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Review

Editorial

by Sandy Liebenberg

The Poverty Hearings are now over, and the dust has settled. However, the real challenge ahead is to use the energy generated by the hearings to work tirelessly for the total eradication of poverty in South Africa. NGO's will have to co-ordinate their efforts in order to make a real impact and to avoid fragmentation in the sector. NGO Week '98 Conference provides an opportunity to reflect on the process of the hearings, and to develop clear strategies for taking forward the recommendations contained in the reports. Human rights NGO's in South Africa face the challenge of developing more effective strategies to advance the realisation of the socio-economic rights contained in our Constitution. These include lobbying, advocacy, monitoring and litigation. Again it will be important for human rights NGO's to combine their efforts, to share lessons learnt from various campaigns as well as creative ideas for future advocacy. The recommendations of the report on *Poverty and Human Rights* are reproduced in the 'Events & Publications' section.

This 3rd edition of *ESR Review* highlights different avenues that can be pursued in socio-economic rights advocacy. Dr. Audrey Chapman, Director of the Science and Human Rights Programme of the American Association for the Advancement of Science (AAAS), discusses a new approach to the monitoring socio-economic rights. This places the focus on developing an inventory of commonly encountered violations of these rights. We are pleased to continue our tradition of providing information on the initiatives of international NGO's working in the area of socio-economic rights. Our second guest feature article is by Alison Tilley, the national advocacy co-ordinator of the Black Sash. She reviews government policy relating to the socio-economic rights of non-citizens and critiques some of the problematic areas. Danie Brand has also contributed a feature article on the nature and scope of the right to food.

The sections dealing with 'Monitoring Bodies' and 'Cases & International Developments' both highlight the importance of integrating gender factors at all levels of socio-economic rights advocacy. Karrisha Pillay examines the role of the Commission for Gender Equality in the monitoring of socio-economic rights. Gina Bekker and Danie Brand provide an overview of South Africa's first report under CEDAW, focusing on women's equal access to socio-economic rights. They also review some of the ways that socio-economic claims have received judicial protection in other countries. Finally we are grateful to Tseliso Thipanyane, Head of the Research Department of the SA Human Rights Commission, for making time to contribute an overview of the progress made by the Commission in

fulfilling its mandate under section 184(3) of the Constitution. Tseliso is in the throes of finalising the Commission's annual report to Parliament on socio-economic rights. He includes a comment on the role of NGO's in the process.

In conclusion, we welcome Sebo Lemekoana and Gina Bekker who have joined the staff of the Centre for Human Rights (Univ. of Pretoria) as part of the joint project with the Community Law Centre (UWC) on Socio-Economic rights.

Monitoring Socio-Economic Rights

A "Violations Approach"

by Audrey R. Chapman

The capacity to monitor human rights instruments is central to their effective oversight and implementation. Otherwise countries cannot assess their own performance. Further, without effective monitoring, States cannot be held accountable for implementation of, or be made liable for, violations of these rights.

I believe that difficulties in monitoring economic and social rights have contributed to the tendency to accord more credibility and legitimacy to civil and political rights. While there are many factors contributing to this situation, difficulties with defining and applying the standard of "progressive realisation" is a major reason. Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the most authoritative international standard for this category of rights, mandates that a State Party - a country that has ratified the Covenant -

take steps individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized?

This differs fundamentally from the standard set forth in Article 2 of the International Covenant on Civil and Political Rights which imposes an immediate obligation to respect and ensure all enumerated rights.

Progressive realisation

Progressive realisation is very complicated to monitor. To be able to do so, it is not sufficient to ascertain current performance. It also requires an ability to gauge trends, specifically whether a State is moving expeditiously and effectively towards the full implementation of enumerated economic, social, and cultural rights. In order to assess these trends, it is necessary to have comparable statistical data from several years.

National averages reveal little about the situation of specific groups, particularly those vulnerable communities most likely to suffer violations. Accordingly, much of the data would need to be disaggregated. Relevant breakdowns would include gender, race, region, socioeconomic groups, urban/rural divisions, and linguistic categories. A thorough evaluation

would therefore require complicated analyses of an enormous quantity of data.

Evaluating progressive realisation within the context of "the maximum of available resources" further complicates the methodological requirements. Under this formulation, monitoring requires generating operational standards based on "the maximum of available resources." This is a relative standard very difficult to define.

"Achieving progressively the full realisation of the rights" through "the maximum available resources" assumes that the valid expectations and concomitant obligations of States under each enumerated right are not uniform. Instead they are relative to levels of development and available resources. This necessitates the creation of a multiplicity of performance standards to fit the many social, developmental, and resource circumstances of specific countries. By extension, it also implies that the standards applied to a specific country would change over time depending on the economic and political situation.

It should also be noted that many governments do not have the good quality and reliable disaggregated data needed for this type of analysis. In South Africa, for example, the apartheid State intentionally failed to collect many types of data that would portray the disadvantages of the black community. Moreover, many governments are reluctant to make these kinds of data available to monitoring bodies or NGOs. And if they did, very few NGOs would be able to retrieve and analyse such complex statistical data and establish and manage an information system of the scale needed.

A new approach

Given these limitations, I believe that there is a need for a new approach to monitoring economic and social rights. Instead of attempting to evaluate progressive realisation, it seems more fruitful and significant to focus on monitoring violations. A violation of a socio-economic right arises from the failure of a State to comply with its obligations. These failures may be acts of either commission or omission.

A "violations approach" has many advantages. It is more feasible precisely because it does not depend on the availability and public release of extensive and appropriate statistical data or on major improvements in data collection systems. The identification of violations can link to strategies to end and rectify abuses and thereby reduce human suffering. An added benefit of focusing on the identification of violations is that it may prove a more effective path to conceptualising the positive content of these rights than the more abstract legal or philosophical analyses attempted thus far. Violations can be identified without having first to conceptualise the full scope of the right in question.

Three categories of violations

To facilitate monitoring of the ICESCR, I am proposing three categories of violations. The first category includes State violations resulting from government actions, policies, and legislation. The second contains

violations related to patterns of discrimination. The third includes violations related to the State's failure to fulfill minimum core obligations of enumerated rights.

Comparable to infractions of civil and political rights, violations in the first category are predominantly acts of commission: activities of governments that contravene ICESCR standards. Others are policies or laws that create conditions inimical to the realisation of recognized ESC rights. In labeling these failures of State policy as violations of the ICESCR, the language of Article 5 should be borne in mind:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein.

Violations related to patterns of discrimination, in the second category, represent a fundamental breach of the ICESCR. Article 2(2) calls on States Parties to guarantee that the rights enumerated in the Covenant "will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 3 further amplifies that States Parties must "undertake to ensure the equal rights of men and women to the enjoyment of all economic, social, and cultural rights set forth in the present Covenant." It is clear from both these articles that the duty of non-discrimination is not subject to progressive realisation. Examples abound of violations reflecting discriminatory actions by States Parties. These include the failure to ensure non-discrimination as well as initiatives and policies that perpetuate or aggravate forms of discrimination.

Violations in the third category consist of the failure by governments to fulfil minimum core obligations. In its third General Comment, issued in 1990, the UN Committee on Economic, Social and Cultural Rights states that it "is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party." (The nature of States parties obligations 11, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* U.N. Doc. HRI/GENI (1992), para. 10). Similarly, the Committee underscores that even in times of severe resource constraints the vulnerable members of society "can and indeed must" be protected by the adoption of relatively low-cost targeted programs.(para. 12).

The Maastricht Guidelines

My critique of "progressive realisation" and proposal for a "violations approach" appeared in an article in the February 1996 Human Rights Quarterly (vol. 18 (February 1996), pp. 23-66.) After it appeared, the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, Ohio, USA) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands) decided to devote an upcoming meeting they were convening to the nature and scope of violations of economic, social and

cultural rights. At their invitation, a group of some thirty experts met in Maastricht in January 1997 and drafted "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" (published in August 1998 issue of *Human Rights Quarterly* vol. 20 (3) (1998), pp. 691-705). The text of the Maastricht Guidelines states the following about the meaning of violations:

Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights. Thus, the failure of State to provide essential primary health care to those in need may amount to a violation. (Part II, para. 6).

The Maastricht Guidelines recognise that just as is the case with civil and political rights, both individuals and groups can be victims of violations of economic, social and cultural rights. Moreover, certain groups, particularly those that are already vulnerable and underprivileged, are more likely to suffer disproportionate harm in this respect. These include poor people, women, indigenous and tribal peoples, occupied populations, asylum seekers, refugees and internally displaced persons, minorities, the elderly, children, landless farmers, persons with disabilities and the homeless. (part IV, para. 20).

The SA Bill of Rights

Several of the socio-economic rights in the Bill of Rights of the 1996 South African Constitution also use the language of "progressive realisation." These include the right of access to adequate housing (s 26), health care services (s 27(1)(a)), sufficient food and water (s 27(1)(b)), and social security (s 27(1)(c)). Additionally, the Constitution defines a right to further (beyond basic) education, "which the State, through reasonable measures, must make progressively available and accessible."(s 29(1)(b)).

Therefore NGO's developing strategies to monitor the provision of these rights confront the same issues arising under the ICESCR. One possibility, of course, is to attempt to define what "progressive realisation" means in the current South African context and attempt to gather the vast amount of disaggregated statistical data necessary to analyse trends over time. This would be a vast undertaking. It would also require a very sophisticated computerised approach to information management.

An inventory of violations

Alternatively, NGOs could use a "violations approach." This would entail anticipating the most serious problems or violations and focusing monitoring more selectively on these rights, groups, and/or regions. If NGO's decide to proceed in this direction, it would be important to attempt to develop an inventory of these priority areas and a focused monitoring strategy.

The Science and Human Rights Program of the American Association for the Advancement of Science (AAAS) and Human Rights Information and Documentation Systems International, a Geneva-based human rights network, are currently compiling an inventory of the most serious and frequent violations of economic, social, and cultural rights. They are also developing resources to improve the monitoring capabilities of NGO's. One resource is an introductory manual which explains the foundations of economic and social rights and the nature of violations of these rights. It will be available in 1999. The project has commissioned a series of experts to write papers on the minimum State obligations with respect to the enumerated rights in the ICESCR and related violations. It plans to produce an edited volume of these papers during 1999. In 1999 the project will also begin producing and field testing manuals on monitoring specific economic, social, and cultural rights. Finally, the project is developing a thesaurus of types of violations that monitors are likely to encounter and computerised formats for storing and analysing violations. We look forward to collaborating with groups in South Africa during this process.

Examples of Potential Violations

Violations Resulting from Government Action, Policy, or Legislation

- Interference with the rights of association, to form trade unions, and to strike.
- Forced evictions and removals of persons from their homes by State agencies.
- Coercive birth control practices, including forced abortions and large-scale sterilizations, or the refusal to provide reproductive health services as a matter of State policy to control fertility.
- Destruction of the cultural heritage of minority communities.

Violations Related to Patterns of Discrimination

- Failure to remove all vestiges of apartheid legislation or to provide legal protection against discrimination.
- Systematic discrimination against particular ethnic, religious, or cultural minorities as under the apartheid system.
- Failure to protect women's equal rights to work or to the enjoyment of just and favourable conditions of work.
- Persistence of gender differences in laws regulating marriage and family relations.
- A serious imbalance in the number of school places available and the quality of schools designated for boys and girls, resulting in a lack of equality of educational opportunity.
- The denial to ethnic and linguistic minorities of the right to use

their language for schooling or broadcasting.

Violations of Omission or State Failure to Fulfill Obligations

- Failure to enforce laws and regulations related to enumerated obligations. For example, child labour continues in many countries despite laws prohibiting employment of children under the age of 14.
- Failure to provide basic education.
- Refusal to provide emergency medical treatment.

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ABOUT AAAS

The American Association for the Advancement of Science (AAAS) is the world's largest multipurpose scientific organisation. Since its founding in 1848, it has grown to be a federation of 243 professional scientific, engineering, medical, and social science societies and 145,000 individual members. From its early, specific aims concerned with communication and cooperation among scientists, the Association's goals now encompass the broader purposes of furthering the work of scientists, facilitating cooperation among them, fostering scientific freedom and responsibility, improving the effectiveness of science in the advancement of human welfare, advancing education in science, and increasing the public understanding and appreciation of the importance of the methods of science in human progress.

The Science and Human Rights Program of AAAS has two major purposes: (1) documenting human rights violations affecting the scientific community worldwide and (2) advancing the use of scientific methodologies and skills for the documentation, monitoring, and prevention of human rights violations. The Program's work is based on the premise that, as a matter of scientific freedom and responsibility, scientific societies should encourage international respect for the human rights standards embodied in the United Nations Universal Declaration of Human Rights and other international treaties.

The Right To Food

by Danie Brand

The South African Constitution recognises the right of everyone to have access to sufficient food (s 27(1)(b)), the right of children to basic nutrition (s 28(1)(c)), and the right of detained persons to adequate nutrition (s 35(2)(e)).

Despite this constitutional recognition of the right to food, many people in South Africa face the spectre of hunger and malnutrition every day. Although little accurate data is available, it is estimated that about 2.5 million South Africans are currently undernourished (see the *October Household Survey* (1994) of the Central Statistical Services, the *Project for Statistics on Living Standards and Development* (1994) of the World Bank and *Children, Poverty and Disparity Reduction* (1996), a report commissioned by the RDP Office).

This problem is particularly acute with regard to previously disadvantaged groups and other groups that are especially vulnerable. For instance it is estimated that 87% of under-nourished people in South Africa are black, that up to 30 % of black children show signs of malnutrition and under-nourishment, and that 50% of infants and pregnant women suffer from particular nutritional deficiencies.

Against this background the importance of giving effect to the right to food is all too obvious. This feature surveys the rights concerning food in the 1996 South African Constitution and explores some of the implications of the constitutional protection of these rights.

Closely related rights

A number of other socio-economic rights in the Constitution are closely linked to the rights concerning food. Particularly important in this regard is the right to sufficient water (section 27(1)(b)), and the right to social assistance (section 27(1)(c)).

Several other provisions in the Bill of Rights are indirectly relevant to the right to food. Section 25, for example, regulates ownership, tenure and access to land which is the basic means of production of food. Section 24(b) promotes the creation and maintenance of an environment which is, amongst other things, conducive to the production of food. Sections 10 and 11 (rights to human dignity and life) are indirectly relevant because a substantive interpretation of these rights would extend to protect the same interests as rights to food.

In the last instance, section 9, which enshrines the right to equality and the prohibition of unfair discrimination is particularly relevant to rights concerning food (as it is to all other socio-economic rights). It protects the right of equal access to food, particularly for disadvantaged and vulnerable groups.

International obligations

In addition to these constitutional provisions, South Africa has also undertaken a number of international obligations relating to food. South Africa has ratified the Convention on the Rights of the Child (1989) (CRC). In terms of article 24 (c) of this Convention, South Africa must take appropriate measures to combat child

malnutrition through the provision of adequate nutritious foods and clean drinking water, "taking into consideration the dangers and risks of environmental pollution."

The International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR) (which South Africa has signed and is due to ratify) guarantees "the right of everyone to an adequate standard of living for himself and his family, including adequate food?" (art 11(1)). Under article 11(2), States parties recognise "the fundamental right of everyone to be free from hunger." To give effect to this right they must take measures "individually and through international co-operation" to improve the production, conservation and distribution of food, and to ensure an equitable distribution of world food supplies in relation to need.

The State's duties

Section 27(1)(b) read with section 27(2) imposes a qualified obligation to provide access to sufficient food to "everyone". A more direct obligation is placed on the State in terms of sections 28(1)(c) and 35(2)(e) to ensure that children and detained persons enjoy basic and adequate nutrition respectively.

In the context of s 27(1), the point of departure is a self-sufficient individual who, given a sufficiently enabling environment, is able to acquire food him or herself. Thus it is not necessarily the duty of the State to provide food directly, free of charge to everyone. Instead its primary duty is create an enabling environment through which individuals are able to secure their own food needs. In terms of section 27(2), the State is permitted to achieve the realisation of this right "progressively" and "within its available resources."

On the other hand, sections 28(1)(c) and 35(2)(e) are concerned with individuals who are objectively unable to provide for themselves. Thus the State's duty to ensure that children enjoy adequate nutrition is not qualified by the concepts of progressive realisation and resource constraints. Any such limitations would have to be justified under the general limitations clause of the Bill of Rights (s 36). In respect of detained persons (including, for example, persons in psychiatric institutions) adequate nutrition must be provided "at state expense."

An argument can also be made that the obligation in s 27(1)(b) also applies to people who, for some reason beyond their control, are unable to acquire food for themselves or their families. Thus people who are destitute, starving, or who suffer from systemic patterns of discrimination may be unable to meet their own food needs without more direct forms of State assistance. In such cases the only viable access to food is through State assistance. This is referred to by the UN Committee on Economic, Social and Cultural Rights as a "minimum core obligation" If the State does assist vulnerable groups to gain access to essential foodstuffs, it is, *prima facie*, failing to discharge its obligations (see General Comment No. 3 (5th sess., 1990) *The Nature of States parties obligations* UN doc. E/1991/23, paras. 10 - 12).

Qualitative dimensions

The next question to be determined is what is the qualitative content of the right. In other words, what constitutes "sufficient" food, and a "basic" or "adequate" level of nutrition? The international standard of "adequate food" can be used as a guide. International commentators agree that adequate food entails more than

the basic calorific package required to ensure survival. Thus it includes the essential elements of a nutritious diet i.e. the recommended proportions of carbohydrates, proteins, fats, minerals and vitamins. In addition, the food for human consumption must be culturally acceptable, fresh and safe. In essence it must enable people to live a fulfilled and dignified life.

Practical dimensions

What do these obligations entail in practical terms? The obligation to provide access to food involves two broad spheres of activity. Firstly, the State must ensure the production and maintenance of a sufficient supply of food so that access to food is possible. The State would therefore have to design its agricultural production policy so as to ensure an adequate supply of food in the country. It would also have to prioritise the availability of an adequate food supply in its international trade relations in order to supplement local production where needed.

However, the production and maintenance of an adequate supply of food is not enough. Under-nourishment often occurs in situations where a sufficient supply of food exists, but that food is not available to certain sections of the population. Furthermore, malnutrition often occurs, not because of a shortage of food, but because of a lack of knowledge about food use and sound nutritional principles. Other factors such as a polluted environment or a lack of access to clean water can undermine the safety of food preparation and consumption. Reasonable policies, legislation and programmes must also be devised to address these issues.

Furthermore, the State must maintain reasonably unimpeded, effective and equitable access to available food supplies. This involves policy around the taxation of basic food stuffs, regulation of food prices, and effective geographical distribution and storage of food supplies to ensure that food is reasonably available to ordinary people. Programmes should be adopted to foster effective food use and self-sufficiency through, for example, training of small farmers and public education in effective food use and storage.

A violation of the right to food could arise, for example, from the imposition of onerous taxes on basic food stuffs, making it impossible for ordinary people to access food. Similarly, a failure to regulate the prices of basic foodstuffs effectively may result in prices that make food inaccessible to poorer communities. Where significant numbers of people are unable to access available food, it gives rise to an inference that the State is failing to discharge its obligations adequately or at all.

With regard to detained persons we have noted that the State is obliged to ensure that they enjoy adequate nutrition at State expense. The responsibility for supporting children, on the other hand, falls primarily on their parents and families. The State's duty to provide basic nutrition directly to hungry children only arises when family support structures fail. However, the right does impose a duty on the State to support parents or guardians so as to enable them to provide basic nutrition to their children (for example, through tax breaks and education regarding proper nutrition). School feeding schemes are vital to ensuring basic nutrition for children from impoverished and disadvantaged families. It must be stressed, however, that the State is ultimately responsible for ensuring that every child enjoys the right to basic nutrition, whatever the source.

Again, a lack of access to basic nutrition by significant numbers of children strongly suggests that the State is failing to meet this core obligation.

Benchmarks and indicators

How can compliance with the obligations set out above be measured? The litmus test is the nutritional status of the population. This enquiry requires, in the first place, the formulation of standards against which to measure compliance (often referred to as "benchmarks"). Secondly, indicators must be developed to determine whether the benchmarks are being met.

The benchmarks against which to test the nutritional status of a population are recommended intakes of nutrients. These benchmarks provide practical information on the quantity and quality of food that an individual must have access to in order to live a dignified and fulfilled life. Very detailed and specific recommended intakes of nutrients have been developed as benchmarks at the international level. These have evolved primarily through the activities of agencies such as the United Nations Children's Fund (UNICEF), the Food and Agriculture Organisation (FAO), as well as international inter-governmental fora such as the periodic World Food Summits and World Summit for Children.

These international benchmarks can inform the development of appropriate benchmarks in the South African context. However, they can only serve as broad guidelines. The determination of benchmarks for a particular country is influenced by a multitude of factors, such as climactic conditions, average size and weight of the population, and prevalent diseases and nutritional defects that are specific to that country. Any benchmarks that are developed have to take these context-specific factors into account. One of the most important duties of the State in fulfilling the right to food is to determine recommended intakes of nutrients which can be used as benchmarks to measure its progress. These benchmarks must be appropriate to the South African context.

A wide range of indicators exist which can be used to test the nutritional status of a population. These relate to the physical condition of the population, and to external factors such as the existence and availability of food supplies. The following indicators can be used to determine the physical condition of the population: clinical examination data (for example physical examination to determine the existence of nutritional diseases), anthropomorphic data (data about the physical dimensions of the population) and laboratory test data (data obtained through technical analysis of physical samples). External indicators include: agricultural data about food production and food balance sheets; economic data about purchasing power of the population, food prices and food distribution; socio-cultural data such as food consumption patterns and food practices and beliefs; and food science data such as the nutrient content of specific prevalent foods, the biological value of diets, the effect on nutrient levels of common processing and storage processes and the presence of possible toxic factors in foods.

Again, one of the primary practical obligations of the State in giving effect to the right to food is to create a comprehensive, functioning system of indicators, tailored specifically to the South African context. At present an adequate and comprehensive system for the collection of nutritional data does not exist in South Africa.

Conclusion

The right to food in the South African Constitution requires the State to formulate and implement, as a matter of priority, a comprehensive, integrated policy to combat the problems of malnutrition, under-nourishment and hunger. Such a plan would initially require setting up systems for information-gathering and analysis as no such systems (at least no adequate systems) currently exist. Secondly, context-specific benchmarks and indicators for measuring the "progressive realisation" of the right to food in South Africa must be developed. Finally, the effective elimination of hunger in South Africa will require the close collaboration of a wide range of different government departments, including at least the national Departments of Agriculture, Health, Welfare and Finance.

Are Non-Nationals entitled to Socio-Economic Rights?

by Alison Tilley

Although economic, social and cultural rights have been incorporated into the South African Constitution, they are surrounded by controversies both of an ideological and technical nature.

While civil and political rights are generally accepted as justiciable, there continues to be debate around the justiciability of economic, social and cultural rights. The differences between these rights are sometimes suggested to revolve around the role of the State. Thus civil and political rights are often seen to require only passive duties of abstention from the State, whereas economic, social and cultural rights require active measures. In my view this distinction is specious. Most rights call for active measures from the State like the provision of courts and court officials in giving effect to the right to a fair trial.

We rely upon our own developing constitutional jurisprudence, and jurisprudence from comparative jurisdictions as to the justiciability question. A number of Ministries have developed policy on the minimum standards applicable to the rights which they are responsible for delivering. Although still to be tested by the Constitutional Court, these policies and legislation attempt to define *what* may be claimed. Where is policy or jurisprudence being developed as to *who* may claim socio-economic rights? This article is not concerned with the extent of justiciability of the various types of rights. Nor is it concerned with what may justifiably be claimed in regard to each right. Rather it is concerned with who is entitled to claim these rights, and where can we turn for guidance in deciding this question.

Draft Green Paper on International Migration

Policy documents issued by the Department of Home Affairs attempt to provide some guidelines on who may claim socio-economic rights. However, I will argue below that these guidelines are confused and do not in all cases comply with the Constitution nor the international instruments ratified by the South African government.

Thus far we have two draft documents giving an indication as to the substantive policy that may be developed within the Department. The first is the *Draft Green Paper on International Migration*. The second is the *Draft White Paper on Refugees*.

The Draft Green Paper states that:

As a sovereign state, South Africa reserves the right to determine who will be allowed entry to the country and under what conditions. The design and implementation of immigration policy must, however, be faithful to the new Constitution and Bill of Rights. It must also be consistent with our commitment to upholding universal human rights, administrative justice and certain basic rights for all the people who are affected by the South African state. (para 1.1.2)

It goes on to say that:

In the development of new policy, due regard must be given to current constitutional obligations and commitments. This means that all existing and new legislation and regulations should be scrutinised for the possibility of constitutional infringement, or infringement of international obligations. To the extent that there is infringement, such policy or legislation should be changed so as to ensure constitutional compliance and compliance with international obligations. The same test of constitutionality should be applied to any new immigration and refugee legislation (para. 1.3.1)

This seems to me to correctly reflect the position, and is unexceptionable. However, the document goes on to say:

The development of a migration regime also relates to whether or not the rights in the Bill of Rights apply to citizens and non-citizens. Most of the rights in the Bill of Rights with the exception of political rights and the right relating to freedom of trade, occupation and profession are guaranteed to "everyone". Immigration and migration policy should affirm that with the exception of those rights, the Bill of Rights does apply to all persons who are affected by South African government action, including non-citizens, with the important proviso in the case of socio-economic rights "to the extent that this is realisable". (para. 1.3.3)

This last quote is not footnoted. It apparently relates to the obligation of "progressive realisation" contained in the relevant sections of the Bill of Rights protecting socio-economic rights (see, for e.g., ss 26(2) and 27(2)). However, this constitutional formulation is substantively different to the meaning ascribed to it by the Department. The constitutional formulation presupposes a progressive implementation of the right, in its initial form granted to the extent possible, and then progressively expanded without any limitation except the resources of the State. It does not attempt to define who is entitled to claim the rights. As the Green Paper points out, the sections in the Bill of Rights dealing with socio-economic rights clearly say that the rights vest in "everyone." Unlike the political rights, they are not expressly restricted to "citizens."

The Green Paper's proviso could also possibly refer to article 2(3) of the International Covenant on Economic, Social and Cultural Rights, 1966 (which South Africa has signed and is shortly to ratify. This article provides that:

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals."

However, this provision is not contained in the Constitution. Accordingly, I am of the view that any limitations to the category of rights-holders entitled to socio-economic rights would have to be justified under the general limitations clause of the Bill of Rights (s 36).

In relation to education, the Green Paper states:

We support the idea of students from SADC member-states obtaining special access to South African universities and technikons. Our institutions should be a resource to Africa, and particularly for our partner states of the SADC. Universities and technikons make their own admission decisions, but it would be useful to develop general guidelines as to quotas, appropriate fee structures, and simple procedures to ease admission for students from SADC countries. The Department of Education, universities and technikons, and the Department of Home Affairs should find a mechanism to provide such guidelines. (at para. 2.4.6.3).

This suggests that there would be a measure of differentiation between the socio-economic rights available to citizens and non-citizens in the area of tertiary education, but that this distinction would need to be a nuanced one, taking into account the needs of our neighbouring States. The treatment of non-nationals in relation to the right to further education (s 29(1)(b)) would be set out in detailed guidelines. Such a nuanced approach could be tested for its reasonableness and justifiability under the general limitations clause of the Bill of Rights. The Green Paper also affirms that the rights to just administrative action, a fair trial and access to information apply equally to citizens and non-citizens (see para. 3.2.1).

However, there is a marked departure from this more encouraging approach in the following paragraph:

We believe that, in terms of socio-economic rights, illegally present immigrants or migrants should not be denied emergency medical treatment nor should their children be punished for the misdeeds of their parents by denying them access to temporary schooling. All other social welfare benefits must be restricted to South African citizens and permanent residents. To know who is whom requires an identification system, and we support current efforts of the Department of Home Affairs to issue a simple credible identification card to individuals of permanent residence or citizen status. (para. 3.2.4)

This seems to suggest that the socio-economic rights of illegally present immigrants or migrants are limited to emergency medical treatment and temporary schooling. No argument is advanced in support of this position. It also suggests that at least permanent residents should be entitled to socio-economic benefits.

Department of Welfare Policy

However, the current policy of the Department of Welfare is that permanent residents are *not* entitled to access to social security benefits such as State old age pensions. Only citizens are entitled to assistance under the Social Assistance Act, 1992. This includes those who are permanently resident as a result of recent government action intended to remedy the effects of past discriminatory immigration legislation. This government action is described in the Green Paper:

Government has provided two types of amnesties to qualifying individuals: (a) one to African miners in 1995, of whom 50,692 were granted permanent residence; and (b) a 1996 amnesty to qualifying SADC citizens, of whom 199,596 applied and 100,218 were granted permanent residence to date. (para. 3.3.2)

Relevant equality cases

Can the distinctions drawn in the Green Paper be challenged on the basis that they discriminate unfairly against non-citizens in their access to socio-economic rights?

In the recent Constitutional Law case of *Larbi Odam and others v Member of the Executive Council for Education (North-West Province) and another* 1997(12) BCLR 1655 (CC), the Court examined the application of the equality clause in the interim Constitution to the terms and conditions of employment of temporary teachers who were non-citizens. The relevant regulation provided that no person may be appointed as an educator in a permanent capacity unless he or she is a South African citizen.

The Court confirmed its previous jurisprudence that where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of section 8(2). Other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner, may also constitute a breach of section 8(2). In determining whether discrimination is unfair, it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination (see *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) at paras. 43)

The disadvantaged group in this case is foreign citizens. Because citizenship is an unspecified ground, the first leg of the inquiry requires considering whether differentiation on that ground constitutes discrimination. This involves an inquiry as to whether:

"objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner." (see *Harksen v Lane NO and Others* 1997(11) BCLR 1489 (CC) at para. 53).

The Court had little doubt that the ground of citizenship could constitute a ground of unfair discrimination. In the first place, foreign citizens are a minority in all countries, and have little political muscle to protect and advance their own needs and wishes. Secondly, citizenship is a personal attribute which is difficult to change.

Judge Mokgoro pointed out that:

This general lack of control over one's citizenship has particular resonance in the South African context, where individuals were deprived of rights or benefits, ostensibly on the basis of citizenship, but in reality in circumstances where citizenship was governed by race. Many became statutory foreigners in their own country under the Bantustan policy, and the legislature even managed to create remarkable beings called "foreign natives". Such people were treated as instruments of cheap labour to be discarded at will, with scant regard for their rights, or the rights of their families. (at para. 19).

The Court accordingly held that the differentiating ground of citizenship in the relevant regulation is based on attributes and characteristics which have the potential to impair the fundamental human dignity of non-citizens hit by the regulation.

This case establishes that citizenship can be a basis for unfair discrimination in the enjoyment of socio-economic benefits such as employment. The same logic can be extended to protect equal access by non-citizens to the socio-economic rights protected in the Bill of Rights. Any departure from this principle would have to be justified by the State under the general limitations clause. This means that there would have to be a sufficiently important reason for limiting the enjoyment of the right to citizens, and the extent of the limitation would have to be proportional to the objectives of the legislation. The blanket assumption in the Draft Green Paper that most of the socio-economic rights in the Bill of Rights will not extend to non-nationals is constitutionally suspect.

Refugees

The Draft Green Paper on Migration suggests that certain socio-economic rights must be extended to refugees:

In general terms, refugee rights under international law fall into four broad categories....Fourth are self-sufficiency rights, including rights to work and education. (para. 4.5.2).

According to Draft White Paper on Refugees, South Africa has ratified the 1951 UN Convention Relating to the Status of Refugees, the 1967 Protocol and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. It goes on to affirm that "refugees shall be afforded self-sufficiency rights, such as the right to work and to education." (para. 4.6).

In conclusion, the lack of precedent in this area leaves government with few guidelines in respect of the application of socio-economic rights. The resulting confusion is reflected in internally inconsistent policy documents around very important issues. We need greater clarity in order to develop a coherent policy framework in relation to the socio-economic rights of non-citizens. So many of the countries of our continent held out a generous helping hand during the struggle, providing shelter, education, food and water, and medical care to South Africans in exile. In this context, reciprocity is certainly a moral obligation. In addition, the State also has constitutional obligations to protect the rights of non-citizens. The extent of these duties may ultimately have to be tested in the Courts. Civil society has a vital role to play in promoting the socio-economic rights of non-citizens through advocacy and, in appropriate cases, through litigation.

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The SA Human Rights Commission

by Tseliso Thipanyane

In recognition of the socio-economic imbalances inherited by post-apartheid South Africa and the abject poverty experienced by many South Africans, the people of South Africa adopted a Constitution fully committed to protecting socio-economic rights and advancing social justice.

In order to ensure that these rights do not just end up as mere paper rights, the progress made in realising these rights will have to be closely monitored. As previous editions of *ESR Review* have highlighted, the Human Rights Commission

has a special role under the Constitution to monitor and report on the realisation of socio-economic rights.

In this article I describe how the Commission has gone about fulfilling its constitutional mandate in this first annual cycle of monitoring socio-economic rights under section 184(3).

First stages of the process

The process of monitoring socio-economic rights began after the Constitution came into effect on 4 February 1997. The first step was to develop a methodology for giving effect to the broadly worded constitutional mandate in section 184(3).

Initially a set of workshops and meeting were held between the Commission and institutions with expertise in socio-economic rights who were prepared to assist the Commission in developing its mandate. The Commission worked closely in this regard with the Community Law Centre (University of Western Cape), the Centre for Human Rights (University of Pretoria), the Human Sciences Research Council, and the Community Agency for Social Enquiry (CASE). The purpose of these workshops and meeting was to develop a comprehensive plan of action for the monitoring process. Draft protocols (questionnaires) to serve as monitoring tools for the realisation of socio-economic rights were also developed

On 18 September 1997, the Commission held a consultative workshop. The purpose of this workshop was to brief relevant organs of State, parastatals, non-governmental organisations and community-based organisations on the Commission's socio-economic rights monitoring process. In addition, the Commission requested feedback on the protocols, relevant organs of State and the process as a whole.

Main Objectives

In appreciation of the fact that the organs of State did not have any prior experience and expertise in reporting on socio-economic rights, it was decided to have a relatively limited focus in the first year of monitoring socio-economic rights. Thus the main objectives of the protocols are to enable the Commission to

- gain an understanding of the impact of past discriminatory policies on the current status of socio-economic rights;
- test government department's understanding of their constitutional duties;
- develop a baseline understanding of the current policy and legislative measures being taken by government to respect, protect, promote and fulfil socio-economic rights;
- establish whether government has appropriate information systems and a plan of action for the realisation of the rights.

In future monitoring cycles, the Commission will expand on the information requested and will attempt to gain as comprehensive a picture as possible of the state of realisation of socio-economic rights in South Africa.

The protocols were based on the seven socio-economic rights listed in s 184(3) of the Constitution. These are the rights concerning housing, health care, food, water, social security, education and the environment.

Submission of the Protocols and Responses

The protocols were sent to relevant organs of State at national, provincial and local spheres of government in December 1997. Relevant organs of State were required to furnish the Commission with the required information by 15 February 1998.

The protocols were sent to the following organs of State: the National Departments of Housing, Health, Environmental Affairs and Tourism, Water Affairs and Forestry, Land Affairs, Agriculture, Education, Welfare, Correctional Services, and Finance; all nine Provincial Governments; and the South African Local Government Association (SALGA).

Most government departments who received the protocols did provide the information requested. However, not all responses were sufficiently detailed to enable the Commission to make a meaningful assessment of the measures taken by the particular department to realise the right or rights falling within its domain. Despite numerous requests, the Commission did not receive any responses from Eastern Cape Province Government, Northern Province Government and the North West Province. Only the Department of Health responded to the protocol directed to the Western Cape Government. The Johannesburg Metropolitan Council was the only local government structure that responded. On the whole the Commission is encouraged by the response received in this first cycle. However, the process has also highlighted the need for education and training on socio-economic rights.

Analysing the responses

Professor Christof Heyns, Acting Director of the Centre for Human Rights was commissioned to assist the Commission in analysing the information received from government. His team of researchers included members of the Community Law Centre (UWC), Centre for Applied Legal Studies (CALS) and the Centre for Human Rights. This analysis was funded by the Human Sciences Research Council.

The analysis of the government's responses to the Commission's socio-economic rights was based on relevant international human rights standards, including the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights.

The CASE Study

In addition to gathering information from government, the Commission appointed the Community Agency for Social Enquiry (CASE) to conduct a study on public perceptions relating to the realisation of socio-economic rights. This study was also funded by the HSRC.

The survey was conducted during February - March 1998 and the report of the study was finalised on 8 June 1998. The survey covered respondents in all the nine provinces, all types of residential areas and racial groups. The study was conducted by asking ordinary people about their experiences of the State's efforts to give effect to socio-economic rights and how their lives have been affected as a result. Interviews were also conducted with several non-governmental organisations, especially those working with disadvantaged communities on socio-economic rights issues.

It should be emphasised that this study is not an evaluation of the government's performance regarding the realisation of socio-economic rights, but a study of the views, perceptions and experiences of the public. The main aim of this study was to gather pertinent information that would shed light on the nature and reach of government policies, seen from the point of view of their intended beneficiaries.

Report to Parliament

Based on the analyses of government information and the report on public perceptions, the Commission is in the process of compiling a composite report to Parliament. A consultative workshop with NGO's on the first draft of the report was held on 4 September 1998. The Commission will integrate the suggestions arising out of this workshop, and is aiming to submit its final report to Parliament before the end of the current session.

The role of NGO's

During the process of developing its report to Parliament, the Commission took the position that the government departments' responses would only be availed to the public after such responses had been analysed and the first draft of the report concluded. The basis for this view was that the release of the documents to the public before they were analysed by the Commission would be in bad faith. These documents were furnished to the Commission in terms of a specific constitutional mandate, and the Commission was concerned that the premature release of this information could detrimentally affect the relationship the Commission is trying to develop with government departments.

Nevertheless, it should be pointed out that NGOs can compile their own reports on the realisation of socio-economic rights in South Africa, independent of the Commission and its own monitoring process. Furthermore, NGOs can wait for the publication of the Commission's report before producing a shadow report.

The Commission has aspires to work closely with non-governmental organisations and civil society as a whole, and will continue to do so. The Commission has also attempted to make the process as open and consultative as possible. However, the Commission's interaction with non-governmental organisations and, for that matter, even with government departments, should not affect the independence and effectiveness of the Commission.*

Conclusion The process of monitoring the realisation of socio-economic rights in South Africa is a new experience for the Commission and also for most non-governmental organisations. Though mistakes have been committed in the process, a lot of useful experience has been acquired. The Commission also hopes that its relation with all the parties concerned, government and non-governmental, will continue to improve in order to ensure a more effective monitoring process for the good of all South Africans.

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*** Editor's Note: There has been a debate about the role of NGO's in the monitoring process and the refusal of the Commission to make available government information prior to the production of its draft report: see the article by Christof Heyns entitled Update on the SA Human Rights Commission:*

The Commission for Gender Equality

What is its Role?

by Karrisha Pillay

Engendering socio-economic rights

There exists a close link between the right to equality and the socio-economic rights in the Bill of Rights. Read together these sections require that the socio-economic rights be realised on the basis of equality and free from unfair discrimination. Section 9 of the Constitution expressly prohibits unfair discrimination on a host of grounds including race, sex, gender, marital status, pregnancy, sexual orientation and culture. It also provides that legislative and other measures may be taken to protect and advance those persons disadvantaged by unfair discrimination. However, in spite of this explicit and unequivocal guarantee, women's access to socio-economic rights is mediated by a multiplicity of factors rooted in both the structural inequalities between men and women as well as the systemic patterns of discrimination experienced by women.

Socio-economic rights are often presumed to be gender neutral. Laws and policies on the subject have accordingly operated on the inaccurate assumption that equal access to these rights can be achieved through treating men and women in an identical manner. However, identical treatment ignores the different social realities and gendered roles of men and women. As O'Regan J has observed: "insisting on equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality." (*The President of the RSA and Another v Hugo* 1997(6) BCLR 708 CC at para. 112).

It is accordingly vital that these structural inequalities be recognised and addressed in the context of women's access to socio-economic rights. When doing so, particular attention should be paid to the multiple barriers that women face in gaining access to socio-economic rights. These barriers include:

- the disproportionate burden of reproductive and care-giving work performed by women;
- the sexual division of labour and segregated employment practices;
- discriminatory traditional and cultural laws and practices;
- unequal representation by women in political and other decision-making structures at all levels; and
- the widespread violence perpetrated against women.

(See *Promoting Women's Enjoyment of their Economic and Social Rights* United Nations Division for the Advancement of Women, Expert Group Meeting, December 1997, para. 18)

Even when women do have access to socio-economic rights, they often experience discrimination in the enjoyment of these rights. This discrimination is manifested, for example, in unequal pay for work of equal value, inferior benefits under social assistance programmes and insecure tenure to land and housing.

These factors have resulted in the experiences and interests of men being disproportionately reflected in the formulation and implementation of laws and policies dealing with socio-economic rights.

The Commission for Gender Equality

In order to address these realities we need to develop an approach to socio-economic rights that recognises gender and women's unequal status in society. Section 187 of the Constitution establishes a Commission for Gender Equality (CGE). Its main function is to promote respect for gender equality and the protection, development and attainment of gender equality. The Commission is tasked with a number of specific duties in terms of both the Constitution and the Commission on Gender Equality Act, 39 of 1996. The key duties of the CGE include the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality. Each of these duties can be exercised in relation to socio-economic rights and in furtherance of the goal of substantive gender equality. The Commission for Gender Equality accordingly can and should play a critical role in advancing women's access to socio-economic rights.

Interaction with the SAHRC

Monitoring access to socio-economic rights is a vital component of ensuring the proper implementation of these rights. It allows for an assessment of the progress being made in realising the rights, identifying violations of the rights as well as the possibility of remedial steps in cases of violations. More specifically, monitoring women's access to socio-economic rights allows for an assessment of the extent to which these rights are being realised in accordance with the fundamental principles of equality and non discrimination.

- **Some of the poorest households are those in rural areas headed by women - the mean monthly income per head in female headed households was R243 compared to R468 for all households in 1993.**
- **Over a half of all households in non-urban areas are forced to fetch water from outside the household. Women are predominantly responsible for this task. The median time spent by women collecting water is 60 minutes a day.**
- **Nearly 23% of all African women aged 25 and older in October 1995 had received no formal education at all, compared to 16% of African men.**
- **Unemployment rates**

Whilst the CGE has a duty to monitor issues concerning gender equality, it has no express constitutional duty to monitor the realisation of socio-economic rights. In contrast, the Human Rights Commission has a particular mandate to monitor the realisation of socio-economic rights. In terms of section 184(3) of the Constitution, the Human Rights Commission is obliged to request relevant organs of state to provide it with information on the measures that they have taken towards the realisation of rights concerning housing, health care, food, water, social security, education and the environment. Following such requests for information, the Human Rights Commission is currently in the process of compiling its report. The report will consist of an assessment of the extent to which the relevant organs of State are taking measures to realise the enlisted socio-economic rights, some of the key difficulties being experienced in their realisation as well as recommendations on strengthening the realisation of these rights.

amongst African women is 50.2%, compared to 33.6% amongst African men. This disparity in the unemployment rates between men and women is reiterated amongst all race groups.

[Sources: The First South African CEDAW Country Report (1998), Part 1, 'The Economy'; and D Budlender, 'Women and Men in South Africa' Central Statistical Service (1998)]

Women's access to socio-economic rights is vital to ensuring gender equality. Accordingly, the CGE is clearly under a duty to monitor women's access to socio-economic rights. This task also accords with its strategic commitment to focus on vulnerable and marginalised groups of women. The outcome of the monitoring process should be an assessment of the extent to which gender equality is being respected in the realisation of socio-economic rights in South Africa.

The CGE may monitor women's access to socio-economic rights independently. However, it makes better strategic sense to collaborate with the Human Rights Commission with a view to promoting the incorporation of gender factors in the section 184(3) process. Such collaboration also avoids a two-track procedure and the duplication of resources.

Gender factors

I suggest that the role of the CGE in monitoring women's access to socio-economic rights should include:

- identifying women's different experiences and needs regarding socio-economic rights as well as the different ways in which women suffer violations of these rights;
- assessing the gender-specific implications of laws, policies, customs and other measures adopted by organs of State and the private sector;
- ensuring that the collection of data is disaggregated by sex so as to identify the factors that cause unequal outcomes for women;
- developing qualitative indicators to ascertain the gender-related experiences of women in the enjoyment of socio-economic rights; and
- studying the impact of resource allocation on the attainment of gender equality.

Monitoring CEDAW

Women's equal access to socio-economic rights is reiterated in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW was ratified by the South African government in 1995. It includes an obligation on

States parties to eliminate discrimination against women in the fields of education, employment and health. Furthermore, article 14 requires States parties to take special measures to ensure that rural women participate in and benefit from rural development. Express reference is made to adequate health care facilities, social security programmes, training and education, as well as adequate living conditions particularly in relation to housing, sanitation, electricity, water supply, transport and communications.

In terms of CEDAW, States parties are required to report regularly on the measures they have taken towards the realisation of the relevant rights. The CEDAW Committee assesses compliance with these obligations on receipt of these reports. The Commission on Gender Equality Act provides that the CGE should monitor compliance of international conventions ratified by South Africa and submit reports to Parliament in this regard. The CGE has indicated that due to capacity constraints it will monitor compliance with specific articles of CEDAW on an annual basis. This annual monitoring has the potential to promote women's equal access to the socio-economic rights recognised in CEDAW. The CGE has indicated that it intends monitoring compliance with article 14 next year. The extensive reference to rural women's access to socio-economic rights in article 14 provides an important opportunity for the CGE to establish its role in monitoring socio-economic rights.

Additional Powers

The CGE also has the following additional powers and functions which it may exercise in relation to socio-economic rights:

- investigating a matter arising from its monitoring function or as a result of an individual complaint;
- making recommendations to Parliament on issues emanating from its monitoring and evaluation processes;
- resolving disputes through mediation, conciliation or negotiation;
- submitting a report to Parliament on particular issues relating to gender equality;
- conducting further research;
- lobbying for change where it has identified an inadequate commitment to women's socio-economic rights;
- educating the public and creating an awareness of women's equal rights to socio-economic rights; and

Conclusion

Women's access to socio-economic rights is fundamental to the furtherance of substantive gender equality. The Commission for Gender Equality should accordingly exercise its powers, duties and functions to promote their access to these rights. In doing so, the entrenched structural inequalities between men and women as well as the systemic patterns of discrimination faced by women in gaining access to socio-economic rights must be recognised, challenged and addressed.

Hard Cases

Focus on the first CEDAW Report

by *Danie Brand and Gina Bekker*

The dearth of new reported cases concerning socio-economic rights continues. This review will accordingly focus on the following two issues: In the first part we will review selected comparative case law on socio-economic rights and relevant international law sources. Secondly, we will focus on South Africa's first report in terms of the Convention on the Elimination of All Forms of Discrimination Against Women (1979) [CEDAW]. This report was recently presented to the Committee on the Elimination of All Forms of Discrimination Against Women [the CEDAW Committee]. We will highlight relevant issues pertaining to socio-economic rights and the monitoring of States' human rights obligations.

A. International and comparative sources of law

The South African Constitution is unique in the extent to which it protects socio-economic rights. Few other national constitutions provide for judicial enforcement of the same extensive list of socio-economic rights as our Bill of Rights. As a consequence there is very little comparative case law that is directly applicable to the interpretation of the socio-economic rights. This presents a problem to practitioners and the judiciary in their development of socio-economic rights jurisprudence, particularly taking into account the emphasis placed on comparative research by section 39(1)(c) of the Constitution. A creative approach to comparative research, focusing on analogous rather than directly applicable jurisdictions, could obviate this problem.

There are, broadly speaking, four categories of useful sources available to aid interpretation of socio-economic rights in the South African Constitution:

- i. On the international level, the work of treaty monitoring bodies overseeing implementation of treaties dealing with socio-economic rights has formed the basis for the development of an extensive jurisprudence surrounding these rights. Certain international tribunals have also pronounced on specific socio-economic rights. In terms of section 39(1)(b) of the Constitution, the courts must consider international law when interpreting the Bill of Rights.
- ii. A number of national constitutions protect certain specific socio-economic rights on the same basis as other rights.
- iii. Some national constitutions protect socio-economic rights as Directive Principles of State Policy that are not judicially enforceable. These Directives may be indirectly justiciable as they are read into or affect the interpretation of justiciable rights.
- iv. In many national jurisdictions socio-economic rights are afforded no formal constitutional protection. However, socio-economic claims may receive indirect protection through the application of civil and political rights, for example, the right to equality and just administrative action.

Within the first category, the most significant source is the work of the United Nations Committee on Economic, Social and Cultural Rights, treaty monitoring body for the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR). Although the Committee plays no adjudicative role, it has the power to issue general comments interpreting the provisions of the ICESCR. The Committee has issued seven such General Comments, dealing with reporting by states parties; international technical assistance in the realisation of economic, social and cultural rights; the nature of states parties' obligations under the ICESCR; the right to adequate housing; the economic social and cultural rights of

the disabled; the economic, social and cultural rights of the elderly; and the right to adequate housing related to forced evictions. Of these, numbers 3 (nature of obligations), 4 (right to adequate housing) and 7 (forced evictions) are particularly relevant.

International law

The provisions of the International Covenant on Economic, Social and Cultural Rights (1966) [ICESCR] and their interpretation by the UN Committee on Economic, Social and Cultural Rights [CESCR] are particularly significant sources of interpretation for socio-economic rights. There are strong similarities between the relevant provisions protecting socio-economic in the SA Bill of Rights and the provisions of the Covenant. Reference can be had to the summary records of the Committee's review of States parties reports submitted in terms of Part IV of the Covenant. In addition, the General Comments adopted by the Committee on various provisions of the ICESCR are extremely useful. To date, the Committee has adopted eight General Comments.

The ICESCR and the work of the CESCR has also elicited substantial academic comment over time. The most important of these are the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (1986) and the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997). These contain basic principles and guidelines relating to the interpretation of the ICESCR. They were developed by a group of experts in the field of international law. Although they have no legal authority, they do provide a useful guide to the interpretation of the ICESCR. The principles they espouse can inform the interpretation of the socio-economic rights in our Constitution. A further such document is the *Bangalore Declaration and Plan of Action* issued by the International Commission of Jurists in 1995.

The jurisprudence of the European Court of Human Rights may also provide some guidance on the interpretation of the right to education in s 29 of our Bill of Rights. The first Protocol to the European Convention on Human Rights (1950) provides that no person shall be denied the right to education (art. 2). There have been a number of cases relating to the interpretation of this right. These include: *"Belgian Linguistic" (Merits)* 23 July 1968, Series A no 6; *Campbell and Cosans* 25 February 1982, Series A no 48; *Kjeldsen, Busk Madsen and Pedersen* 7 December 1976, Series A no 23; *Olsson* 24 March 1988, Series A no 130; and *Eriksson* 22 June 1989, Series A no 156.

Finally, the activities of the International Labour Organisation in monitoring certain of its conventions relating to social security may be referred to for guidance in interpreting the right to social security in section 27(1)(c) of the Constitution.

Comparative constitutional law

The second category of sources mentioned above concerns the jurisprudence developed in States that provide judicial protection to at least one or two socio-economic rights. For example, educational rights are protected in a large number of national constitutions, including the constitutions of Canada, Germany, the Netherlands, Norway, Sweden and Denmark.

The third category of sources is found in countries that protect socio-economic rights through Directive Principles of State Policy. These constitutional policy

guidelines reflect the principles that are regarded as fundamental in the governance of the country. These Directives are not directly justiciable. However, in certain jurisdictions they have had an indirect influence on the interpretation of the justiciable rights in the Bill of Rights.

Countries that protect economic and social rights in this way include India, Ireland, Spain, Portugal, Brazil, Nigeria, and Namibia. Particularly in India, the Directive Principles of State Policy have had an important influence on the development of general human rights jurisprudence.

The Indian Supreme Court has held through a series of decisions, culminating in *State of Tamil Nadu v Abu Kavier Bar* AIR (1984) SC 725, that it has a duty to harmonise the fundamental rights with the Directive Principles. In applying this doctrine, it has upheld limitations on the fundamental rights in the light of the requirements of certain Directive Principles. For example, it has ruled that legislation providing for minimum wages and price-fixing measures does not violate the right to freely carry on any occupation, trade or business. It has also held that land reform measures allowing for the transfer of property only to certain groups does not violate the right to equality. It has further interpreted certain rights substantively, imposing positive duties on the State in the light of the Directive Principles. For example, it has held that the right to life includes the provision of emergency medical treatment (see *Paschim Banga Khet Mazdoor Samity v State of West Bengal* AIR (1996) SC 2426).

The German Constitutional Court has similarly used the "social state principle" in articles 20 and 28 of the German Basic Law to uphold certain limitations on civil rights, and to accord a substantive interpretation to the basic rights.

The same basic interests that underlie the socio-economic rights in the South African Constitution may be legally protected through ordinary legislation. The case law pertaining to this legislation may afford useful guidance on the interpretation of socio-economic rights. For example, a large body of law has developed in the United States around the provision and regulation of public housing under the Fair Housing Act, 1968, the Fair Housing Amendments Act, 1988 and the activities of the Federal Department of Housing and Urban Development.

Socio-economic benefits may also receive protection through administrative justice rights, the right to equality as well as other rights. For example, there are a large number of British decisions applying the principles of administrative law to the public provision of health care. In *Youngberg v Romeo* 457 U.S. 307, the US Supreme Court held that the Fourteenth Amendment prohibition on cruel and unusual punishment places an affirmative duty on the State to provide adequate food, shelter, clothing and medical care to prisoners.

B. SA's Report to the CEDAW Committee

The CEDAW Committee is responsible for supervising States parties obligations under CEDAW. In terms of article 18, States parties to the Convention must submit an initial report to the Committee within one year after entry into force of the Convention for that country. Thereafter it must submit reports at least every four years and when the Committee so requests. These reports must include the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the Covenant and "on the progress made in this respect."

The Committee has the power to consider these reports and make specific recommendations to the State party concerned. The Committee reports annually on its activities (including its review of State reports) to the General Assembly of the United Nations through the Economic and Social Council. These reports are also transmitted to the Commission on the Status of Women.

The Committee convenes once a year to review States parties reports. Two days are allocated for the discussion of each report. A representative of the particular government is invited to introduce the report. Thereafter members of the Committee may ask questions, request additional information or seek clarification on issues arising from the report. On the second day, State representatives are given the opportunity to respond to these questions and remarks by Committee members.

A number of provisions of CEDAW deal directly with women's equal access to socio-economic rights. The most important of these are article 3 and articles 10 to 14. The review and discussion by the Committee of the sections of the reports pertaining to these articles helps clarify the scope of States' parties obligations.

South Africa ratified CEDAW on 15 December 1995 and submitted its initial report at the end of 1997.

The South African report (drafted according to the guidelines of the Committee) consists of two parts. The first part gives a brief description of the country and its conditions. The second part consists of a sequential discussion of each CEDAW article and a separate section on violence against women. The report details the key problems and issues encountered in relation to the different rights, and outlines the main legislative and policy measures taken by government. The overarching aim was to establish a baseline of information from which progress in eliminating discrimination against women in all spheres can be measured in future.

Relevant articles

Article 3 of CEDAW requires State parties to take all appropriate measures, including legislation, for the full development and advancement of women particularly in the political, social, economic and cultural fields. In its discussion of this right, the South African report focused on the recent repeal of laws discriminating against women, and identification of other discriminatory laws. The work of the Portfolio Committee on the Quality of Life and Status of Women in reviewing the gender implications of legislation was discussed. The report also highlighted South Africa's National Machinery for Advancing Gender Equality.

Article 10 requires States parties to eliminate discrimination against women and to ensure them equal rights with men in the field of education. The South African report noted various disparities with regard to women in education. It also reported on a number of measures adopted to ensure the right to basic education and equal access to education institutions. These include compulsory schooling for all children from the age of 7 -15. The establishment of the Gender Equity Task Team was also mentioned.

Article 11 states that States parties should take all appropriate measures to eliminate discrimination in the field of employment. The report detailed disparities with regard to the participation of women in the workplace. It noted a number of government initiatives with regard to job creation in which women were

specifically targeted. In addition, the legislative framework for ensuring equal rights and protection at work was described. The establishment of a Directorate of Equal Opportunities to address gender imbalances in the workplace was also discussed.

Article 12 provides for equality in access to health care. The report noted that there were still severe imbalances in access to health care in South Africa, with a particularly negative impact on rural black women. In discussing the South African government's response to these problems, the report referred to the government's initiative of free health care to pregnant women and children under six and also the extension of primary health care to all South African residents. A number of obstacles to women's ability to access health care facilities were also identified. Particular reference was made in this context to certain cultural and religious practices. Reproductive health was also discussed.

Article 13 deals with social security and assistance benefits. The report noted the deficiencies in the present social security and assistance system and discussed some of the recommendations of the Report of the Lund Committee on Child and Family Support (August 1996).

Article 14 requires special measures of assistance for rural women . The report discussed the multiple levels of discrimination and subordination that rural women in South Africa face. It recognised that a key factor contributing to rural women's poverty is their lack of access to, and rights in land. This lack of access to land can be attributed to discriminatory customary and social practices in addition to the apartheid legacy. The report indicated that the government has undertaken a Land Reform Programme in order to address these problems.

The process of drafting the report was a useful experience, highlighting important problems relating to effective human rights monitoring in South Africa. The most important of these, alluded to in the introductory section of the report, is the unavailability of critical social and economic data. The monitoring of socio-economic rights requires disaggregated data, efficient systems for the gathering and analysis of information, and the active co-operation of a range of government institutions.

The presentation of the report

South Africa's initial report was presented to the CEDAW Committee at its 19th session, which took place from 22 June to 10 July 1998. The presentation was conducted by Geraldine Fraser-Moleketi, Minister for Welfare and Population Development, and a team of experts from the Department of Justice, the Office of the Deputy President, the Office on the Status of Women and the Department of Foreign Affairs. This was the South African government's first oral presentation of a report submitted in compliance with its human rights treaty obligations.

The initial presentation took place on 24 July, and was well received. It generated substantial discussion, questions and requests for clarification. These were dealt with in the South African government's response, presented on 29 July.

The responses and questions related to a wide range of issues. Very specific questions were asked about the nature and functioning of the National Machinery for the Advancement of Gender Equality, as well as the overall strategy to address gender and sex inequality. More general questions and clarifications were asked around issues such as violence against women, access to health care

services, finance and housing, exploitation of the girl child, women in rural areas, affirmative action and a number of constitutional and legal issues.

The presentation of this first report to the Committee, apart from its inherent significance with regard to gender and sex equality in South Africa, demonstrated how a body such as the CEDAW Committee tackles its monitoring functions. In particular, the approach of the Committee highlighted the importance for any monitoring process of comprehensive information gathering systems, and the precise analysis of information. This is of particular relevance to the monitoring functions of the Human Rights Commission under section 184(3) of the Constitution.

Review Of Events And Publications

by Sandy Liebenberg

Reports of the Poverty Hearings

The Poverty Hearings convened by the SA National NGO Coalition (SANGOCO), the SA Human Rights Commission (SAHRC) and the Commission for Gender Equality (CGE) from March to June 1998 is now complete. They culminated in the production of two reports which were released on 16 July 1998 at Regina Mundi Church, Soweto. The first report, written and compiled by Debbie Budlender of the Community Agency for Social Enquiry (CASE), is entitled *The People's Voices*. The second report is entitled *Poverty and Human Rights* and was written and compiled by Sandy Liebenberg and Karrisha Pillay of the Socio-Economic Rights Project, Community Law Centre (UWC).

We reproduce here the main recommendations contained in the report on *Poverty and Human Rights*:

Recommendations

It is not possible within the scope of this report to make detailed recommendations in relation to each right. However, based on the themes identified above a number of general recommendations can be made:

a) Human rights awareness and education

Campaigns and training programmes to increase awareness and knowledge of the Bill of Rights among disadvantaged communities should be a priority. They should be designed so as to be accessible to persons with a low level of literacy, and should be relevant to their daily experiences of poverty. They should also pay particular attention to economic and social rights, including practical ways to enforce them. Human rights education should be a joint responsibility of government and civil society.

b) Improved access to legal services

Intensify efforts to improve access to legal services, particularly in the rural areas. This could be achieved through revision of the legal aid system, and establishing a network of community-based legal aid centres and advice offices. It is essential, that both the public legal aid system and legal services provided by non-governmental organisations include redress for violations of economic and social rights within their respective mandates. This clearly implies that local and international donors, providing funding for legal services in South Africa, should

be aware of the importance of ensuring proper mechanisms for the enforcement of economic and social rights.

c) Integrated strategies and intersectoral collaboration

Promoting access to all economic and social rights requires an integrated strategy and intersectoral collaboration on the part of all relevant organs of the State. Because of the interdependency of all human rights, establishing strong linkages between the policies and programmes of different government departments, is vital.

d) Improving the responsiveness of government officials

Government must give priority attention to improving the responsiveness of officials to the needs of disadvantaged communities. It must actively enforce and monitor the implementation of the Public Service's Code of Conduct. It is essential officials respond to requests for advice and assistance efficiently and in clear, accessible language. Officials should make every effort to advise people of their entitlements under various programmes (e.g., the new child support grant), and should minimise inconvenience and costs incurred by the public. Strong penalties must be applicable to officials who do not respect the human dignity of those that apply to them for assistance, particularly social grant recipients. Local government and other relevant officials must be trained on economic and social rights.

Efforts to promote participation by disadvantaged communities in policy-making and legislative processes should be intensified. These should include community workshops, adequate response times for public comments, and holding public hearings in informal settlements and rural areas. It is also essential that disadvantaged communities, in both rural and urban areas, are actively involved in the process of monitoring socio-economic rights by the SA Human Rights Commission under section 184(3) of the Constitution.

e) Strengthening the role of government

Government should play a proactive role in ensuring that everyone has access to basic social services, building a comprehensive social security system, and fostering conditions that enable people to gain access to employment and land on an equitable basis. It should explore creative ways of supporting and building on the initiatives of poor people: for example, by facilitating access to credit, providing transport and telecommunications infrastructure, and promoting skills development. In doing so the needs of groups in vulnerable and disadvantaged circumstances should be prioritised.

To achieve equitable access to basic needs and a fair distribution of resources, government must play a leading role. This is particularly important in the light of the legacy of poverty and inequality in South Africa. Market mechanisms alone cannot be relied on to achieve equitable access to economic and social rights in the South African context.

The government must also avoid retrogressive measures that reduce or deprive people of access to economic and social rights.

f) The participation of the private sector

This sector must also participate actively in promoting a more equitable distribution of socio-economic resources in society. This can be achieved by, for example, providing skills training, implementing affirmative action policies, and extending social insurance protection to all categories of workers. They must also

adhere to the labour and environmental standards enshrined in the Constitution and legislation.

g) *Removing legal obstacles*

Legislation that is passed must make it easier, and not more difficult, for people to gain access to socio-economic rights. Enforcement, and proper implementation of socio-economic legislation, is critical. The hearings on the theme of the environment highlighted the importance of partnerships between government and communities in ensuring the proper enforcement of legislation.

h) *Removing administrative obstacles*

Administrative procedures for accessing social grants, subsidies, land, etc. should be streamlined. Much work is needed to ensure that these procedures are simple, speedy, transparent and effective. Government must eliminate the long delays in processing applications for assistance as they expose poor people to great uncertainty and insecurity.

i) *Removing financial obstacles*

It is essential that government develop and implement policies that remove financial obstacles to gaining access to economic and social rights - particularly in relation to water, medicines, land, housing and education. This may include an increased level of subsidisation and more effective procedures for reducing or exempting poor people from paying user-charges. Where such procedures do exist, for example, in relation to water services and the payment of school fees, it is vital that government and NGO's promote a more widespread awareness of these procedures.

j) *Removing physical obstacles*

Government must make on-going efforts to locate basic social services in closer proximity to people, and to eliminate the effects of apartheid rural and town planning. It must complement these efforts by improving transport infrastructure and more affordable forms of transport (e.g. subsidised bus services for school children). Programmes, aimed at improving access to social and economic rights, must be designed in such a way that people with disabilities can participate equally in them. They must also accommodate the diverse needs of women, elderly persons and other disadvantaged groups.

k) *Removing gender-based obstacles*

Promoting women's full and equal enjoyment of economic and social rights will require a range of intersectoral strategies aimed at eliminating the gendered division of labour both within the home and in the economy. These strategies should include improving the level of social assistance for child support, intensifying the efforts to make the private maintenance system more effective, and mobilising private sector resources for child care and early childhood development facilities.

Government must investigate, with the full participation of women affected by these practices, appropriate measures to eliminate discriminatory customary practices which undermine women's rights. The elimination of all forms of violence against women continues to be a key priority for both the State and the NGO-sector.

Government must give a high priority to adopting special measures and policies that facilitate women's independent access to resources such as land, capital, credit and income-generating opportunities. Finally, efforts to improve the

working conditions, social security benefits and job security of domestic workers, informal sector workers and those engaged in casual and other atypical forms of employment should be intensified. This will benefit disadvantaged women who predominate in these types of jobs.

These recommendations and how to take them forward will be discussed further at NGO Week '98 Conference which is taking place in Cape Town from 17 - 20 September 1998. For further information on either of the Reports, contact: Jacqui Boule, National Programmes Director, SANGOCO at tel. no. (011) - 403 7746. We thank SANGOCO for permission to reproduce a section of the report.

Forthcoming seminars and publications

The Socio-Economic Rights Project, Community Law Centre (UWC) and the Constitutional Litigation Unit of the Legal Resources Centre are co-hosting a seminar entitled *Giving Effect to Socio-Economic Rights: The Role of the Judiciary and other Institutions*. The seminar is taking place at the Parktonian Hotel, Johannesburg on 6 and 7 October 1998. Our international guest speaker is Prof. Craig Scott of the University of Toronto, Canada. A special edition of *ESR Review* will be devoted to the proceedings of this seminar. For further details contact Sandy, Karrisha or Sonya at tel no. (021) - 959 3808 or e-mail: sliebenberg@uwc.ac.za.

The Centre for Human Rights (Univ. of Pretoria) is planning to host a seminar entitled Basic Issues regarding Socio-Economic Rights: The Implications for Government on 27 October 1998. The seminar will take place in Pretoria. For further information, contact Danie Brand at tel no. (012) - 420 3034.

The Centre for Human Rights is in the process of producing a compilation of basic source material relating to the socio-economic rights in the SA Constitution.