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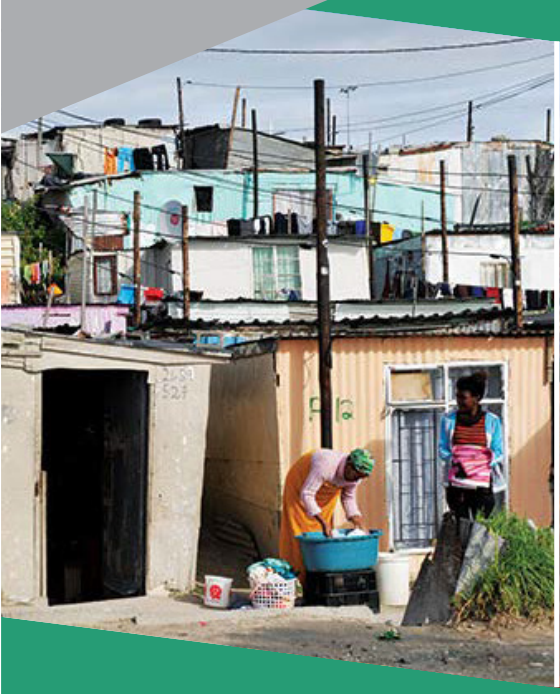

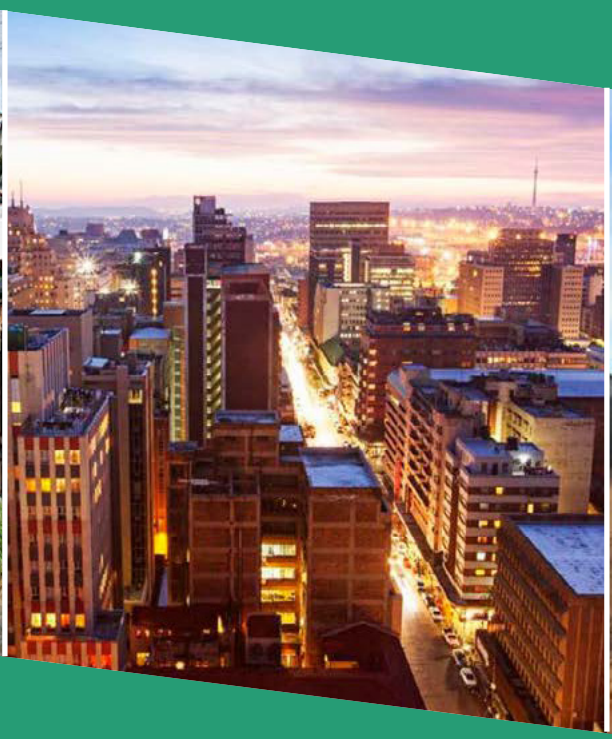

ESR REVIEW

Economic & Social Rights Review in Africa

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

SPECIAL EDITION ON ACCESS TO JUSTICE

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CONTACT

Socio-Economic Rights Project

Dullah Omar Institute for Constitutional Law, Governance and Human Rights.

University of the Western Cape, New Social Sciences Building. Private Bag X17, Bellville, 7535

Tel: (021) 959 2950
Fax: (021) 959 2411
Email: serp@uwc.ac.za
Website: https://dullahomarinstitute.org.za

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Editorial

Welcome to the third issue of *ESR Review* of 2021 and the sixth in our series with a special focus on access to justice. Apart from being a fundamental human right, access to justice is a basic principle of the rule of law, and is crucial to the realisation of sustainable development. Hence, as we said in our previous issue, the 2030 Agenda for Sustainable Development, and in particular the Sustainable Development Goal 16, underscores the need to build peaceful, just and inclusive societies that provide equal access to justice for all and which are based on, inter alia, respect for human rights and effective rule of law.

However, limited access to justice remains a threat to sustainable development, and the Covid-19 pandemic threatens to exacerbate this challenge. In addition to being a health crisis, the Covid-19 pandemic is a justice and human rights crisis (Adil and Deramaix 2020). The impact of the pandemic, and of states' responses to addressing it, have implications that affect, among other human rights, people's ability to access timely, fair and effective justice (UNDP and UNODC 2020).

The pandemic has not only given rise to 'justice "needs"', such as addressing gender-based violence and undertaking additional reforms to strengthen the effectiveness of the justice chain in a radically shifting context, but has also placed children, LGBTI persons, women, persons with disabilities, older persons and displaced populations, amongst other groups in society, in more vulnerable or disadvantaged positions (UNODC and UNDP 2020).

As the United Nations notes, 'In the absence of access to justice, people are unable to have their voices heard, exercise their rights, challenge discrimination or hold decision-makers accountable.' Access to justice is also 'critical for the preservation of physical integrity' (UNODC and UNDP 2020).

Stronger and more effective efforts are thus required in order to ensure equal access to justice for all. Also, there is the need to ensure that responses to Covid-19 are not delinked from the SDGs (Heggen, Sadset and Engebretsen 2020). Thus, responses to the pandemic should not impede access to justice and sustainable development. SDG 16, for example, provides an inimitable opportunity to enhance the realisation of access to justice, and to strengthen rule-of-law efforts in relation to access to justice for children, LGBTIQA+ people and other groups in society. Similarly, SDG 6 provides an opportunity to improve the realisation of access to water, which has been impacted by Covid-19 in many states, including those in Africa.

The first feature in this issue, by Robert Doya Nanima, considers the role of the African Committee of Experts on the Rights and Welfare of the Child in the realisation of SDG 16.3 for children. He highlights the normative and jurisprudential framework of the Committee that harnesses the realisation of SDG 16.3 indicators.

The second feature, by Busangokwakhe Dlamini, examines the nexus between human rights and access to justice for LGBTIQA+ people. The author notes, among other things, that progress in implementing SDG 16 'is bound to be thwarted by discrimination on the basis of sexual orientation in South Africa'.

The third feature, by Louisa Madeleine Schmiegel, considers the realisation of SDG 6 – access to clean, safe (drinking) water – for residents in the township of Khayelitsha, in Cape Town, South Africa. She highlights the negative effects that a lack of access to sufficient water (a daily challenge for the residents) has on food security, health, livelihood choices and educational opportunities.

The fourth feature, by Paul Mudau and Nomzomhle Kona, examines the legal, institutional and structural challenges faced by the City of Tshwane Metropolitan Municipality in the implementation of informal street trading as it pertains to its urban poor. The authors draw attention to possible solutions to the challenges.

We hope you will find this issue both stimulating and useful in the struggle for the realisation of SDG16 in Africa, and beyond. We wish to thank our anonymous peer reviewers, and our guest authors, for their insightful contributions.

Prof Lilian Chenwi, Guest Editor

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FEATURE

Towards the Realisation of SDG 16.3 on Access to Justice: Contextualising the Role of the ACERWC

Robert Doya Nanima

Introduction

The 2019 Africa-Asia High-Level Political Forum (HLPF) in Johannesburg, South Africa, reflected on the status of, and challenges to, access to justice. The participants at the Forum comprised various stakeholders such as governments, academia, the judiciary, practitioners and civil society organisations. The Forum highlighted the need to aid the marginalised population, including the African child, by improving access to justice in our communities. The importance of ensuring 'access to justice for all' in achieving sustainable development is highlighted in Goal 16 of the Sustainable Development Goals (SDGs).

This article evaluates the role that the African Committee of Experts on the Rights and Welfare of the Child (the Committee, or ACERWC) plays in the African human rights system in regard to the achievement of SDG 16.3. In particular, it provides a contextual evaluation of the normative and jurisprudential framework of the ACERWC, along with various recommendations.

The SDGs were adopted in 2015, following the expiry of the eight Millennium Development Goals (UNHCR 2017). They are a set of 17 global goals adopted by the United Nations (UN) General Assembly in 2015, to be achieved by 2030, and clustered into 169 targets and 232 indicators (UNHCR 2017). This contribution interrogates SDG 16 on the promotion of 'peaceful and inclusive societies for sustainable development', the provision of 'access to justice for all' and building 'effective, accountable and inclusive institutions at all levels'. While this SDG has 10 indicators, the emphasis here is on target 16.3, which relates to the promotion of the rule of law at both national and international levels, and the need to ensure equal access to justice for all.

An overview of SDG 16.3

From a theoretical perspective, SDG 16.3 targets the promotion of the rule of law, at both national and international levels, and the need to ensure equal access to justice for all. Two indicators inform this target (UNHCR 2017). These are, first, the proportion of victims of violence in the previous 12 months who reported their victimisation to competent authorities or other officially recognised conflict-resolution mechanisms, and secondly, the number of detainees who have not been sentenced, as a proportion of the overall prison population.

To engage with the first indicator under SDG 16.3, states should report on the number of victims who have either reported or not reported incidents. This has been identified as a challenge in some states such as Sierra Leone, Liberia and Thailand (Smits, Conolly & Sluijs 2017). For instance, in Sierra Leone, it was argued that different rates showed either a lack of trust in authorities, or cultural differences, at various local governance

levels (Smits, Conolly & Sluijs 2017). Furthermore, the National Statistics Offices did not have the necessary technological, financial and human resource capacities to collect and analyse the data.

There is also a need for competent authorities or other officially recognised conflict-resolution mechanisms to which to submit reports. Some states have identified a single or systematic data gathering and reporting mechanism (Sa-ardyen 2016). Concerning the second indicator, states need to specify the proportion of detainees who have not been sentenced in relation to the overall prison populations; this could be done through the establishment of clear benchmarks concerning the lengths of detention and the protection of rights of the detainees (Sa-ardyen 2016).

Poverty and its eradication were identified as key factors that affect access to justice.

From a practical perspective, various steps have been taken by stakeholders to aid the realisation of SDG 16.3. This has been through workshops taking stock of the Voluntary National Review(s) (VNR) and steps by stakeholders, such as the judiciary, the police, legal aid, prosecution and civil society organisations (DOI 2019) in the justice and law and order sectors. The most recent of these in Africa was the HLFP workshop for Africa and Asia, which took place in Johannesburg from 27-29 March 2019 (DOI 2019).

Various matters were identified as priorities for action. These included the positioning of the judiciary as an instructive institution concerning access to justice (DOI 2019). The National Prosecuting Authority, the Attorney-General's Office, the police, and the legal aid office should take note and make an effort to implement this. Poverty and its eradication were identified as key factors that affect access to justice.

Some of the challenges that were identified included an adversarial judicial system that fails to offer solutions to the parties concerned, as well as the lack of practices to reflect the constitutional grounding of access to justice, the technicalities in the judicial process and the lack of human resources to cater for problems of access to justice (DOI 2019). One key dimension missing from the engagement with SDG 16.3 is the position of the child as a crucial agent in the SDG Agenda. In view of the identified role of the Committee in the SDG Agenda within the Agenda 2063 and Agenda 2040 frameworks, the steps towards the improvement of the person of the child in this context need to be unpacked.

The role of the ACERWC in the SDG Agenda

The Committee was established by the African Charter on the Rights and Welfare of the Child (the Charter or ACRWC), with the mandate of promoting and protecting the rights and welfare of the child. It is expected to 'collect and document information, commission inter-disciplinary assessment ... organize meetings ... and give its views and make recommendations to Governments' (article 42(a)(i), ACRWC). It may also 'formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa (article 42(a)(ii), ACRCW). Its other function is to consider communications from individuals and State Parties on alleged human rights violations and to undertake investigative missions. The question is how the mandate of the Committee relates to the SDG Agenda.

The African Union has adopted a 50-year plan, called 'Agenda 2063', to transform Africa into a global powerhouse of the future, to spur economic growth, and to improve the standard of living for all persons on the continent (AU 2013). Agenda 2063 aims to bring about inclusive and sustainable development and is a concrete manifestation of the pan-African drive for unity, self-determination, freedom, progress and collective prosperity pursued under pan-Africanism and the African Renaissance (AU 2013). Agenda 2063 identifies seven priority areas; priority area 6 hinges on the mandate

of the Committee (DeGhetto, Gray & Kiggundu 2016). This priority area speaks to an Africa whose development is people-driven, relying on the potential of the African people, especially its women and youth, and which cares for children (NEPAD 2019). Although Agenda 2063 clearly identifies the efficacy of the Committee in assisting the realisation of SDG 4 and 5, there is a need to interrogate whether the Committee has a role to play concerning SDG 16.3.

Following the adoption of Agenda 2063, the Committee adopted Agenda 2040 as a result of the conclusions of a High-Level Conference held in Addis Ababa on 20-21 November 2015 (ACERWC 2016). The Committee has developed 10 aspirations; access to justice is embedded in aspiration 8, which states that children have to benefit from a child-sensitive criminal justice system.

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The Charter's normative and jurisprudential framework

For the Committee to carry out any activities, a normative mandate has to be provided for in the Charter. This normative mandate is provided for under article 42, which includes the promotion and protection of the

This priority area speaks to an Africa whose development is people-driven, relying on the potential of the African people, especially its women and youth, and which cares for children (NEPAD 2019).

rights in the Charter, monitoring the implementation of the Charter, and interpretation of the provisions therein. It can be argued that the SDGs are not explicitly provided for in the Charter. (It should be recalled that the SDG Agenda started in 2015, 25 years after the adoption of the Charter.) However, the Charter, under article 46, allows the Committee to draw inspiration from other sources of international and regional human rights law. As such, any inspiration that promotes the child-rights agenda may be a source of inspiration for subsequent application by the Committee.

An interrogation of the normative and jurisprudential framework is key to understanding the fusion between the work of the Committee and the SDGs. The link between SDG 16.3 and the African Children's Charter has to be evident in the normative, jurisprudential and other activities of the ACERWC. This section interrogates the normative and jurisprudential framework of the ACERWC, on one hand, and the target and indicators of SDG 16.3, on the other.

> **...that the child shall be informed of the nature of charges in a language he or she understands;**

The Charter places an obligation on State Parties to recognise the rights and freedoms and duties enshrined therein and take steps to realise them. This provision speaks to the general realisation of SDG 16 that requires State Parties to develop effective, accountable and transparent institutions at all levels. Concerning SDG 16.3, several articles in the African Children's Charter provide for it. To this end, article 17(1) of the ACRWC provides that every child who has been accused or found guilty of a criminal offence shall be accorded special treatment 'in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others'.

States are also required to promote the rule of law at national and international levels, and ensure equal justice for all. This is applies before and during a trial, and when sentencing takes place.Concerning the pre-trial and the post-trial process, article 17(2)(a) requires that State Parties ensure that no child who is detained, imprisoned or otherwise deprived of his or her liberty is subjected to torture, inhuman or degrading treatment, or punishment. Also, article 17(2)(d) requires that states ensure that children are separated from adults in their place of detention or imprisonment. Article 17(4) requires State Parties to prescribe a minimum age to guide the presumption of criminal responsibility.

> **The state is assessed on how it has upheld its obligations concerning children generally,...**

With regard to the course of the trial, article 17(2)(d) of the Charter prohibits the attendance of the press and public from the trial. Various guarantees are provided for in article 17(2)(c), such as the presumption of innocence until proof of guilt; that the child shall be informed of the nature of charges in a language he or she understands; and the provision of appropriate legal assistance in the preparation and presentation of his or her defence.

Another requirement is the obligation to have the matter determined as speedily as possible by an impartial tribunal; where the accused is found guilty, he or she is entitled to an appeal to a higher tribunal. Concerning sentencing, article 5(3) prescribes that the death sentence shall not be pronounced for crimes committed by children. In addition to the post-trial guarantees reiterated under the pre-trial discussion, article 17(3) of the Charter underscores the use of reformation, reintegration into the family, and social rehabilitation for a child in conflict with the law.

Concerning jurisprudential developments, this contribution evaluates some of the concluding observations on the state reports to the Committee. This is because there are no General Comments that deal with access to justice for children in conflict with the law. An evaluation of decisions that engage the thematic aspects of SDG 16.3 is instructive in getting the correct picture. The Committee has handed down 10 decisions since its inception (ACERWC 2019). Six of these decisions were

decided from 2015 to date, a period of four years following the adoption of the SDG Agenda. However, none of these decisions refer to access to justice. This is largely due to the nature of the communications that have been brought to the Committee, in that they do not present a child who is or has been in conflict with the law, and has been through the pre-trial, trial or the post-trial period (ACERWC 2019).

> **Concerning sentencing, article 5(3) prescribes that the death sentence shall not be pronounced for crimes committed by children.**

Despite this challenge, the Committee's recommendations in *MRGI and another v Mauritania (2018)* and IHRDA v Cameroon (2018) are instructive. In both cases, the Committee reiterates the principles of the best interests of the child and due diligence as components that inform the protection of the rights of a child. In Mauritania, the Committee uses the best-interests principle as a gap-filling tool. To this end, the position of the victim is an indication of the state's failure to comply with the principle, and the need is for the Committee to advise on the desired position. In the two decisions (*Mauritania*, paras 47-58; *Cameroon,* para 46-57), the Committee incorporates the due diligence principle for State Parties. The state is assessed on how it has upheld its obligations concerning children generally, and the steps it has taken to protect the rights of the child or children who are before the Committee seeking redress. As such, the state has to show the concrete steps that have been taken to uphold the rights of the victim, rather than abstract steps that are based on general attempts to uphold its obligations.

Although these cases did not deal with access to justice of a child in conflict with the law, the two principles indicate that a higher standard is expected of State Parties concerning the protection of the child. This leads to the question of whether they can be used to add value to access to justice regarding a child in conflict with the law. This question can be interrogated through the evaluation of other activities of the Committee.
The Committee has considered 55 periodic reports since its inception, 11 of which have been considered between 2015 and the present (ACERWC 2019). A search on the Committee's website indicates that the two concluding observations of Angola and Cote d'Ivoire are not accessible, and two others are in French. Therefore this contribution evaluates the seven concluding observations on Algeria, Lesotho, Zimbabwe, Namibia, Madagascar, Gabon and Sierra Leone (ACERWC 2019). The contribution evaluates selected sections of four states, as discussed below.

The concluding observations and recommendations by the Committee on the report by Algeria do not engage the direct use of the SDGs. A close reading, however, implies three recommendations in relation to SDG 16.3. First, in paragraph 37, the Committee recommends that the State Party provides mechanisms and structures outside the prison to take care of minors in conflict with the law, and, where detention is inevitable, that minors are detained separately from adults in all correction facilities in the country. In addition, the Committee recommends that Algeria establish child-friendly courts within the juvenile justice system. This is reiterated in paragraphs 46 and 47 of the ACERWC's concluding observations on the report of Gabon, paragraphs 42 and 44 of its concluding observations on Madagascar (ACERWC 2018), and paragraph 49 of its recommendation and concluding observations on Lesotho.

> **This shows that the monitoring role of the Committee has influence in ensuring that the goals of SDGs are realised.**

The point of departure in the observations on Lesotho is that the state is required to apply non-custodial sentencing and train judges, prosecutors and police in the rehabilitation and reintegration of juvenile offenders (ACERWC 2018). This shows that the monitoring role

of the Committee has influence in ensuring that the goals of SDGs are realised. In addition, the Committee recommends a shift from the presumption of lack of criminal capacity for children between 10 and 14 years to compliance with the international standard of the age of 12 (ACERWC 2018).

With regard to Madagascar, the Committee reiterates that pre-trial guarantees do not relate to actual detention, but rather to the need to avoid the subjection of homeless children to arbitrary justice (ACERWC 2018). This shows that the indicators that speak to SDG 16.3 may be limited in scope and that some of these recommendations, when engaged with by State Parties, do aid the realisation of the SDGs.

The Committee on the Rights of the Child has given some insight on the SDG Agenda. In its concluding observations, it has called on a State Party to ensure the meaningful participation of children in the design and implementation of policies and programmes that are geared towards achieving the SDGs (CRC 2020; CRC 2020b). Concerning SDG 16, it is worth noting that most of the reflections by the Committee in these recent concluding observations have been on the need for State Parties to deal with corporal punishment under SDG 16.2 (CRC 2020; CRC 2020b).

Conclusion and recommendations

The Committee plays a key role in the realisation of SDG 16.3 regarding children. Various provisions in the Charter that speak to the pre-trial, trial and post-trial guarantees of a child in conflict with the law make use of SDG 16.3 indicators. Some of the limits on the indicators can be complemented by the monitoring and implementation of guarantees by the Committee. There is a need for synergy between the activities of the HLPF and the Committee for the sake of realising SDG 16.3.

Dr Robert Doya Nanima is a Senior Lecturer in the Department of Criminal Justice, Faculty of Law, University of the Western Cape.

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FEATURE

The Nexus between Human Rights and Access to Justice for LGBTIQA+ People

Busangokwakhe Dlamini

Introduction

After a legacy of colonialism and apartheid, South Africa in 1994 became a democratic nation in which all its citizens were granted the right to partake in all spheres of life equally. The Constitution of South Africa, described as one of the most progressive, transformative, and gender-sensitive in the world (Kibet & Fombad 2017; Mohamed 2017; Rapatsa 2014), does not seem to deter discrimination against LGBTIQA+ people.

Section 9 of the Constitution enshrines the right to equality and non-discrimination for all. In terms of this right, '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including ... sexual orientation'. This also means that no individual is allowed to discriminate on the basis of sexual orientation.

The progress made by United Nations (UN) member states in implementing Goal 16 of the Sustainable Development Goals (SDGs) is hindered by discrimination on the basis of sexual orientation, which seems to continue. This article explores why this is the case. The exploration is made in the context of 25 years of democracy in South Africa, as well as the inaugural evaluation of progress made by UN member states in implementing Goal 16 of the SDGs. Discrimination on the basis of sexual orientation seems to continue, having a far-reaching effect and making those affected particularly vulnerable.

Why discrimination seems to persist

Apathy is one factor that perpetuates discrimination on the basis of sexual orientation. 'Apathy' is defined by the *Cambridge Advanced Learner's Dictionary* (2008) as a noun meaning 'when someone shows no interest or energy and is unwilling to take action, especially over something important'. The *Oxford Learner's Dictionary of Current English* (1974) says it is 'absence of sympathy or interest' or 'indifference'. This indifference is fed by a lack of awareness of the impact that every citizen can make once they show interest in another, and are willing to take action over the wrongs they see perpetrated against members of their communities.

In South Africa, the majority of people have fresh and vivid memories of racial oppression and are enor-

> **...'[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including ... sexual orientation'.**

mously sensitive to the question of discrimination in the context of sexual orientation. One might have expected them to be willing to take action whenever, wherever, and in whatever form discrimination rears its head. This, however, is not true in the case of sexual orientation. The will is absent.

This unwillingness to take action has its root in heterocentrism, also called heteronormativity and/or heterosexism. This is the assumption or conviction that all people are heterosexual and that heterosexuality is the normative form of human sexuality (Goss 1993; Jung & Smith 1993). It denotes prejudice in favour of heterosexual people. All other forms of sexual expression or orientation are regarded as deviant. Heterocentrism is the measure by which all other sexual orientations are judged. Sexual authority, value, and power are centred in heterosexuality.

This is rooted in a largely cognitive constellation of beliefs about human sexuality and may be described as a 'reasoned' system of bias regarding sexual orientation. This system shapes religious, economic, educational, familial, historical, interpersonal, legal, political, and social institutions (Jung & Smith 1993). These institutions continue to perpetuate discrimination against all other sexual orientations; hence the unwillingness to take action, and the apparent continuation of the prevalence of discrimination.

Hate crimes and violence against the LGBTIQA+

Hate crimes and violence against the LGBTIQA+ are rampant within diverse South African communities (Sexual & Reproductive Justice Coalition 2020). Bigotry could be lying at the root of such hate crimes and violence. The *Cambridge Advanced Learner's Dictionary* (2008) defines a 'bigot' as 'a person who has strong, unreasonable beliefs and who thinks that anyone who does not have the same beliefs is wrong'. The *Oxford Learner's Dictionary of Current English* (1974) defines 'bigotry' as a 'state of being bigoted'. 'Bigoted' is defined as being 'intolerant and narrow-minded'. A 'bigot' is defined as a 'person who holds strongly to an opinion or belief in defiance of reason or argument'.

> **It is through his wife and children that a man becomes somebody in society.**

Bigotry breeds ideology. There are different ideologies that dominate the minds of diverse communities in South Africa. These ideologies seem to be bred by bigotry. One of the ideologies is patriarchy. Black South Africans, in particular, put strong emphasis upon children as central to human worth and the continuity of lineage (Dlamini 1992; Dlamini 2005; Ward 2006). Procreation characterises their interpretation of human existence. The expectation is that each man is to contribute to the biological growth of the community and its survival (Dlamini 1992; Dlamini 2005; Ward 2006). Any obstacle to this growth is evil. Thus, childlessness is a disgrace, is evil, and a great mishap upon a man (Dlamini 1992; Dlamini 2005; Ward 2006).

It is in this context that many have great difficulty in coming to accept a sexuality which cannot be legitimated in terms of children. It is through his wife and children that a man becomes somebody in society. A man is a person who controls women and whose duty is to procreate. Not to procreate is to go against the ancestors, and against the one who endowed the man with procreative power (Dlamini 1992; Dlamini 2005; Ward 2006). For a man not to procreate equals non-existence.

Furthermore, for a man not to procreate equals emasculation. The sources of men's sense of emasculation and its relation to violence are complex and deep-rooted. Given the enduring tradition and history of patriarchal society, in which men have been accustomed to economic and political power, and the more recent realities of political and social change, in which they feel a loss of control and power, violence has become an important vehicle for re-asserting their masculine identity and influence.

Economic and political changes are fundamentally undermining the identities conferred upon men by patriarchy. Formidable obligations and a sense of responsibility are interpreted in male-specific terms: men as

breadwinners, men as guardians, men as protectors. As men fail to earn the bread and fail to act as guardians – whether in an economic or political context – they fail in their responsibility as protector. They must seek alternative vehicles for sustaining a sense of identity and self. Violence is such a vehicle.

> **...people have limited or no information about human sexuality, gender identity and sexual minorities.**

Many are blinded by hatred. Many within these communities do not seem to have a clear realisation that these acts of hatred and violence constitute a violation of constitutionally protected rights. This raises questions concerning the awareness of communities about what, and how much, human rights entail, and about the right to access justice by the groups of people affected. It never occurs to the minds of many that affected and aggrieved groups might lay charges against the offenders, or sue them.

Although the constitutional protection is there, hate crimes and violence against the LGBTIQA+ are rampant in South African communities, who do not even seem to realise that they are transgressing. The view that hate crimes and violence against the LGBTIQA+ are rampant finds support in the launching of the desk by the ANCWL precisely to tackle rampant hate crime (Eye-Witness News 2020; MambaOnline 2020). The view that some do not even seem to realise that they are transgressing is further supported by OUT-GBT Well-Being (2016), where it is stated that South Africa in general is a very homophobic nation, and that this might be because people have limited or no information about human sexuality, gender identity and sexual minorities. South African society has normalised homophobia. The formal democratisation of society has not decreased levels of violence. What we see are various ways in which aggression, mainly male, is continually displaced towards the vulnerable. Instead of treating South Africa as a post-conflict society, there is need to recognise that the historical consequences of impoverishment and marginalisation, which in the past were translated into overtly political violence, are now manifesting in other forms of social conflict.

South Africa shares some similarity with other countries. Research demonstrates that criminal youth gangs function as a cohesive vehicle for sustaining male identity when other environments fail as places of belonging. The LGBTIQA+ become the victims of a displaced re-assertion of masculine authority. Comparative research on the relationship between political transition and violence has linked the social upheaval of societies in transition to displaced aggression against 'weaker' ones.

> **The LGBTIQA+ become the victims of a displaced re-assertion of masculine authority.**

Bigotry feeds fear. Individuals have different fears about the LGBTIQA+. The most commonly expressed fears are the confusion of youth; destabilising of society; eroding the meaning of family; and preying on the vulnerable. These are kinds of fears linked with the acceptance of homosexuality, and other adjoining sexual orientations. Patricia Beattie Jung and Ralph F. Smith (1993: 90) have referred to these fears as 'imaginary consequences created by an unexamined heterosexist bias'. Although fear may be thought to be the consequence of heterosexism, it simultaneously serves to foster it.

Why LGBTIQA+ continue to suffer secondary victimisation

The LGBTIQA+ seem to continue to suffer secondary victimisation. Theoretically, there seems to be sufficient protection for all sexual minorities in respect of rights and freedom from violence in South Africa; yet, in reality, and within communities and the criminal justice system, the LGBTIQA+ seem to continue to suffer secondary victimisation.

LGBTIQA+ are perceived to be under some foreign influence. African tradition, conceived as monolithic, is positioned against Western modernity. In this opposition, homosexuality is represented as a decadent Western import and an ill-effect of economic modernisation. This is a deeply familiar opposition, and it has played itself out in recent years in debates about LGBTIQA+ identities and rights.

It takes time to break stereotypes. Because LGBTIQA+ relations seem to challenge gender stereotypes, a feeling of instability is created. Violating expected gender roles seems to contribute to an unstable society by rendering people incapable of predictable behaviours. It takes time to break down such stereotypes and integrate new ways of thinking and acting into a culture. This seems to be the primary reason why the LGBTIQA+ continue to suffer secondary victimisation.

LGBTIQA+ people call traditional assumptions into question. This could be another reason for continued victimisation. At this point, the necessity to interrogate the intersection of socio-economic phenomena with gender, heteronormativity and patriarchy becomes obvious, and leads to a need to identify the power structures that disempower people in different ways. These power structures seem to undergird the perception of LGBTIQA+ people as those who are calling traditional assumptions into question and are thus a threat to the social order. The media have played a part in portraying this view. This portrayal has included misconceptions and myths, as well as mirroring the silences in communities around the violence experienced by, and perpetrated against, the LGBTIQA+.

LGBTIQA+ people are seen as unnatural. Negative attitudes and judgments towards the LGBTIQA+ arise from misinformation, prejudice, and superstition. Such attitudes and judgments seem to have no more validity than earlier falsehoods and practices surrounding left-handedness. According to proponents of this newer falsehood, LGBTIQA+ equals unnaturalness. Being gay or lesbian is a problem in a heterocentric culture that denies the normalcy or validity of homosexual identity. Here, people view homosexuality as a defect or something that needs to be fixed. Such a view will not be helpful in fostering the societal access of gays and the adjoining sexual orientations.

“ Such attitudes and judgments seem to have no more validity than earlier falsehoods and practices surrounding left-handedness.

South Africa has, however, attempted to correct this view. This can be seen in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others (CCT10/99),* the Constitutional Court decision which extended the same benefits generally granted to spouses to same-sex partners.

Outside of South Africa, Botswana and Zimbabwe have followed suit, though only in 2019, and Angola did so in 2021. In *Letsweletse Motshidiemang v Attorney General (2019),* the Gaborone High Court ruled that sections of Botswana's Penal Code which criminalised same-sex sexual conduct are unconstitutional. In *Nathanson v Mteliso & Others* (2019), the Zimbabwean High Court in Bulawayo found that transgender people have the same rights as all citizens.

It is worth noting that 'two countries in the Southern African Development Community (SADC) region, namely the Democratic Republic of Congo and Madagascar, never made same-sex conduct criminal' (Viljoen 2019 ; Centre for Human Rights 2021).

“ It takes time to break down such stereotypes and integrate new ways of thinking and acting into a culture.

General observations

The factors discussed above have influenced the debate about LGBTIQA+ rights. What stands out clearly is that the perpetrators of discrimination do not seem to realise that rights are inter-related and mutually supporting. Affording any of the rights to any person or group enables people to enjoy all others enshrined in the Bill of Rights of the Constitution. While all citizens have a common task in shaping a society that honours all its members and encourages and nurtures relationships that foster respect, administrators of justice have an added responsibility in this and, in so doing, build up the community.

The above understanding of the place of a man in an African world-view enables the recognition of the immensely powerful influence that social conditioning has on the formation of attitudes, beliefs, norms, opinions and values. These will have a bearing upon the people who are placed in positions of administering justice, and will present a setback in the accessing of it by the LGBTIQA+.

Deconstructing patriarchy is one part of the solution. This deconstruction needs to be linked with how the more general problems of violence in society are understood and dealt with, and based on the recognition that these are not simply consequences of imbalances of economic impoverishment and political power.

While all citizens have the common task of shaping a society that honours all its members and encourages and nurtures relationships that foster respect, administrators of justice have an added responsibility here and, by taking it on, build up the community. They may need to be conscientised towards this responsibility.

Human development needs to address the issue of identity. It will have to engage more deeply with those who were marginalised by apartheid and who still remain marginalised under the new dispensation. These people need to start feeling that they have a stake in society and that they have some power.

There is a need to push human development to the fore in re-stitching our social fabric. Institutions which empower people are the points of intervention for re-establishing a sense of a stake in society, particularly for young men. In the absence of such interventions, young men are capable of forging new sources of cohesion and identity for themselves, very often through violence.

Conclusion

The South African Constitution, described as one of the world's most progressive, transformative, and gender-sensitive, does not seem to deter discrimination against LGBTIQA+ people. Progress towards Goal 16 of the SDGs is being thwarted by discrimination on the basis of sexual orientation in South Africa. Apathy, rooted in heterocentrism, seems to be one of the major drivers of continued discrimination on the basis of sexual orientation.

This is despite the expectation that the question of discrimination would propel the enormously sensitive people of South Africa to act decisively. Hate crimes and violence against the LGBTIQA+ are rampant within diverse South African communities. Bigotry could be lying at the root of such hate crimes and violence. Bigotry breeds the ideology of patriarchy that maintains that childlessness is a disgrace and evil.

Failure by some to produce children leads to a frustrating feeling of emasculation in others, which is often vented through violence. The LGBTIQA+ become the victims of a displaced re-assertion of masculine authority. Not even democracy has been seen to be able to decrease this reaction. Bigotry feeds irrational fears that continue to fuel the perceptions of the LGBTIQA+ as an unnatural threat to the social order.

Dr Busangokwakhe Dlamini is an Anglican priest based in Sankontshe, Hammarsdale, and Director/ Coordinator: Siyakhana – Ecumenical Community of the Paraclete. He is a member of Religions for Peace, an international NPO. He formerly worked as a lecturer, researcher, and Academic Development Officer at the University of KwaZulu-Natal (UKZN).

“These people need to start feeling that they have a stake in society and that they have some power.

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FEATURE

SDG6: Access to Clean, Safe Water: A Case Study of Khayelitsha Township, Cape Town

Louisa Madeleine Schmiegel

Introduction

Safe and clean drinking water is indispensable for sustaining life and health, and is fundamental to the dignity of all. This article investigates the lived experiences of the residents and their access to water in the township of Khayelitsha in Cape Town, South Africa. The reference points are Sustainable Development Goal (SDG) 6 and General Comment 15 of the Committee on Economic, Social and Cultural Rights (CESCR). The methods of qualitative research, literature review, and interviews and observation are used to gain a better understanding of the needs of the residents.

The conclusion is that residents in government subsidised homes (RDP homes) find access to water stressful, challenging and a struggle. They feel powerless, and are pressured by their inability to pay for water. This shortage has negative effects on food security, health, livelihood choices and educational opportunities. Water becomes even more essential for survival given that hand-washing is a key measure in limiting the spread of Covid-19.

For the residents, access to sufficient water remains a daily challenge and puts them at high risk due to ongoing water apartheid. The government must thus provide constant access to sufficient water to the most vulnerable residents.

Problem statement and research question

Water is essential for life. Safe and clean water is indispensable for sustaining life and health, and is fundamental to the dignity of all (OHCHR 2010: 1). Shortage of water, poor water quality and poor sanitation have negative effects on food security, livelihood choices and educational opportunities (OHCHR 2010: 3, SAHRC 2014: 14&25). The current water crisis can be traced back to poverty, inequality and unequal power relationships, and is reinforced by social and environmental challenges, increasing urbanisation, the depletion, pollution and privatisation of water resources, and climate change (OHCHR 2010: 1).

> **..it is clear that its water issues are the result of a flawed system historically based on institutionalised racism and discrimination against many of its people.**

Section 27(1) of the Constitution of South Africa states that everyone has the right to access to clean water and proper sanitation. However, the reality in many townships looks very different, and this reflects a structural problem which is due to the large wealth gap be-

tween the rich and poor and to persisting racial segregation. The wealth gap and racial segregation reduced the access of black and poor people to water and sanitation. On the one hand, the water crisis is about water scarcity, and on the other hand it is the product of structural discrimination of access to water, also known as water apartheid. After assessing the problems that South Africa faces, it is clear that its water issues are the result of a flawed system historically based on institutionalised racism and discrimination against many of its people.

> **The wealth gap and racial segregation reduced the access of black and poor people to water and sanitation.**

This research investigates the lived dimensions of water access in impoverished and marginalised urban areas in South Africa. The target group consists of the residents of the township of Khayelitsha in Cape Town. Equitable and universal access to water is of particular importance in the context of post-apartheid South Africa, where there has been a strong desire to abolish deeply-rooted historical colonial inequalities through improving the quality of life of formerly marginalised populations (Rodina 2016: 58). The research draws attention to a new development in the discussion about universal access to water, since the challenges caused by Covid-19 are related to the socio-economic rights of impoverished residents in the townships in South Africa.

The object of this research is to acquire a balanced picture of access to water for residents of Khayelitsha, with reference to SDG 6, which refers to the CESCR's General Comment 15, 'The Right to Water' (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)). The research question is: How do residents living in RDP homes experience access to water in Khayelitsha?

Human rights perspectives

In order to address the water crisis, the United Nations (UN) has increasingly recognised that access to safe drinking water must be considered within a human rights framework. While access to water is not yet recognised as a self-standing human right in international treaties, international human rights law contains specific obligations related to the access to safe drinking water.

In 2002 the CESCR framed a general comment on the right to drinking water, which is defined as the right of everyone 'to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses' (OHCHR 2010: 1). The Committee underlined that the right to water was part of the right to an adequate standard of living, and was indispensably linked to rights to health, adequate housing and food. It defined the right to water, including key principles like acceptability, physical accessibility, affordability, quality and safety (OHCHR 2010: 4&8; UNESCO 2019: 36-38).
In 2010, the UN General Assembly recognised the human right to water and sanitation, and acknowledged that clean drinking water and proper sanitation are essential to the realisation of all human rights (UNDESA 2014, A/HCR/RES/16R).

In 2015, the UN Agenda 2030 for Sustainable Development was adopted by the General Assembly. It contains 17 SDGs (United Nations 2015: 1). Goal 6 of the SDGs – 'Ensure availability and sustainable management of water and sanitation for all' (United Nations 2015: 14) – is considered one of the central SDGs. Its essential functions are related to human health, dignity and the survival of the planet (UNESCO 2019: 36).

At the regional level, draft guidelines on the right to water in Africa have been developed by the African Commission on Human and Peoples' Rights. These guidelines state that persons living in informal settlements should not be denied access to water because of their housing status. Their living situation should be upgraded through the provision of water services (African Commission on Human and Peoples' Rights 2015: 17).

With regard to all human rights obligations to clean water, South Africa, as a UN member state, is bound by them, and responsible for realising access to water for all. South Africa provides an example of the progressive implementation of the human right to water as a constitutional guarantee of the right of citizens to access sufficient water. The Constitution of South Africa states that 'all citizens have the right to access sufficient food and water' (Gov ZA 1996: 11).

Furthermore, its Free Basic Water (FBW) policy of 2001 sets a minimum amount of water for basic needs, free of charge, to ensure that the constitutional right to water is realised, regardless of the ability to pay. It was initially mandated that municipalities provide at least 25 litres per person per day of free water for basic needs, within 200 meters of their dwelling. In 2007, this was revised to 50 litres per person per day (Rodina 2016: 58-59).

Methodology

This research used three different methods. There were interviews with residents; one group discussion with community leaders; and field observations. The collection of field observations and interview data took place in March 2020. The first field observation on communal water taps was done during a township tour with a local guide in the shack area QQ of Khayelitsha. The second field observation on water management devices was done on a tour with the community leader in the neighbourhood of the Uxolo High School in Mandela Park, Khayelitsha. The group discussion with community leaders about their difficulties concerning the realisation of the right to health took part during community workshops hosted by the Socio-Economic Rights Project at the Dullah Omar Institute, University of the Western Cape. Three interviews were held with residents in the neighbourhood of the Uxolo High School in Mandela Park, Khayelitsha.

Results

The main result is that access to water for the residents is highly contextual. The residents in shack area QQ in Khayelitsha can collect water free of charge and theoretically reach the 50 litres per day per person. However, the collection of water depends on distance and time. The communal taps are not maintained, and are often unhygienic and polluted with dirt. Their design and location make them inaccessible for vulnerable groups. It is not safe to collect water at night as their location is not visible and criminal attacks happen often. Also, in the case of a fire in the shacks, the communal taps provide insufficient water to extinguish the fire. Nevertheless, a greater risk is currently posed by Covid-19, as the communal taps are not cleaned and pose a high risk of spreading of the virus.

The residents in the Uxolo High School Area in Mandela Park, Khayelitsha, have a small amount of water per household for free. As the interviewees either are or were unemployed or have lost their jobs due to the national lockdown, they are unable to afford more. As a consequence, they are often unable to afford the necessary 50 litres per person per day. These taps are more accessible than the communal taps, but bring their own problems, as the water is unaffordable. The water management devices are much discussed in the neighbourhood; the residents receive letters and bills, and fear disconnection because they cannot pay.

The interviewees stated that their biggest need is access to water at home and they hope that this will not denied due to their income. They are generally aware of their human right to water, but they feel powerless, and do not know what to do. When they have no water, they rely on the help of their community. However, their neighbours are in a similar position and do not have enough water either. Most of the interviewees were also afraid of the Covid-19 situation because of the

The communal taps are not maintained, and are often unhygienic and polluted with dirt.

shortage of water in their homes. One interviewee, as well as the community leader, stated that this shortage promotes the spread of Covid-19.

> **Many residents are unemployed, and Covid-19 has made this problem worse.**

These results mean that access to water for the residents of Khayelitsha has positives and negatives. It is helpful that water at communal taps is free; however, security, design, maintenance and hygiene are all below standard. The collection of water is a barrier against ensuring that everyone has the necessary daily amount of water. It can be assumed that the collection of water, with its attendant physical exertion, will fall to women and children.

Indoor water taps do not present problems of security, design, maintenance and hygiene, but they have the disadvantage of costs. Because of lack of employment (possibly because of the national lockdown), the residents cannot afford water anymore. Many residents are unemployed, and Covid-19 has made this problem worse. The amount of water provided free of charge is not enough, so residents go into debt or rely on the support of neighbours. The amount free of charge is not sufficient to provide the necessary water per person per day, which pressures the residents to go into debt or rely on solidarity. This puts them at great risk, especially in times of Covid-19.

> **Also, residents without access to water have to ask residents in the RDP homes for water.**

When compared to the research of Rodina, the same picture is found, where the residents are divided into unregistered shack residents with communal water taps and RDP homes with private water access. Similarly to Rodina's results, the communal taps were often described as dirty, filthy and messy. Also, residents without access to water have to ask residents in the RDP homes for water. This too caused a similar problem found in this study where neighbours cannot afford more water. A common theme was: 'Wasting water means wasting money', which conforms to the statement: 'It is all about the water bills'.

Likewise, there is a big problem of safety in the townships, especially at night due to crime. In addition, safety concerns related to health risks were prominent themes of the interviews and group discussions. It was expected to find that water access in the shack area, through communal taps, is often inconvenient, unsafe and physically inaccessible. In contrast, it was unexpected to be confronted with the water cut-offs of the residents in RDP homes, who might seem to have a higher living standard due to their private water access and housing status. Whereas the in-house water taps provide hygiene and cleanliness, and tend to be more convenient and significantly safer, in terms of health risks and crime, the problem of paying for water is of importance.

> **Whereas the in-house water taps provide hygiene and cleanliness, and tend to be more convenient and significantly safer, in terms of health risks and crime, the problem of paying for water is of importance.**

Rodina's research merely touches on this issue by stating that RDP home residents do not want to share water, as with the in-house service a sense of ownership arises (Rodina 2016: 62-65). The problems concerning the inability to pay for water, the water cut-offs, the denial of access to water and the current health risk of Covid-19 are new.

Conclusion

This research showed that a township does not mean that people only live in shacks. There are also RDP homes with private in-house water access. The South African government tries to change the image of shack areas by sugar-coating these areas through the building of RDP homes for residents of shack areas. Shack residents can apply for these houses, yet actually prefer their shacks as it takes decades to receive a RDP house, which may be far away from their neighbourhood, and brings financial burdens like water bills.

Here lies the problem with access to water – the residents in the shacks and in the RDP homes are both impoverished groups, even when their housing status might suggest differently. The shack residents can access water without limit and for free, despite physical access remaining problematic. There is also diversity in the design of housing, which brings two different kinds of access to water with it – the communal tap or the private in-house tap. But the users are the same poor people, and those who have private water access can also still not afford the water bill. The residents in the RDP homes are denied access to water because of their inability to pay.

The former UN Special Rapporteur on access to water and sanitation, Catarina de Albuquerque, has stated that disconnection of water supplies because of the inability to pay due to a lack of means may constitute a violation of human rights (UNCESCO 2019: 37).

Concerning the human rights perspective, it was great to recognise the access to safe and clean drinking water as a human right as this addresses global inequalities in access to water. Most residents in the RDP homes know about this right, but feel powerless in claiming it. The lived-experience approach gave valuable insights into the on-the-ground realisation of the human and constitutional right to water. Hence, social workers and human rights advocates can get a deeper understanding of the lived dimensions of different forms of water access to better address the inequalities.

The shack residents can access water without limit and for free, despite physical access remaining problematic.

Moreover, it gives current, important, and first-insight knowledge of the impact of the access to water and the spread of Covid-19. Water becomes essential to survive, as hand-washing is a key measure in limiting the spread of Covid-19, and prevents other public health risks.

However, the ongoing water apartheid puts residents in the township at high risk due to their inability to afford water (as well as sanitisers, health insurance, and adequate housing). Covid-19 emphasises how critical access to water is for the residents in townships because their access to safe, clean, affordable drinking water remains a daily challenge. Besides, the communal areas are a perfect base to exchange bacteria or viruses, which makes it crucial that these taps remain hygienic.

As the safest ways to stop the distribution of the virus is repetitive hand-washing, the provision of clean water to the residents is essential for them to remain healthy. Thus, the government must provide continuous access to sufficient water to those residents living under the most deprived conditions. With regard to the future, it is essential to abolish the two classes of access to water for the residents in the townships, and to ensure a sufficient amount of water per person per day.

Covid-19 emphasises how critical access to water is for the residents in townships because their access to safe, clean, affordable drinking water remains a daily challenge.

To answer the research question: The residents living in RDP homes experience access to water as stressful, challenging and a huge struggle. They feel powerless, and are pressured by their inability to pay for water.

Louisa Madeleine Schmiegel is a Master's student of the programme, Social Work as a Human Rights Profession, at the Alice Salomon Hochschule in Berlin. She was an intern of the Socio-Economic Rights Project of the Dullah Omar Institute, University of the Western Cape in 2020. This article is an updated version of the unpublished research report which was submitted to the Master's programme of the Alice Salomon Hochschule in April 2020.

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FEATURE

A Rights-Based Approach to Informal Street-Trading Challenges in Tshwane Metropolitan Municipality

Paul Mudau and Nomzomhle Kona

Although there are intense disagreements about associating informal street traders with poverty, the urban poor are profoundly impacted by pervasive poverty. In response to their inability to obtain decent employment opportunities, a considerable number of them resort to informal street trading in order to pursue a livelihood (Tissington 2009: 6). Importantly, the National Development Plan estimates that the informal sector has the potential to create 1.2-2 million jobs by 2030. Section 22 of South Africa's Constitution guarantees everyone the right to freely choose his or her trade, occupation and industry; the Constitution also provides for local government envisioned as democratic, participatory, inclusive, responsive and accountable to people's needs and aspirations.

Additionally, in *South African Informal Traders Forum v City of Johannesburg* (2014), the Constitutional Court held that informal trade is integrally linked to the right to human dignity. However, the vast majority of post-apartheid municipal by-laws and policies persist in alienating the urban poor, whose quest to live profitable, dignified and fulfilling lives through informal street trading is met with stringently restrictive and prohibitive regulations that aggravate their deplorable living situations. Their inability to comply with excessively strict conditions and requirements results in their exclusion from social benefits.

The City of Tshwane Metropolitan Municipality has a high number of people who participate in the informal sector (Chatindiara 2019: 5). Because of its restrictive and prohibitive by-laws and policies, the City is one of the many cities and towns in South Africa that encounter multiple challenges in dealing with the implementation of the urban poor's pursuit of informal street trading (Chatindiara 2019: 5).

From a human rights perspective, the purpose of this article is to explore the primary legal, institutional and structural challenges faced by the City in the implementation of informal street trading by its urban poor. The article identifies possible solutions to these predicaments from the starting-point of systematic commitment to integrally linking informal street trading with the urban poor's rights to dignity, equality, choice of trade, occupation or profession, access to just administrative action, and freedom from arbitrary deprivation of their property.

> **...institutional and structural challenges faced by the City in the implementation of informal street trading by its urban poor.**

Contextual background

The City of Tshwane is the executive or administrative capital of South Africa, and the largest municipality when measured by land area. The 2011 Census reveals that the City is home to 2,9 million people. Although the municipality's main economic sectors are community services and government, followed by finance and manufacturing, the plight of its urban poor is truly unbearable, with a 24.2 per cent unemployment rate and a 32.6 per cent youth unemployment rate. The urban poor are the most affected by poverty as their lives are characterised by lack of means to achieve a decent level of social well-being, including access to basic needs such as food, clothing and housing; due to their lack of education and skills, they have no access to economic opportunities (Landman and Ntombela 2006: 5).

> **...living in such circumstances threatens peoples' right to enjoy the highest attainable standard of physical and mental health.**

The City's main developmental challenges are inequality, unemployment, poor economic conditions, poverty, and the inherent need to survive (Chatindiara 2019: 4). The cumulative impact of living in such circumstances threatens peoples' right to enjoy the highest attainable standard of physical and mental health (article 12, ICESCR). Neighbourhoods such as Hatfield, Sunnyside and Arcadia have fairly high population densities, with more than a thousand registered informal street traders. Other parts of the municipality, such as Marabastad and Magaliesberg, face similar challenges. For that reason, informal street trading plays a critical role in the informal economy, as it has created jobs and continues to improve the lives of people from disadvantaged communities.

Indeed, the Socio-Economic Rights Institute of South Africa (2018: 4) affirms that informal trade has an important role to play in addressing challenges such as high levels of unemployment, poverty and accelerated rates of rural-urban migration.

Legal framework for informal trading at local government level

The 1998 White Paper on Local Government envisages a developmental local government which centres on working with local communities to find sustainable ways to meet their needs and improve the quality of their lives. Section 152(1)(c) of the Constitution states that local government has the object of promoting social and economic development. A municipality is also obliged to structure and manage its administration, budgeting and planning processes to give priority to the basic needs of the community (section 153, Constitution).

The Constitution enshrines a number of fundamental rights that are linked to informal trade; these include the right to human dignity, the right to equality, the right to choose one's trade, occupation or profession, the right to a just administrative action, and the right not to be arbitrarily deprived of one's property. These rights are given effect in the Businesses Act 71 of 1991, the Promotion of Administrative Justice Act 3 of 2000, and the National Small Business Act 102 of 1996. In terms of section 34 of the Constitution, street traders have the right to access to courts when there is a violation of these rights.

> **A municipality is also obliged to structure and manage its administration, budgeting and planning processes...**

dignity respected and protected. Currie and De Waal (2016: 465) argue that, 'although section 22 does not expressly mention the freedom "to pursue a livelihood", by implication, it is included within the scope of section 22'. This right can be extended to the urban poor's pursuit to live profitable, dignified and fulfilling lives through informal street trading.

By exercising the right of access to courts as stipulated by section 34 of the Constitution, informal street traders rely on judicial recourse for the protection of fundamental rights associated with informal trade. The courts in South Africa have duly reaffirmed that the right to human dignity is integrally connected to informal traders' ability to participate in and carry on informal trade businesses. In Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism (2015), the Supreme Court of Appeal declared that

> *the ability of people to earn money and support themselves and their families is an important component of the right to human dignity. Without it [informal traders] faced 'humiliation and degradation'. Most traders, we were told, have dependants. Many of these dependants are children...*

The Businesses Act governs informal street trading; its section 6(1)(b) allows municipalities to make by-laws that restrict, regulate or control the businesses of street vendors, pedlars or hawkers. Section 6(1)(b)(i) of the Act provides for the creation of laws that provide for the removal and impoundment by an officer of any goods. This is seen in some quarters as an unconstitutional infringement of informal traders' right to trade (Ligthelm and van Wyk 2004: 40).

The policy regime and the challenge of informal street trading

The post-apartheid national policy framework has given attention to informal activity within the context of economic development. However, the situation at grassroots level has not improved significantly. What is needed is a realistic local policy framework, with appropriate support measures, that can contribute to enhancing the sustainability and profitability of informal trade businesses.

The street-trading sector is principally regulated by rules enacted at the municipal level. The City of Tshwane Metropolitan Municipality Street Trading By-Laws are directed at regulating the control and effective management of the informal sector, and in the process helping people to exercise their rights to choose their trade. An inclusive policy for lease and allocation of trading stalls and sites has to accommodate all traders, irrespective of their social origin, nationality, race, colour or creed.

A key contributing factor to this is the lack of effective communication channels between the municipality and the street traders.

However, the municipality is still facing challenges pertaining to the provision of sufficient space needed by the rapidly growing number of street traders who operate lawfully. Nkrumah-Abebrese (2016: 34) sums up the four main allocation challenges:

> *[T]he problem in the allocation of the trading sites and the regulation of storage facility; the lack or poor space allocation located within the Spatial Development Framework of the City to meet the demand of informal traders; inadequate level of legal support to protect informal traders against any abuse by the so-called trader organisation; and the lack of a governance regulatory framework to prevent illegal trading activities within the municipality's streets and pavements.*

The City of Tshwane Informal Trading Policy and Implementation Plan (2013) reveals that these issues

hinder the development of an effective informal trading policy because of the highly uncoordinated nature of the street-trading sector. Additionally, apart from problems with trading space and infrastructure, more challenges are encountered through lack of financial assistance, inadequate business skills, and poor working conditions. Another pressing problem is the wide gender disparity of informal traders; a large percentage are made up of men, for social reasons (Masonganye 2010: 8).

As South Africa is a patriarchal society, women are still not fully participating in economic activities, and the City of Tshwane's by-laws and policies lack the ability to address gender gaps in informal street trading, especially taking into account the fact that women are the primary caregivers of children. Lack of awareness of municipal by-laws and policies that regulate informal street trading is another challenge (Nkrumah-Abebrese 2016: 38). A key contributing factor to this is the lack of effective communication channels between the municipality and the street traders. Another impediment is the lack of policy guidance in creating an enabling environment for informal street traders. The municipality is not particularly sensitive to the needs of certain groups within the community, who tend to be marginalised.

These challenges remain unchanged despite the impressive legal framework which, through purposive interpretation, can be used to promote and secure the efficiency, sustainability and profitability of informal street trading. The City cannot renege on its constitutional obligation to address the plight of its urban poor, who are mostly disadvantaged and voiceless. Section 22 of the Constitution entitles the urban poor, just like any other citizens, to freely choose their own trade, occupation and industry. Given the fact that, through municipal by-laws and policies, the municipality plays a crucial role in minimising, perpetuating or increasing the vulnerability of street traders, it becomes a challenge for the municipality to implement this correctly when certain economic activities are prohibited or restricted.

Section 4 of the City of Tshwane Metropolitan Municipality Street Trading By-Laws prohibits street traders from operating businesses in a public amenity or a garden or park to which the public has a right of access. The only exception is when a person has received special permission from an authorised officer. Additionally, in order to operate the business lawfully, the Tshwane Business Licence Application regulation serves as a compliance method, to ensure that street traders have the necessary permits and licences.

> **"This would include negotiating with informal traders or informal trade organisations.**

The City of Tshwane Metropolitan Municipality By-Laws Pertaining to Public Amenities (2005) prevent a person from selling anything without first seeking permission from the municipality. Any person who deliberately contravenes the by-law shall be fined not more than R10,000 or shall be imprisoned for a period of one year. Almost 60 per cent of the informal traders in the area do not have licences to trade in that particular trading space, yet anyone, no matter how poor, working as a street trader without a licence, can be sentenced to a hefty fine or imprisonment.

Pieterse (2017: 3) contends that local governments are struggling to deal with informal street trading as they need to balance their obligations to create and sustain healthy and safe urban environments conducive to economic growth and the sustainment of all urban activities, against the fundamental socio-economic rights of traders, who are often some of the most vulnerable members of society. These 'arbitrary restrictions' can be deemed to be contrary to the underpinned developmental duty of maximising social development and economic growth, and encompassing the resolve to secure the best interests of persons living in poverty.

Before the City considers restricting or prohibiting trading in an area, it must investigate how this will affect informal traders (SERI 2018: 35). The investigation must consider two things. The first is to ascertain the realisation of the City's objectives through more effective supervision and control of informal trade in

the area. This would include negotiating with informal traders or informal trade organisations. The second is to assess whether the restriction or prohibition of street trading in an area would mean that traders would go out of business.

The Report of the United Nations (UN) Special Rapporteur on Extreme Poverty and Human Rights focusing on Penalization of People Living in Poverty & Human Rights (2011: 2) recognises the concerns relating to the 'laws, regulations and practices which unduly restrict the performance of life-sustaining behaviours in public spaces by persons living in poverty'. The Report further notes that, rather than to permit the imposition of restrictions by the state, the primary objective of the human rights framework is to protect the rights of individuals.

Accordingly, states are obliged to demonstrate that the restrictions imposed on the exercise of rights by the urban poor comply with the following criteria: they must be 'determined by law', 'compatible with the nature of these rights', 'solely for the purposes of promoting general welfare' and 'necessary in a democratic society', and are therefore legitimate, reasonable and proportionate to the aim sought (UN Special Rapporteur 2011: 2).

To make matters worse, the Tshwane Spatial Development Framework (2012) fails to recognise and address informal street trading because spatial plans do not provide space for this activity (Masonganye 2010: 5). The City contends that informal street trading businesses destroy the character of an area, are not in line with the zoning of the area, and are associated with anti-social behaviour (e.g. drugs being sold from the stalls). Killander (2019: 87) rightly bemoans that 'by-laws treat people as objects that should be removed from the view'. More constraints stem from the absence of vital infrastructure such as access roads, efficient public transport, health facilities, electricity, water, telephones and ablution facilities (Wiego Law & Informality Project 2014: 8-9).

Conclusion

This contribution has explored the legal, institutional and structural challenges that beset the City of Tshwane in the implementation of informal street trading with regard to its urban poor who rely largely on the activity to earn a living and support themselves and their families. The City's by-laws and policies are complicit in the alienation of street traders. The municipality must review the By-Laws Pertaining to Public Amenities (2005), the Street Trading By-Laws (2008), and the Informal Trading Policy and Implementation (2013). These by-laws and policies need to allow all relevant government departments to unite in creating an efficient, sustainable and profitable informal sector that benefits its participants, the informal street traders, stakeholders, and the municipality as a whole.

> **A rights-based approach towards the regulation of street trading anticipates a revitalised commitment to developmental local government.**

The Street Trading By-Laws can be revised to the extent that they enable the City to provide sufficient capacity for trading space and infrastructure, promote entrepreneurial skills and increase the number of street traders. A rights-based approach towards the regulation of street trading anticipates a revitalised commitment to developmental local government. This would encompass an urban poor-friendly policy framework anchored on the protection and promotion of the poor's rights to dignity, equality, choice of trade, occupation or profession, just administrative action, and an end to arbitrary confiscation of property.

Because the municipal by-laws and policies have the potential to uplift the socio-economic status of the urban poor, the municipality should craft and sustain a conducive policy environment that allows informal street trading to flourish. Through progressive by-laws and policies that are pro-poor and development-oriented, the formulation and implementation of these measures should be geared towards combating poverty and unemployment and avoid reinforcing the patterns of the exclusion of the most powerless and marginalised social groups. The solution is to link informal trade integrally with the rights of the urban poor.

Paul Mudau is a PhD Candidate and Researcher under the NRFSARChl in Equality, Law and Social Justice at the School of Law, University of the Witwatersrand.

Nomzomhle Kona is a final-year LLB student at the School of Law, University of the Witwatersrand.

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EVENT

Meeting on 'Research on Community-Based Paralegals in Africa' Preliminary Findings 6-7 May 2021

Paula Knipe

The Socio-Economic Rights Project of the Dullah Omar Institute in partnership with the African Centre of Excellence for Access to Justice (ACE-AJ), hosted a meeting on the Research Study of Legal Recognition of Paralegals/Community-Based Paralegals in Africa, at the Lake Heights Hotel in Entebbe, Uganda, on 6 – 7 May 2021.

ACE-AJ is a continent-wide network of African civil society organisations focused on working together to promote human rights, access to justice and legal aid for poor and marginalised communities, and promotes the work of community justice institutions on the African continent.

The stakeholders were largely drawn from ACE-AJ, with other participating organisations, who acknowledged that in many African countries, paralegals have assumed an important role in providing legal support and realising access to justice for disadvantaged groups. Paralegals in Africa bridge the gap between access to justice on one hand and indigent and marginalised people on the other. However, their work is hindered by the inconsistent recognition and regulation of their activities by the State – while international and regional laws recognise the role of paralegals. This has led to a parallel regime concerning the recognition and regulation of paralegals and related services.

As such, the study on the legal recognition of paralegals/community-based paralegals (CBPS) in Africa is a two-year research project which aims to document the roles, functions, challenges and implications of paralegals in the following selected African countries - Ghana, Nigeria, Mozambique, Zambia, Tanzania and Uganda. This research will inform a collection of data on the best practices of paralegals across Africa, that can be replicated in other countries.

This meeting focused on the preliminary findings from three countries, namely, Uganda, Tanzania and Zambia. It sought to evaluate the legal recognition of paralegals/CBPs in Africa, drawing on the lessons, challenges and good practices that accrue therefrom in the respective countries.

> **He highlighted the core objectives of this research, the information it intends to collect and why it is important in furthering access to justice.**

The stakeholders that engaged in this fruitful discussion included Primah Kwagala - Women's Probono Initiative (WPI) - Uganda; Christina K Ruhinda of the Tanzania Network of Legal Aid Providers (TANLAP) - Tanzania; Clarisse Munezero of the The Legal Aid Forum (LAF) - Rwanda; Phillip Sabuni of the Paralegal Alliance Network (PAN) -Zambia; Clifford Msiska from Paralegal Advisory Service Institute (PASI) and Chairperson of the ACE-AJ -Malawi and the Socio-Economic Rights Project of the Dullah Omar Institute (DOI).

Clifford Msiska delivered the welcoming speech and opened the floor for discussion by emphasising the importance of conducting this research, even amidst the unprecedented COVID-19 pandemic. Mr Msiska also presented on the ACE-AJ's history, current activities and plans for expansion.

From DOI, Dr Robert Nanima presented an overview of the study, including the research design, methodology, data collection and workplan. He highlighted the core objectives of this research, the information it intends to collect and why it is important in furthering access to justice. Dr Nanima noted that the preliminary findings show that the respective countries dealt with different issues in terms of recognition and regulation of paralegals/CBPs which allowed for the collation of data to show the best practices in overcoming the various obstacles. He also contextualised the data collection process and acknowledged the flexibility of the project and partners involved in having to adopt a hybrid research approach, as the initial research and data collection plans was hindered by the pandemic.

During the Q & A that followed, stakeholders were able to actively engage on their experiences of conducting research of this caliber and in particular, the many lessons learnt. The preliminary findings seemed to indicate central challenges under the following themes – obstacles surrounding ethical clearances and permits; the importance of a contingency plan regarding the actual data collection process; the capacity of the organisations involved to conduct the research; and the sensitivity surrounding the regional representation of paralegals/CBPs in Africa.

The stakeholders from Tanzania, Uganda and Zambia then had the opportunity to share their experiences of the data collection process in their respective countries. Their presentations covered the logistics involved, the participant selection process, challenges and obstacles faced and subsequently - how they overcame those hurdles and the lessons they learnt.

In Tanzania, there were a number of issues that arose. Namely, the political climate, further permits for the research conducted and logistical difficulties during the data collection process (transportation challenges and language barriers). However, TANLAP relied on existing working relationships within its network to provide solutions and ensure that the quality of the research gathered. It was also highlighted that it is important to put a policy in place to deal with unforeseen circumstances such as the pandemic.

In Uganda, there were similar challenges faced, but one of particular importance was the ongoing hostile and political climate. The Ugandan government heavily regulates the information that leaves the country and so attention should be given to the ethical approvals and clearances needed to conduct a research activity of this nature. WPI also encountered logistical challenges but similarly worked hard to complete the research activity and beyond that reported how much it expanded on their understanding of the recognition of CBPs within their country.

In Zambia, it was reported that the biggest challenge faced was the time constraints during which the data had to be collected, further complicated by the pandemic. PAN also noted the importance of financial support in bringing people together to conduct this research. However, for the most part the data collection process went smoothly as they also relied on working relationships, as well as the current policy framework which regulates CBPs.

“ The Ugandan government heavily regulates the information that leaves the country and so attention should be given to the ethical approvals and clearances needed to conduct a research activity of this nature.

Each of these presentations were followed by a Q & A session which allowed for the stakeholders to actively engage each other and discuss the details of their respective experiences and recommendations for future studies of the same nature.

The second day of the meeting provided the opportunity to critically analyse the preliminary findings of the research study. Dr Nanima presented an in-depth analysis of the data collected including the demographics of participants, notably the gendered dimensions, the context of dispute resolution within communities, the types of cases dealt with and the various forms of recognition and regulation. These findings allowed for the development of recommendations toward the enhancement capacity of the work of CBPs as well as good practices for other countries to learn from.

The open discussion that followed allowed for all the stakeholders to engage with and draw insights from the preliminary findings - which enriched the content of research and will be further developed in the final report of the project.

To conclude, while it must be noted that the participants carefully deliberated physically meeting during the pandemic, it successfully provided meaningful engagement on the research study, which was already adapted to accommodate certain restrictions. It also allowed for a comprehensive dialogue on how to best expand this research, being cognisant of the challenges faced. Most importantly, the outcome of this meeting was realistic recommendations on how best to support the sustainability of paralegals and CBPs in Africa, promoting the realisation of access to justice for all Paula Knipe is a doctoral researcher at the Socio-Economic Rights Project, Dullah Omar Institute, University of the Western Cape..

Contact

Socio-Economic Rights Project
Dullah Omar Institute for Constitutional Law,
Governance and Human Rights

University of the Western Cape
New Social Sciences Building
Private Bag X17, Bellville, 7535

Tel: (021) 959 2950
Fax: (021) 959 2411
Email: serp@uwc.ac.za
Website: https://dullahomarinstitute.org.za