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Editorial

Sibonile Khoza

This is the second issue of the *ESR Review* for 2006.

This issue includes two feature articles, two case reviews, an update on international developments, a seminar report and a book review.

David Bilchitz critiques the notion of the minimum core argument in the context of the right to health care services. He argues that the lack of clarity on the meaning of the minimum core has allowed for different interpretations of its purpose. He contends that it can be understood in terms of principled and pragmatic minimum core strands and discusses their implications for South Africa.

The second feature discusses the importance of a dialogue on strategies to advance socio-economic rights in South Africa. It warns that civil society organisations and other actors should not be complacent because political environments may become unfavourable, even in societies with the strongest constitutional frameworks, such as South Africa. It calls for a new thinking on how the various actors will promote these rights in future and what the new agenda will be.

Stuart Wilson reviews the Johannesburg High Court decision in the *City of Johannesburg v Rand Properties (Pty) Ltd and Others,* pertaining to the evictions of inner city residents from certain 'bad' buildings in Johannesburg. He argues that the finding that the right to adequate housing includes the right not to be deprived of a livelihood is consistent with international law.

Lukas Muntingh and Christopher Mbazira provide an overview of the recent Durban High Court judgment in *EN and Others v The Government of South Africa and Others.* The case involves the right of prisoners living with HIV/Aids to have access to health cares services (anti-retroviral drugs) at the state's expense. They argue that the decision affirms the long-standing argument that prisoners' rights can only be limited by those principles that are necessary for a sentence of the court to be administered.

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Connie de la Vega reports on the replacement of the United Nations Commission on Human Rights by the United Nations Human Rights Council. She discusses the motivation behind this move and examines its implications for the protection of human rights.

Karen Kallmann reports on a seminar on strategies for promoting socio-economic rights which was co-hosted by the Socio-Economic Rights Project of the Community Law Centre and the Norwegian Centre for Human Rights of the University of Olso in May 2006 in Cape Town.

Lastly, Pierre de Vos reviews the book *Democratising Development: The Politics of Socio-Economic Rights in South Africa*, edited by Peris Jones and Kristian Stokke.

We hope that you will find this issue stimulating and useful in the struggle for the realisation of socio-economic rights in South Africa and beyond.

We wish to thank our guest authors for their insightful contributions.

The right to health care services and the minimum core

Disentangling the principled and pragmatic strands

David Bilchitz

The idea that the state must give priority to the most urgent needs of individuals is of fundamental importance in ensuring that socio-economic rights have an impact on the lives of those worst off in our society. That idea has been expressed in international law by the notion of the 'minimum core' of fundamental rights. In South Africa, the Constitutional Court has sought to give recognition to this idea through the use of the notion of 'desperate need'.

The right to health care raises a number of particularly complex questions about defining the minimum core. Dealing with these questions involves recognising that this concept serves several important purposes, each of which is of significance in giving content to socio-economic rights in our law. This article attempts to disentangle some of these strands of thought.

The rationale for the minimum core

First, it is important to consider the reasons for the introduction of the notion of minimum core obligations by the UN Committee on Economic,

Social and Cultural Rights (CESCR), which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The rationale that the CESCR provided when introducing the notion in General Comment 3, *The nature of States parties obligations* (1990), was not entirely clear. The CESCR provides two fairly elusive reasons: first, that it became necessary to recognise a minimum core obligation as a result of its experience in examining the reports of states concerning their compliance with the ICESCR. Secondly, it claims that: "if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'etre*".

The first reason is inadequate because it fails to explain the problems that the CESCR experienced and why the recognition of the minimum core obligation would rectify them. Presumably, these were practical difficulties relating to the development of normative standards against which to measure state compliance. One central reason for a minimum core is thus the development of minimal benchmarks against which to evaluate state action.

The second reason is essentially incomplete. It requires an understanding of the purpose behind the ICESCR and an explanation as to why recognition of a minimum core obligation is necessary to realise that purpose. As a result, the motivation for introducing a minimum core obligation into the discussions concerning socio-economic rights is unclear from the statements in the General Comment.

This lack of clarity has allowed for different understandings of the purpose of the minimum core. A reconstruction of the reasons for such an approach is necessary in order to understand its importance to the enforcement of socio-economic rights.

Although a detailed reconstruction of these reasons cannot be provided here, it is submitted that there are two ways in which the minimum core can be understood: the 'principled minimum core' and the 'pragmatic minimum threshold'. Both these notions are of importance to the content and enforcement of fundamental rights but need to be distinguished conceptually.

A key aspect of the minimum core is the development of a threshold against which state performance can be measured.

The principled minimum core

Essentially, the principled minimum core relates to the statement by the CESCR that the minimum core describes "minimum essential levels of the right". The minimum core here refers to the minimum basic resources that are necessary to allow individuals to be free from threats to their survival and to achieve a minimal level of well-being. In this respect the minimum core does not encompass the resources necessary to live a decent or dignified life in a community, but rather the basic resources that allow people to move beyond starvation, thirst and homelessness.

One of the key evils sought to be remedied by the minimum core approach was the lack of practical benchmarks against which to evaluate the performance of states in meeting the needs of their people. This is the second key aspect of the minimum core: the development of a threshold against which state performance can be measured.

In relation to food, water and housing, it seems that the principled minimum core notion can provide such benchmarks. We can determine the amount of food necessary to prevent malnutrition or the amount of water necessary to avoid dehydration. The state's actions can then be measured against the levels of food, water and housing it provides. However, matters are different in relation to health care.

There are several strong reasons which can be given to show the difficulty, if not impossibility, of realising the principled minimum core obligation in the context of health care.

First, consider the definition of the principled minimum core obligation as the duty to ensure that individuals are provided with the necessary health care to enable them to be free from threats to their survival. In relation to health care, the imposition of such an obligation would involve not only primary health care, but also the provision of expensive drugs and treatments, such as dialysis and heart transplants, that are necessary to preserve life. The imposition of such an obligation could preclude spending on any other important socio-economic services and lead the entire budget of a country to be absorbed by health-care expenditure.

The problem with providing such care universally is explained eloquently by Moellendorf:

The cost of providing needed medical resources to all citizens, unlike the costs of providing universal housing and access to food and water, may be limitless since the costs of new technology are high and resources needs continue to grow as new treatments become available. If the cost of providing needed medical resources to all citizens is limitless, then clearly available resources are insufficient to meet all claims and a system of rationing available resources is needed (1998 *SAJHR* 327).

The second problem with focusing all expenditure on the provision of health-care services is that it will inevitably affect the realisation of other less expensive needs, such as the provision of housing and food. The failure to realise these needs in turn would have an impact upon the health of individuals. Thus, focusing expenditure purely on health-care services that meet survival needs can be self-defeating.

In the *Soobramoney v Minister of Health (KwaZulu Natal)* 1997 (12) BCLR 1696 (CC) (*Soobramoney*), Sachs J quoted with approval a United Nations Educational, Scientific and Cultural Organisation (UNESCO) publication stating that the provision of equal access to high-technology care, even in industrialised nations, "would inevitably raise the level of spending to a point which would preclude investment in preventive care for the young, and maintenance care for working adults" (para 53).

Finally, the vast spending necessary to maintain everyone at the level of the principled minimum core in relation to health care would ensure that people only attain a very low standard of living. Few resources would be available for people to use to fulfil their projects and goals beyond those focused on guaranteeing survival needs. It is unlikely that people would be content to live in a society which offers such minimal conditions and ambitions for individuals.

Thus, in the context of health care, it is possible to say that there is indeed a principled minimum core providing strong reasons for prioritising the health care necessary for survival and to alleviate suffering. However, there are strong countervailing reasons in this area generally not to impose a practical obligation upon governments to fully realise the principled minimum core. Simply put, giving people in all cases the level of health care necessary to eliminate threats to survival can be too costly for a society.

Giving people in all cases the level of health care necessary to eliminate threats to survival can be too costly for a society.

The importance of the principled minimum core

In light of this conclusion, it may be objected that the idea of a 'principled minimum core' loses its usefulness in the context of the right to health-care services and that we should dispense with this idea and rather focus our energies on defining practical minimum standards against which government action can be measured.

It is important to make two points in response to this objection. The first is that the reasons behind identifying the principled minimum core apply to the case of health care as much as to any other socio-economic right: the core represents the necessary conditions for individuals generally to be free from threats to their survival. This threshold recognises the importance of having the health care necessary for people's survival. Any failure to provide such health care has adverse consequences for the individual and we should not attempt to pretend otherwise. The provision of such health care remains a priority and only strong reasons can help to justify the failure to provide such services.

The principled minimum core ensures that we recognise the urgency of basic individual needs and that these have a central place on our list of concerns that governments are obliged to address. That importance persists even if there are strong reasons why a government cannot afford to provide the entire principled minimum core. To focus only on pragmatic standards, as discussed below, loses sight of the urgency that certain interests have for individuals irrespective of resource constraints. Tragic consequences may follow for individuals even if it is simply not possible to assist them in realising these important interests. The principled minimum core thus has the virtue of placing these interests in clear view, and, practically, still requiring justification for the failure to realise them.

Secondly, the formulation of pragmatic minimum standards does not take place in a vacuum. The point is that without some form of principled foundation, the pragmatic standards are likely to be arbitrary. It is thus necessary to have a background theory that determines

why the minimum practical standards are determined in the way that they are. Central to any formulation of practical standards in relation to fundamental rights must be the recognition of the interests involved and the differing levels of urgency that must be attached to the realisation of such interests. Thus, even though the principled minimum core will not itself provide the minimum standard against which government action will be evaluated, it remains of importance in helping to define – along with a range of other factors – the practical standards that will be used. Thus, there is good reason to retain the idea of a principled minimum core even where it is not realisable, as is the case with health care.

A pragmatic minimum threshold

A focus on the principled minimum core alone in the context of health care will mean that we lack practical minimum standards that governments must meet in the provision of health care. Arguably, this is one of the important functions of identifying a minimum core obligation.

One of the functions of a minimum core obligation is to identify certain clear obligations imposed by socio-economic rights and to give more definite content to these rights. A minimum core obligation identifies a minimum level below which government action should not fall. In this way, it ensures that these rights are enforced and given effect. Without it, it is unclear whether the ICESCR (or the South African Constitution for that matter), would achieve its *raison d'etre*, which involves protecting and enforcing socio-economic rights.

Thus, it is important to define certain practical minimum standards that government action must meet, as a matter of urgency, in the sphere of health care. Defining such a 'pragmatic minimum threshold' involves a number of factors – apart from the urgency of the interests already mentioned – only some of which are canvassed here. First, the cost of the treatment required would clearly be of relevance. Second, the availability of resources needs to be taken into account. Third, it will be important to balance a preventative strategy focused on preventing health-care problems from arising against a curative strategy that focuses on treating health care problems when they do arise. Fourth, it is important to try and ensure that each individual is offered equal opportunities for treatment. Finally, it is important to consider the impact of a pragmatic minimum on other needs and wants in the society.

It is important to try and ensure that each individual is offered equal opportunities for treatment.

The pragmatic minimum threshold is thus arrived at by considering the principled minimum core as well as other theoretical considerations, together with the resources and capacity available in a particular society.

These considerations are then used in the process of formulating a threshold that specifies a pragmatic minimum standard to which governments must devote urgent attention. This standard is a result of several considerations and lacks the simplicity of the justification for the principled minimum core. It is a notion that arises from a combination of principled and pragmatic considerations.

The CESCR has in fact defined a 'pragmatic minimum core' in its General Comment 14 on the right to health care. In this General Comment, it defines a core obligation to "ensure the satisfaction of, at the very least, minimum essential levels" of the right to the highest attainable standard of health in the ICESCR. However, the obligations it identifies do not meet even people's survival needs. Much life-saving health care is left out of the scope of the minimum core: for instance, surgery and treatment of life-threatening illnesses that do not constitute epidemic diseases.

Thus, it is evident that the definition of the minimum core has not only been governed by the 'essential' nature of the interests involved but by pragmatic considerations as well.

Distinguishing the principled and pragmatic strands in the minimum core concept allows us to understand the various important theoretical and practical purposes that it must fulfil. In the cases of most other subsistence rights, these purposes coincide. They do not in the case of health care. Thus, modifications need to be made to our conceptual and policy frameworks in order to give effect to the right to health-care.

Practical implications for South Africa

While it is not possible to guarantee all in South Africa the treatment necessary to eliminate threats to survival, it is possible for the

government to institute programmes that guard against some of the most prevalent threats. These include, for instance, eliminating malnutrition, and ensuring equal and urgent access to and the availability of treatment programmes for HIV/Aids. In this way, the principled minimum core can play a role in the development of pragmatic minimum standards against which to evaluate government health programmes.

In many parts of this country health care services are in an abysmal state, which is having a dire impact on people's health. The Department of Health should be obligated to develop pragmatic minimum standards that must be met as a matter of priority within the public health care system. These will also provide basic standards that can be improved over time to progressively realise the right to health care services in South Africa.

The right to health care services requires, at least, that a number of goals be set for government policy (this need not be done by the courts), that a minimum level of service be specified and that the government establishes detailed plans and programmes for increasing the quality of health care over time with measurable indicators, targets and deadlines. The reasons for such a plan and the pragmatic minimum threshold set could be evaluated by courts. Moreover, failure by the government to meet those targets may mean that it is in breach of its constitutional duty to progressively realise the right to health care.

Courts need to be prepared to impose obligations upon the government to develop such a plan, to evaluate it and to compel the government to implement it. In this way, a pragmatic route can be forged for realising a most important matter of principle: decent health-care services for all.

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The importance of a dialogue on strategies to promote socio-economic rights in South Africa

Sibonile Khoza

During the celebrations of the ten years of democracy and the 1996 South African Constitution, much was said about the substantial progress made in enforcing and implementing socio-economic rights in South Africa. Considerable attention was paid to the role of the courts in enforcing these rights. Previous issues of the *ESR Review*, including 5(5) of 2004, have reviewed the progress made thus far.

In contrast, there has been little debate about the role of and progress made by civil society organisations (CSOs) and other independent state and non-state institutions in promoting and protecting socio-economic rights. An evaluation of the progress made to realise socio-economic rights will be incomplete if not accompanied by a reflection on the contribution made and the effectiveness of the strategies and tools used by a range of actors other than the courts.

A reflection of this kind should take its cue from a similar debate that has taken place at the international level. Various human rights activists recently engaged in a debate about the effectiveness of the different strategies their organisations have used to promote human rights, specifically socio-economic rights. Among them were Kenneth Roth (Human Rights Watch), who initiated the debate, Leornard Rubenstein (Physicians for Human Rights), Mary Robinson (Ethical Globalisation Initiative and former United Nations Human Rights Commissioner) and Katarina Tomaševski (Lund University and the former Special Rapporteur on Education).

This debate appeared in certain editions of the 2004 and 2005 *Human Rights Quarterly* and was

reviewed in a previous issue of this publication (*ESR Review*, 2005, 6(1)).

In an attempt to carry this debate forward, the Socio-Economic Rights Project of the Community Law Centre and the South Africa Programme of the Norwegian Centre for Human Rights at the University of Oslo co-hosted a seminar in May 2006 in Cape Town on 'Strengthening strategies for promoting socio-economic rights in South Africa'. A summary of the outcomes of the seminar appears under the Events section of this issue. Once compiled, the report of the seminar will be circulated widely and posted on our website.

The advent of democracy in South Africa presented a favourable climate for human rights struggles and advocacy.

Why is it important to evaluate the effectiveness of strategies for promoting socio-economic rights in South Africa? What are the trends in South Africa's politics on socio-economic rights vis-à-vis the role of CSOs and other actors? What tone should the debate on these issues adopt? Are some strategies more effective than others for certain issues? If so, which strategies and for which issues? These are some of the pertinent questions addressed here.

The struggle for protecting socio-economic rights in South Africa

The advent of democracy in South Africa presented a favourable climate for human rights struggles and advocacy. It opened up opportunities for the use of a number of strategies to advocate for certain guarantees to be protected in the Constitution. Many CSOs and other actors have made full use of the favourable spaces of democracy to advance their agendas.

The first issue that became the subject of campaigns by CSOs was the inclusion of socio-economic rights in the Constitution. This was certainly not a walk in the park for human rights organisations, who were in favour of protecting these rights in the Bill of Rights. They had to contend with stiff opposition from a variety of circles, including academics, politicians and legal practitioners.

Stuck in traditional and conservative ideological notions that socio-economic rights are not 'real' human rights, the objectors argued that they are not 'universally accepted' as 'fundamental rights'. They contended that socio-economic rights are 'inconsistent with the principle of separation of powers' in that they have budgetary and policy implications and are mainly positive in nature. On this basis , they concluded that they are not appropriate for judicial enforcement. In contrast, the inclusion of civil and political rights was not in dispute: they were accepted as fundamental rights.

Sadly, these arguments have continued to delay the adoption of an optional protocol to the International Covenant on Economic, Social and Cultural Rights. The Optional Protocol will provide victims of violations of socio-economic rights with an opportunity to lodge formal complaints with the United Nations Committee on Economic, Social and Cultural Rights. Negotiations on the adoption of the Optional Protocol are still taking place.

Fortunately, in South Africa the debate about socio-economic rights ended in favour of their proponents. During the certification of the 1996 Constitution, the Constitutional Court (the Court), unconvinced by the objectors' arguments, ruled in favour of the inclusion of socio-economic rights in the Bill of Rights (*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* (BCLR 1253 (CC) para 78). The Court reviewed the arguments against socio-economic rights and found there were no significant differences between them and civil and political rights. At the very least, the Court held, they are capable of negative enforcement by the courts.

The Court's ruling set the stage for judicial enforcement of socio-economic rights. It also laid the foundation for an increased role for different interest groups in the alleviation of poverty in South Africa, using a human rights-based approach. It set a new agenda and challenge for many CSOs and human rights institutions that had previously focused exclusively on civil and political rights. The key challenge was now to develop the normative content of all human rights entrenched in the Bill of Rights and to define, in precise terms, the obligations of the state in relation to these rights to make them meaningful for poor and disadvantaged individuals and communities.

Not surprisingly, human rights organisations have increasingly incorporated socio-economic rights in their work. In addition, development organisations have also promoted a rights-based-approach to development and poverty alleviation.

No room for complacency

Potential limitations for CSOs participation

Clearly, CSOs and other interest groups have, in different ways, taken advantage of the spaces provided by the institutionalisation of democracy and human rights.

They have been at the centre of the 'constitutional dialogue' on how best to realise socio-economic rights during the last decade. They have contributed significantly towards the enactment of a range of progressive laws, the development and implementation of responsive social policies and programmes and the evolution of a promising body of case law on these rights.

However, they should not be complacent about these successes. The honeymoon phase may soon be over. Their role and the impact of their strategies may be limited in a wide range of ways. As Siri Gloppen rightfully warns on litigation as a strategy:

> The impact of litigation is bound to be limited, even under the favourable conditions prevailing in South Africa in the past decade – where the ideological commitment to constitutionalism and social rights is strong, both in civil society and within the judiciary, and where the ideal of social transformation and progressive realisation of social rights has also been prominent in political society.

Gloppen's warning is as valid against other strategies of advancing human rights as it is against litigation.

Limitations on the activities of CSOs often appear without warning. States do not usually announce their intentions to limit the role of certain groups in society. Constitutions and their values can actually be abused to limit the activities of CSOs.

The participation of CSOs and other actors may be limited in different ways. Their activities may be limited at the level of engagement with the government. In South Africa the favourable political environment may change over time as the government becomes more intolerant of organisations that are critical of its actions or conduct. This could be done by enacting or threatening to enact legislation. The government's threat to pass legislation to restrict whistle blowing in April 2005 may be regarded as an indicator of such an intention. Such threats may prevent organisations from criticising government in the future for the sake of protecting the current favourable spaces for engagement.

CSOs should not be complacent about their successes. The honeymoon phase may soon be over.

The government may also limit the participation of CSOs through a vindictive attitude towards critical voices or groups. The government's attempt to prevent the Treatment Action Campaign from attending a high-profile UN meeting on HIV/Aids in New York in May this year is a case in point.

Moreover, South African CSOs are facing a challenge of funding, which in and of itself poses a threat to their existence and future participation in issues concerning human rights. Most donors are shifting their focus away from South Africa to other African countries where there are persistent gross violations of human rights. Many organisations that have relied on donor funds are now closing down. Others are seeking alternative ways of surviving. For example, some are stretching their wings to other parts of the continent in the search for financial resources. Others are providing services to the government for pay or are receiving funds from the government to do specific work.

There are dangers involved in some of these alternative means of funding. For example, entering into partnerships with the government or receiving funds from it can potentially compromise the independence and objectivity of CSOs. It is difficult for an organisation relying on funds from government to be critical of it.

These potential limitations, as Gloppen warns, exist even in societies with the strongest constitutional framework, such as South Africa.

The need for a new thinking on strategies to promote socio-economic rights

Since 1994, the political environment in South Africa has evolved favourably. As we move into the second decade of democracy, different interest groups and individuals need to develop a new thinking around the best ways of promoting and protecting socio-economic rights. In doing so, sight should not be lost of the symbiotic relationship between, and the interrelated nature of, the different strategies.

In the past ten years, great reliance has been placed on litigation. Litigation has undoubtedly yielded results. Celebrated judgments (such as those in the *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) and the *Minister of*

Heath and Others v Treatment Action Campaign and Others 2002 10 BCLR 1033 cases) have left an indelible impact on the interpretation and meaning of socio-economic rights and have also received wide international acclaim.

Despite this, it is important to note that litigation has its limitations and, if not accompanied by other strategies, it cannot achieve the goal of transformation. Litigation is case responsive – courts act retroactively only after cases with the proper set facts are brought to their attention through the prescribed procedures. The scope of litigation is also very focused, in terms of issues but also in terms of the parties. Courts are reluctant to resolve issues not argued before them; they also shy away from issues they consider 'polycentric'.

In his speech to the Third Dullah Omar Memorial Lecture hosted by the Community Law Centre on 13 June 2006, the former Chief Justice, Mr Arthur Chaskalson, argued that courts should not readily be dragged into socio-economic battles. Strategies other than litigation must first be explored or used in conjunction with it. These include mediation (especially in the case of evictions) and advocacy and social mobilisation.

Chaskalson's strong arguments against the regular use of structural interdicts in socio-economic rights cases indicates that the courts would like to be a 'one-stop shop' in resolving these cases – they do not want to look at a case again once they have decided on it.

It is thus important that CSOs look beyond litigation and explore other strategies to compel government to discharge its constitutional obligations. Strategies used thus far include research, advocacy, education and training, monitoring, shadow reporting, naming and shaming, mediation, litigation, social mobilisation, alliances and campaigns, as well as budget analysis. The latter will become a very useful strategy in the second decade of democracy as the government develops more and more policies and enacts more legislation to implement these rights.

Conclusion

As South Africa celebrates the ten years since the adoption of the Constitution, CSOs should reflect on the effectiveness of the various strategies used to advance socio-economic rights. They should not be complacent. The political environment changes over time and so, too, should the strategies used to push a particular agenda.

It is time for different interest groups to reflect on their experiences and set a new agenda for the second decade of democracy. Below are some of the issues that require attention:

- the lack of implementation of court orders relating to socio-economic rights;
- the courts' reluctance to grant supervisory orders in relation to socio-economic rights cases;
- the rejection by the Constitutional Court of the minimum core obligations concept;
- the question of how to make the test of reasonableness more robust and responsive to the needs of the poor and of disadvantaged groups;
- analysis and allocation of budgets;
- the failure by the government to ratify the Covenant on Economic, Social and Cultural Rights; and
- the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights at the international level.

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A new dimension to the right to housing

Stuart Wilson

City of Johannesburg v Rand Properties and others 2006 (6) BCLR 728 (W) (*Rand Properties*)

A new dimension has been added to the right of access to adequate housing. The High Court recently held in the *Rand Properties* case that poor people living in unsafe buildings in the Johannesburg inner city were entitled, in terms of this right, to accommodation located within a reasonable distance of their existing livelihood opportunities.

This article first sets out the socio-economic and political context leading up to the *Rand Properties* case. It then examines the arguments placed before the Court, before concluding with a brief analysis of the High Court's ruling.

Background

In 2003, the City of Johannesburg launched its Inner City Regeneration Strategy (ICRS).

As part of the municipality's effort to mould Johannesburg into an 'African World Class City', the ICRS is intended to transform the inner city's 'sink-holes' (run-down areas) into modern, commercially sustainable and visually attractive 'ripple ponds' ('re-generated' areas).

It will, says the municipality, lead to higher commercial investment in the inner city and contribute to a gradual increase in property prices.

Part of the ICRS relates to the identification of 235 'bad' buildings – urban slums, home to large numbers of poor people – as hives of chaos and decay.

'Bad' buildings were created after property owners simply abandoned their investments during the long period of capital flight and inner city decline in the 1990s.

Some of these buildings have subsequently fallen prey to slumlords who unlawfully collect rent and service charges from people living there. Others have been more or less effectively managed in good faith by informal 'residents' committees' in the absence of a legitimate owner.

As a result of a history of poor management and exploitation, 'bad' buildings very often owe large sums of money to the municipality for rates and services.

In addition, these buildings are often very unsafe to live in. Few have stable water and electricity supplies. Sewerage systems have completely broken down. Informal subdivisions and overcrowding are commonplace.

'Bad' buildings therefore often present serious fire and public health risks.

The intention of the municipality is to close these buildings down in what the ICRS calls 'blitz operations'. In practice this means that large numbers of desperately poor people will be evicted without proper notice or the provision of alternative accommodation.

Eviction applications are always made on an urgent basis, without giving occupiers an opportunity to defend themselves.

In 2004 there was an acceleration of 'bad' building clearances in the inner city and the ejection onto the streets of, at minimum, some 5 000 men, women and children.

Eviction applications are always made on an urgent basis, minimising the possibility for the occupiers to make a defence.

Eviction application are therefore often unopposed, since occupiers of 'bad' buildings are usually unable to pay for (quality) legal representation.

The victims of municipal blitz operations are often depicted as criminals, prostitutes, drug dealers, illegal immigrants or people of otherwise violent or dishonest tendencies who, as a spokesperson for the municipality in 2005 said, "ought not to be rewarded" with somewhere else to stay.

Another facet of the ICRS, running parallel to the municipality's 'blitz operations', is its 'Better Buildings Programme'. 'Bad' buildings marked for evictions or whose occupants have already been evicted are often either expropriated or attached in execution of debts owed to the municipality by the registered owner(s). Once cleared, they are transferred to third party property developers selected by the municipality through a competitive tender process and are then upgraded for residential or commercial occupation.

The cost of accommodation in upgraded buildings for residential occupation usually exceeds the means of the people who originally lived there. For example, in one of the properties targeted for eviction in the *Rand Properties* case, a potential developer recently suggested an upgrade that would result in a minimum rental of R800 per month. The average monthly household income of the occupiers of property in question is reported to be around R400.

In 2004, the Centre for Applied Legal Studies and the Centre on Housing Rights and Evictions conducted a study of the municipality's evictions programme and the socio-economic circumstances of people who live in 'bad' buildings. The study, entitled 'Any Room for the Poor? Forced Evictions in Johannesburg, South Africa', found that the average occupier of a Johannesburg 'bad' building is a South African citizen, earning between R500 and R1 000 per month, supporting a large family and eking out a living as an informal trader, petrol pump attendant, casual factory worker or

cleaner in the inner city area. Many others have no formal employment or income and have often been homeless for long periods. They live in 'bad' buildings because they have nowhere else to go.

The report also found that there was a huge unmet demand for low cost housing (that is, housing available to households with incomes of less than R3 500 per month) in the inner city. It has been estimated that this demand currently stands at 16 000 units.

The report was admitted as part of the evidence in the *Rand Properties* case.

The *Rand Properties* case

The occupiers' arguments

In *Rand Properties*, the municipality sought the eviction of some 300 men, women and children ('the occupiers') from six properties in the Johannesburg inner city.

The municipality alleged that the properties were unhygienic and constituted a fire hazard and sought an eviction order in terms of Section 12 (4) (b) the National Building Standards and Building Regulations Act 103 of 1977 (the BSA). The municipality refused to offer the occupiers alternative accommodation.

While the eviction applications were being prepared, one of the properties – a 16-storey block of flats called San Jose – was 'provisionally awarded' to a private property developer in terms of the Better Buildings Programme.

The Wits Law Clinic and Webber Wentzel Bowens Attorneys, along with Advocates Heidi Barnes and Paul Kennedy SC, defended the occupiers against the eviction on the following grounds:

- Most of the occupiers were 'unlawful' within the meaning of Section 1 of the Prevention of Illegal Eviction (PIE) Act, and therefore entitled to its protection. PIE requires a court to consider the availability of alternative accommodation in deciding whether or not to grant an eviction order. The BSA, it was argued, contained no such provision, and thus allowed for arbitrary evictions to take place. The municipality's failure to bring its case in terms of PIE rendered the application fatally defective.
- Since the BSA allowed for the possibility of arbitrary evictions, its provisions were in conflict with the prohibition against arbitrary evictions under section 26 (3) of the Constitution, and therefore invalid. Section 12 (4) (b) of the Act grants a local authority unfettered discretion to declare any property within its area of jurisdiction a health hazard and evict its occupiers, in theory without first seeking a court order.
- Even if the BSA was valid, the decision to issue an eviction notice under the Act constituted administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 and Section 33 of the Constitution. The occupiers were therefore entitled to a hearing before such a decision was taken. The municipality made no effort to convene such a hearing, nor to consult the occupiers.
- Even in terms of the BSA the evictions, without alternative accommodation, would be unjust, inequitable and in violation of their constitutional rights of access to adequate housing.
- The City of Johannesburg's practice in seeking evictions in the inner city without providing alternative accommodation, ostensibly on health and safety grounds, amounted to selective enforcement of the BSA. There were hundreds of thousands of shacks outside the inner city of Johannesburg that were just as unhealthy and unsafe as the buildings at issue in this case.

> **There were hundreds of thousands of shacks that were just as unhealthy and unsafe as the buildings at issue in the *Rand Properties* case.**

The occupiers also brought a counter-application against the municipality to have the BSA declared unconstitutional.

Relying on Sections 26 (1) and 26 (2) of the Constitution, the occupiers sought an order declaring the municipality's housing policy unconstitutional insofar as it did not cater for those who were economically vulnerable and would be in a crisis if they were evicted without being given alternative accommodation.

The occupiers also sought an interdict restraining the municipality from evicting them before alternative accommodation was provided, an order declaring the municipality's practice of seeking evictions in terms of the BSA unconstitutional and an order setting aside the decision to apply for an eviction order in the first place.

Underlying all of the occupiers'

claims was the assertion that living in 'bad' buildings was the only way in which they were able to sustain their livelihood in the inner city of Johannesburg. This was so because the incomes they were able to derive from these livelihoods did not permit them to access safe accommodation on the private residential housing market or in any of the social housing initiatives currently available in the inner city.

Their incomes did not permit them to commute into the inner city since transport costs were too high.

Nor did their incomes permit them to live on the urban periphery and commute into the inner city, since the transport costs of doing so were simply too high. In most cases, the costs of commuting into the inner city accounted for between a third and a half of the occupiers' income. In some cases, monthly transport costs from the urban periphery exceeded the occupiers' current income.

Their eviction without the provision of alternative accommodation in or near the inner city would therefore have presented them with three alternatives:

- to move into another 'bad' building in the inner city;
- to leave the inner city and sacrifice their livelihoods; or
- to leave the inner city and sacrifice a large proportion of an already meagre income in transport costs.

The substance of the occupiers' case in the High Court was that the municipality's action in clearing and upgrading 'bad' buildings in terms of the ICRS would result in their gradual exclusion from the inner city. This, it was argued, was unconstitutional.

The municipality's response

The municipality's reply to the occupiers' defences and counter-application was simply to admit that it did not have a policy to deal with their housing needs. Nor did it even implement national policies intended to address unsafe living conditions through the provision of emergency shelter.

Nevertheless, it agued that the exercise of its powers under the BSA was not unlawful. These powers could be subject to review, the municipality contended, only on the grounds of rationality. The municipality argued that it had not acted irrationally in identifying buildings in which the occupiers' lived as hazardous. Thus, the occupiers had no legally relevant objection to their eviction.

A consideration of the longer-term consequences of removing very poor people from their (unsafe) homes in circumstances where the state had nothing else to offer them, it was argued, was simply beyond the court's purview.

Further, the occupiers could not rely on their right of access to adequate housing to resist the municipality's eviction application, as it was common cause between the parties that the housing the occupiers currently live in was 'manifestly inadequate'. To deprive the occupiers of their current housing could therefore not be regarded as a violation of Section 26 (1) of the Constitution, which only protects access to adequate housing.

The municipality denied that it intentionally enforced the BSA selectively and argued that the 'upliftment of the city' was a difficult task that had to start somewhere. The decision to start in the inner city, it was implied, was based on sound policy considerations. The municipality was silent on what these considerations were.

Although it did not deny any of the facts adduced on behalf of the occupiers relating to the effect of the ICRS on the inner city poor, the living circumstances and livelihood strategies of the occupiers or the backlog of low-cost housing in the inner city, the municipality did not explicitly address these issues on its papers or in argument.

During the course of argument, however, counsel for the municipality stated bluntly that those unable to access safe inner city housing through the market ought to move to another location. They had no right to state assistance.

The decision

The case was heard in the Johannesburg High Court between 6 and 8 February 2006. Judgment was handed down on 3 March 2006. In his ruling, Judge Jajbhay:

- dismissed the municipality's eviction application;
- declared the municipality's housing policy unconstitutional insofar as it "failed to provide suitable relief for people in the inner city of Johannesburg who are in a crisis situation or otherwise in desperate need of accommodation";
- ordered the municipality to "devise and implement within its

available resources a comprehensive and co-ordinated programme to progressively realise the right to adequate housing [for] people in the inner city of Johannesburg who are in crisis situation or otherwise in desperate need"; and

- interdicted and restrained the municipality from evicting or seeking to evict the occupiers "pending the implementation" of a constitutionally valid housing programme.

Employing a strategy that Iain Currie has called 'judicious avoidance', the Judge declined to rule on the constitutionality of the BSA, the municipality's evictions practice, or on the occupiers' prayer for a structural interdict. He did say, though, that he was heartened that the municipality had accepted during argument that its practice in seeking evictions from inner city building would have to be made more consultative.

Perhaps most importantly, the Judge found that:

> The absence of adequate housing for the [occupiers], and any subsequent eviction, will drive them into a vicious circle, to the deprivation of their employment, their livelihood, and therefore their right to dignity, perhaps even their right to life. The right to work is one of the most precious liberties that an individual possesses. An individual has as much right to work as the individual has to live, to be free and to own property. To work means to eat and consequently to live. This constitutes an encompassing view of humanity.

This finding explicitly locates the right of access to adequate housing in a network of other rights, including the right of access to a livelihood, which is not currently recognised explicitly in the South African Constitution.

International law has long recognised the interrelationship between the rights to housing, food, medical care and a livelihood (see especially Article 25 of the Universal Declaration on Human Rights and Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights).

In the broader context of the case, the nature of the Judge's finding allows the conclusion to be drawn that the right of access to adequate housing implies a right to a specific location within a reasonable distance of livelihood opportunities.

The Judge explicitly stated that one of the shack settlements to which the municipality said the occupiers may be able to move (although it made no formal offer to accommodate them there) was far away from the inner city and not itself a safer place than the current one.

The judge declined to rule on the constitutionality of the BSA.

Conclusion and the appeal

The City of Johannesburg has appealed against the High Court's judgment to the Supreme Court of Appeal.

The thrust of the municipality's appeal is that the Judge should have accorded a greater degree of deference to the municipality in its exercise of its powers under the BSA. Had the Judge done so, the municipality argues, he would have ordered the occupiers' eviction, without requiring it to provide alternative accommodation and/or design a constitutionally valid housing policy to benefit the occupiers.

In a press conference called after the deaths of 12 people in an inner city fire in late March 2006, the Mayor of Johannesburg, Amos Masondo, summed up the municipality's attitude to the judgment. He accused Judge Jajbhay, albeit indirectly, of a lack of common sense and of failing to understand the complexities of urban renewal or the difficulties of addressing unsafe living conditions.

Sadly, the Mayor did not explain why he thought making large numbers of poor people homeless contributed to either urban renewal or public health and safety.

The Mayor's comments underscored the fact that the municipality is unlikely to comply with any final order requiring it to address the needs of the inner city poor. Recognising this, the occupiers' lawyers decided to cross-appeal against the Judge's decision not to grant a structural interdict. Such relief would require the municipality to submit a revised housing policy to the occupiers and the court for further examination in light of its constitutional obligations.

The occupiers also appealed against the Judge's refusal to grant all the other prayers in their counter-application.

It is expected that the Supreme Court of Appeal may hear the case as early as November 2006.

Stuart Wilson is a research officer at the Centre for Applied Legal Studies, University of the Witwatersrand. He is also a member of the occupiers' legal team in the *Rand Properties* case.

Prisoners' right of access to anti-retroviral treatment

Lukas Muntingh and Christopher Mbazira

EN and Others v The Government of South Africa and Others (Durban High Court, Case No. 4576/2006) [unreported] (*EN* case)

Prisoners are susceptible to a number of illness and diseases due, in part, to poor living conditions in prisons (e.g. overcrowding and poor nutrition), substance abuse and sexual violence (e.g. male rape).

From a health care perspective, prisons present a particular challenge. From 1996 to 2005, the number of prisoners dying from natural causes per year increased from 211 to 1 507. HIV/Aids has contributed to this increase.

The rate of HIV infection among prisoners is unknown and the Department of Correctional Services (the Department) has commissioned a research project to establish this. In the absence of accurate and publicly accessible data, it is difficult to establish the size and scope of HIV infection and the actual number of persons living with AIDS in our prisons. What we do know is that prisoners' access to anti-retroviral treatment (ARV) is extremely limited. To date, only one accredited ARV treatment centre has been established by the Department, at Grootvlei Correctional Centre in the Free State.

In September 2005, the Department briefed the Parliamentary Portfolio Committee on Correctional Services regarding prisoners' access to ARV. It reported that the Department was not accredited to provide ARV to prisoners. It also noted that the ARV roll-out centres were located off-site at Department of Health facilities, which created security concerns as a result of the lack of staff and logistics (e.g. transport).

In essence, the Department's position was that, while it would like to provide access to ARV, it lacked the resources (staff and infrastructure) to do so.

The applicants in the present case sought to remove all obstacles preventing prisoners from accessing ARV.

Facts

The AIDS Law Project (ALP) assisted 15 HIV/Aids-positive prisoners (the applicants) serving sentences at the Westville Correctional Centre (WCC) to bring an application to the Court:

- to compel the government to remove all obstacles preventing them (and other qualifying prisoners) from accessing ARV at accredited public health care facilities;
- to seek an order that they be provided with ARV in respect of the established government Operational Plan for Comprehensive HIV and AIDS Care (the Operational Plan); and
- to require it to issue a structural interdict compelling the government to report to it within one week on the measures taken to give effect to the reliefs granted.

Only one accredited ARV treatment centre has been established by the Department of Correctional Services.

The application was preceded by a fairly lengthy but largely unproductive process of meetings and correspondence between the ALP, the WCC and the Head Office of the Department of Correctional Services.

This process began in October 2005 and by March 2006, the ALP came to the conclusion that it would bear no fruit. It decided to launch the application in the Durban High Court on 12 April 2006.

The respondents were the Government of the Republic of South Africa, the Head of WCC, the Minister of Correctional Services, the Area Commissioner of Correctional Services (KwaZulu Natal), the Minister of Health and the KwaZulu Natal MEC for Health.

The respondents apparently tried to undermine the application by, among other things, contesting the *locus standi* of the applicants, the urgency of the application and the validity of the founding papers. Justice Pillay dismissed these arguments.

Arguments

The applicants' arguments were simple and straightforward. They argued that the respondents had failed to meet two Constitutional obligations in respect of the right to health in sections 27(1)(a) and 35(2)(e) of the Constitution. Section 27(1)(a) guarantees everyone the right of access to healthcare services, which the state must realise progressively, subject to available resources. Section 35(2(e)) guarantees every detained person the right to conditions of detention which are consistent with human dignity, including medical treatment.

The applicants argued that the Operational Plan was unreasonable because it was being implemented slowly. All they sought was an order compelling the respondents to fast track the implementation of the Operational Plan to enable the applicants and similarly situated prisoners be assessed for ARV treatment.

As is often the case with socio-economic rights litigation, the respondents attempted to seek refuge in the doctrine of separation of powers. They argued that the applicants were asking the Court "to prescribe ARV", a task falling beyond the courts' competence.

The respondents, while not contesting the principle that a court can grant a structural interdict, argued that it was not necessary in this case because they were implementing the Operational Plan.

They also argued that the issuance of structural interdicts in certain circumstances amounts to unwarranted interference with the authority and discretion of the executive arm of government in violation of the doctrine of separation of powers.

The respondents also argued that the applicants were already being taken care of under what was described as a Wellness Programme. The applicants contested this assertion and no evidence was led by the respondents to substantiate their claim.

The Court ordered the removal of restrictions that prevent prisoners from accessing ARV.

The decision

Judge Pillay dismissed the respondents' arguments. He focused on the urgency "to remove all obstacles preventing the applicants (and other qualifying prisoners) from accessing ARV at an accredited public health facility". He stated that what was being sought was the removal of unnecessary delays in the treatment of the prisoners, as this was indeed a "matter of life and death".

According to the Judge, the question was whether the respondents were meeting their constitutional obligations by taking reasonable steps or measures to ensure that the applicants were receiving adequate medical treatment. There was no argument on the part of the respondents that they were constrained by resources in their endeavours to ensure adequate medical treatment for the applicants.

The judgment describes in detail the history of the case and the apparent lack of seriousness on the part of the respondents in dealing with the applicants' problem:

> The dilatoriness and lack of commitment by the respondents as evidenced by the correspondence forming part of the founding affidavit is quite evident. It seems to me that but for the intervention of the State Attorney, who used his good offices to convene the round table meeting which took place on the 15th of December 2005, the ALP may well have had good cause to have launched this application earlier.

The Judge castigated the respondents for their inflexibility, as exhibited in their argument that they were bound by the Operational Plan and its guidelines, which they were implementing. It was apparent to the Judge that the respondents were implementing the Operational Plan without due regard to the circumstances of prisoners, yet the plan itself had room for flexibility.

Relying on the precedent in *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), the Court held that the Respondents' implementation of the relevant laws and policies in this case was unreasonable as it was inflexible, characterised by unexplained and unjustified delays and irrationality.

The order

The Court granted the relief sought by ordering the respondents, with immediate effect, to remove the restrictions that prevented the applicants and similarly situated prisoners from accessing ARV. An order was also issued that ARV be provided to the applicants and similarly situated prisoners in accordance with the Operational Plan.

The Court made a structural interdict granting the relief sought (for example, the removal of obstacles) and ordered the respondents to submit to the Court by 7 July 2006 (two weeks after

judgment) a plan as to how they intended to comply with the orders above. While acknowledging the sensitivity of a structural interdict, the Judge held that the case was one in which such an order was required. Nothing rational or workable had been done by the respondents for the applicants and similarly situated prisoners.

Concluding observations

This case reinforces the jurisprudence on socio-economic rights in South Africa. It also affirms the long-standing principle that the rights of prisoners that can be limited are only those that are necessary for a sentence of the court to be administered. Prisoners retain all other rights.

The judgment gave a pronounced expression of the right of access to healthcare and its obligations. The state has the primary duty to provide access to healthcare to prisoners, because these prisoners are placed in the care of the state and do not have the means or ability to access medical care on their own. A prisoner cannot approach a different hospital or arrange for his own transport – he or she is dependent on the state to provide this. This absolute dependency places prisoners in an extremely vulnerable situation. The duty of the state towards prisoners is therefore inescapable.

Interestingly, the respondents did not raise the issue of resources, as was the case when the Department briefed the Portfolio Committee on Correctional Services in September 2005. This may have been done for two reasons. The first is that the 'resources argument' is not a convincing one in some cases, and the Constitutional Court has already made this clear. The second is that the respondents believed that they were indeed meeting their constitutional obligations.

However, the key question here was whether they were taking reasonable steps or measures to ensure that the prisoners were receiving adequate medical care. The evidence showed that they were not. An arrangement for the treatment of prisoners was made with only one out of a possible seven hospitals and this hospital agreed to see four prisoners per week. This arrangement was regarded as inadequate as it would have taken more than three weeks to assess the applicants and more than a year to assess other similarly affected prisoners at WCC. It was therefore clearly not possible under this arrangement for qualifying prisoners to receive their weekly treatment.

The rights of prisoners that can be limited are only those that are necessary for a sentence of the court to be administered.

The judgment also pointed out that prisoners did not receive any special mention or attention in the Operational Plan and Guidelines. This was regarded as a shortcoming and probably one that could have been foreseen, given the high number of prison deaths.

The structural interdict granted should be regarded as the result of the poor track record of the respondents in this case. Their lack of cooperation, tardiness and general unwillingness to show good faith in assisting with the applicants' problem created a situation where it would have bordered on irresponsibility on the part of the Court to have ordered otherwise. The willingness of the Court to intervene in this manner is a positive development for vulnerable persons in need of protection. In this case, the state was compelled to deliver in a real and tangible manner on the right to adequate health care.

The judgment also recognised that this case was a matter of life and death requiring urgent action.

It stated that "the graver the threat to fundamental rights, the greater the responsibility on the duty bearer".

Binding the respondents to a time frame in this case helped to underscore the significance of the violations at hand.

This judgment means that all qualifying prisoners are entitled to be given access to ARV.

Unfortunately, however, the victory has been short-lived. The State has filed an appeal against the judgment. It is seeking leave to appeal to a full bench of the provincial division of the KwaZulu Natal High Court.

Sadly, this means that the successful applicants will have to wait until the legal battle is over before knowing whether or not they are entitled to ARVs.

Lukas Muntingh is the co-manager of the Civil Society Prison Reform Initiative (CSPRI) and **Christopher Mbazira** is a researcher in the Socio-Economic Rights Project, both of which projects are at the Community Law Centre (UWC).

The United Nations Human Rights Council replaces the Commission on Human Rights

Connie de la Vega

The United Nations Commission on Human Rights (Commission) held its last meeting on 27 March 2006. On 3 April 2006, after almost a year of negotiations, the UN General Assembly adopted a resolution creating a Human Rights Council (Council) to replace the Commission [GA Res. 60/251, A/RES/60/251 (2006)].

This article considers the motivation for the change and its implications for the protection of human rights. The nature and functions of the Council and some areas of concern are highlighted.

The call for reform

The Commission was created in 1946 by the Economic and Social Council (ECOSOC), initially to prepare the draft International Bill of Rights.

Over time, its significance in the field of human rights grew considerably although it remained a subsidiary organ of the ECOSOC. It comprised 53 members who were elected by the regional branches of ECOSOC. Each region was responsible for electing the members from each ECOSOC group.

It met for six weeks in March and April each year to draft the major human rights treaties, among other things.

The Commission created a number of mechanisms to review countries accused of gross violations of human rights, regardless of whether or not they were party to particular treaties. These include both a public procedure under ECOSOC Resolution 1235 (which provides for a country's human rights record to be discussed in public and allows for the creation of specific country rapporteurs) and a confidential procedure in terms of ECOSOC Resolution 1503 (which provides for a confidential review of gross violations of human rights, which could result in public disclosure if the country does not cooperate with the Commission).

The Commission also developed procedures to examine human rights issues based on themes, such as working groups (with five members) or special rapporteurs. These procedures could be used for both civil and political rights, and economic, social and cultural rights.

The Commission's successes including calling for economic sanctions against South Africa because of apartheid.

They proved quite effective in addressing violations of individual rights timeously.

In addition, the Commission created the Sub-Commission on the Promotion and Protection of Human Rights (known prior to 1999 as the Sub-Commission on the Prevention of Discrimination and Protection of Minorities).

This body is unique in that its expert members are elected to act in their individual capacity, not as government delegates. Both the Commission and Sub-Commission developed very transparent procedures and allowed for full participation by non-governmental organisations (NGOs).

The successes of the Commission in rooting out human rights violations include:

- calling for economic sanctions against South Africa because of apartheid;
- developing procedures that helped end the disappearances of large numbers of persons in South America; and
- resolutions and statements affirming the prohibition of the juvenile death penalty. This was cited by the United States Supreme Court in *Roper v Simmons* (US Supreme Court judgment of 1 March 2005), holding that the juvenile death penalty was unconstitutional.

However, in the past few years there were claims that the Commission

had become too political, that its procedures were unmanageable, that it could not act quickly to address emergency situations and that its membership included human rights violators.

These reasons led to the call for reform. Rather than reform the Commission, the General Assembly decided to create a new body: the Human Rights Council.

The preamble to Resolution 60/251, reaffirms the indivisibility and universality of human rights as well as non-discrimination. The right to development is mentioned and the principle of non-selectivity is noted. The importance of NGOs is also acknowledged.

The Human Rights Council

Nature and functions

The nature and functions of the Council are laid down in the resolution that established it.

The Council:

- is a subsidiary organ of the General Assembly (and thus will enjoy higher status than the Commission) (para 1);
- will be responsible for promoting universal respect, addressing situations of violations of human rights, including gross and systemic violations, making recommendations and promoting effective coordination and mainstreaming of human rights within the UN system (paras 2 and 3);
- has the mandate to, among other things, promote human rights education, provide advisory services and capacity building, serve as forum for dialogue on thematic issues, promote implementation of obligations and follow-up on goals, and undertake periodic reviews of all states, which shall be based on an interactive dialogue with full involvement of the country concerned and with consideration of capacity building. Its role should not duplicate the work of the treaty bodies (para 5);
- has the obligation to rationalise mandates and mechanisms of the Commission within a year of the holding of its first session (para 6);
- will consist of 47 member states elected by secret ballot of the majority of the members of the General Assembly. Members will serve for three years and cannot be eligible for immediate re-election after two consecutive terms. Members can be suspended by a two-thirds vote of the members of the General Assembly if they commit gross and systematic violations of human rights. Members are distributed equitably by regions: the African Group has 13 members (South Africa is one of the current members), the Asian Group has 13, the Eastern European Group has six, the Latin American and Caribbean Group has eight and the Western Europe and Other Group has seven. Members will be reviewed during their term of membership (terms of first Council is staggered by the drawing of lots taking into account geographical distribution) (paras 7-9 and 14);
- will meet regularly, no fewer than three times per year for no less than 10 weeks, with one main session (para 10);
- shall apply rules of procedure established for Committees of the General Assembly and shall include participation of non-member states, specialised agencies and other intergovernmental organisations (ILO, UNICEF, etc.), national human rights institutions and NGOs, based on procedures of ECOSOC and practices of the Commission, "while ensuring the most effective contribution of these entities" (para 11); and
- will be reviewed after five years (para 16).

It would be naive to think that this body will be able to avoid politics altogether as it is a body of government delegations.

Some concerns

The Council has some strengths as well as weaknesses.

More sessions will make it easier to deal with emergency situations as they arise.

The requirement that members be elected by the General Assembly rather than by the regional groups of ECOSOC should keep some of the major violators of human rights from achieving membership.

However, it would be naïve to think that this body will be able to avoid politics altogether as it is, after all, a body of government dele-

gations. This is demonstrated by the first Council, which includes known states with poor human rights records, such as Pakistan, Saudi Arabia, Cuba, and Algeria, though it is hard to argue that any country is completely free of human rights abuses.

There was also a lack of transparency in the drafting of the resolution, which could spill over to the functioning of the Council.

There was a lack of transparency in the drafting of the resolution that could spill over into the functioning of the Council.

Another concern is that the focus on periodic review could take up all the Council's time and that the interactive dialogue with governments that continue to violate human rights might make it difficult to put pressure on states through shaming, as the Commision's experience has shown. As Council members oblige themselves to be reviewed under this process, it is likely that the first reviews will involve only them, which might delay the review of serious human rights violations in non-member countries for a few years.

There is also a concern that the last clause of paragraph 11 of the resolution could be used to limit NGO participation, despite the acknowledgement of the importance of their role. The clause provides that the participation of, and consultation with, observers (including NGOs) shall be based on arrangements while "ensuring the most effective contribution of these entities". This could be used to limit speaking times or participation in certain meetings. For example, at the end of the last Commission's meeting, NGOs were told that they had to be prepared for presentation of joint statements – something that has been encouraged but not required in the past. Joint statements can result in the watering down of interventions and favour NGOs that are based in Geneva.

There is also concern that the special rapporteurs and working groups that have been effective for developing standards and addressing individual complaints will be discontinued, together with the Sub-Commission on the Promotion and Protection of Human Rights.

However, at the end of its first session in June 2006, the Council decided to extend all mandates, mechanisms and functions of the Commission for a year, as well as the Sub-Commission which will meet for three weeks starting on 31 July 2006 (A/HRC/1/L.6 (2006)).

It also decided to establish an open-ended intergovernmental working group to review and rationalise, if necessary, all the procedures (A/HRC/1/L.14 (2006)). The group was supposed to have transparent and well scheduled consultations with all stakeholders.

A similar working group was created to develop the modalities of the universal periodic review mechanism (A/HRC/1/L.12 (2006)). The first emergency session was also called to address the situation in Gaza.

The Council has also approved the extension to two years of the mandate of the Working Group that is drafting an optional protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR). This is a critical step for ensuring the promotion of the rights in this Covenant.

Conclusion

While it is difficult to say that the political aspects of the human rights body will be removed by the creation of the Council, there is some room for hope that it will take its mandate to protect and promote human rights throughout the world seriously. NGOs should be prepared, however, to ensure that their voice will continue to be heard.

The membership of certain countries on the Council also empowers NGOs to push their governments to ratify treaties that have not yet been ratified. South Africa, for instance, has not yet ratified the ICESCR in spite of the extensive domestic protection of these rights in the Constitution. However, the government has, since assuming Council membership, undertaken to ratify the treaty.

Connie de la Vega is a professor of law and the academic director of International Programs at the University of San Francisco (USA). She has represented human rights advocates at the Commission on Human Rights for the past nine years and will continue to participate with her students at the Human Rights Council meetings.

Seminar on strengthening strategies for promoting socio-economic rights in South Africa

Karen Kallmann

On 29 and 30 May 2006, the Socio-Economics Rights Project in conjunction with the Norwegian Centre for Human Rights co-hosted a seminar entitled 'Strengthening strategies for promoting socio-economic rights in South Africa'.

The seminar brought together researchers, academics and civil society activists to:

- discuss and reflect on the effectiveness of strategies for advancing socio-economic rights;
- explore and devise alternative strategies, including making use of the notion of interdependence, interrelatedness and indivisibility of human rights as a tool to advance socio-economic rights; and
- establish and improve communication and networking between participating organisations.

Delegates presented useful papers advancing the major themes of the seminar. The papers were, however, just the starting point for a lively and engaging discussion resulting in both proposals and questions that need further discussion.

Various key issues were highlighted. The first was the interdependency of rights and strategies and the need to promote dialogue on the different strategies that civil society organisations use in relation to different sets of rights and contexts. It was acknowledged that changes in the political context result in changes to strategies employed. Among the questions raised included:

- Do civil society organisations need to engage in self-censorship when choosing strategies?
- On what level should civil society organisations focus their activities? Should they focus on the moral 'high' ground (international norms and standards) or the middle ground (mechanisms translating international norms into practice at national level) or the muddy 'low' ground (identifying with communities)?

The second theme was that rights are complicated by cultural and economic issues. There was a sense that economic issues were getting too little attention or were considered 'off limits' in the debate on socio-economic rights. Yet the economy is exactly where inequality is produced or at least not challenged. Additionally, the economic policies that a country adopts have an impact on the way the government approaches social justice issues. It is therefore necessary that activists of socio-economic rights engage with these economic policies.

There was also a concern that rights are being squeezed. On one hand, there is a conservative reinvention of rights and an opinion that culture is not subject to rights. On the other hand, rights are seen as too liberal and as an obstacle to transformation. Rights themselves are seen as problematic and using rights as possibly unpatriotic. Their use therefore needs to be limited in order to enhance the transformation agenda.

The third theme concerned the identification of duty bearers and holding them accountable. Questions under this theme revolved around what strategies to adopt in an environment of privatisation of essential services and the existence of different centres of power in a federal state. It was pointed out that in trying to strategise, we need to think about a variety of role players such as private service providers, national, provincial and local governments, and about the modes in which they work.

The seminar then discussed specific strategies that are used to promote socio-economic rights. These were research, advocacy, education, training, monitoring,

shadow reporting, naming and shaming, litigation and the use of social movements.

A key methodological challenge identified included how to translate research findings into knowledge that is accessible for members of the community. The different strategies that organisations use and problems encountered in integrating communities into research were also discussed.

Regarding training, it was clear that there was a lack of mainstreaming of socio-economic rights in the education system. It was suggested that human rights education should be included in the curriculum at all levels. There is also a need to train university students to become human rights activists. Education and training should not only focus on the grassroots level, but also on developing capacity at all levels of society, including the government. It was stressed that education should not be a 'one shot' undertaking but should have mechanisms of follow-up to assess its impact on communities.

The discussion on monitoring highlighted concerns about the lack of civil society organisation participation in the activities of the South African Human Rights Commission as well as in the preparation of reports to treaty bodies. There were strong views about the need to integrate regional and international instruments into the domestic sphere.

A proposal was made to lobby government to ratify the International Convention on Economic, Social and Cultural Rights, as well as ratifying 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

Naming and shaming was considered as a 'hard' strategy. In isolation, it has no impact and there is thus an additional need for mobilisation around the issues at hand. Notice was taken of the fluidity of this strategy as the nature of its use is context based and it is sometimes used as a means of last resort after failed dialogue.

There is a tendency in South Africa to treat all social movements as the same, when many do not fit academic definitions.

It was acknowledged that litigation has its limitations and that it may be used to undermine social transformation as it is very focused on what may be won in the courts rather than addressing broader transformation needs. Expertise and resources are needed for litigating socio-economic rights.

Delegates were concerned about the nature of an effective remedy and when to engage with the court regarding the remedy, especially with regard to structural interdicts.

They were also concerned about conflicts of interest during the process of litigation.

In spite of these shortcomings, litigation was accepted as a very important strategy, which should be supported by other strategies such as social mobilisation and monitoring of the implementation of court orders.

The discussion on direct action and social movements raised the following issues: Does the partnership between some civil society organisations and government pose a threat to their independence? Is the role of civil society organisations different to that which they had prior to 1994? Have we become more established, mature and sensible?

There is a tendency in South Africa to treat all social movements as the same when many do not fit academic definitions.

The seminar also highlighted the importance of the right of access to information in the struggle for socio-economic justice. Many challenges in accessing information were highlighted, which need to be dealt with. A concern was raised about the lack of an authoritative court decision on the issue of access to information and the need for an Information Commission was emphasised.

In the discussion on the way forward, it was agreed that participating organisations need to collaborate with each other in order to maximise the impact of their work by sharing information and resources. It was resolved that other meetings on this topic should be held annually.

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Pierre de Vos

Peris Jones and Kristian Stokke (eds), *Democratising Development: The Politics of Socio-Economic Rights in South Africa*, Martinus Nijhoff Publishers, 2005

In a debate dominated by lawyers, much has been said and written in the past ten years in South Africa about the nature of the obligations engendered by social and economic rights and about the role of courts in enforcing these rights. After the inclusion of social and economic rights in South Africa's 1996 Constitution, lawyers began to engage in the difficult task of giving meaning and substance to these rights as formulated in the Constitution.

The quality of these discussions has generally been excellent. Lawyers have also seriously and creatively engaged with the growing jurisprudence of the Constitutional Court on socio-economic rights and today, ten years after their inclusion, there seems to be a growing understanding about their place in the Bill of Rights.

However, little attention has been paid to the broader questions around the politics of socio-economic rights in South Africa. Discussions have generally been of a legal-technical nature with much emphasis on the standard of review used by the Constitutional Court in such cases and the nature of the remedies proposed.

Democratising Development: The Politics of Socio-Economic Rights in South Africa is an important contribution. It seeks to provide a broader understanding of socio-economic rights in South Africa. It originated as a conference held in 2004, co-hosted by the South African Programme at the Norwegian Centre for Human Rights and the Network on Local Politics in Developing Countries, but does not suffer from the disjointedness associated with many conference publications.

The main themes include democracy and socio-economic rights; rights based development; labour and politics; social movements; poverty, inequality and the social wage; judicial enforcement of socio-economic rights; social rights litigation as transformation; HIV/AIDS and access to health care services; and communal land rights.

The book mainly deals with the delicate relationship between democracy and socio-economic rights. The editors' introductory chapter argues, among other things, that democracy is important to ensure the realisation of socio-economic rights because it introduces mechanisms of accountability through which government policies are publicly justified. At the same time, they warn that this does not mean that democracy will automatically lead to social justice. Democracy is a necessary, but not sufficient, condition for a "democratic politics of socio-economic rights and a realisation of the right to development".

This theme is tackled differently in the chapters by Mark Heywood and Mandisa Mbali discussing the fight of the Treatment Action Campaign (TAC) for the adoption of an HIV/Aids treatment plan by the government. For example, Heywood reminds us that the courts are only one avenue of enforcing social and economic rights and that battles around these rights are also usualy won or lost in the arena of democratic politics.

He argues that the success of the TAC in challenging the government's policies on HIV/Aids can be partly attributed to the fact that the it engaged at a political level with the issue long before the court challenge was launched. Heywood argues that advocacy for human rights should always precede legal action. The public must first be educated about the cause and its importance and justness must be established in the minds of the democratic polity. This should be done first through persuasion and debate, rather than confrontation. He also emphasises the importance of building alliances with like-minded groups in civil society and of showing a willingness to engage with the government and even to compromise.

Heywood gives a fascinating account of the debates that raged within the TAC about its tactics in engaging with the government. Some activists favoured 'militant action', such as launching a defiance campaign, while others favoured a more conciliatory approach. He shows how the

strategic choices made by the leadership of the TAC contributed to the success of the campaign.

The book has several other interesting contributions which place the debate on the realisation of socio-economic rights in a broader economic and political context. Adam Habib writes knowledgably and informatively about the politics of economic policy-making, reminding us that policy choices in the economic field invariably change the 'facts on the ground' and influence the realisation of socio-economic rights and the extent to which courts are prepared to enforce them.

He also argues that governments are, to some degree, constrained in the policy choices they make, either by outside players or by the electorate, depending on the power relations in a specific country. Globalisation has enhanced the leverage of foreign investors (also in South Africa) and the leverage of citizens has been weakened. In South Africa the concessions made during the negotiating process have further weakened the leverage of citizens.

It is against this background that Richard Ballard's chapter, which discusses the role of social movements in South Africa, acquires specific relevance. Ballard points out that social movements in many post-colonial countries are weak and ineffectual because they find it difficult to adapt to a new reality in which they are no longer required to struggle for state capture against an illegitimate state. He argues, though, that the social movement in South Africa, although usually issue-driven and often fragmented, has managed the transition well. There is much potential for the emergence of a more coherent social movement in South Africa as single issue causes become vehicles for achieving broader ideological goals.

Reading this book makes it impossible to see the realisation of social and economic rights as merely a clinical 'legal' problem to be solved by agreeing on certain standards of review. While strong, and to my mind, persuasive arguments are made by some of the contributors about the need to frame social justice issues in terms of the rights discourse, the book also reminds us that rights are realised mainly through the state. There is also a strong reminder that courts operate within a political and economic 'reality' – whether that reality is real or perceived – and are inevitably constrained by it.

This book offers a solid starting point for understanding the forces that inhibit the realisation of socio-economic rights through either democratic struggle or, ultimately, the courts. However, more work of this nature is needed.

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New publications

The Socio-Economic Rights and the Local Government projects of the Community Law Centre (UWC) have recently produced three publications as part of their joint project on the privatisation of municipal services at the local government level which is funded by the Dutch Inter-Church Organisation for Development Cooperation (ICCO) of the Netherlands. The common theme in these publications is the right to water.

***Water delivery: Public or Private?* – by Jaap de Visser and Christopher Mbazira (eds)**

This book deals with access to water in the Netherlands and South Africa, based on presentations at a seminar held in Utrecht in March 2005.

De Gaay Fortman sheds a piercing light on the essence of access to water as an entitlement rather than an abstract right. He argues that a sole focus on access to water as a human right that becomes real only through standard setting, supervision and enforcement ignores the actual content of rights as instruments for transformation.

Christopher Mbazira's case study brings home the reality of two South African municipalities' attempts to deliver water, highlighting the negative impact of the insistence on cost recovery.

Victoria Johnson approaches the growing momentum for private sector involvement in water delivery in South Africa from a democratic perspective, investigating whether the practices of private-public partnerships live up to the ideals and advantages with which they are normally associated.

Jaap de Visser compares trends in water delivery in the Netherlands and South Africa, pointing out that the Dutch government has firmly rejected any private involvement in water delivery, unlike South Africa.

Tobias Schmitz discusses the restructuring of Johannesburg's water services management. Bert Raven, Jeroen Warner and Cees Leeuwis's case study of integrated water management in the Lower Blyde painfully exposes how the various governmental and private stakeholders fail in reaping the benefits that would flow from integrating an existing water irrigation project with improved access to drinking water for disadvantaged communities.

In sum, this book puts access to water in a human rights perspective. It is useful not only for human rights practitioners and activists, but also for those involved in public policy making and implementation, especially in the areas of socio-economic goods and services.

***Realising socio-economic rights in the Constitution: The obligations of local government. A Guide for municipalities* (July 2006) – by Christopher Mbazira**

This guide is primarily aimed at municipal officials, councillors and members of the public who seek a general overview of municipalities' socio-economic rights obligations. While the Constitution guarantees a number of such rights, they are yet to become a reality for the majority of South Africans. Municipalities are at the centre of realising these rights because they are the sphere of government closest to the people.

The guide is written in a user-friendly manner to simplify legal duties. It is not intended for use as a legal reference work; reference is made to legislation and particular sections of Acts only where strictly necessary. Hypothetical examples and case studies illustrate the obligations in a practical context. A checklist is provided that may be used by municipalities to determine whether a programme adopted to deliver socio-economic rights is reasonable, not only in conception but in implementation as well.

***Outsourcing municipal services: A practical guide for councillors and communities* (December 2005) – by Victoria Johnson**

This guide is primarily aimed at municipal officials, councillors and others who seek a general overview of topical issues relevant to municipal out-sourcing, or who wish to give input into particular municipal outsourcing projects. Again, reference is made to legislation only where strictly necessary. It gives an idea of the policy and legal context within which municipal outsourcing takes place and gives a brief overview of the procedures involved. Its main aim, though, is to explore the practical issues likely to face a municipality when outsourcing a service and how to best deal with them in the interests of all stakeholders.

The book is based on a Community Law Centre analysis of 15 municipal outsourcing contracts, ranging from short-term service delivery agreements with community organisations, to long-term water concessions with private companies. Most were for water and sanitation services though some were for refuse removal and related services and one was for the provision of electricity. Contracting municipalities ranged from metropolitan municipalities to rural local authorities and service providers included companies, water boards, municipal entities and community organisations.

The contracts were analysed to assess how effectively they translated the objectives of outsourcing into binding contract terms. Case studies were also examined to assess the relevance and effectiveness of outsourcing contracts during contract implementation. Key findings include:

- policy and legislative objectives are not entirely harmonious when it comes to outsourcing;
- there is significant scope for improvement in the drafting of outsourcing contracts; and
- contract objectives are put at risk during subsequent contract amendments.

Electronic versions of all three of these publications are accessible online
www.communitylawcentre.org.za

For printed copies of the guide for municipalities, contact Ms. Valma Hendricks on 021 959 2950 **or** vhendricks@uwc.ac.za