelter. This may not always be the case for all children who belong to or live with squatter families;
- The parent applicants in the present case are unable to provide the requisite shelter for their children, which is their primary duty to provide. This may not always be the case;
- In the present case, it is in the best interests of the children applicants to be accompanied by their parents, though not necessarily by extended families (289 H-J).

The remedy

The Court declared that the appropriate organ or department of State is obliged to provide the applicant children and their parents with shelter until such time that the parents are able to shelter their own children. Although the court was not prescriptive about the exact nature of such shelter, it did note that provisionally, tents, portable latrines and a regular supply of water (albeit transported) would constitute "the bare minimum." The court also expressed its confidence that a site could be found within the area of the first respondent (the Oostenberg Municipality), or at any rate within the area of the second respondent (the Cape Metropolitan Council) (293 A - C).

The court further held that the respondents must present under oath a report to the court on its implementation of the aforementioned order within a period of three months. The applicants are given an opportunity to comment on this order. This order of is based on the remedy of supervisory jurisdiction proposed by Wim Trengove (1999*ESR Review*vol. 1, no. 4, 8).

This decision can be heralded as a landmark decision in the area of socio-economic rights. Although the court held that the applicants had failed to make out a case based on the right of access to adequate housing in s 26 of the Constitution, it accepted that the applicants had made out a case for shelter under section 28(1)(c). The decision clearly recognises that the State has a positive duty to provide shelter to children whose parents are unable to do so. It also recognises that it is in the best interests of children to be accommodated with their parents. Parents thus have a derivative right to shelter in terms of s 28(1)(c)). The Court also confirmed unequivocally that the question of budgetary limitations were not applicable to the determination of the rights in s 28(1)(c). However, a disappointing aspect was the judgment's failure to deal directly with the minimum core duty argument under section 26.

Appeal to the Constitutional Court

The Respondents appealed against this judgment to the Constitutional Court. The case was argued before the Constitutional Court on 11 and 12 May 2000. The

Community Law Centre together with the South African Human Rights Commission intervened as *amici curiae* in the case. Their brief was argued by Geoff Budlender, Director of the Legal Resources Centre's Constitutional Litigation Unit. The *amici* argued that it was arbitrary to provide relief only to those adults who had children, "and leave the remaining four adults sleeping in the cold under plastic sheeting, waiting for their number to come up on a twenty-year waiting list, and waiting too for the inevitable application for their eviction" (Heads of Argument on Behalf of the *Amici Curiae*, para. 31). It was thus argued that s 26 imposed a minimum core duty on the State to ensure that people who were literally homeless were provided with some form of basic shelter. This complemented the unqualified right of children to shelter in terms of s 28(1)(c). According to *amici*, the Constitution does not contemplate a situation in which people without a roof over their heads must wait years to be provided with "adequate housing" in its full sense, when in fact it would have been possible to relieve the emergency situation in which they have been living.

The judgment of the Constitutional Court was pending at the date of writing. On 21 September 2000, the Court ordered the respondents to give effect to certain undertakings they had made during the argument of the case. The applicants argued that the respondents had not complied with these undertakings, and that they were still living in appalling conditions on the Wallacedene sportsgrounds. This order including the provision of toilets and taps, as well as funds to purchase building materials in order to waterproof the applicants' existing accommodation.

The Constitutional Court's judgment in the *Grootboom*case will be critical to future litigation in the area of economic and social rights.

The South African Human Rights Commission

The Second Economic And Social Rights Report

Danie Brand and Sandra Liebenberg

On Friday 15 September 2000 the South African Human Rights Commission launched its second annual Economic and Social Rights Report. This presents an opportunity to take stock again of the manner in which the Commission is implementing its mandate in terms of section 184(3) of the Constitution.

The process and report arising from the second monitoring cycle warrants some comment. The report and the monitoring procedure are discussed under three main headings: the process of preparing the report; the protocols in terms of which information was gathered for the report; and the final product, the report itself. We then finally consider what the final outcome of the monitoring process should be now that the report, a step in that process, has been completed.

A. The process

Public participation

The Commission was at pains throughout the preparation of its second Economic and Social Rights Report to assert its control over the monitoring process. In doing so, it has restricted civil society involvement in the process to a minimum by, for example, only seeking comments and suggestions from some NGOs on the draft protocols (questionnaires) to be submitted to relevant organs of state.

However, the Commission maintained its position adopted during the first monitoring cycle that it would not make the reports submitted to it by organs of state available to organisations of civil society prior to the production of its own report (see Tseliso Thipanyane, 1998 ESR Review vol 1 no 3, 11 - 12). This position was also confirmed in a number of recent conversations between staff of the Centre for Human Rights and the Commission. The Commission seems to justify this stance in the following terms: Government departments submit their reports to the Commission in confidence. The Commission would be held responsible if the reports were made public and caused embarrassment or harm to the relevant departments.

The SA Human Rights Commission's Second Economic and Social Rights Report: 1998 - 1999 is available on its website: www.sahrc.org.za

At the risk of sounding like a stuck record, this position of the Commission's is problematic and difficult to understand (see Danie Brand, 1999 ESR Review vol 2 no 1, 18 at 20). What possible harm could come from making information available to NGOs that is in any event part of the public record? What is it that the Commission will be blamed for - engendering a critical appraisal of government performance within civil society? With one exception, all of the government departments approached by the author were perfectly willing to provide the reports they had sent to the Commission. Why then should the Commission be so reluctant to do so?

It is also detrimental for the effective running of the monitoring process. The Commission, by all accounts, does not have sufficient resources for carrying out its mandate. Civil society organisations can provide invaluable resources of information and analysis to the Commission. NGOs, if allowed to study the information provided to the Commission by government departments, can provide the Commission with alternative information against which to verify the government reports. They can also furnish the Commission with their own experience and evaluation of government programmes and policies. During the course of this second cycle of the monitoring process a group of people organised by the Centre for Human Rights at the University of Pretoria engaged in the preparation of an economic and social rights report parallel to that of the Commission. This report will be launched on 15 October 2000. The information and context provided on the realisation of socio-economic rights in South Africa would have been useful to the Commission in the preparation of its own report, had it been willing to take up the offer. Many NGOs and CBOs operate at the coalface of delivery of social services to communities. There are also many university-based institutions that have done valuable studies on issues relating to socio-economic rights such as children's nutritional status, the impact of HIV/AIDS and housing delivery. These experiences and research projects could provide the Commission with valuable insights on where the gaps and problems lie in the realisation of socio-economic rights. This would have enhanced the status of the Commission's final report as an independent, well-researched and extensively consulted assessment of the measures taken by organs of state to realise socio-economic rights. At least the First Socio-Economic Rights Report annexed the report on *Poverty and Human Rights* arising from the National 'Speak Out on Poverty' Hearings held during 1998, as well as an independent study commissioned by the Human Rights Commission on public perceptions regarding the state of realisation of socio-economic rights in South Africa.

Finally, the lack of effective participation by NGOs in the process is bad for the Commission's image. It is the premier institution tasked with the promotion and monitoring of human rights in South Africa. As such, it should be seen to function

in a transparent, open and participatory way. Withholding information from NGOs, and not actively seeking input from civil society on the realisation of social and economic rights does not project a positive image.

Relations with government departments

Some government departments were tardy in responding to the Commission's requests for information during the first cycle. The Commission was at pains to ensure that government departments took its section 184(3) mandate seriously during the second monitoring cycle.

It emphasised the need for government departments to respond timeously to its requests for information. To underscore this, the Commission eventually, after various extensions of deadlines, subpoenaed 36 government departments who had not submitted their reports by the final deadline. Departmental representatives were subpoenaed to appear before the Commission to explain the reasons for their failure to submit the information requested. This had the desired effect: all but two of the subpoenaed departments managed to submit their reports before the return date.

Strong action by the Commission to ensure compliance with the monitoring process has to be welcomed. It emphasises the fact that government departments are constitutionally obliged to provide information to the Commission on the realisation of socio-economic rights. However, the power of subpoena should be used with some caution in the section 184(3) process.

One of the most important advantages of a human rights monitoring process, is the opportunity it creates for a constructive dialogue between the monitoring body and those who are monitored. The Commission has the opportunity through its monitoring system to influence the policies, laws and programmes of Government through education and recommendations.

The adversarial atmosphere created by the issuing of subpoenaes is not conducive to the process of constructive engagement. This problem comes into focus when one takes into account that no substantial effort was made by the Commission to ensure that officials in government departments responsible for preparing the reports received some sort of education and training on socio-economic rights, and the specifics of the reporting process.

The Commission identifies as one of the most important reasons for the inadequacy of the reports received from government departments the lack of awareness, understanding and knowledge of the section 184(3) process (South African Human Rights Commission, 2000, *2nd Economic and Social Rights Report*at 13). In the light of this problem, it is critical that the Commission engages in a process of training of government officials who have to prepare reports for the Commission. Such officials need to be trained in the technical aspects of the monitoring process: how to prepare reports, what information to include, what format to follow. They should also receive substantive training on socio-economic rights and the duties they impose on the State. This training can be provided by the Commission or through NGO partners, but it will have to be relatively intensive to have the desired effect.

B. The protocols

The Commission elicits information from relevant organs of state through questionnaires (referred to as 'protocols'). The nature and role of these protocols was one of the most contentious issues during preparation for the first monitoring cycle. The protocols that formed the basis of the first monitoring cycle represented a compromise between two differing views held respectively by the Commission and its NGO partners in the process at the time. Nevertheless the Commission and its partners developed an understanding of the nature and role of the protocols during the first cycle. This was intended to form the basis for the further development of protocols in the future.

The protocols for the second monitoring cycle were developed by the Commission with the assistance of a Canadian consultant specialising in the quantitative analysis of social and economic policy. The new protocols have problems that go to the core of the monitoring process, and will influence their practical efficacy as a human rights monitoring tool. The new protocols are problematic for two reasons: they ask government departments for too much, and they ask for the wrong things.

During the first monitoring cycle, the approached adopted was that the information requested in the protocols should be relatively modest. This would enable government departments to respond adequately, and the Commission would be able to process and analyse the information it received (see Tseliso Thipanyane, 1998 ESR Review vol 1 no 3, 11 - 12). This set of protocols focused on:

- the impact of past discriminatory policies and practices on the implementation of socio-economic rights;
- the understanding by government departments of the obligations imposed on them by the socio-economic rights in the Constitution;
- the policies, laws and programmes planned or in place to implement socio-economic rights; and
- the existence of information and monitoring systems within government departments through which to track the implementation of socio-economic rights.

In essence the protocols focused on very clearly defined and limited batches of information. This information was designed to give the Commission a relatively clear picture of the measures being taken by relevant organs of state towards the realisation of socio-economic rights.

This approach had a number of advantages. The amount of information requested was not so extensive that the government departments and the Commission would not be able to deal with it in a useful manner. In fact, the argument could be made that the protocols should have been even more limited than they were. The focus on the measures adopted by government departments was also appropriate for the first monitoring cycle. In future cycles, the Commission could ask about the impact of the measures, as well as the problems and difficulties experienced in implementing policies and laws intended to advance the realisation of socio-economic rights. The more modest approach also avoided overlap with other processes of information gathering, such as those conducted by Statistics South Africa.

The Commission, in designing its protocols for the second cycle of monitoring, consciously departed from the a more modest approach in favour of a "maximalist" approach (South African Human Rights Commission, 2000 2nd

Economic and Social Rights Report 1). The new protocols require extensive and detailed statistical information from government departments, for example, the numbers of people denied access to medical services because of fees. Government departments are asked, where possible, to provide the statistical data separately for seven listed categories of vulnerable and disadvantaged groups.

This is too much. The Commission's Report indicates that in general government departments could not provide this kind of information. Where this information is reflected in the Commission's report, it was gathered by the Commission from other sources (see for instance the sources quoted for nutritional information: South African Human Rights Commission, 2000 2nd Economic and Social Rights Report 110). The Commission is also not adequately equipped to analyse large volumes of statistical information effectively. This function is better performed by other institutions such as Statistics South Africa. To ask government departments this kind of detailed statistical information amounts to a waste of effort and energy. Much of the detailed information the Commission requests is already available from other institutions in a conveniently digested form. The Commission can find this information in sources such as Measuring poverty in South Africa (Statistics South Africa, 2000), Men and Women in South Africa (Statistics South Africa,1998), and the publications of the Health Systems Trust.

Some of the information requested is also of the wrong kind. The role of a particular government department in realising the right to food, for example, cannot be assessed by examining abstract statistical information relating to the nutritional status of the population. These statistics may reveal that there are people without access to sufficient food, but they do not indicate which organ of state should be held responsible and why this situation exists. Is it due to a lack of a coherent nutritional strategy on the part of government, or that relevant policies and laws are not being properly enforced? Only through a close examination of the measures adopted by relevant organs of State and their impact, is it possible to assess whether government is fulfilling its constitutional duty to respect, protect, promote and fulfil socio-economic rights. As discussed above, it is also vital that the intended beneficiaries of socio-economic rights - disadvantaged communities and their organisations - are consulted on the impact of government measures. Relevant questions for consultation are:

- Are relevant laws, policies and programmes effective in improving access to socio-economic rights?
- What are the main problems experienced in seeking to participate in various government programmes to improve access to land, housing, health care etc?
- Where are the main shortcomings of these measures, and where do the main gaps lie?

This type of engagement will provide the Commission with the insight it needs to ask probing and meaningful questions of the relevant organs of state.

C. The report

The second report highlights a number of key problem areas in the implementation of socio-economic rights in South Africa. A welcome feature of the report is the fact that it is clearly a product of an evaluation exercise. This presents an important departure from the Commission's understanding of its s 184(3) mandate during the first monitoring cycle. It seems that the Commission

now accepts that its role in the socio-economic rights monitoring process is indeed to evaluate the performance of government in realising socio-economic rights, and to report to Parliament on its assessment. One of the main functions of the South African Human Rights Commission in terms of section 184(3) of the Constitution is to "monitor and assess the observance of human rights in the Republic." Section 184(3) is an important tool for information-gathering in the sphere of socio-economic rights. It is intended to facilitate this over-all monitoring and evaluation role of the Commission.

The evaluation of government reports by the Commission is discussed in each particular section of the report under the heading "Commentary". The "Commentary" is then followed up by a list of "Recommendations" addressed to the particular government departments involved. The "Commentary" and Recommendations" sections of the report tend to focus on an evaluation of the manner in which a particular department reported to the Commission, rather than the contents of the report itself. This is understandable given the fact that the reports submitted by a large number of the government departments were clearly inadequate, and did not provide the information the Commission required. It is important, however, that the Commission focus more on an evaluation of the actual contents of the reports in future monitoring cycles.

The focus in the evaluation of reports further falls on an analysis of the statistical indicators relating to social services. More emphasis needs to be given to assessing whether the measures taken by relevant organs of state are "deliberate, concrete and targeted as clearly as possible" towards ensuring the effective realisation of socio-economic rights within the shortest possible time (UN Committee on Economic, Social and Cultural Rights, General Comment No 3, UN doc. E/1992/23, paras. 2 and 9). In order to hold Government accountable for a failure to realise socio-economic rights, it is imperative that there is a thorough analysis of the legislation, policies and programmes adopted by all spheres of government, and the manner in which they are implemented. As has been emphasised, a rigorous, independent analysis is only possible if the Commission solicits divergent views from civil society on the effects of government policies and practices. A failure to do so, makes the reporting process a highly technical exercise which excludes the on-the-ground experiences of the disadvantaged groups and communities in South Africa.

The outcomes of the reporting process

A further shortcoming of the Second Report, is the fact that it makes no reference to the recommendations made in the first report. The protocols did not contain any follow-up questions to government departments on the extent to which these recommendations were accepted and implemented. It is also not clear whether the Commission itself took any action to follow-up on the recommendations it made in the First Report.

The end-goal of the section 184(3) process should not be seen as the production of a report. A report has the potential to be a valuable public record of the monitoring process. However, the Commission's primary objectives should be to:

- engage in a constructive dialogue with relevant organs of state on measures needed to improve access to socio-economic rights;
- make well-considered and targeted recommendations flowing from the information it has gathered from government departments and civil society;

- follow-up on the implementation of its recommendations in a sustained way;
- identify cases where economic and social rights are being violated, and where stronger action is needed eg an investigation, negotiation or mediation of a dispute, or even embarking on litigation to enforce people's socio-economic rights.
- educate relevant organs of state about their obligations in relation to social and economic rights;
- raise public awareness about socio-economic rights, and their importance to the reconstruction and development of our society;
- identify priority areas of focus for the next monitoring cycle eg social security rights for people living with HIV or AIDS, the right to nutrition of children.

At the end of the day, the value of the section 184(3) mechanism lies in its ability to contribute to making socio-economic rights a reality in the daily lives of disadvantaged groups. The tabling of a formal report in Parliament will not achieve this goal on its own. Finally, in order to promote public debate and accountability for the realisation of socio-economic rights, it is essential that the report receives some form of consideration in the parliamentary process. The first report was tabled in Parliament, but was not publicly considered or debated. At the very least, the second report should be considered by the relevant portfolio committees, and the possibility explored of a debate on the Commission's report in the National Assembly. In addition, a 'user-friendly' version of the report should be actively disseminated to the general public. Ways should also be found of popularising the report, for example, through the use of media such as the radio .

Conclusion

The section 184(3) mandate presents the Commission with a number of challenges. There are few comparative precedents available to guide the Commission in carrying out this mandate. Valuable guidance can however be obtained from the development of the international reporting procedure under the International Covenant on Economic, Social and Cultural Rights, 1966. By studying some of the strengths and weakness of the international reporting systems, the Commission can develop this mandate into a dynamic tool for advancing the realisation of socio-economic rights in South Africa.

A Review Of International Developments

Focus On Children's Socio-Economic Rights

Gina Bekker

Two important developments with regard to children's rights have recently taken place namely South Africa's ratification of the African Charter on the Rights and Welfare of the Child,1990, and the consideration by the United Nations Committee on the Rights of the Child of South Africa's initial country report under the Convention on the Rights of the Child, 1989. We give a brief overview of the implications of South Africa's ratification of the African Charter on the Rights and Welfare of the Child, as well as the concluding observations made by the Committee on the Rights of the Child on South Africa's initial report.

A. South Africa ratifies the African Charter on the Rights and Welfare of the Child, 1990

On 7 January 2000 South Africa ratified the African Charter on the Rights and Welfare of the Child ('the Charter'). The Charter, which entered into force on 29 November 1999, is one of the most progressive children's rights instruments in the world today. It makes provision for a broad range of economic, social and cultural rights as well as civil and political rights. It contains extensive provisions on children's rights to education, health care services as well as child labour. In addition, it makes provision for children's rights to survival and development and their right to be protected against harmful social and cultural practices. Special provision is also made for the rights of children with disabilities, children of imprisoned mothers and refugee children.

Copies of the African Charter on the Rights and Welfare of the Child are available on the website of the Centre for Human Rights: www.up.ac.za/chr/ahrdb/index.htm

The Charter provides for the establishment of a Committee on the Rights and Welfare of the Child to supervise its implementation. This Committee is given the mandate to protect and promote the rights and welfare of the child. It has the power to discharge its functions through the receipt of State parties' reports, the receipt of communications from any person, group or non-governmental organisation, and the undertaking of investigations.

By ratifying this instrument, South Africa has committed itself to bringing its legislation and policy in line with the Charter. Furthermore, it has also committed itself to take measures to give effect to the provisions of the Charter. South Africa's first report to the Committee on the Rights and Welfare of the Child is before 7 January 2002. Thereafter, it must submit reports to the Committee every three years.

B. The Committee on the Rights of the Child considers South Africa's Initial Country Report

South Africa's first report to the Committee on the Rights of the Child was discussed in ESR Review, 1999, vol. 2, no. 1, 22. This report was submitted on 4 December 1997 and was considered by the Committee at its twenty-third session in January 2000. In addition to the initial report, a supplementary report was submitted at the session in January. This report dealt with the responses that were given to a number of questions previously raised by Committee members.

The full text of the Committee's concluding observations are available on the website of the United Nations High Commissioner for Human Rights: www.unhchr.ch/tbs/doc.nsf

The South Africa delegation present at this session was led by Mr. Essop Pahad, Minister in the Office of the Presidency, and included representatives from the Departments of Justice, Labour, Social Services, Health, Education, Central Statistics, Police Services, and other institutions relating to children's rights.

On 28 January 2000 the Committee concluded its twenty-third session and issued final observations and recommendations concerning South Africa's initial country report.

The Committee made the following observations:

- It expressed appreciation for the efforts made by the State party in the area of legal reform. It welcomed in particular article 28 dealing with children's rights in the 1996 Constitution.
- It welcomed various efforts undertaken to strengthen children's rights within the country.
- It acknowledged the challenges faced by South Africa in overcoming the legacy of apartheid, which continue to have a negative impact on the situation of children and to impede the full implementation of the Convention. In particular, the Committee noted the vast economic and social disparities that continue to exist between various segments of society as well as the relatively high levels of unemployment and poverty.
- It encouraged South Africa to continue its efforts in the area of law reform to ensure that its domestic legislation conformed fully with the principles and provisions of the Convention.
- It also noted with concern the failure of the South African government to ratify the International Covenant on Economic, Social and Cultural Rights, 1966, and encouraged it to do so.

Main recommendations

The Committee's recommendations included that South Africa:

- Pay particular attention to the full implementation of article 4 of the Convention by prioritising budgetary allocations and distributions to ensure the implementation of the economic, social and cultural rights of children to the maximum extent of its available resources and, where needed, within the framework of international co-operation.
- Increase its efforts to ensure implementation of the principle of non-discrimination in article 2 of the Convention, particularly as it related to vulnerable groups.
- Expand its Child Support Grant programme or develop alternative programmes to support disadvantaged children up to the age of 18 years who are still in school, and take effective measures to ensure the continuation of support programmes for economically disadvantaged families.
- Increase its efforts to allocate appropriate resources and develop comprehensive policies and programmes to improve the health situation of children, particularly in rural areas.
- Facilitate greater access to primary health services; reduce the incidence of maternal, child and infant mortality; prevent and combat malnutrition, especially in vulnerable and disadvantaged groups of children; and increase access to safe drinking water and sanitation.
- Reinforce adolescent health policies, particularly with respect to accidents, suicide, violence and substance abuse.
- Reinforce training programmes for youth on reproductive health, HIV/AIDS and STDs. It noted that these programmes should be based, not only on gaining knowledge, but also the acquisition of competencies and life skills that are essential to the development of youth.
- Ensure the full participation of youth in the development of strategies to combat the spread of HIV at the national, regional and local levels.
- Reinforce early identification programmes to prevent disabilities, establish special education programmes for children with disabilities and further encourage their inclusion in society.

- Take effective measures, including training for practitioners and awareness-raising, to ensure the health of boys and protect against unsafe medical conditions during the practice of male circumcision.
- Undertake a study on virginity testing to assess its physical and psychological impact on girls. In this regard, the Committee also recommended the introduction of sensitisation and awareness-raising programmes for practitioners and the general public to change traditional attitudes and discourage the practice of virginity testing in light of articles 16 and 24 (3) of the Convention.
- Strengthen its efforts to combat and eradicate the practice of female genital mutilation, and carry out sensitisation programmes for practitioners and the general public to change traditional attitudes and discourage harmful practices.
- Continue its efforts to promote and facilitate school attendance, particularly among previously disadvantaged children, girls and children from economically disadvantaged families.
- Take effective measures to ensure that primary education is available free to all.
- Take additional measures to ensure non-discrimination within the school environment.
- Take effective measures to improve the quality of education and ensure access to education for all children in South Africa.
- Strengthen the educational system through closer co-operation with UNICEF and UNESCO.
- Implement additional measures to encourage children to stay in school, at least during the period of compulsory education.
- Take effective measures to ensure that children, especially those in disadvantaged communities, enjoy the right to leisure, recreation and cultural activities.
- Improve its monitoring mechanisms to ensure the enforcement of labour laws and protect children from economic exploitation.
- Undertake all appropriate measures to ensure that the rights of children belonging to minority groups (including the Khoi-Khoi and San) are protected, particularly those rights concerning culture, religion, language and access to information.

Time To Ratify The International Covenant On Economic, Social And Cultural Rights

Lawrence Mashava

Our nation's commitment to social justice is evidenced by the inclusion of a wide range of socio-economic rights in the Constitution. Though the enforcement and protection of human rights through a national Bill of Rights is vital, it is only one of the many ways through which human rights are protected.

To participate in the efforts of the Centre for Human Rights to secure South Africa's ratification of the ICESCR, contact: Lawrence Mashava at (012) -

Another important tier of enforcement and protection is at the regional and international level. The international system for the protection of human rights is premised on the consent of States. Consent is given through the ratification of treaties protecting human rights. When States ratify international treaties they do not only incur obligations to the international community, but also to individuals within their territory to give effect to those human rights obligations.

This article focuses on the need for South Africa to ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR) as a matter of urgency. It also emphasises the need for NGOs to place pressure on the government to ratify the Covenant.

SA's regional and international commitments

South Africa has committed itself at both the regional and international level to the protection of human rights. At the regional level, South Africa has ratified the African Charter on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child. Both these treaties protect a wide range of human rights, including socio-economic rights. South Africa's obligations under both these treaties are enforced through two mechanisms: a State reporting procedure and a complaints system.

The State reporting process is the most common enforcement mechanism for human rights treaties. It requires State parties to submit periodic reports to a monitoring body on measures it has taken to implement the rights in the specific human rights instrument. Depending on the instrument, the complaints system allows individuals to bring complaints against a State party alleging that there has been a violation of human rights.

On the international level, South Africa has ratified five of the six major treaties protecting human rights. These are:

- the International Covenant on Civil and Political Rights (ICCPR);
- the International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- the Convention against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment (CAT); and
- the Convention on the Rights of the Child (CRC).

The only major international human rights treaty which South Africa has not ratified is the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR is unique in that it is the first binding international instrument exclusively dedicated to the protection of socio-economic rights. Given South Africa's strong constitutional commitment to social justice and the protection of socio-economic rights, the failure to ratify the ICESCR is particularly concerning.

Overview of the ICESCR

Most of the socio-economic rights included in the South African Constitution are echoed in the ICESCR. These are: workers' rights (art. 7 and 8); the right to social security (art. 9); the right to housing and food (art. 11); the right to health

(art. 12); and the right to education (art. 13 and 14). It also guarantees other rights that are not protected in the Constitution, such as the right to work (art. 6).

The ICESCR is enforced through the Committee on Economic, Social and Cultural Rights (CESCR). The CESCR receives reports from State parties on measures they have adopted to implement the provisions of the ICESCR. It analyses these reports and makes certain recommendations to improve the realisation of socio-economic rights within particular State parties. The CESCR also adopts General Comments on important aspects relating to the implementation and interpretation of the rights contained in the ICESCR. Though not legally binding, these General Comments are widely accepted as being an authoritative guide to the obligations contained in the Covenant. To date, the CESCR has adopted 14 General Comments dealing with either specific rights or general aspects on the implementation of the ICESCR.

One of the shortcomings of the ICESCR is that it currently lacks a complaints mechanism, through which individual complaints can be lodged with the CESCR. The reporting system under the ICESCR is the only mechanism for monitoring State parties' compliance with their obligations. However, there have been recent proposals to adopt an Optional Protocol to the ICESCR which will make provision for a complaints system. A draft protocol to the ICESCR has already been drafted. The Protocol, if it is adopted and comes into force, will increase the level of protection accorded to socio-economic rights by allowing individuals to bring complaints to an international body where there is an alleged violation of the rights contained in the Covenant. This will reaffirm the interdependence and indivisibility of civil and political rights and socio-economic rights by providing equally effective enforcement mechanisms.

Why South Africa should ratify the ICESCR

South Africa signed the ICCPR and the ICESCR on 3 October 1994. By signing a treaty, a State indicates its intention to ratify the treaty, and incurs an international obligation not to act contrary to the object and spirit of the treaty. The ICCPR was ratified on 10 December 1998. The South African Cabinet has recognised the importance of ratifying the ICESCR through granting approval for ratification to take place. The process has already been set in motion and the Department of Labour has been charged with the responsibility of effecting ratification. However, to date ratification has not occurred.

There are a number of compelling reasons for this process to be completed as urgently as possible.

South Africa's failure to ratify the ICESCR threatens its image before the international community. Judging from the international instruments South Africa has ratified to date, it seems that more emphasis is placed on civil and political rights than on socio-economic rights. Support for this contention lies in our ratification of the International Covenant on Civil and Political Rights (ICCPR), but our ongoing reluctance to ratify the ICESCR.

Commitment to the ICESCR is an ideal opportunity to reiterate our commitment to alleviating poverty and ensuring social justice for all. Ratification of the ICESCR will indicate a clear and unambiguous South African commitment to the plight of its poor and development opportunities for all.

Shaping policy and legislation

Just as CEDAW and the CRC have been instrumental in shaping government policy and legislation on issues concerning women and children, the ICESCR can do likewise in the area of socio-economic rights. In other words, the ICESCR together with its General Comments will serve as guiding tools for the adoption and implementation of socio-economic policies and legislation.

Inspection and introspection

The reporting system under the ICESCR has been characterised as offering an opportunity for inspection and introspection (F. Viljoen, *The Realisation of Human Rights in Africa through Inter-Governmental Institutions* LLD Dissertation, University of Pretoria 1998, p. 235). Inspection refers to the role played by the supervisory body (CESCR) in inspecting the conduct of the State. Introspection is the opportunity for the State to take stock of what it is doing in terms of both its international obligations and national constitutional obligations.

Inspection offers an opportunity for the government to receive valuable input from the CESCR on the effectiveness or otherwise of governmental measures. The CESCR has a wealth of expertise on these issues and their contribution will be useful in helping the government to advance socio-economic rights.

Although the South African Human Rights Commission (SAHRC) performs this inspection function in terms of section 184(3) of Constitution, this alone is clearly inadequate. Section 184(3) requires relevant organs of State to submit yearly reports on measures they have taken to realise the socio-economic rights in the Constitution. Although this unique domestic reporting procedure is welcomed, its actual effectiveness has been challenged. The are a number of shortcomings with the SAHRC's monitoring process. Limitations in terms of both resources and expertise to effectively fulfil this constitutional mandate have been particularly apparent. The absence of any follow-up on the Commission's report once it has been tabled before Parliament is also disappointing. In light of these limitations of the domestic reporting system, the protection of socio-economic rights in South Africa can only be enhanced through its participation in the well-developed international reporting system under the ICESCR.

There is an opportunity for introspection through the submission of reports by relevant organs of state to the SAHRC. However, the domestic reporting process does not offer an opportunity for introspection by the entire government (national, provincial and local) as a collective. Reports to the SAHRC are compiled individually by each of the relevant departments. There is accordingly no opportunity for an integrated analysis by the government as a whole.

On the other hand, reporting to an international monitoring body is usually done by one department which reflects the measures adopted by all three spheres of government and all government departments. This allows for a more consistent and integrated approach on government action in relation to its obligations. This process facilitates the opportunity for introspection.

Review by independent institutions

The value of protecting human rights through independent institutions should not be underestimated. History has shown that total disrespect for human rights can occur within States. Our own history bears testimony to this. Whilst the policy of

the present government may be 'human rights friendly,' this may not always be the case. International human rights obligations can therefore also serve as a safety net. Even when there is a change in government policy towards human rights, the international obligations will remain and cannot easily be ignored.

It must be remembered that the struggle for human rights and democracy in South Africa gained much inspiration and legitimacy from international human rights instruments. International obligations under a treaty will serve as a reminder to any future government that there are certain limits to what a State can do, and certain positive duties that a State must fulfil.

A call for action from NGOs

Although the process of ratifying the ICESCR is already underway, it needs to be fast-tracked. The Socio-Economic Rights Project at the Centre for Human Rights has been involved in lobbying government for the urgent ratification of the ICESCR. This process has culminated in a letter being submitted to the Director-General of the Department of Labour requesting information on the process as well as timeframes for ratification. To date there has been no plausible response from the Department.

A number of activities, based on the response from the Department, have been planned to put pressure on the government to ratify the ICESCR as a matter of urgency. We intend first exhausting all avenues within the Department. The next step we will follow is to make representations to the Minister of Labour, as the political head of the department and a member of the Cabinet which approved ratification.

Possible action also involves approaching the Office of the President and requesting that office to intervene. As a last resort, we plan to write a letter to all Members of Parliament (MPs) to bring this matter to their attention. We will also include a dossier of all our correspondence with the Department and Ministry of Labour.

As activists involved in issues of social justice, we need to place a much greater emphasis on securing South Africa's ratification of the ICESCR. We call on other NGOs to participate in attempts initiated by our project to ensure speedy ratification of the ICESCR. NGOs are invited to endorse the representations which the Centre for Human Rights is making or make representations of their own, calling for South Africa's ratification of this important international treaty.

UN Appoints Special Rapporteurs On The Rights To Adequate Housing And Food

The UN Commission on Human Rights recently appointed two new special rapporteurs on the rights to adequate housing and food respectively. Mr. Miloon Kothari of India is the Special Rapporteur on Adequate Housing, and Mr. Jean Ziegler of Switzerland is the Special Rapporteur on the Right to Food. These special rapporteurs will serve for three years and report the results of their research and field missions relating to these socio-economic rights to the Commission on Human Rights.

The mandate of these special rapporteurs include:

- To report on the status, throughout the world, of the realisation of the rights that are relevant to their mandate, and on developments relating to these rights. These developments include laws, policies and good practices most beneficial to their enjoyment, as well as the difficulties and obstacles experienced at a domestic and international level in implementing the rights. The rapporteurs can take into account information received from Governments, organisations of the UN system, other relevant international organisations and non-governmental organisations.
- To apply a gender-perspective in their work;
- To promote co-operation among, and assistance to Governments in their efforts to secure these rights.
- To develop a regular dialogue and discuss possible areas of collaboration with Governments, relevant UN bodies, NGOs and financial institutions;
- To make recommendations on the realisation of the rights;
- To identify possible types and sources of financing for relevant advisory services and technical co-operation;
- To submit an annual report to the UN Commission on Human Rights covering the activities relating to their mandate.