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Volume 19
2018

ESR REVIEW

Economic & Social Rights Review in Africa

ENSURING **RIGHTS** MAKE REAL **CHANGE**

DULLAH OMAR INSTITUTE
FOR CONSTITUTIONAL LAW, GOVERNANCE AND HUMAN RIGHTS

A publication of the Dullah Omar Institute for Constitutional Law, Governance and Hu man Rights (formerly Community Law Centre) at the University of the Western Cape

ESR REVIEW #02 | Vol. 19 | 2018
ISSN: 1684-260X

A publication of the Dullah Omar Institute for Constitutional Law, Governance and Human Rights (formerly Community Law Centre) University of the Western Cape

ESR REVIEW ONLINE
www.dullahomarinstitute.org.za/socio-economic-rights/esr-review

PRODUCTION
The *ESR Review* is produced by the Socio-Economic Rights Project of the Dullah Omar Institute for Constitutional Law, Governance and Human Rights, with the financial assistance of the Ford Foundation.

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Editorial

Welcome to the second issue of the ***ESR Review*** in 2018, which features three articles exploring economic, social and cultural rights from different perspectives.

In the first article, Tinashe Kondo discusses developments in socio-economic rights in Zimbabwe post-Mugabe. He argues that although Robert Mugabe ruled through a regime that posed as 'democratic', it was for all intents and purposes a façade for dictatorship. Kondo observes that the government's power stemmed not from the will of the people but from control of the armed forces and intelligence operatives, as a result of which many basic socio-economic rights were abused or neglected. Turning to consider the future, he raises the question: What does Mugabe's exit entail for the protection, promotion and realisation of these rights?

In our second feature article, Robert Doya Nanima explores the implications of Uganda's ratification of the Maputo Protocol with the reservation that it will not be bound by the clause on the authorisation of medical abortion unless domestic legislation is passed to this effect. Nanima points out that while Uganda's economy is based to a large degree on the activities of women, their significant status as economic co-creators is not reflected in how the issue of abortion is addressed in the legal and policy framework. He proposes that, to rectify this disconnect, the 'abortion question' should be mainstreamed as part of the right to health.

In a case review, Gaopalelwe Lesley Mathiba interrogates the transformative intention of the current South African constitutional regime on housing and evictions by reflecting on ***Baron and Others v Claytile (Pty) Limited and Another*** (2017). The case seeks to balance, on the one hand, the rights of property owners not to be arbitrarily deprived of their entitlements over a property and, on the other, the right of unlawful occupants to adequate housing. In so doing, the case challenges the conventional thinking that eviction is the only remedy open to the property owner when dealing with an unlawful occupant who refuses to vacate the property after the legal basis for occupation has come to an end.

The events section reports on a roundtable discussion entitled 'Deconstructing States' Obligations to Realise the Right to Health'. The roundtable was hosted on 12 April 2018 by the Socio-Economic Rights Project of the Dullah Omar Institute at the University of the Western Cape.

We acknowledge and thank all the guest contributors to this issue.

Gladys Mirugi-Mukundi, Co-Editor

What does Mugabe's exit entail for the protection, promotion and realisation of socio-economic rights?

FEATURE

Socio-Economic Rights in Post-Mugabe Zimbabwe

Tinashe Kondo

From 1980 to 2017, Robert Mugabe ruled Zimbabwe through a regime that posed as 'democratic' but which for all intents and purposes was a dictatorship. The power of the government stemmed not from the will of the people but its control of the armed forces and intelligence operatives. As a result, human rights abuses were commonplace. Poor governance, coupled with sanctions, led to the collapse of social systems. Poverty and hunger were the order of the day, and many basic socio-economic rights (SERs) could not be realised. In 2017, the military intervened and succeeded in pressurising Mugabe into resigning. His former vice president, Emmerson Mnangagwa, took over as president, promising a raft of changes, including respect for human rights. Against this backdrop, we look at developments in human rights, in particular SERs, since Mugabe's exit.

A chequered past

As Mugabe admitted in an interview with ITV News after he was forced to resign, his government had made some 'errors' with regard to the respect and promotion of human rights. He said, 'I agree we offended with regard to that area in relation to how we handled the opposition, the violence' (News24 2018). He noted, however, that Zimbabwe's record of non-compliance with human rights was still relatively better than that of other countries. In this spirit, it is important to re-examine some of the violations of SERs that occurred in Zimbabwe prior to the 'new dispensation'. For illustrative purposes, two examples will suffice.

The first is the violation of the freedom from arbitrary eviction, a freedom grounded in section 76 of the Constitution. In March 2017, the government sent an estimated 100 police officers to a farm to evict residents it claimed had settled there illegally. Residents were bundled onto trucks and left to find their way from a drop-off point 40 kilometres away. Court orders were subsequently issued to bar the evictions, but these were ignored.

This was not the first time the government undertook mass evictions. In 2005, before SERs had been constitutionally enshrined in 2013, it launched a campaign known as Operation Murambatsvina ('move the rubbish'). The objective was to eliminate slums across the country and clamp down on illegal housing and commercial activities. By the end of the operation, about 700,000 people had been directly affected and another 2.4 million indirectly affected (Tibaijuka 2005: 67). Operation Murambatsvina also had downstream effects on other rights, such as freedom of movement, the right to property, and the right to personal security.

While the operation could have been defended legitimately in terms of domestic laws such as the Regional Town and Country Planning Act 1976 (Chapter 29: 12), the Housing Standards Control Act 1972 (Chapter 29: 8), the Urban Councils Act (Chapter 29: 15, 1995), and several other municipal by-laws, the International Covenant on Economic, Social and Cultural Rights (ICESCR) stipulates that forced evictions are permissible only in exceptional circumstances – and according to the United Nations, the circumstances in this operation did not qualify as such.

A second example is that the government has been in dereliction of its duty to give effect to the right to food and water contained in section 77 of the Constitution. In 2013, a survey by UNICEF (2016: 4) revealed that, on average, a rural household is located at least a kilometre from a main drinking source. In towns, people also have to cart water over considerable distances, which has given rise to a black market in which water is sold for as much as 1 USD per 20 litres.

The reason for this state of affairs is that the government has not prioritised an expansion of its water storage and distribution infrastructure and has failed to monitor the provisioning of clean water by municipalities. Much of the country's water infrastructure is now in disrepair, creating the risk of the spread of water-borne diseases such as cholera and typhoid. In January 2018, four people died of cholera in the town of Chegutu. At the same time, the capital, Harare, battled with a typhoid outbreak, with at least 200 reported cases. Nor are these outbreaks the first of their kind. In 2008, a nationwide cholera outbreak devastated communities, and its peak, about 8,500 cases were being reported weekly. These crises highlight the collapse of governance under the previous administration and the latter's failure to respect SERs.

Socio-economic rights in an 'unfolding democracy'

Robert Mugabe's exit has been cause for celebration. Although some lament the fall of a struggle stalwart and African intellectual giant, many more are overjoyed at the removal of a dictator who had long suffocated democracy. Looking to the future, though, what does his exit entail for the protection, promotion and realisation of SERs in Zimbabwe – an area in need of a lot of attention?

To delve into this question, we review some of the developments that have taken place on the SER front since Mugabe's departure. Much of the answer depends on the government's commitment to meeting its wider state obligations over and above those specifically to do with SERs. Of note has been the crafting of the new government's mandate to develop the economy and emancipate the people of Zimbabwe. This is crucial, given that the realisation of SERs does not occur in a vacuum: SERs require the mobilisation of resources, which are generally only available when an economy is functioning. In other words, there is a vital nexus between economic development and the realisation of SERs.

It could thus be said that current measures to grow the economy are key in indirectly protecting and realising SERs in Zimbabwe; by contrast, the Mugabe regime failed to protect SERs because the government had no resources as a result of a haemorrhaging economy. Importantly, the government has begun to re-engage with the international community, forming partnerships that will contribute to advancing SERs. Thanks to these reopened channels of communication, the United States, United Kingdom and United Nations have provided support for social services such as health, sanitation and education (Human Rights Watch 2018).

More directly, the new government has made a commitment to respect human rights and the rule of law. In connection with SERs, it has made sweeping commitments to ensure the provision of key social services such as health, shelter, clean water and education. However, most of these commitments are yet to be spelt out in detail, and to date only two measures have been actioned.

The first action was taken with regard to the realisation of the right to health care enshrined in in section 76 of the Constitution. To this end, health care has been made freely available to vulnerable members of society. Accordingly, the Health Levy is being used to provide free health care for the elderly and infants; there is also free maternal care. The Health Levy is raised from a 50 per cent allocation of the 10 per cent deduction made on every dollar of cellular airtime that is purchased.

The subsidisation of health care for the vulnerable is particularly important, given that most of the elderly cannot afford to pay hospital fees. Further to this, in terms of maternal mortality, there are about 614 deaths per 100,000 live births. In the same vein, the government has increased the health budget by 73 per cent, the significance of which is that many of the challenges in the health sector are due to a lack of

> **The Zimbabwe Human Rights Commission has been unable to fulfil its mandate.**

resources. The increased budget falls short, however, of the Abuja Declaration's target of 15 per cent of the annual budget (Abuja Declaration 2001, article 26).

The second action taken by the new government pertains to the promotion of right to education contained in section 75 of the Constitution. The government has increased the budget for secondary education by 16 per cent. Furthermore, it has proposed allocating 21 million USD for the operationalisation of three new state universities. A further 6.3 million USD was allocated for the construction and rehabilitation of schools in areas where people have recently been resettled. While much more is still needed to ensure the right to education, these are certainly steps in the right direction.

The missing debates

Many of the government's promises on human rights concern civil and political rights (CPRs), and to this end, it has fleshed out how it intends to realise them. Proposed measures include the observance of equity and freedom as well as commitment to free and fair elections and a movement towards further democratisation. Yet while it is paramount to realise CPRs, it is equally important to give attention to SERs. Human rights are indivisible and interconnected; accordingly, the government ought to lay out more plans for realising SERs.

The government has also failed to harmonise existing laws with the new Constitution and Zimbabwe's regional and international human rights obligations. This process requires it to amend, repeal or enact new pieces of legislation. Most notably, and in connection with SERs, Zimbabwe is yet to domesticate the African Charter on Human and Peoples Rights (African Charter) and the ICESCR (Kondo 2017: 173). Similarly, the country is yet to become a state party to the ICESCR optional protocol. In terms of enforcement, Zimbabwe is yet to accept the jurisdiction of the African Court on Human and Peoples' Rights (African Court).

Moreover, the government has not set out a plan for assisting institutions that support democracy and which are key to the enforcement of SERs. Notably, there are no measures on the functioning of the Zimbabwe Human Rights Commission (ZHRC). Section 243 of the Constitution gives the ZHRC the mandate to promote awareness of and respect for human rights, but the ZHRC has been unable to fulfil its mandate due to budgetary constraints. Furthermore, there has been controversy over the appointment of individuals who are seen as undermining its effectiveness and independence (Chiduza 2015: 174).

This highlights the ZHRC's lack of ability to be proactive in the SER space. Its actions are unlike those of its counterpart in South Africa, the South African Human Rights Commission (SAHRC), which has published numerous reports promoting and interpreting SERs. When matters are viewed through this prism, it becomes critical for the government to enhance the ZHRC's effectiveness as an organ providing parliamentary oversight, as required by section 235(1)(c) of the Constitution. By engaging in action of this kind, the government can put deed to word in seeking to ensure that SER are realised in practice.

Another debate that has tended to slip through the cracks is the one about re-establishing an independent judiciary. Under the previous dispensation, a culture of patronage took root in all spheres of life, and the judiciary was no exception. The core of the problem lay in the appointment process of the judiciary. Section 180 of the Constitution provides that the Chief Justice, the Deputy Chief Justice, the Judge President of the High Court and all other judges are appointed by the President. Importantly, when such appointment takes place, the Judicial Services Commission (JSC) must advertise the position, invite the President and the public to make nominations, conduct public interviews of prospective candidates, and prepare a list for submission to the President of three qualified persons. The President should then

appoint the officer from the submitted list or require the JSC to submit a further list of three persons if not satisfied.

This procedure provided for checks and balances in the appointment process of the judiciary, limiting the power of the President in exercising executive appointments. For precisely this reason, it was deemed too restrictive under the previous regime. As a result, the contents of section 180 of the Constitution became the subject of debate in the process to replace former Chief Justice Chidyausiku in 2017. President Mnangagwa, in his previous capacity as Minister of Justice, Parliamentary and Legal Affairs, moved to amend the procedure under the Constitution of Zimbabwe Amendment (No. 1) Bill 2016. Under the proposed scheme, it was envisaged that the President, in appointing the Chief Justice, the Deputy Chief Justice, and the Judge President of the High Court, would be mandated to consult with the JSC but not compelled, however, to follow its recommendations. This proposal was accepted and passed as part of the Constitution of Zimbabwe Amendment (No. 1) Act 2017.

As it stands, section 180 weakens the judiciary. The independence of the judiciary is crucial because judicial enforcement of SERs is crucial to their realisation. Judges have to make key decisions on the state's allocation of resources and its ability to govern, decisions that cannot be made effectively when the judiciary is compromised. The new government thus needs to reverse the amendment of section 180 of the Constitution, otherwise the realisation of SERS will remain a pipe dream.

Conclusion

A new government in Zimbabwe has got the winds of change blowing in the human rights space. The government has made firm commitments to be governed by the rule of law and respect for human rights. In terms of SERs, it has made broad proposals with regard to health, shelter, water, education and other key social services. However, the government has made practical changes in connection with only two rights: the right to education and the right to health care. These changes are supported by broader measures which have an effect on the realisation of SERs. For this, the government is to be commended.

Nevertheless, there are still gaping holes in the government's plans – and a corresponding need to reinforce and widen measures to ensure the realisation of SERs. The government should articulate a clear plan on how it intends to realise SERs. It should also adopt supporting measures such as re-establishing judicial independence, strengthening the ZHRC, and aligning domestic laws to the Constitution and to regional and international laws.

Tinashe Kondo is a lecturer at the Mercantile Law Department, University of the Western Cape. He publishes in the areas of international human rights law and international investment law.

References

Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, Abuja, Nigeria, 24-27 April 2001

Chiduza L (2015) 'The Zimbabwe Human Rights Commission: Prospects and challenges for the protection of human rights.' ***Law, Democracy and Development***, 19, pp. 148-174

Human Rights Watch (2018) 'Zimbabwe: Events of 2017'. Available at https://www.hrw.org/world-report/2018/country-chapters/zimbabwe

Kondo T (2017) 'Socio-economic Rights in Zimbabwe: Trends and emerging jurisprudence.' ***African Human Rights Law Journal***, 17, pp. 163-193

News24 (2018) '"I didn't ruin Zimbabwe ... and we weren't that bad," says Mugabe.' Available at https://www.news24.com/Africa/Zimbabwe/watch-i-didnt-ruin-zimbabwe-and-we-werent-that-bad-says-mugabe-20180317

Tibaijuka KA, UN Special Envoy on Human Settlements Issues in Zimbabwe (2005) ***Report on the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina.*** Available at http://www.un.org/News/dh/infocus/zimbabwe/zimbabwe_rpt.pdf

UNICEF (2016) 'Rural Wash Project: Improving water, sanitation and hygiene in rural areas of Zimbabwe'. Available at https://www.unicef.org/zimbabwe/WASH_2016_Compilation_of_Human_Interest_Stories.pdf

FEATURE

Mainstreaming the 'Abortion Question' into the Right to Health in Uganda

Robert Doya Nanima

The right to health is a social and economic right that requires progressive realisation by states (Chenwi 2013). Although Uganda's Constitution does not provide for the right to health, the country is a signatory to the International Covenant on Economic, Social and Cultural Rights (UN General Assembly 1966). The Constitution contains other social and economic rights, such as the right to education, but the lack of the right to health has prompted several recommendations by the Committee on Economic, Social and Cultural Rights' (CESCR) that Uganda take legislative and other measures to ratify and apply the rights in the ICESCR.

Another challenge relates to how a state party engages the progressive realisation of this right without undue regard to resource constraints (Fukuda-Parr et al. 2008). As will be shown, the challenge Uganda faces in the progressive realisation of the right to sexual and reproductive health with regard to abortion lies in its reservation to article 14 of the Maputo Protocol (Ngwenya 2016). This reservation should be subject to the Limburg Principles, which require that states parties begin the immediate implementation of the obligations under the ICESCR (UNCHR 1986).

The marginalisation of women in Uganda

Agriculture forms the backbone of Uganda's economy. It has the potential to create lucrative livelihoods and lift thousands of Ugandans out of poverty, especially with the adoption of modern techniques and better quality inputs (World Bank 2016). Whereas women control only 27 per cent of plots and 20 per cent of all cultivated land, 73 per cent and 80 per cent, respectively, of the plots and cultivated land are managed either jointly by women and men or solely by men (UN Women 2015). Overall, 77 per cent of women are involved in agriculture, compared to 62 per cent of men alone (Derick, Daniel, Klaus & Duponchel 2015).

However, women's engagement in activities that mitigate poverty is hindered by discrimination in various aspects of their lives (UN Women 2015). One notable area of discrimination is in the realisation of their socio-economic right to reproductive health – a situation which is due both to social, cultural and religious factors and to a general lack of knowledge of the extent of this right (Kembabazi 2016).

Uganda has an estimated 775,000 unintended pregnancies per annum, of which 25 per cent are among adolescents (NBS 2009). A total of 297,000 (38.3 per cent) result in abortions (Guttmacher 2013). While many women have unwanted pregnancies, they can only abort them secretly in dangerous conditions due to the poor conditions of health units, the shortage of qualified health practitioners, the lack of

medication and the influence of religion and culture on the practice of abortion. This negatively affects women's economic productivity.

Uganda is lagging behind in attaining Sustainable Development Goal (SDG) 5 of gender equality owing to its slow progress in reducing child mortality and illness (NBS 2009). Thus, there is a disconnection between the Ugandan woman's hard work and the failure to recognise her right to sexual and reproductive health. While she contributes to the economy, she is hampered by the lack of adequate protection under the law with regard to abortion. Her inability to make decisions about her sexual and reproductive rights (SRR) hinders her enjoyment of the highest attainable standard of health, which in turn affects her attempts to improve her economic well-being (Hunt & MacNaughton 2006).

The intent of article 14 of the Maputo Protocol

The Maputo Protocol promotes women's control of their sexual and reproductive health rights, which is a key indicator in advancing the MDG on gender equality (Maputo Protocol 2003). However, the recomendations on Uganda's fifth periodic report to the UN point out that the country's reservations to articles 14 and 21 of the Maputo Protocol impede the full enjoyment of women's health and reproductive rights with regard to medical abortion (CESCR 2015).

The Maputo Protocol recquires that promotion of the SRR of women with regard to the decision whether to have children, the number of children, and the spacing of children (Maputo Protocol 2003). Uganda entered a reservation to article 14(2)(c), to the effect that the article would be interpreted subject to domestic legislation on abortion. Although it has been suggested that this reservation is limited to the application of article 14 of the Maputo Protocol without rendering abortion illegal (Ngwenya 2016), this position is not reflected in the wording of the reservation.

It is argued instead that Uganda seeks to maintain the domestic regulation of abortion in order to override the notion that a woman's right to abort forms part of the SRR. This position presents a dangerous predicament. First, the reservation defeats the purpose of the Maputo Protocol. Secondly, it does not take into consideration the polarities that misinform the abortion question in Ugandan society (OAU 1981; Mujuzi 2008; Baderin 2005; Nsibirwa 2001). It is submitted that the cumulative effect of this reservation is a restriction on the ability of the Protocol to address the question of abortion.

The legal and policy regime on abortion

The marginalisation of women with regard to abortion is aggravated by the legal regime. The Constitution does not provide for the right to health. However, it provides that no one has the right to terminate the life of an unborn child unless its authorised by the law (Constitution 1995). This provision, though, does not provide adequate guidance on the grounds for abortion in Uganda. It is thus instructive to look at other provisions before one turns to the subsidiary legislation.

The Constitution recognises equality between women and men, which is amplified by the requirements for freedom from discrimination, for affirmative action in favour of women, and for outlawing practices that undermine the welfare, dignity and interests of women. It may be argued that provisions that undermine the welfare and dignity of women are effectively against a woman's attempt to secure a livelihood. The Ugandan courts have ruled in ***Salvatori Abuki v the Attorney General*** (1997) that the right to life encompasses the right to engage other rights which enable one to have a livelihood. As such, while the Constitution recognises the right to life, it also recognises the special role of a woman in society and affords her rights against discrimination and to equality with men. These provisions have to be reconciled with each other and used as a guide in 'mainstreaming' the abortion question.

The Penal Code Act (PCA) has various provisions that speak to the position of abortion in Uganda. It provides, for instance, that

> [a]ny person who, with intent to procure the miscarriage of a woman … unlawfully administers to her or causes her to take any poison or other noxious thing … or uses any other means, commits a felony

The Penal Code Act makes several dangerous assumptions about abortion.

> and is liable to imprisonment for fourteen years (PCA, section 141).

This section of the Act makes several dangerous assumptions about abortion. First, it does not qualify the type of person referred to. In so doing, it fails to recognise persons with professional qualifications and experience, such as doctors and other medical officers. It conflates professionals with all other persons. Secondly, on the basis of this conflation, it implies that such persons, regardless of their professional qualifications or experience, have the intention of procuring an abortion – an act which is portrayed in a false negative light. The intention, indeed, may be to save the mother's life or to uphold the rights of the mother, among other things, an intention which is then put into practice by procuring an abortion.

Thirdly, the section assumes that abortion is a mode of family planning that is outlawed by the section. It is argued that abortion should not be seen as a form of family planning but as a mode of promoting the SRR of the woman. Therefore, this provision is based on assumptions that do not take into account the various circumstances that may inform a Ugandan woman's decision to procure an abortion.

A similar section provides:

> Any person who unlawfully supplies to or procures for any person any thing, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, commits a felony and is liable to imprisonment for three years (PCA, section 141).

Section 141 adds to the previous section by criminalising the actions of the person referred to therein. To reiterate, the two sections fail to capture the reasons that may lead a woman to procure an abortion. The cumulative effect of these two provisions is to discriminate against the woman on account of her sex and her need to decide when to have a child. This discrimination is further evident in the failure of the penal laws to appreciate the SRR of a woman, in view of the community's misconceptions about abortion.

Furthermore, the PCA provides that

> [a]ny woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means, or permits any such things or means to be administered to or used on her, commits a felony and is liable to imprisonment for seven years (PCA, section 141).

This provision criminalises a woman's attempt to procure an abortion on herself. While this is a good provision insofar as it criminalises abortion where a woman performs it herself, it fails to engage with the circumstances of the woman who has done so: there is a need to focus on the 'why' question.

The final provision in the Penal Code that deals with abortion states as follows:

> A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his or her benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time, and to all the circumstances of the case (PCA, section 224).

The wording of this section indicates that one has a defence, with regard to prosecution under the Act, where one can prove that one acted in good faith and with reasonable care in performing the operation to save a mother's life. What should be noted is that this section comes into effect after one has been arrested and perhaps prosecuted. As a result, the persons who have acted in good faith and with reasonable care are still subjected to the same process as those who have not exercised good faith, before the defence is engaged. This defence may not fend off possible conviction. It may instead be used to mitigate the sentence in terms of the length of imprisonment and the amount of the fine payable. The application of the

penal provisions results in practices that undermine the welfare and dignity of women in the field of reproductive rights. Consequently, the provisions fail to reflect the constitutional values that are ascribed to a woman.

Apart from the legal framework, the policy framework needs to be addressed as well. First, the National Gender Policy (NGP) recognises gender as a concept that is useful in understanding the social roles and relations of women and men of all ages and how these impact on development (NGP 1997). With regard to SRR, the NGP, at its core, has a specific strategy to develop and implement sexual and reproductive health rights programmes. It follows that reduction of the high teenage pregnancy rate, which addresses the discriminatory tendencies that the penal laws present, form part of this agenda.

On a positive note, the NGP recognises the high incidence of teenage pregnancies and the risks that arise for the health of the mother and child (NGP 1997). Given that Uganda is a signatory to the International Conference on Development and Population (ICDP), the policy reiterates the government's commitment to the promotion of sexual and reproductive health rights by putting gender relations at the centre of health and population interventions. The position consequently raises questions about Uganda's reservation with regard to the implementation of the Maputo Protocol. Furthermore, it questions the ability of the PCA to promote the SRR of women in view of the dangerous presumptions on which it is based. Therefore, while the NGP recognises the person of a woman and the particular realities she faces, the penal laws criminalise abortion. As such, the policy and the laws represent a parallel engagement in dealing with abortion in Uganda.

In addition, the Uganda National Policy Guidelines and Service Standards for Sexual and Reproductive Health Rights (GSS) were adopted to address all aspects of SRR. This was a broad-based approach that moved beyond a narrow engagement with family planning and maternal health (International Conference on Population and Development 1994). The GSS recognise that the prevention and management of unsafe abortion is a component of sexual and reproductive health (GSS 2006). While this is a welcome development, it should be recalled that the PCA does not provide for safe abortion. It criminalises the acts of the person and the woman without clarifying what constitutes safe or unsafe abortions, and generalises all acts of abortion as illegal.

The GSS provide for comprehensive abortion care services for a woman or a couple seeking advice or services for termination on grounds, for instance, of life-threatening maternal illness, severe foetal abnormalities, cervical cancer or HIV, or rape, incest and defilement (GSS 2006). This is a radical departure from the general provisions of the PCA, insofar as they acknowledge the various situations that may require a woman to terminate a pregnancy. In addition, the GSS are silent on the use of abortion as a mode of family planning. As with the NGP, the GSS embrace the constitutional values of non-discrimination, affirmative action and equality.

However, the implementation of these values is curtailed by the general criminal provisions of the PCA. Therefore, the simultaneous application of the legal and policy regimes entails a parallel application of the regimes that does little to harmonise the contradictory positions regarding the abortion question. This position is similar to that in other policy documents, such as the National Policy on Post Abortion Care (NPPAC) and the Africa Plan of Action for Abortion (APAA).

Dealing with misconceptions

Uganda's reservation to the Maputo Protocol encourages the continued use of penal laws to criminalise abortion in instances other than those that place the mother's life at risk. This position does not reflect the various realities a woman may be facing that lead her to take the decision not to keep the child. This shallow position is reflected in the moral, social, religious and cultural reasons for abhorring abortion without appreciating the circumstances of the woman. It is submitted that these reasons are dangerous assumptions that do not justify controlling a woman's reproductive health.

The effect of the current approach is that there are competing priorities – on the one hand, the societal need to control a woman's right to sexual and reproductive health, and on the other, the need to recognise a woman's realities – but at the moment, the former is upheld at the expense of the latter. This should not be the case; indeed, there is no need for competition: instead there should be a conversation that harmonises the reasons put forward by the 'competing camps' of societal needs and of the woman's realities.

Conclusion

Durojaye and Oluduro (2016) use an interesting principle to evaluate the African Commission's jurisprudence on the rights of women. They argue that the African Commission's development of jurisprudence on the rights of women requires that it not only ask the 'woman question' but the question that affects the 'African woman' (Durojaye & Oluduro 2016). When one asks the right question, the African woman has to be placed at the centre of any decision in the light of her realities. The realities of the woman should form the basis of the conversation, not the assumptions that are held by society. This approach will enhance the woman's ability to contribute more effectively – and equitably – to Uganda's economy.

Robert Doya Nanima is a doctoral (LLD) candidate and lecturer at the Faculty of Law, University of the Western Cape.

References

Ali D, Bowen D, Deininger K and Duponchel, M (2015) Investigating the ***Gender Gap in Agricultural Productivity: Evidence from Uganda.*** The World Bank

Author unknown (1987) 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights.' ***Human Rights Quarterly***, 9(2), pp. 122-135

Baderin MA (2005) 'Recent developments in the African regional human rights system.' ***Human Rights Law Review***, 5(1), pp. 117-149

Chenwi L (2013) 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance.' ***De Jure***, 46(3), pp. 742-769

Cleeve A, Faxelid E, Nalwadda G and Klingberg-Allvin M (2017) 'Abortion as agentive action: Reproductive agency among young women seeking post-abortion care in Uganda.' ***Culture, Health & Sexuality***, 19(11), pp. 1286-1300

Committee on Economic, Social and Cultural Rights (2015) Concluding observations on the initial report of Uganda. Available athttp://repository.un.org/handle/11176/312436

Durojaye E and Oluduro O (2016) 'The African Commission on Human and People's Rights and the woman question.' ***Feminist Legal Studies***, 24(3), pp. 315-336

Fukuda-Parr S, Lawson-Reme T and Randolph S (2008) ***Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfillment.*** Available at https://bit.ly/2N4ePhw

Gürsoy A (1996) 'Abortion in Turkey: A matter of state, family or individual decision.' ***Social Science & Medicine***, 42(4), pp. 531-542

Guttmacher Institute (2013) 'Abortion in Uganda: Fact sheet.' Available at https://www.guttmacher.org/fact-sheet/abortion-and-postabortion-care-uganda

Hunt P and MacNaughton G (2006) 'Impact assessments, poverty and human rights: A case study using the right to the highest attainable standard of health.' ***Health and Human Rights Working Paper Series 6***

Hussain R (2013) 'Unintended pregnancy and abortion in Uganda.' ***Issues in Brief (Alan Guttmacher Institute),*** (2), pp. 1-8

International Conference on Population and Development Programme of Action. Available at https://www.unfpa.org/publications/international-conference-population-and-development-programme-action

Kakaire Kirunda KA (2007) 'Uganda: Abortion complicates ratification of protocol on women's rights.' ***AllAfrica***. Available at http://allafrica.com/stories/200710301207.html

Kembabazi A (2016) 'The state of economic, social and cultural rights in Uganda and emerging issues.' Reproductive Health Matters. Joint Submission to the United Nations Universal Periodic Review (UPR) of Uganda. Available at https://bit.ly/2R1d2x8

Kyomuhendo GB (2003) 'Low use of rural maternity services in Uganda: Impact of women's status, traditional beliefs and limited resources.' ***Reproductive Health Matters***, 11(21), pp. 16-26

Larsson S, Eliasson M, Allvin MK, Faxelid E, Atuyambe L, and Fritzell S (2015) 'The discourses on induced abortion in Ugandan daily newspapers: A discourse analysis.' ***Reproductive Health***, 12(1), p. 58.

Moore AM, Jagwe-Wadda G and Bankole A (2011) 'Men's attitudes about abortion in Uganda.' ***Journal of Biosocial Science***, 43(1), pp. 31-45.

Mujuzi JD (2008) 'The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's reservations and interpretative declarations.' ***Law, Democracy and Development***, 12(2), pp. 41-61

Nabugoomu J (2018) ***Adolescent Maternal Nutrition and Health in Uganda: Voices from the Community.*** Available at https://bit.ly/2IjAiCz

National Baseline Survey (2009) ***Uganda Baseline Survey on the African Women's Rights Protocol – The Maputo Protocol.*** Available at https://www.akinamamawaafrika.org/index.php/publications/research-reports/42-maputo-baseline-survey/file

National Gender Policy (1997). Available at http://www.mglsd.go.ug/policies/Uganda-Gender-Policy.pdf

Ngwenya C (2016) ***Taking Women's Rights Seriously: Using Human Rights to Require State Implementation of Domestic Abortion Laws in African Countries with Reference to Uganda.*** Available at https://bit.ly/2N3eLyw

Nsibirwa MS (2001) 'A brief analysis of the Draft Protocol to the African Charter on Human and People's Rights on the Rights of Women.' ***African Human Rights Law Journal***, 1, pp. 40-64

Organization of African Unity (OAU) African Charter on Human and Peoples' Rights ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Available at http://www.refworld.org/docid/3ae6b3630.html

Rasch V and Lyaruu MA (2005) 'Unsafe abortion in Tanzania and the need for involving men in postabortion contraceptive counseling.' ***Studies in Family Planning***, 36(4), pp. 301-310

Salvatori Abuki and Another v Attorney General ((Constitutional Case No. 2 of 1997) [1997] UGCC 5 (13 June 1997)

Uganda National Policy Guidelines and Service Standards for Sexual and Reproductive Health Rights (GSS). Available at http://library.health.go.ug/publications/service-delivery-public-health/health-education/national-policy-guidelines-and-service

Uganda Poverty Assessment Report (2016) ***Farms, Cities and Good Fortune: Assessing Poverty Reduction in Uganda from 2006 to 2013***. Available at https://bit.ly/2zvmCS1

UN Commission on Human Rights (1987) Note ***verbale*** dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ('Limburg Principles'), 8 January 1987, E/CN.4/1987/17. Available at http://www.refworld.org/docid/48abd5790.html

UN Women (2015) ***The Cost of the Gender Gap in Agricultural Productivity in Malawi, Tanzania, and Uganda.*** Available at http://documents.worldbank.org/curated/en/847131467987832287/The-cost-of-the-gender-gap-in-agricultural-productivity-in-Malawi-Tanzania-and-Uganda

Worell J (ed) (2001) ***Encyclopedia of Women and Gender: Sex Similarities and Differences and the Impact of Society on Gender*** (vol. 2). Academic Press

World Bank (2016) 'Agriculture: A driver of growth and poverty reduction'. Available at http://www.worldbank.org/en/country/uganda/publication/uganda-poverty-assessment-agriculture-a-driver-of-growth-and-poverty-reduction

CASE REVIEW

Evictions and Tenure Security in South Africa: A Review of Baron and Others v Claytile (Pty) Ltd and Another (2017)

Gaopalelwe Lesley Mathiba

The main societal challenge causing instability in most areas of South Africa, especially in white commercial farms, is that the vast majority of black people continue to live under insecure tenancy on privately owned lands. The fact that the land is registered in their names and that they have title to the land confers on them a form of complete and unreserved power of disposal. This reasoning is informed mainly by the Roman-Dutch Law principle of dominium. In terms of this principle, the owner of the land has the unqualified discretion to evict anyone at any time, without even serving a notice, and to decide unilaterally who should reside on the land, for how long, and under what circumstances. Due to the absolute powers of ownership stemming from the dominium principle, large numbers of illegal evictions have been noted.

When tenants are evicted, they usually have no alternative place to resort and are thus compelled by the landlessness situation to submit themselves to the exploitative and inhumane demands of the land owners. This is so because, in the absence of capitulation on the victims' side, forced eviction is the unavoidable outcome. Upon eviction, these victims have nowhere else to go and suffer terrible hardships stemming from homelessness and destitution.

It is against this backdrop that this review discusses the judgment of the Constitutional Court handed down on 13 July 2017 in the case of Baron and Others v Claytile (Pty) Ltd and Another [2017] ZACC 24. Central to this judgment is a controversial interpretation of section 26 of the Constitution of the Republic of South Africa, 1996, with the controversy relating to what constitutes 'adequate accommodation' in eviction matters and what duty rests on the state to make alternative accommodation available to the person under threat of eviction. Moreover, the judgment has determined whether it is 'just and equitable' to evict applicants from privately owned dwellings in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA). It is important to note that the availability of alternative accommodation, it was argued, should be a precondition of granting an eviction order. This article looks at the historical context of evictions and the legislative framework governing them. It goes further to discuss the effects of the state's failure to fulfil its duty to provide alternative accommodation.

Forced evictions before the 1996 Constitution

According to Terreblanche (2002: 6), modern-day South Africa has been shaped by the intersecting histories of land, power and labour. Colonialism created a monopoly of economic power in which white farmers enriched themselves at the expense of natives from the mid-seventeenth century until the late twentieth century. Van der Walt (2005b: 285) points out that under the apartheid regime, a number of racially based laws regulating evictions were formulated and applied in a partisan fashion. Rugege (2004) argues that the apartheid land laws were framed in such a way that the idea behind was to impoverish and disrelish black people.

This is best illustrated by the infamous Natives Land Act of 1913, which contributed immeasurably to black economic downturn by bringing about the impoverishment of black society (Modise & Mtshiselwa 2013: 5). This legislation accomplished its purpose of pushing the vast majority of black South Africans off their aboriginal land titles and into farms owned predominantly by whites, where, under insecure tenancy, they were accommodated in structures that were inadequate. In the aftermath of this punitive history, the government adopted few legislative measures and policies to secure the tenure rights of farm dwellers as part of its national land reform programme (Hall 2013: 1).

It is noteworthy that during the apartheid regime, the remedy available to property owner faced with an unlawful occupant was the common law remedy of ***rei vindicatio*** ('action for vindication'), as opposed to the current remedy of eviction, a process normally carried out under strict judicial supervision through the courts in order to avert arbitrariness. According to Wilson (2009: 270), ***rei vindication***, as it was then interpreted, meant that the property owner had an absolute right to evict all unlawful occupants from his property at any time he so wished. It is also important to note that the latter eviction was undertaken regardless of the victim's housing needs and other personal circumstances which, upon proper consideration, might lead to the decision to evict being otherwise.

In the light of the above discussion on the past lawlessness, this article submits that this historic pattern was not a coincidence and arose very possibly because there was neither the constitutional right to adequate housing nor the duty on the state to provide alternative accommodation to the evicted, which could have served as a counterweight to the then owner's absolute property rights over the unlawfully occupied property (Van der Walt 1990: 32).

The constitutional and legislative framework on evictions

Section 26 of the Constitution affords everyone the right to adequate housing. This right, according to Hall (2013: 1), is the most contested and litigated socio-economic right in South Africa. The situation is the unavoidable outcome of South Africa's deeply unequal housing regime. Hall (2013: 1) goes further to observe that the black majority are denied access to adequate housing opportunities and other basic amenities of life, which has led to many underprivileged black households being exposed to unbearable hardships and perilous living conditions in the 'slums', over and above the constant risk of forced and illegal eviction.

The thrust of the argument in this case review is that section 26 of the Constitution, which affords everyone the right to adequate housing, is in stark conflict with the pervasive realities of forced removals, housing deficits and evictions; hence the right has been frequently invoked in courts during litigation, and hence there is an urgent need to devise proactive, programmatic and coherent responses to cases of evictions.

Analysis of the Baron case

In the ***Baron case***, the Constitutional Court had to clarify a matter concerning whether it is just and equitable to evict applicants, who were under insecure tenancy, from a privately owned property in terms of the ESTA, notwithstanding the

> **The court ignored the possibility of homelessness after granting the eviction order.**

non-availability of alternative accommodation. The employer, Claytile (Pty) Ltd, sought an order evicting its former employees from its private units prior to the termination of their employment contracts, and this was in accordance with the provisions of ESTA. Subsequently, an eviction order was granted and later confirmed by the Land Claims Court. However, the applicants refused to vacate the private dwellings of their former employer (Claytile) because, had they done so, it would have resulted in their being homeless. Furthermore, it must also be borne in mind that by then the legal basis of the applicants' occupation, namely the employment relationship with the respondent (Claytile), was terminated. To that end, two main shortcomings have been noted from this judgment.

First, in terms of section 26(2) of the Constitution, the responsible municipality (state), in this case the City of Cape Town, had a duty to provide alternative accommodation to the applicants upon their eviction, based on its available resources. However, the municipality failed to fulfil this constitutionally imposed obligation. For the duration of this impasse, the employer (Claytile) was then implicitly forced to accommodate the applicants (unlawful occupants) on its private dwellings until the municipality fulfilled its obligation, since there was no way they could vacate in the absence of alternative accommodation.

Secondly, section 26(3) of the Constitution is clear that eviction can be effected only through a court order, which can be granted or refused, after the court has taken into consideration relevant circumstances. Moreover, the eviction sought must not be effected in an arbitrary manner. In the light of this case, one of the relevant circumstances that the court of first instance ignored was the possibility of homelessness after granting the eviction order; this notwithstanding, the court went on to grant an order. This raises the question as to how this was possible, given the fact that legislative protection was in place which strongly prohibits illegal evictions. It is due to this blunder that this article finds repugnant the flawed decision of the Constitutional Court to confirm the validity of an eviction order which was granted without all relevant circumstances being taken into consideration, as required by the Constitution.

In line with the foregoing discussion, two observations may be made. At first, as a result of the municipality's failure to provide alternative accommodation, the property owner's right, in terms of section 25(1) of the Constitution, to not be arbitrarily deprived of his property, was hampered, raising the question of whether such hampering was just. In this regard, one could argue that the burdening of the property owner by the municipality was legally unjustified since the obligation in section 26(3) is not a shared one.

Secondly, it is evident from the facts of the case that the municipality had later made an offer to the applicants of alternative accommodation at Blikkiesdorp. However, the applicants rejected the offer, arguing that it was not suitable and adequate in comparison to the dwellings they were unlawfully occupying at that stage, since the accommodation offered at Blikkiesdorp had no electricity and was far from basic services such as schools and health-care centres. In this regard, the question that ultimately arises is, In terms of which structure and/or criteria is the adequacy of alternative accommodation assessed? Is the benchmark of adequacy not set by the property from which the victims have just been evicted?

Be that as it may, this article holds a 'stubborn' view that the Constitutional Court did not delve deep in providing much-needed clarity on the two questions raised above and on how one can strike an equitable balance between, on the one hand, applicants

who are on the verge of being rendered homeless and, on the other, respondents who are denied the undisturbed enjoyment and use of their property.

Conclusion

The task of interpreting eviction laws and harmonising competing rights often falls exclusively to the courts. However, the courts have been indecisive in their interpretation of the 'relevant circumstances' to be considered before an eviction order can be granted, and have also been unclear on what exactly one should prove, or what key considerations one may argue, to establish whether the granting of an eviction order will be 'just and equitable'. It is only after the judgment in the ***Baron*** case that the Constitutional Court attempted to shed light on how the latter indecisiveness can be averted, although the justification demonstrates the misdirection of law. Despite the latter incongruities, the ***Baron*** judgment is important in two respects.

In the first instance, it elaborates at length on the circumstances under which an eviction can be said to be 'just and equitable' in the absence of alternative accommodation, and it goes further to consider what constitutes 'suitable adequate housing' on eviction matters. Secondly, the judgment highlights that the constitutional obligation on the state to provide alternative accommodation to those faced with eviction is not a shared obligation with private citizens but it is meant to be fulfilled exclusively by the state.

To that end, this article is of the view that eviction order should not be granted if the person against whom it is sought will end up being homeless. Moreover, this article further suggests that an eviction order should always be kept at halt, pending the availability of alternative accommodation, unless there is a strict urgency to divert. It is submitted that the latter will not be unjustly depriving the owner of his ownership rights over an unlawfully occupied property since property rights are not absolute and are subject to limitation, given the nature of the right it competes with. The right to adequate housing is inseparable from a number of other rights, such as the right to human dignity, freedom of security of person and freedom of residence, and hence it should be given effect over ownership rights.

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References

Baron and Others v Claytile (Pty) Ltd and Another [2017] ZACC 24

Constitution of the Republic of South Africa, 1996

Extension of Security of Tenure Act 62 of 1997

Hall R (2013) 'Evaluating land and agrarian reform in South Africa' ***PLAAS***, pp. 1-50

Modise L and Mtshiselwa N (2013) 'The Natives Land Act of 1913 engineered the poverty of black South Africans: A historico-ecclesiastical perspective.' ***Studio Historiae Ecclesiasticae***, 9(2), pp. 359-378

Natives Land Act of 1913

Rugege S (2004) 'Land reform in South Africa: An overview.' ***IJLI,*** pp. 1-28

Terreblanche S (2002) ***A History of Inequality in South Africa 1652-2002.*** Durban: University of Natal Press

Van der Walt AJ (1990) 'Towards the development of post-apartheid land law: An exploratory survey.' ***De Jure,*** 23, pp. 1-45

Van der Walt AJ (2005a) 'The state's duty to protect property owners v the State's duty to provide adequate housing: Thoughts on the ***Modderklip*** case.' ***SAJHR,*** 21, pp. 144-161

Van der Walt AJ (2005b) ***Constitutional Property Law***. Claremont: Juta

Wilson S (2009) 'Breaking the tie: Evictions from private land, homelessness and a new normality.' ***SALJ,*** pp. 270-290

EVENTS

Roundtable on States' Obligations to Realise the Right to Health

On 12 April, 2018, the Socio-Economic Rights Project at the Dullah Omar Institute at the University of the Western Cape held a roundtable entitled 'Deconstructing States' Obligations to Realise the Right to Health'. In his introductory statement, Ebenezer Durojaye noted that there are problems with the nature of state obligations as defined by the CESCR, particularly regarding the reality of states' capacity to meet the minimum core obligations. Unending questions are 'what are these minimum cores?', 'how can their realisation be measured?' and 'how, and on what basis, are they achievable?'

There is also the issue of state accountability in relation to obligations to realise the right. In essence, what is the meaning of accountability and who can be held accountable for the fulfilment of the right to health as well as its violation? The role of the regional human rights bodies in ensuring the realisation of the right to health is also an important area of concern. These are issues which the panel sessions and discussions sought to answer.

The keynote address was delivered by Commissioner André Gaum of the South African Human Rights Commission. He noted that the Commission, one of the institutions created by Chapter 9 of the Constitution, has its mandate in section 184 of the Constitution (1996), which is to monitor compliance with the observance of human rights and secure redress in case of a human rights violation. Through its investigative functions, the Commission has been able to uncover several violations of human rights, including those of the right to health. The latter is one of the most important socio-economic rights recognised in the Constitution. Everyone has the right of access to health-care services, including reproductive health care, as well as other determinants of good health, such as food, water (section 27(2)) and adequate housing (section 26). Also, no one may be refused treatment in case of an emergency (section 27(3)).

The commitment of the government of South Africa to reengineering the health-care system is demonstrated by the introduction of a national health insurance programme aimed at promoting universal health coverage as well as by the establishment of the office of health standards and compliance responsible for ensuring that health facilities comply with norms and standards. South Africa has also made progress in providing access to primary health care.

The Commissioner noted some successes recorded by the government in the realisation of the right to health. These include the building of hospital facilities, the significant reduction in maternal and child mortality rates, increased access to anti-retroviral drugs, declining rates of HIV transmission from mother to child, increased life expectancies, and an overall improvement in access to primary health care.

However, despite receiving the second largest share of the budget, health outcomes remain poor and the health-care system continues to face multiple challenges, among them a shortage of human resources, poor management, underfunding, and deteriorating infrastructure. There have also been declining levels of community participation, spiralling costs in the private health-care sector, delays in service delivery, long waiting times, medicine stock-outs – mostly in rural health care facilities, especially in the Eastern Cape and KwaZulu-Natal – as well as concerns about cleanliness, safety and security, and disregard of patients' rights. All of these are frequently cited as major issues.

Some questions the Commissioner thought needed

to be answered are: What does section 27(3) regarding non-denial of access to emergency medical treatment mean? What are the parameters of acceptability and quality of care? This was one of the core issues emanating from the inquiry into access to health-care services, which emphasises the fact that policies are needed to guide the provision of services in order to prevent the perverse form of rationing and unequal access to health-care services.

In 2015, the Commission also conducted a provincial hearing on access to emergency medical services in the Eastern Cape. What was discovered were transport problems and an insufficient number of operational ambulances due to poor planning, funding and lack of accountability. Poor road networks also led to delays in the arrival of ambulances. Ambulances lack basic equipment and supplies, and staff are not adequately trained to respond to emergency cases. Policies lack a human rights approach, which, when combined with other factors, leads to a denial of health-care services. The Commission is working with the Department of Health to address these problems.

The panel session was moderated by Leslie London, a professor and chair of public health medicine in the School of Public Health and Family Medicine at the University of Cape Town. He is an active researcher in the field of occupational and environmental health research, and leads the health and human rights programme in the School, which has a broad research and training mandate addressing health as a socio-economic right and examining human rights and ethical issues in relation to the practice of health professionals. The panellists were Lisa Forman of the University of Toronto; Daphine Agaba of the School of Public Health, University of Western Cape; and Ciara O'Connell of the Center for Human Rights at the University of Pretoria.

Professor Forman's presentation focused on the evolution of core obligations as well as on trends in concluding observations and their implications for core obligations. Given the provision of article 2 of the ICESCR, the obligation of the state as defined by the Committee is limited largely to the progressive realisation of the right to health. Due to the challenges in realising socio-economic rights, including the right to health, it becomes necessary to define the obligations of states in a way that will protect the rights of the people, especially vulnerable groups in society. The Committee has noted that if the obligation of states is limited by progressive realisation, there needs to be something more fundamental that is protected. In order words, governments will not be permitted to deny access to health-care services simply based on non-availability of resources. This has brought to the fore the idea that the core content or obligation should reflect the most essential part of the rights – parts so fundamental that if they are denied, the essence of the right is defeated.

The problem with the reasonableness standard is that it could engender real deprivation.

Another issue Professor Forman noted with regard to core obligations as defined by the Committee is that they are non-derogable (General Comment 14, 2000). She maintains that strict standards may not be feasible in low-income settings. The definition of core obligations has a contrasting definition at the domestic level. Latin American Courts (Colombia, Costa Rica) define the essential minimum core of the right to health irrespective of resource constraints and budgetary impacts. The South African court, by contrast, has rejected core obligations in favour of a reasonable standard focused on the urgent needs of the poor (as in the ***Grootboom*** and ***TAC*** cases). This standard requires the state to act reasonably in the realisation of socio-economic rights.

Professor Forman believes, however, that the problem with the reasonableness standard is that it could engender real deprivation, as happened in the ***Mazibuko*** decision (2013) in which a water policy that deprived 100,000 households in Johannesburg of access to water was considered reasonable.

Dr Daphine Agaba's presentation dealt with the prevalence of maternal mortality in different parts

of the world and emphasised the disparity between high- and low-income countries. She highlighted the human rights issues associated with maternal mortality, stressing that timely access to reproductive health care is an important means of preventing maternal mortality and that states had to be held accountable for their obligations in this regard.

Accountability is a core human rights principle, as various human rights documents make clear. For instance, the CESCR General Comment 22 emphasises that it is key for the realisation of sexual and reproductive health and rights (2016). Describing accountability as concerned mainly with limiting or restraining power, Dr Agaba said it entails conducting regular bottom-up diagnostic exercises to identify systemic blockages that hinder women in giving birth safely and to provide feedback prompting action that addresses these blockages.

Accountability involves ensuring that duty-bearers or public officials are answerable for their actions, make citizens aware of their decisions, and, where necessary, are sanctioned for them. It is a process that goes beyond mere supervision or monitoring to include the development of guidelines, protocols or institutions by which standards of performance can be measured. In this way a system is established to make duty-bearers more responsive to rights-holders. Accountability is thus not solely focused on assigning blame; rather, it entails responsibility, answerability and enforcement.

In her presentation, Dr Ciara O'Connell examined approaches that have been adopted in the Inter-American System of Human Rights (ISHR) to realise rights to health. After giving an overview of the ISHR, she focused on two approaches for developing the justiciability of the right to health. The first is direct protection, which entails realising the right to health in the American Convention and the Protocol of San Salvador. The other approach is an indirect method that involves using the civil and political rights enshrined in the American Convention to argue for socio-economic rights.

With regard to the right to life with dignity, Dr O'Connell referred to the case of ***Street Children (Villagran-Morales et al) v Guatemela*** (1999) in which the Inter-American Court stated that the right to life concerns not only the right all persons have not to be deprived of life arbitrarily but the right to have access to the conditions necessary for leading a dignified life.

Similarly, in ***Yakye Axa Indigenous Community v Paraguay*** (2006), which dealt with indigenous people who had been forced out of their ancestral lands and were living in deplorable conditions, the Court said the state had failed to adopt the positive measures that were necessary to ensure the community lived under dignified conditions while its was without its land. The Court concluded that the state has the obligation to adopt positive measures promotive of a dignified life; this is particularly so when high-risk, vulnerable groups are at stake – their protection then becomes a priority.

References

CESCR General Comment No. 22 on the right to sexual and reproductive health (2016)

Committee on Economic, Social and Cultural Rights General Comment 14 on the right to the highest attainable standard of physical and mental health (2000)

Constitution of the Republic of South Africa, 1996

Government of the Republic of South Africa v Grootboom CCT11/00) [2000] ZACC 19; 2001 (1) SA 46

Mazibuko and Others v City of Johannesburg 2013 (6) SA 249 (CC)

Minister of Health v Treatment Action Campaign (2002) 5SA 721 (CC)

Street Children (Villagran-Morales et al) v Guatemela IACtHR November 19 1999

Yakye Axa Indigenous Community v Paraguay IACtHR 6 February 2006.

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