ESR REVIEW
Economic and Social Rights in South Africa
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Editorial

Sibonile Khoza

Welcome to the first issue of the *ESR Review* for 2006.

In this issue, we feature articles on a range of issues and developments in socio-economic rights in South Africa and abroad.

Hye-Young Lim examines the role of the current social assistance grants system in alleviating child poverty in South Africa. While commending government's efforts to tackle the problem and to meet its constitutional obligations, Lim identifies several weaknesses in the administration of the grants. She makes a number of recommendations on what the government needs to do to address the weaknesses. She strongly recommends, among other things, a reform of the system and the establishment of a broad social security net which will include a minimum income grant system.

Mira Dutschke explores the issues related to the definition of the right to children's services in South Africa from a constitutional and international law perspectives. Dutschke observes that South Africa's Constitution and White Paper for Social Development, as well as the Convention on the Rights of the Child, place great emphasis on the strengthening of the family to prevent the neglect and abuse of children. She argues that the right to social services is inseparably linked to this objective and identifies the services needed to achieve it. She concludes that the Constitution requires a shift away from a residual to a developmental model of social welfare.

Lilian Chenwi and Christopher Mbazira report on developments around the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. This follows the session of the Open-Ended Working Group to consider options regarding the elaboration of an Optional Protocol, held in February 2006 in Geneva. Chenwi and Mbazira provide the historical background to, the benefits of, and the components for, an effective Optional Protocol.

Fons Coomans analyses the implications of the Voluntary Guidelines on the Right to Food for

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Ethopia. Coomans highlights the usefulness of the Guidelines in combating hunger and in efforts to ensure food security in that country.

In the electronic version of this issue, Bryge Wachipa reports on a conference on improving access to legal services to challenge HIV-related discrimination and claim socio-economic rights, held in Johannesburg. (The electronic version of the *Review* is available on our website at www.communitylaw centre.org.za/ser/esr_review.php.)

We wish to thank all our guest contributors to this issue. We trust that you will find this issue enlivening and valuable in helping to advance socio-economic rights in South Africa and abroad.

Alleviating child poverty in South Africa

The role of social assistance grants

Hye-Young Lim

Child poverty is deepening in various parts of South Africa. Over 13 million children live on under R430 per month. Of these, 9.7 million live in 'dire' poverty, on under R215 per month, according to a submission by ACESS to the Department of Social Development, on the Regulations in terms of the Social Assistance Act, dated 14 March 2005.

The high prevalence of HIV/Aids among caregivers has worsened the challenges of child poverty. By 2004, about 840,000 children had lost their mothers to HIV/Aids and it was estimated in 2004 that without effective, comprehensive and timely intervention, this figure is expected to reach three million by 2015.

The government has been implementing a social assistance grant system to help children living in poverty. The Child Support Grant (CSG) is the primary social grant targeting these children. However, less than 20% of children living in poverty receive it due to the low age limit and various administrative hurdles. Consequently, a large number of children are left destitute.

While the government should be commended for implementing social assistance grants, this article identifies various weaknesses in the grants' administration. It argues that the government should strive to address these in order to ensure that it meets socio-economic rights obligations under the Constitution.

The government's constitutional obligation

According to section 28(1) of the Constitution, every child has the right to, among other things, appropriate alternative care when removed from the family environment, basic nutrition, shelter, basic health care services and social services.

Although this section does not create any 'primary state obligation' if children are cared for by their parents or families, the Constitutional Court has noted that the state has an obligation to provide the "legal and administrative infra-

structure necessary" to make sure that children's rights under section 28 are fulfilled [*Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 78 (*Grootboom*)].

In addition to section 28(1), children may also claim the socio-economic rights guaranteed by sections 26 and 27 of the Constitution. Particularly relevant to children living in child-headed households are the rights of access to health care, food, water and "social security, including if they are unable to support themselves and their dependents, appropriate social assistance" (s27). Therefore, a child who is a head of a family and unable to support her- or himself and any dependents is entitled to appropriate social assistance and social security.

Government's obligation in relation to children's rights goes beyond just taking legislative measures.

The government may fulfil its constitutional obligations by passing laws. However, the Constitutional Court has stated that the government's obligation in relation to these rights goes beyond just taking legislative measures. The government also has the duty to develop "appropriate, well-directed policies and programmes implemented by the executive" to give effect to the legislative measures (*Grootboom*, para 42).

The government has passed the Social Assistance Act of 2004 (the Act) to give effect to the constitutional right of children to have access to social assistance and social security. It has also put in place a social assistance grants programme to support the Act. The following section provides an overview of the social grants available under the current system. This is followed by a critique of the system.

The social assistance grants system for children

The Social Assistance Act requires the Department of Social Development (the Department) to provide various grants to economically disadvantaged people. Section 4 of the Act specifies seven types of grants, three of which target children in need of financial assistance.

The Care Dependency Grant

This grant is available to a parent or primary caregiver of a child who requires and receives permanent care because of a mental or physical disability. It can be given to a family whose household income is less than R48,000 a year or R4,000 per month as long as the income of the child is less than R17, 760 per year.

The Child Support Grant

A primary caregiver of a child under the age of 14 can apply for this grant of R180 per month (in 2005). The primary caregiver should live in a rural area and have an income of less than R1,100 a month, or live in an urban area in an informal house and have an income of less than R1,100 a month, or live in an urban area in a house or flat and have an income of less than R800 a month. Separate applications for the grant can be made in respect of a maximum of six non-biological children or children who have not been legally adopted. The CSG is the main social assistance programme targeting children in poor households. It is designed to work as a poverty alleviation tool.

The Foster Care Grant

The Foster Care Grand (FCG) grant of R560 (in 2005) is available to a foster parent of a child who is under 18 years of age and deemed to be "in need of care". It is an important grant in the context of the increasing number of orphans and child-headed households resulting mainly from the HIV/Aids pandemic. The Department has been actively encouraging relatives to take care of orphans and apply for the FCG. This has led to a considerable increase in the number of applications for this grant. As an indication of the increasing demand for the grant, the Institute for Democracy in South Africa (Idasa) has reported that the national budget allocation for this grant between the 2004 and 2006 fiscal years has been increased by 18.37%.

A critique of the system

Despite the government's effort to protect vulnerable children through various social grants designed to tackle poverty, the system suffers from several problems. This is particularly the case with regard to the CSG and FCG.

The CSG does not focus on children *per se* but their families. Its objective is to support parents who are unable to provide adequate care for their children.

However, it is too simplistic to assume that poverty alleviation policies that are directed at the 'family' will automatically solve children's problems. It is under-

standable that there is an inseparable link between child poverty and that of parents, which justifies anti-poverty policies that have broad aims and perspectives not specifically focusing on children.

Considering that the CSG is the main social assistance grant for children and the *only* grant for poor children, it should be used solely for children. However, this would only be possible if a separate grant is made available to parents or primary caregivers so that they do not use the money received for children to meet their own needs.

The absence of this measure inevitably also alters the nature and purpose of the FCG, which is not intended to be a general poverty alleviation measure like the CSG. The main purpose of the FCG is to provide 'protection' to children who are in need of care. However, in reality, the FCG is sometimes used as a poverty alleviation mechanism by relatives who are fostering orphans. Some foster parents actually use children as a means of earning extra income.

Furthermore, the disparity between the CSG and the FCG in the amount of money given renders the social grant system unfair to poor children whose primary caregivers do not have enough extra income. It also entices extended families that are providing informal care for orphans to apply for the FCG despite its lengthy and complicated procedure.

There is a huge backlog of unprocessed FCG applications. The procedures take several months to a number of years to complete. During this time, extended families are left without any state support. Problems regarding the administration of social grants are particularly acute in rural areas due to weak infrastructure and the shortage of social workers.

Therefore, the current system cannot sustain the rapidly increasing number of FCG applications unless the government provides solutions to the procedural hurdles relating to this grant.

It must also be mentioned that poor children above the age of 14 are left without state support because the CSG is not available to them. It has been estimated that even if the Department managed to provide the CSG to all poor children under the age of 14, which it has failed to do to date, there would still be three million poor children aged between 15 and 18 in need of assistance. It can therefore be argued that the current system unfairly discriminates between younger and older children, although they may be in comparably desperate situations. According to section 14(4) of the Child Care Act 1983, the term "child in need of care" includes "children without visible means of support". The latter phrase should be interpreted broadly to include poor children above the age of 14, who need financial support.

Poor children over 14 are left without state support because the CSG is not available to them.

Furthermore, the restriction of the number of non-biological children for which a caregiver may receive a CSG to six is also unjust. It raises problems in the context of increasing dependency ratios as a result of the HIV/Aids epidemic. As more parents die, relatives of the deceased parents are compelled to look after more children than would normally be the case. It is therefore anomalous that biological parents should receive the CSG in respect of more than six children while non-biological caregivers may not.

More importantly, the current social assistance system fails to provide adequate protection for child-headed households. Section 1 of the Social Assistance Act defines a "primary caregiver" as "a person older than 16 years, whether or not related to a child, who takes primary responsibility for meeting the daily care needs of that child". Hence, it is not possible for a child below the age of 16 years to access social grants on behalf of children for whom she or he is the primary caregiver. Arguably, this limitation unjustifiably and unduly encroaches upon the rights of children under section 28(1) and other socio-economic rights under section 27(1)(c) of the Constitution. It is therefore strongly recommended that provision should be made to allow children who head households to have direct access social grants.

Reforming the system

The South African government has made tremendous efforts to tackle the issue of poverty. As the South African Human Rights Commission has noted in its 2004 report, the government has demonstrated its firm determination to improve the lives of marginalised and vulnerable people.

It is unquestionably difficult to tackle child poverty as an isolated issue. Alleviating general family poverty indirectly (and sometimes directly) improves the situation of children. However, in order to make a real difference in the lives of poor

children, there is an urgent need to establish a broad social security safety net.

First, the introduction of the minimum income guarantee system based on the national poverty line can be a starting point. The idea of providing a minimum or basic income is not new. Organisations like the Basic Income Grant Coalition have been arguing for the introduction of a basic income grant for years.

To enhance the use of child-specific grants for children, a minimum income grant should be provided in addition to the CSG and other grants.

To enhance the use of child-specific grants for children, the minimum income grant should be provided in addition to the CSG and other grants. As a general poverty alleviation grant, the minimum grant would make up for the difference between the actual family income and the determined minimum income level for the family. At present, a household living in a flat or house in an urban area with an income of less than R800 a month qualifies for the CSG. Thus, a family living in an urban area with an income of R600 would be granted R200 through the minimum income scheme, in addition to their CSG or other grants to which they may be entitled.

Second, with regard to the age restriction for the CSG, it is recommended that the age of eligibility for the grant be extended to 18 to enable a wider number of poor children to get assistance.

Third, as an interim measure, the amount given for the CSG should be increased. This would not only be beneficial to poor children with primary caregivers but would also help extended families looking after orphans without their having to undertake complicated and lengthy court procedures for obtaining the FCG.

Needless to say, it is government's responsibility to improve the administrative efficiency of the FCGs. Although this responsibility has to be fulfilled progressively given that there are people in desperate need, increasing the amount of the CSG would afford immediate relief to heavily burdened extended families.

The government has undertaken some steps to improve the administration of social grants. The Social Security Agency Act 2004 establishes a Social Security Agency (the Agency) to manage, administer and pay social assistance grants (s2). It is hoped that the Agency will address the problems of the current social assistance delivery system.

However, strong reservations have been put forward about the creation of the Agency by some organisations (including the Community Law Centre, ACESS, the Legal Resources Centre and the South African Council of Churches), who are concerned about the Agency's effectiveness. In April 2003, they argued, in a consolidated civil society submission on the Draft South African Social Security Agency Bill, that most of the Agency's professed benefits could be more efficiently realised through changes to the current administrative system.

Lastly, child heads of households should also be allowed to access the minimum income guarantee and CSG, irrespective of their age. While it is understandable that children should not assume parental responsibilities, the reality is that many children are heads of households and are in dire need of state support. It is the government's constitutional responsibility to provide urgent protection to such children.

Conclusion

All poor children in South Africa are yet to receive the support to which they are constitutionally entitled. Children living in poverty – without social assistance – are denied a number of basic human rights, such as the right to health care services, adequate housing, education, sufficient food, social security and human dignity. A reform of the current social assistance system is necessary to ensure that all poor children have access to social assistance grants.

Recognising that poverty is a violation of human rights, it is imperative that government's efforts to combat child poverty and improve access to social assistance grants are measured against the principle of the best interests of the child. The importance of a child-centred policy formulation is based on this premise. This approach requires that benefits from policies concerning children should be directed to children, not to their parents.

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Children's right to social services in South Africa

Mira Dutschke

The right of children to social services has not been defined by South African courts to date. Only a few academics have explored the topic. It is therefore not clear what this right entitles children to and what obligations it places on the State.

Literally, the term 'social services' refers to interventions that help people to deal with social problems arising from social, economic or political changes. Social services are the service delivery arm of the welfare system of a state. They run alongside other social welfare programmes such as social security, housing and health programmes. Together, these interventions make up the overall welfare system of a state.

Approaches to social welfare in South Africa

The old and the new

There are different approaches to social welfare. The services that a state provides depends on the type of welfare system it adopts. Since South Africa is a constitutional democracy, the type of welfare system and services it delivers should be guided by South Africa's Constitution of 1996 (Constitution).

During apartheid, South Africa operated under a 'residual model' of social welfare. Under this model, state intervention was minimal. The state only intervened when the 'normal' structures such as the family or the community had broken down. People were basically expected to provide for themselves. The welfare system was racially fragmented and focused on remedial interventions through casework. Social workers only got involved after the problems had already occurred and they did not perform preventative, developmental or protective functions.

The residual welfare system was based on models of social work in the United States and Europe and was not responsive to the local needs of South Africans. Tied to the oppressive machinery of the apartheid State, the welfare system failed to address serious problems of poverty, underdevelopment, declining economic growth, large-scale unemployment and lack of access to land and social services. These problems represented a depressed state of social welfare or 'distorted development', which occurs when economic development has not been accompanied by an appropriate level of social development.

A developmental approach to social welfare is the only approach that encompasses both economic and social development.

The political change in South Africa in the early 1990s led to the recognition in government, social work and academic circles of social services as part of the overall welfare system, with a role in addressing 'distorted development'. Since the residual approach to social welfare would not be successful in achieving this task, there was a need for a developmental approach to social welfare, which is the only approach that encompasses both economic and social development.

Both the Constitution and the White Paper for Social Development 1997 (White Paper) reflect this shift in thinking.

It is arguable that the drafters of the Constitution envisaged a developmental approach to social welfare in post-apartheid South Africa. When debating the right to social services for children, for example, they agreed that it should, among other things, deal with children with family problems, neglected and abused children and children with learning disabilities. They also agreed that social services should be based on social work and contribute to the welfare and development of both individuals and groups in the community.

These ideas are reflected in the Constitution, which contains a number of socio-economic rights meant to address issues of socio-economic development in areas such as housing and health. Section 28(1)(c) guarantees every child the

right "to basic nutrition, shelter, basic health care services and social services".

The Constitution also provides that children have the right to be cared for by their parents [s28(1)(b)] and to be protected against abuse, neglect and degradation [s28(1)(d)].

Welfare rights indirectly contribute to the protection of these rights because they enhance the ability of parents to provide for their children.

Like the Constitution, the White Paper endorses a developmental approach. It states that social welfare should contribute to the reduction of poverty through a developmental approach. It stipulates that services should be aimed at preventing poverty and promoting people's capacity to get themselves out of poverty rather than just addressing the consequential problems through a casework approach (para 27).

Furthermore, it emphasises that appropriate programmes should be put in place to deal with poverty-related problems (e.g. family disintegration, children in trouble with the law and substance abuse) in order to enhance social integration through support and assistance for individuals and families [para 27(c)].

Since strengthening the family lies at the root of the developmental approach, the White Paper gives the highest priority to the promotion of family life and the survival, protection and development of children.

In view of the foregoing, the right to social services in the new constitutional order should be understood to require strengthening the ability of parents to care for and protect their children from abuse and neglect.

Social services under international law

The United Nations Convention on the Right of the Child (CRC), like the Constitution, links the right of the child to be cared for in a family or family-like environment with the right to be protected from abuse, neglect and degradation. State parties are obliged to protect children from abuse or neglect while in the care of parents or any other person exercising parental care over a child (article 19). Such protective measures include social programmes to provide necessary support for children and for those exercising parental care [article 19(2)].

Children have the right to be cared for by their parents and to be protected against abuse, neglect and degradation.

The guidelines for periodic reports by states to the Committee on the Rights of the Child (Committee) also groups the rights related to family care and alternative care together with the right to be protected against abuse and neglect under the broad section entitled "family environment and alternative care".

It can therefore be concluded that the CRC gives an express indication of the services that characterise a human rights-based approach to social welfare. In the first place, it requires that families should be strengthened to protect the child. In the second place, it requires that social services should ensure that the child is protected from abuse and neglect. Thirdly, it requires children with special needs to be given special attention.

Proposed social services for the new South Africa

The Constitution, the White Paper and the CRC place great emphasis on strengthening the family to prevent the neglect and abuse of children. Drawing from these documents and academic writings, this section identifies the social services needed to achieve this objective. The list is not exhaustive but is a starting point for understanding the types of social services the State is constitutionally obliged to provide.

Children in a family environment

The following social services are needed to provide for children in a family environment:

- childcare facilities for children of working parents;
- education for adults on responsible family planning and child spacing;
- employment and tax benefits for parents as well as parental leave for both men and women;
- parental training on the development and rights of the child;
- enforcements mechanisms for maintenance claims;
- programmes to support single parents;
- assistance to families that are at risk of breaking down;
- counselling for family problems;
- centres for mothers with babies;
- school-based medical staff;
- early childhood development programmes; and
- education programmes on the rights of the child for people

working with children, such as social workers, teachers, nurses, doctors and lawyers.

Children deprived of their family environment

These children are entitled to special protection and care. They require:

- services to enable their participation in proceedings concerning their removal from the family;
- services enabling them to remain in contact with their parents;
- services to encourage their reunion with their parents;
- placement in alternative care that is consistent with national traditions; placement in alternative care should prioritise the need to retain them within their extended family or in a family-like environment. Placement in an institution should be a measure of last resort;
- training for foster parents;
- supervision of foster placements;
- adequate support to alternative care centres;
- assistance to street children and refugee children;
- assistance to child-headed households;
- periodic review of the placement of the child; and
- collection of data on child abandonment, refugee and asylum-seeking children and disabled children.

Prevention of child abuse and neglect and remedial services

Measures to prevent child abuse and neglect and to redress these problems include:

- social programmes that support both children who have suffered abuse or neglect and the person caring for them, including, for example, rehabilitation and counselling;
- measures to identify, report, refer, investigate, treat, and follow up on instances of abuse;
- confidential help lines;
- training for people working with abused children;
- services directed at women and children suffering from domestic violence;
- research into the reasons for domestic violence and child abuse;
- clear procedures for dealing with domestic violence cases;
- procedures for interdepartmental collaboration;
- reintegration services for abused, neglected or exploited children; and
- rehabilitation services for children abusing drugs or narcotics.

Refugee children

The services needed for refugee children include the following:

- reunification and family tracing services;
- humanitarian assistance;
- registration through interviews; and
- appointment of guardians or advisors.

Children with disabilities

The needs of children with disabilities include:

- access to rehabilitation services;
- services enabling the maximum possible social integration;
- support to their families;
- information campaigns about how some disabilities can be prevented; and
- services making possible the vocational training of children with dis-abilities.

Conclusion

This article has shown that the Constitution requires a shift away from the residual model of social welfare to the developmental model. While the State under apartheid took minimal responsibility for the wellbeing of the majority of its citizens, the new, democratic post-apartheid State is constitutionally required to facilitate and promote the social and economic growth of the people and the country.

In terms of services interventions, this obligation means that the root causes (in most instances, poverty) of social problems should be addressed, rather than just their manifestation. Social services should also be preventative rather than being exclusively remedial.

There are two promising new developments in social services. Firstly, the Social Security Agency has now been established to take over the payment of social grants. This implies that the Department of Social Development will now focus on the provision of other social services. Until now, it has spent more money on administering social grants than on social services.

Secondly, the first part of the Children's Bill was passed in December 2005. This Bill stipulates a legal framework for children's right to social services. The second part of the Bill is currently being finalised. These developments will help to define and elaborate on the scope of the right to social services.

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The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

Lilian Chenwi and Christopher Mbazira

Historically, economic, social and cultural rights (ESC rights) have received less protection through enforcement mechanisms than civil and political rights. Victims of ESC rights violations do not have the opportunity of submitting formal complaints to the Committee on Economic, Social and Cultural Rights (CESCR), the supervisory body of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Conversely, the 1976 Optional Protocol to the International Covenant on Civil and Political Rights allows victims to lodge complaints with the Human Rights Committee (HRC), the supervisory body of the International Covenant on Civil and Political Rights (ICCPR).

An optional protocol to the ICESCR has long been advocated as a means of ensuring that, just like victims of civil and political rights violations, victims of ESC rights have access to remedies at the international level.

The journey towards the adoption of the Optional Protocol to the ICESCR (the Optional Protocol) has been riddled with obstacles and setbacks revolving on the continuing doubts about the justiciability of ESC rights by some state parties to the ICESCR.

However, a flicker of light signalling hope for the adoption of a complaints mechanism is now visible. In 2006, governments will decide whether or not to draft an optional protocol permitting the consideration of complaints under the ICESCR. The decision reached will have immense repercussions for the realisation of ESC rights at international, regional and domestic levels.

The progress made thus far has resulted from the efforts of several role players, including agencies of the United Nations, some state parties to the ICESCR (though not all), intergovernmental organisations, academics, and non-governmental organisations (NGOs). The NGOs' campaign for recognising the complaints procedure for ESC rights has been mobilised mainly through the NGO Coalition for an Optional Protocol (the NGO Coalition).

We focus here on some of the key proposals for an effective complaints mechanism advocated by the NGO Coalition. They are that the Optional Protocol should:

- include both communications and enquiry procedures;
- apply to all rights protected by the ICESCR and all levels of state obligations;
- enshrine wide rules of standing;
- make provision for a follow-up mechanism; and
- not make allowance for reservations.

The decision to draft an optional protocol will have immense repercussions for the realisation of ESC rights at all levels.

Before we examine each of these components, it is worthwhile tracing the journey towards a complaints mechanism and highlighting the benefits of adopting the Optional Protocol. While the beginning of this journey predates the ICESCR's adoption, we intend to trace it from the time the CESCR reopened the issue.

The historical background

In 1990 the CESCR started discussing the desirability and modalities of an individual complaint procedure for ESC rights by way of an optional protocol to the ICESCR. Subsequently, the 1993 Vienna Declaration and Program of Action (UN document A/Conf.157/23) urged the UN Commission on Human Rights (UNCHR) and the CESCR to continue work on it.

In 1996, the CESCR reached consensus on the need for an individual complaints procedure. It

then finalised a draft Optional Protocol, which was presented to the UNCHR in 1997 (UN document E/CN.4/1997/105) and later to states, intergovernmental organisations and NGOs for their comments. Most member states did not submit comments while NGOs strongly supported the draft Optional Protocol.

In 2001, the UNCHR appointed an independent expert to examine the draft Optional Protocol, the comments made on it by states, intergovernmental organisations and NGOs, as well as the report of a workshop held in 2001 on the justiciability of ESC rights and the draft Optional Protocol.

In 2002, the expert submitted his first report, which was in favour of the adoption of the draft Optional Protocol (E/CN.4/2002/57). In his second report, the Independent Expert recommended that the UNCHR should establish an Open-Ended Working Group (OEWG) with the mandate to consider options regarding the elaboration of an optional protocol to the ICESCR.

In 2003, the UNCHR agreed to convene the OEWG to consider the issue. The UNCHR, Special Rapporteurs consulted by the OEWG, representatives of the International Labour Organisation (ILO) and UN Educational, Scientific and Cultural Organisation (UNESCO) and almost all of the experts participating in the discussions, as well as NGOs, Latin American and African countries and some European countries, have supported the drafting of an optional protocol.

Australia and the United States are opposed to the drafting of an optional protocol.

However, the United States (US) and Australia are opposed to it. They continue to raise concerns about the justiciability of ESC rights. These states still contend that ESC rights are vague and demand a great deal of resources. They ignore the fact that civil and political rights also require significant resources and have only been clarified after repeated application and elaboration by courts. ESC rights should be afforded a similar opportunity to develop through a case-by-case interpretation by courts.

Other countries, such as Canada, Sweden and the United Kingdom, though no longer opposed to the move towards elaborating an optional protocol, do not support the idea that it should apply to all rights under the ICESCR for essentially the same reasons put forward by Australia and the US.

The benefits of the Optional Protocol

If an Optional Protocol is adopted, it would benefit not only individuals but state parties and the international community as well, in that it would:

- bring the ICESCR into line with other human rights treaties by placing ESC rights on equal footing with civil and political rights, thereby emphasising their indivisibility, interrelatedness and interdependence;
- provide individuals and groups alleging violations of ESC rights with access to an international adjudicative procedure and remedies;
- lead to clarification of the nature of ESC rights and the obligations they engender; and
- encourage states to take steps towards the full implementation of ESC rights.

Components of an effective optional protocol

As noted above, the NGO Coalition has proposed that an effective optional protocol should contain certain key elements. These proposals were included in a Joint NGO Submission to the OEWG, which met from 6–17 February 2006 in Geneva. The meeting was the last opportunity for governments to express their views on the Optional Protocol. These key components are discussed below.

(a) Communications and enquiry procedures

The NGO Coalition has been pushing for the idea that the Optional Protocol should contain both a communications and an enquiry procedure. The communications procedure would enable individuals to file complaints on specific violations of their ESC rights before the CESCR. The enquiry procedure would enable the CESCR to initiate, on the basis of reliable information, enquiries into grave or systematic violations of ESC rights.

(b) Indivisibility of all rights

The procedures established under the Optional Protocol should cover all the rights and obligations under the ICESCR. One of the most controversial issues has been whether it should apply to all of the rights recognised under the ICESCR or only to some. Some states parties have proposed that the Protocol

should allow states parties, on ratification, to choose the rights that would apply to them (commonly known as the 'à la carte approach'). This has not been used before within the UN human rights treaty-based system.

The CESCR has warned that the à la carte approach to the enforcement of ESC rights would allow states to obtain the prestige associated with ratification of the Optional Protocol while at the same time incurring minimum obligations.

The à la carte approach would undermine the integrity and independence of the rights in the ICESCR.

The NGO Coalition has pointed out that the à la carte approach would undermine the integrity and independence of the rights in the ICESCR. This is because it would allow states to 'opt out' of the obligation to provide effective remedies to particular rights or components of rights in the Covenant. This would reinforce the idea that some rights are different in nature and require a lesser level of protection than others do.

As argued above, this approach is unprecedented in the UN human rights treaty-based system. It would blatantly contradict the principle enunciated clearly by the CESCR that 'effective remedies' should be made available to all rights recognised in the ICESCR, even if such remedies may not always be judicial.

The NGO Coalition has also rejected as untenable the approach that allows states parties to subject themselves only to selected levels of obligations. Instead, it has argued that the complaints and enquiry procedures should provide the possibility of reviewing all aspects of ESC rights and all levels of state obligations – to respect, protect, or fulfil these rights.

In the NGO Coalition's view, a selective enforcement of state obligations would ignore the importance of maintaining a unitary and indivisible framework of human rights obligations.

(c) Self determination

There has been considerable controversy about whether the right to self-determination (article 12 of ICESCR) should be subjected to the complaints mechanism.

It has been argued that the inclusion of this right poses the danger that the procedure might be abused for political reasons.

The NGO Coalition maintains that the right to self-determination should indeed be subjected to the complaints mechanism.

This right is also included in the ICCPR and is already formally subject to individual complaints under the Optional Protocol to the ICCPR.

The position of the CESCR has always been that, in addition to its civil and political dimensions, this right has economic, social and cultural dimensions that merit protection under the optional protocol. To justify inclusion of this right, the NGO Coalition has given the example of indigenous peoples. The exclusion of this right would deny them their rights to cultural, economic and social self-determination.

(d) The role of NGOs

The NGO Coalition has also recommended that the Optional Protocol should make provision for the participation of NGOs in its procedures by allowing representative or group complaints.

Such a provision would help to protect victims of human rights who are at risk of abuse or ill-treatment for directly engaging in the process and ensure that vulnerable, poor or marginalised individuals or groups have access to these procedures.

While the Utrecht Draft of the Optional Protocol (SIM Special No. 18) restricted standing to individuals, groups or organisations claiming to be victims, the CESCR has always recommended that standing should be understood in wide terms.

The NGO Coalition fully supports the CESCR's view.

(e) Reservations

The NGO Coalition proposes that reservations to any provision of the Optional Protocol should not be allowed since the treaty is by its very nature optional. Through reservations, rights that are interdependent and overlapping could be severed. Thus, reservations would undermine the indivisibility, interdependence and interrelatedness of the rights contained in the ICESCR.

(f) Follow-up mechanism

The NGO Coalition has proposed that the Optional Protocol should make provision for a follow-up mechanism to ensure that the decisions and recommendations made are implemented and enforced. According to the CESCR, a follow-up mechanism could take different forms, including calling on the offending state to discuss the

measures it has taken to give effect to the recommendations with the CESCR, inviting the state party to include in its report the details of the measures taken and including in its annual report the response of the State to its recommendations.

The NGO Coalition argues that this procedure would open an avenue for addressing problems encountered when implementing orders and would provide guidance and support to the states regarding the measures taken to comply with the order.

(g) Admissibility

Lastly, the NGO Coalition has argued that the Optional Protocol should not limit the territorial and jurisdictional application of the ICESCR or the temporal jurisdiction of the CESCR, as is the case with most other complaints mechanisms. Further, it has submitted that the 'exhaustion of domestic remedies' rule should not apply in cases where the remedies available are likely to be un-reasonably prolonged or ineffective.

Some states have also proposed the inclusion of the requirement that regional remedies should be exhausted first before a complaint can be lodged with the CESCR. It has been argued that this requirement would protect regional human rights systems from being pre-empted by the UN systems. While the NGO Coalition recognises the importance of regional mechanisms, it maintains that these should play a complementary role to UN mechanisms rather than provide a basis for denying complaints from regions where regional remedies are available.

Conclusion

The impact of that the Optional Protocol will have on the realisation of ESC rights will depend largely on its substance. As has been shown in this article, the NGO Coalition has argued emphatically that the Optional Protocol should affirm, without restrictions or reservations, that ESC rights, like civil and political rights, can only be properly understood and elaborated if claimants of these rights are fully heard. Restrictions on the justiciability of any rights or enforceability of any obligations under the ICESCR would reinforce the second-class treatment of ESC rights in the UN system and have a negative impact on domestic advocacy for the better protection of these rights.

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Further information on the Optional Protocol to the ICESCR and the work of the NGO Coalition is available at the following website: www.escrprotocolnow.org

Voluntary Guidelines on the Right to Food

Their practical implications for Ethiopia

Fons Coomans

The right to adequate food is protected in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 11(1) recognises the right of everyone to an adequate standard of living, including adequate food. Article 11(2) recognises the fundamental right of everyone to be free from hunger. States Parties have the obligation to realise these rights progressively [Article 2(1)].

On 23 November 2004, the General Council of the United Nations Food and Agriculture Organisation (FAO) adopted the Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security (the Guidelines).

In previous issues of the *ESR Review*, the history and the development of the drafting process of the Guidelines were discussed (2004, volume 5, no. 1, pp. 11 - 14 and no. 4, p. 16).

Now that representatives of the Member States of FAO have formally approved the Guidelines, it is necessary to comment on their content and meaning, and, finally, their practical significance. In particular, this article highlights the usefulness of the Guidelines in combating hunger and in efforts to ensure food security in Ethiopia.

The nature and objectives of the Guidelines

The aim of the Guidelines is to provide practical guidance to states in their efforts to progressively realise the right to adequate food in the context of national food security. The Guidelines are a practical, human rights-based tool addressed to all states to achieve this aim.

A human rights-based approach emphasises the need to protect vulnerable members of society and for mechanisms to hold duty bearers accountable, as well as (legal) remedies to redress violations. It also requires that non-discrimination and equality should underlie efforts aimed at realising the right to food.

Realising the right to food is crucial to achieving food security. This right requires the state to make food available and ensure its steady supply and access to it. Although food security is not a human rights concept, it is linked to the right to food. Both concepts emphasise economic access to income or food-producing resources such as land.

Although the Guidelines adopt a human rights-based approach, they do not establish legally binding obligations on states or international organisations. States, as the key actors responsible for their implementation, are only encouraged to apply the Guidelines in developing their policies and programmes.

Although the Guidelines adopt a human rights-based approach, they do not establish legally binding obligations on states or international organisations.

Thus, the Guidelines use soft legal terms to define the obligations of states. For example, they provide that states "should promote", "may wish" or "are invited" to take certain measures.

In drafting the Guidelines, the ICESCR was taken into account as a reference document. In addition, the Guidelines use language derived from General Comment no. 12 on the right to adequate food adopted by the United Nations Committee on Economic, Social and Cultural Rights (CESCR) in 1999. An example can be found in the definition of the right to food and states' obligations to respect, protect and promote that right. However, there is no reference to the minimum core obligations implicit in the right to food or to the concept of violations that form part of the General Comment.

Nonetheless, the Guidelines show commitment by states at the diplomatic level to take the right to food seriously.

Their adoption signifies universal acceptance by states of what the right to food means, including by those that haven't ratified the ICESCR yet. The Guidelines have thus strengthened the status of the right to food in international human rights law. According to the FAO, the Guidelines must be implemented in order to meet the goal stipulated in the Millennium Development Goals of reducing the number of hungry people in the world by half by 2015.

A selective overview of the content of the Guidelines

The Guidelines are embodied in a lengthy document covering a number of topics that are directly and indirectly related to the right to food. They are divided into three parts. The first part is the introduction. The second part focuses on the creation of an enabling environment to implement the right to food, issues of accountability and issues concerning the provision of assistance. The third part deals with international measures and commitments that should be undertaken to realise this right.

The enabling environment for the realisation of the right to food that states are encouraged to create includes adherence to the principles of democratic governance, the rule of law, participation of stakeholders and the adoption of economic

policies that take a comprehensive approach to hunger and poverty reduction. In addition, the Guidelines state that legislation is necessary to ensure that policies of the state aimed at achieving food security are implemented. Administrative, quasi-judicial and legal remedies should also be available and accessible (Guideline 7).

A component of the obligation to create an enabling environment for the realisation of the right to food deals with access to productive resources (Guideline 8). The Guidelines encourage states to provide access to land, labour, water, forests, fisheries and livestock, genetic resources and services. In their efforts to make these resources available, states should give particular attention to marginalised and vulnerable groups, such as rural workers and women. For example, land reform is mentioned as an appropriate means of promoting and protecting the security of land tenure of the poor and of women.

In order to develop, implement and monitor coherent and effective food security policies, the Guidelines state that information should be made available on the current food situation and future prospects (food in stock, harvests) that is accurate, detailed and reliable. Benchmarks and indicators are also necessary to evaluate success or failure of those policies (Guideline 17).

The part relating to international measures deals with well-known issues such as international cooperation, international trade, external debt and development assistance. This section does not contain new ideas but reaffirms existing issues and developments discussed in other international fora, such as in the World Trade Organisation, the UN Conference on Trade and Development and the Highly Indebted Poor Countries initiative.

However, it is noteworthy that the Guidelines' introduction stipulates that "food should not be used as a tool for political and economic pressure". It is therefore not clear whether this provision only applies to the framework of international humanitarian law (for example, blocking food transports to insurgent territory).

The Guidelines also discuss the role of donors in providing international food aid in times of serious food insecurity. However, they do not indicate when the need for international food aid could be said to exist.

Although the Ethiopian Constitution recognises economic, social and cultural rights, it does not guarantee the right to food.

The implications of the Guidelines for Ethiopia

Ethiopia is a primarily agrarian society. Over 85% of its population live in rural areas and depend on small-scale agriculture, cattle breeding or pastoralism for their livelihood. Ethiopia is characterised by chronic food insecurity, malnutrition and rural poverty.

Farmers do not produce sufficient food for their own subsistence. Presently, 5.5 million people receive food assistance.

This problem is worsened by drought. About 1.75 million people are currently affected by failed rains and drought (Report of a mission to Ethiopia by the UN Special Rapporteur on the Right to Food, UN Doc. E/CN.4/2005/47/Add.1). This situation increases the vulnerability of the people.

The legal framework

Ethiopia is a member of the FAO and has endorsed the Guidelines. It is also a State Party to the ICESCR. However, it has failed to submit any report on the implementation of that treaty to the CESCR. Furthermore, although the Ethiopian Constitution recognises economic, social and cultural rights (Article 41), it does not guarantee the right to food. Since the Guidelines emphasise the need to strengthen the legal framework for the protection of the right to food at the domestic level (Guideline 7), a national framework law in Ethiopia is necessary for the progressive realisation of this right.

Framework legislation is ideally meant to cover a whole spectrum of cross-sectoral issues related to food security.

It would facilitate a more cohesive, co-ordinated and holistic approach to the right to food by laying down the basic legal principles, goals and competences necessary for its implementation at the national level.

Ethiopia's food security policy

In 2004, the Ethiopian government introduced a new programme called the Coalition for Food Security whose aim is to establish a long-term safety net to guarantee food security for people in need. This programme meant a switch from short-term emergency (food) aid to long-term

development of the people and communities. For instance, it requires the government to implement land tenure reform to (re)distribute state land to farmers. Its overall aim is to reduce the vulnerability of people in the event of famines.

The programme has been implemented since January 2005 with the assistance of foreign donors. It provides for financial aid intended to stimulate the development of local markets. It aims to facilitate internal trading between regions where extra food exists and those with a food shortage. In order to promote the development of local (food) markets and transport, emphasis is placed on the construction of roads. The programme also provides for direct financial or food support to households that are not able to contribute labour to work schemes. In this way, the programme intends to reach vulnerable groups such as female and child-headed households, orphans and pregnant women (Report on the FAO/WFP Crop and Food Supply Assessment Mission to Ethiopia).

A critique of the policy

The Coalition for Food Security Programme is obviously an important step towards realising the right to an adequate standard of living, including the right to food. It deals with the issue of food security in a comprehensive and systematic way. Seen from this perspective, it is certainly in conformity with the objectives of the Guidelines. However, from a human rights perspective, the programme has a number of deficiencies, which make it fail to comply with the Guidelines in full.

First, the programme is not based on the right to food as its point of departure. Not only does it fail to treat the intended beneficiaries of the programme as rights holders, it also fails to define the commitments of the state as binding obligations arising from the right to food. Rather, it is predominantly an economic and humanitarian programme that lacks human rights inspiration.

Accountability is an element of good governance that is essential to the progressive realisation of the right to food.

Second, mechanisms for holding local authorities accountable for the implementation of the programme are missing. For example, the programme provides for the resettlement of farmers from less food-secure localities to areas that are more food-secure. Although the government and FAO have emphasised that these resettlements are voluntary, there is a need to monitor the effects of the resettlement programme and to put in place a mechanism to remedy any negative effects on farmers. Accountability is an element of good governance that is essential to the progressive realisation of the right to food, as highlighted in the Guidelines (s II). In addition, a human rights impact assessment would be necessary to assess the implications of resettling about two million people from overcrowded to unoccupied lands (Guideline 17.2).

Third, Guideline 8.6 enjoins states to promote women's full and equal participation in the economy, including equal access to productive resources such as land and credit. However, *de facto* discrimination against women in matters of inheritance and in control over productive resources is still widespread in Ethiopia. Although the principle of gender equality is recognised by the government, discrimination against and the marginalisation of women in land ownership exists in practice. There is thus a need to tackle this problem by raising awareness at the community level.

Fourth, a human rights-based approach to food security also involves the participation of all stakeholders in the design and implementation of programmes. This principle has been affirmed in Guideline 6. The UN Special Rapporteur on the Right to Food has noted, however, that in a number of cases, some small-scale irrigation projects have been designed and implemented in a top-down manner, without the active involvement of the local people, without giving enough attention to their needs or knowledge and without adapting those projects to the local ecological situation (Report by the UN Special Rapporteur on the Right to Food). In the opinion of the UN Special Rapporteur, it is important that the Ethiopian authorities allow for the involvement of the various stakeholders in the formulation and implementation of policies.

Fifth, Guideline 4 deals with the need to improve the functioning of agricultural and food markets. Other Guidelines (4.5, 4.6 and 4.8) relate to promoting access to food that is affordable through small-scale local and regional markets by establishing well functioning transportation,

communication and distribution systems. However, there are no functioning market information systems in Ethiopia that could be used by traders to explore opportunities for trade. Most traders rely on personal contacts with specialised brokers who are mainly based in Addis Ababa, the capital. As a result, surplus grain first moves to the capital and is then redistributed to areas facing food shortages. This cumbersome practice is also partly the consequence of the under-developed nature of the existing road network (Report on the FAO/WFP Crop and Food Supply Assessment Mission to Ethiopia).

A stronger adherence to the Guidelines would improve Ethiopia's food security policy.

The problem of transportation increases transaction costs for food products, making it difficult for needy people in rural areas to gain access to food. The Ministry of Agriculture has plans to introduce a comprehensive market information system, but these are still under review.

Sixth, the Guidelines clearly prescribe that when support is given to vulnerable people, states should establish eligibility criteria that are transparent and non-discriminatory "in order to ensure effective targeting of assistance, so that no-one who is in need is excluded, or that those not in need of assistance are included" (Guideline 13.3). In other words, the government and its supporters should not use food assistance and access to land, fertilizer and seed for political reasons. Also, the realisation of the right to food also requires a political environment that is favourable for community-based organisations (CBOs), such as farmers' associations, and NGOs. Such an atmosphere is lacking at present. Political turmoil and unrest, fuelled by ethnic divisions, have made it difficult for NGOs and CBOs to operate freely and con-tribute to the fight against hunger.

Conclusion

The Guidelines offer insights into how the right to food could be realised in various contexts. They may serve a particularly important purpose in Ethiopia, which has been struck severely by natural disasters and in which food security has been a problem for a long time. The Guidelines' value lies in the fact that they adopt a rights-based approach to safeguarding and ensuring food security.

This article has shown that a stronger adherence to the Guidelines would improve Ethiopia's food security policy and probably help to find a peaceful solution to the political problems the country is currently facing.

Overall, raising awareness on the right to food and a human rights-based approach to food security among all stakeholders is vital. Awareness campaigns should focus on educating both state officials responsible for implementing the right to food at the national and regional levels, and the public generally, about the content and meaning of the Guidelines. The Guidelines should be seen as a common standard of achievement and as a guide for all those involved in the process of realising food security.

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The Guidelines are available at www.fao.org

The Report on the FAO / WFP Crop and Food Supply Assessment Mission to Ethiopia, 24 February 2006, is available at www.who.int / hac / crises / eth / sitreps / Ethiopia_fao_Feb06.pdf

Conference on improving access to legal services to challenge HIV-related discrimination and claim socio-economic rights

Bryge Wachipa

Protecting the human rights of people living with HIV/Aids is a growing challenge. Their rights are continually violated on a wide scale and in a variety of contexts including in the workplace, the health care sector, the financial sector (particularly the insurance industry) and the community generally.

Insufficient knowledge of basic human rights accounts for the underutilisation of paralegal and legal services by people experiencing HIV/Aids-related discrimination and the inability of these people to enforce their rights. People living with HIV/Aids thus need information about their human rights and access to the legal system in order to enforce them.

This was the context within which the Aids Law Project, Street Law Project , Acornhoek Advice Centre and Centre for the Study of Aids co-hosted a workshop from 17–18 February 2006 on HIV and access to legal services.

The overall aim was to find feasible ways of improving public education on HIV/Aids and the law and access to legal services for those living with HIV/Aids. The conference also aimed at improving communication between the various organisations working in the field of HIV and human rights.

The presenters and participants at the workshop represented a broad spectrum of NGOs, human rights activists and researchers, community-based organisations, public institutions (also known as 'chapter 9 institutions' under the Constitution) and representatives from government and legal service providers.

The issues addressed included:

- how to improve public education on the rights of people living with HIV/Aids;
- how to improve access to legal services using a legal and human rights approach;
- how to ensure that existing legal advice offices are equipped to deal with HIV-related matters, in terms of training both on the legal aspects and staff attitudes towards people living with HIV/Aids; and
- how to improve coordination and collaboration between different actors working in the field, such as non-legal organisations, paralegal organisations, training organisations and public interest or legal aid organisations.

Chief Justice Pius Langa of the South African Constitutional Court stated in his keynote address that rights are entitlements and should be claimed as such. People living with HIV/Aids are thus entitled to the assistance that their condition demands. While acknowledging that legal interventions have a limited scope, he noted that legal practitioners and the courts have a role to play in addressing the issues faced by people living with HIV/Aids.

Other presenters noted that the right of access to legal services means that courts must be available in sufficient quantity and accessibility to everyone without discrimination. It also means that legal services must be within safe, physical reach of all sections of the population, especially vulnerable or marginalised groups such as ethnic minorities, indigenous populations, women, children, older persons, persons with disabilities and persons with HIV/Aids. Also, it was pointed out that this right requires that legal services should be affordable for all. Accessibility, it was emphasised, also includes the right to seek, receive and impart information and ideas.

In short, participants unanimously supported the call for increased access to legal services by people living with HIV/Aids. Considering that the reach of the current legal aid system is narrow, as it caters mainly for criminal matters, participants urged the government to adopt a rights-based approach to efforts aimed at addressing access to legal services so that legal aid is extended to those living with HIV/Aids.

Since the conference was the first step towards a broader campaign on access to legal services for people living with HIV/Aids, it was resolved that a working group should be appointed to take the campaign forward.

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