#1
Volume 20
2019

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 Human Rights (formerly Community Law Centre) at the University of the Western Cape

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
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 and AmplifyChange.

The contents of the *ESR Review* are the sole responsibility of the Socio-Economic Rights Project and can under no circumstances be regarded as reflecting the position of the FORD Foundation and AmplifyChange.

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

Contents

Editorial

Welcome to the first issue of the ESR Review for 2019, which features two articles and a case review engaging with economic, social and cultural rights.

In the first article, Sekai Furaha-Joy Saungweme argues that illicit financial flows are highly detrimental to the developmental agenda in Africa and need to be combated more effectively through additional measures – in particular, through greater reliance on the adoption and enforcement of access to information laws, which advance the democratic principles of transparency and accountability. The article examines how these laws can be used as a tool to expose corruption and how, conversely, the suppression of the right to information creates a breeding ground for adverse practices such as illicit financial flows.

The second article, by Meskerem Geset Techane, explores the alternative avenue for ESR adjudication that may be offered by national human rights institutions (NHRIs). It considers the role of non-judicial mechanisms in the protection of ESR, and focuses on the nature, advantage and effectiveness of national inquiries as an ESR redress mechanism.

The case review by Roopanand Mahadew delves into the *Kenyan case of Ndoria Stephen v Minister for Education & 2 others* (Kenya, 2015). At the core of this petition are the challenges surrounding the provision of education to children living in what are regarded as marginalised areas of the country, namely its north and north-eastern regions as well as parts of the coast and Rift Valley. The petitioner alleges that, as a result of discriminatory educational policies by the government, children in these areas are unable to access the right to education on the same basis as those in other, more developed parts of Kenya.

We wish to extend a special thanks to Prof Oluduro for peer-reviewing this issue of the *ESR Review*. We hope you enjoy the issue.

Gladys Mirugi-Mukundi
Co-Editor

FEATURE

Enforcing the Right of Access to Information as a Tool to Curb Illicit Financial Flows in Africa

Sekai Furaha-Joy Saungweme

The relevance of enacting access to information (ATI) laws in the light of the problem of illicit financial flows in Africa is that it entails putting the tried and tested principles of transparency and accountability to work.

Through proper application, these democratic principles can serve as effective mechanisms to counteract and expunge the socio-economic and political conditions that enable national and international transactions of financial and economic significance to be shrouded in secrecy and conducted without accountability – conditions that allow illicit financial flows to continue to derail agendas for economic development.

The negative impact of illicit financial flows in Africa

The negative impact of illicit financial flows is a well-researched subject and is generally understood as a reference to money which is illegally earned, illegally transferred or illegally utilised (High Level Panel Report by AU/ECA 2015). Occurring both horizontally across and vertically up and down different levels of social and political structures, these flows inevitably impact on the poor whilst enriching the few. Illicit financial flows are symptomatic of poor models of governing resources and point to the incapacity of African states to stop these flows and track and secure the return of the funds involved.

False invoicing, tax avoidance, tax evasion, money-laundering, and transfer pricing are merely a few examples of how illicit financial flows are channelled. Their negative impact is often experienced in the form of the loss of investment capital and revenue, loss that severely weakens a country's capacity for national development, in particular its ability to provide public and social services that could benefit the poor and marginalised. It is from this perspective that arguments arise linking illicit financial flows to rising poverty and corruption levels in Africa, as well as to heightened inequalities between developed and developing countries.

In recognition of the dire consequences of illicit financial flows, initiatives have been undertaken by the global community, national governments and regional bodies to address the problem. These initiatives were assessed by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights (United Nations Human Rights Council 2015). The Independent Expert's report incorporated further information from studies

that support the view that illicit financial flows remain one of the underlying causes of poverty and constitute a human rights issue, one which contributes, for example, to inadequate compliance with the Millennium Development Goals.

Addressing illicit financial flows: ATI under international law

ATI laws have long-standing recognition under international law, particularly given that that ATI has been viewed traditionally as an offshoot of freedom of expression; fortunately, it has developed into a stand-alone right, thus placing greater obligations on states to ensure the accessibility of public interest information. One of the earliest instruments according prominence to ATI is the Universal Declaration of Human Rights, which refers to the right to 'seek, receive and impart information and ideas through any media and regardless of frontiers' (article 19).

This right is also echoed by article 19 of the International Covenant on Civil and Political Rights. The United Nations Human Rights Committee has recognised the relevance of article 19 to developmental issues. In its General Comment No. 34, it requested that states proactively disclose government information which is of public interest, emphasising the need for them to remove unnecessary impediments to ATI, such as unreasonably high fees, and to ensure mechanisms are in place to hear appeals against refusals to grant ATI.

The intersection of ATI and development has allowed for the integration of ATI principles in certain regional and international conventions that have a bearing on illicit financial flows and the general anti-corruption agenda. The United Nations in particular has initiated several conventions useful to this cause. These include the United Nations Convention against Corruption, which focuses on the prevention of corruption through international cooperation among member states and domestic criminalisation and asset recovery procedures, all of which are critical for dealing effectively with illicit financial flows.

Another example is the United Nations Convention against Transnational Organized Crime. Not only does it encourage international cooperation, but most signatories have, as a result of it, enacted domestic legislation and created a number of criminal offences, such as participation in organised criminal groups, money-laundering, corruption and obstruction of justice; in addition, new and sweeping frameworks have been adopted in respect of extradition, mutual legal assistance, and law enforcement cooperation.

Furthermore, ATI laws are found in at least six African Union treaties. The African Charter on Human and Peoples' Rights (African Charter) declares in article 9 that 'each individual shall have the right to receive information', while the African Charter on Democracy, Election and Good Governance (Democracy Charter) stipulates more directly under article 19(2) that 'each State Party shall guarantee [...] free access to information'. Similarly, the African Convention on Preventing and Combating Corruption provides that 'each State Party shall adopt such legislative and other measures to give effect to the right to any information'. It is significant that the right to information is guaranteed under a convention which is solely concerned with detecting, preventing, and prosecuting acts of corruption.

In addition, there is the Model Law on Access to Information for Africa (Model Law 2013). Adopted by the African Commission, it is controversial inasmuch as it provides a model for guaranteeing that 'every person' in member states – as opposed to 'every citizen' – has access to information held by both public and private bodies. It attempts in several ways to give information rights much broader scope than usual, and regards them as necessary for the successful application of good-governance principles.

However, the Model Law provides for certain exceptions that limit the right to information, limitations which could put efforts to curb illicit financial flows at risk. For example, commercial

and confidential information may be withheld from a requester (section 28), and can also be withheld on the basis of the economic interests of the state (section 32). Commercial information, as well as information pertaining to economic interests, is directly relevant to illicit financial flows, given that these flows derive from commercial activities and from national development opportunities that serve national economic interests.

Emerging norms in international law pertaining to ATI recognise the role of the internet in facilitating the free flow of information. This led to a resolution adopted by the African Commission on the Right to Freedom of Information and Expression on the Internet in Africa, which reaffirms prior declarations and resolutions promoting and protecting access to information both off- and online. Similarly, the African Declaration on Internet Rights and Freedoms describes the internet as a 'vital tool for the realisation of the right of all people to participate freely in the governance of their country and to enjoy equal access to public service'.

The essence of the Declaration is that online injustices, inequalities and marginalisation are reflective of the offline injustices, inequalities and marginalisation that ultimately deny people their fundamental human rights. Not only does the Declaration specifically recognise the right to development, which is relevant to the discourse on illicit financial flows, but its provisions place obligations on governments to ensure the proactive release of data and information, which may be restricted only on legitimate grounds.

Several initiatives in this vein have been developed by the international community, among them the Stolen Asset Recovery Initiative (StAR) which supports international efforts to end safe havens for corrupt funds. One of the challenges noted by StAR concerns the lack of cooperation from those developed countries which are tax havens for illicit financial flows. Such lack of cooperation was intended to be resolved through the advent of the automatic exchange of information initiative (Financial Transparency Coalition 2013), a response by G8 countries to growing demand for disclosure and exposure of tax evasion and corporate tax avoidance. The automatic exchange of information by tax authorities thus encourages the sharing of tax information between the countries in which individuals and corporations hold accounts. This exchange of information should be automatic and not require that tax or law enforcement officials in one jurisdiction request it from those in the jurisdiction where the account is held.

Other notable initiatives that have successfully integrated developmental goals with concerns relating to illicit financial flows and ATI include the Sustainable Development Goals (SDGs), which aim to significantly reduce illicit financial flows by 2030 (Target 4) and to enable public ATI (Target 10), and the Extractives Industry Transparency Initiative (EITI), which consists of 12 core principles all of which are relevant to ATI principles. Similarly, the Open Government Partnership (OGP) promotes open, responsive, and accountable governance in which governments are empowered to enhance domestic accountability processes and strengthen relations with civil society in common agendas such as advancing anti-corruption reforms. Potential country candidates must meet the eligibility criteria of fiscal transparency, adoption of ATI laws, asset disclosure by public officials, and citizen engagement in policy-making and governance.

Domestic enactment and enforcement of ATI laws

Illicit financial flows are a global problem requiring global solutions; at the same time, illicit financial flows impede national development, increase inequalities between citizens, and cause injustice, making these flows a national problem as well, one hence requiring national solutions.

Enactment and implementation of ATI laws serve to strengthen transparency and accountability, especially in respect of commercial activities that provide the opportunity for unlawful acts involving illicit financial flows. ATI laws provide a means by which citizens and interested parties can hold governments to account on matters of public interest such as these. To date, however,

> **Only a handful of African countries have a genuine interest in defending and availing the right to information**

less than 20 African countries have enacted ATI laws, specifically the Model Law, at the domestic level. Even though exercising the right to ATI enhances 'transparency, accountability and the participation of persons in public affairs, including exposing corruption and issues associated with underdevelopment', there is, according to the Law's preamble, still a 'dearth of access to information legislation in Africa' (Model Law 2013).

As noted in the Model Law, only a handful of African countries have a genuine interest in defending and availing the right to information to their people or citizens. Most constitutions on the continent provide for a general right to seek, receive, and impart information; some include a more specific right to information held by the state on certain matters, for example, the right to access personal information or environmental information; other countries yet provide for the right to information as a component of the right to freedom of expression – unsurprisingly so, given that the right to information has its origins in the right to freedom of expression. For example, article 29 of the Constitution of Ethiopia (1994) provides that

> *[e]veryone has the right to freedom of expression without any interference. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.*

In contrast to a general provision of this kind which does not create any positive obligation on a government to disclose information, a few countries have adopted specific constitutional provisions on ATI. For example article 62(2) of the 2013 Constitution of Zimbabwe explicitly provides for this right by declaring: 'Every person including the Zimbabwean media has the right of access to any information held by any person, including the State, in so far as the information is required for the exercise of the protection of a right.' The Constitution goes further by calling, in article 62(4), for the enactment of legislation to guarantee a statutory right of access to information.

However, there are various challenges in respect of enacting and enforcing ATI legislation. With regard to enactment, the reasons for not having such legislation usually centre around the political stability of the state. For example, it could be argued that an ATI law would hardly be a priority in a country undergoing civil unrest, armed conflict or post-conflict recovery. Other reasons may be that politically repressive and despotic regimes would be averse to democratic influences and freedoms, which would result in greater scrutiny of financial flows, governance practices and corruption allegations. Then, among countries which have indeed taken measures to adopt ATI laws, a challenge is that a common approach is to include 'claw-back' clauses that in essence create justifications for limited access to, or narrow application, of a right.

A case in point is a matter brought before the Magistrates' Court of Uganda (*Charles Mwanguhya and Angelo Izama v Attorney General Uganda*) by two journalists to whom the government denied access to information concerning an oil exploration agreement. The Constitution of Uganda provides in article 41 that

> *[e]very citizen has a right of access to information in the possession of the state or any other organ of the state except where the release of the information is likely to interfere with the security of the state or the right to the privacy of any other person.*

Relying too on Uganda's Access to Information Act (No. 6 of 2005), the applicants contended that because the subject matter of the agreement, namely oil, belonged to the people of Uganda, the state was under an obligation to comply with the request, which was made in the public interest. The Court, however, found that the applicants had not sufficiently proven public interest or demonstrated clearly how this information would be used 'to make government more transparent, accountable and efficient in the management of the oil resources'.

This case illustrates a number of recurring problems relating to the status of ATI in Africa and the factors that facilitate illicit financial flows. Lack of transparency is a key factor. The oil prospecting and exploitation agreement regarding which the applicants sought disclosure raises concerns that unequal contracts negotiated between multinational corporations and governments in the secret corridors of political power and fuelled by bribery serve to enable illicit financial flows, for example by allowing parties to avoid payment of royalties and taxes.

The Constitution of Uganda, together with Uganda's ATI legislation, contains provisions which limit – or, rather, undermine – the right to ATI. According to the Constitution, state security and privacy are legitimate reasons for the denial of ATI (article 41). Indeed, the question of privacy as a reason for non-disclosure was defended by the Court as valid in view of the confidentiality clause in the oil agreement; privacy was therefore a more compelling argument than public interest. However, even if it were true that the applicants had not sufficiently proven public interest, the Court's decision reinforces public wariness that such agreements enjoy a privileged status and protect elite interests far removed from the lives of ordinary people.

Uganda's Access to Information Act provides further exemptions that curtail access (articles 23-34). These include the protection of certain confidential information from third parties, the implication being that parties in the position of, for example, multinational corporations would enjoy complete protection from disclosure regarding the agreements they conclude with their government partners. Such an approach is in conflict with democratic principles and values emphasising maximum disclosure, transparency, citizen participation, and accountability. Arguments against the protection of the confidentiality of such agreements find support in several international law instruments, among them the Declaration of Principles on Access to Information (Principle IV), which affirms that information held by public bodies must be accessible on request from interested parties and goes so far as to define the role of these bodies as that of 'custodians', rather than proprietors or owners, of such information.

Although the right to access information held by public bodies is also subject to limitation inasmuch as it must be 'subject only to clearly defined rules established by law', the issue is not that such an exemption has been provided – the issue is how to ensure that it, and other exemptions like it, are not manipulated to serve unconstitutional and illegal agendas. Indeed, an ATI law like Uganda's serves no effective purpose if it is simply ignored or if the exemptions in it are used to facilitate the corrupt activities of an elite. For example, it is reported that although section 43 of the Act requires each Minister to make available reports on requests for ATI and state therein whether or not the requests were granted, this provision has never been complied with and there appears to be no political will to ensure that it ever will be; this provision therefore has been rendered virtually redundant (CIPESA 2017).

Uganda attracts significant foreign direct investment but annually loses at least USD 739 million, or 2.6 per cent of it gross domestic product as a result of illicit financial flows, making this 'a major source of domestic resource leakage, which drains foreign exchange, reduces tax collections, restricts foreign investments, and worsens poverty in [one of the world's] the poorest developing countries' (SEATINI 2015). In the light of these facts, the intersection of economic growth and illicit financial flows is clearly apparent. It is thus imperative that laws

which support transparency and accountability should be developed and properly enforced.

Moreover, Uganda is a signatory to the Convention on Mutual Administrative Assistance in Tax Matters (CMAATM), a major multilateral transparency and disclosure initiative to enable the automatic exchange of information among participating countries. It has proven to be a formidable tool in fighting unlawful activities that entail illicit financial flows such as tax evasion. Against a background of globalisation, African countries often find themselves vulnerable to illicit financial flows due to a lack of capacity to monitor and respond to financial trends. The CMAATM therefore promotes a support system that, founded on ATI principles, facilitates the exchange of information on a broad range of taxes. In particular, it provides for the automatic exchange of certain kinds of information (article 6) and for the spontaneous exchange of information even where no prior request was made (article 7).

Furthermore, the only limitation the CMAATM places on disclosure of trade, business, industrial, commercial, and professional information is where such disclosure could be construed as contrary to public policy (article 21(d)). This is a provision that gives significant support to efforts to address the context within which illicit financial flows occur and sets a new international benchmark in information exchange. Unfortunately, as at 26 March 2018, only a handful of African countries had signed this convention, namely, Burkina Faso, Cameroon, Gabon, Ghana, Kenya, Mauritius, Nigeria, Senegal and South Africa.

As noted, Nigeria is also a signatory to the CMAATM. Its economy has been negatively impacted by illicit financial flows, which between 2002-2009 amounted to 182 billion USD (Global Financial Integrity Report 2014). The key economic sectors of agriculture, energy, tourism, mining and manufacturing have suffered with especial severity, exacerbating the country's widespread poverty, low standards of living, and rising unemployment (High Level Panel Report 2015). Such pronounced financial leakages point to

African countries often find themselves vulnerable to illicit financial flows due to a lack of capacity to monitor and respond to financial trends

institutional incapacity as well as to complicity between governmental and private-sector role-players in facilitating illicit financial flows. Hence, transparency and accountability measures must be strengthened through Nigeria's existing laws as well through the adoption of new legislation and initiatives to this end.

Fortunately, in Nigeria the right of access to information held by the state is an established legal principle by virtue of the Freedom of Information Act (section 1(1)). This right formed the basis of an application brought against the government by the Socio-Economic Rights and Accountability Project (SERAP v Nigeria), which requested that the government disclose information about public funds stolen pre-1999. When the government denied this request, SERAP approached the Federal High Court of Nigeria, which found in favour of the applicant, stating that failure to disclose the information about stolen public funds amounted to a breach of the fundamental principles of transparency and accountability as well as the principles enunciated in the African Charter (sections 9, 21 and 22).

However, as a result of non-compliance with the judgment, SERAP commenced contempt proceedings against the government. The fact that the latter had still not complied with the Court's ruling several years after it was handed down is testimony to how a lack of political will can impede efforts to combat illicit financial flows and improve the economy.

Conclusion

The cases of Uganda and Nigeria illustrate the relevance of ATI laws to eradicating illicit financial flows, which are a significant contributor to economic stagnancy in developing countries. However, the two countries are among only a handful of those which have incorporated the right to information in their domestic legislation. African states need to appreciate that while limited transparency and disclosure pose a risk to the effective administration and governance of any economy, this risk is far greater in developing countries in view of their dependency on foreign direct assistance and developmental aid. Furthermore, developing domestic ATI laws will equip African countries to access information on multinational companies and increasingly sophisticated taxation systems, given that illicit financial flows are both a national and global dilemma.

Sekai Furaha-Joy Saungweme is a legal and research consultant as well as a registered legal practitioner in Zimbabwe.

References

African Monitor (2017) *State of Illicit Financial Flows in South Africa: A Scoping Exercise*. Cape Town and Johannesburg. Available at https://bit.ly/2MefBMW

Bohoslavsky JP (2018) 'Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights.' United Nations Human Rights Council. A/HRC/37/54/Add.3. Available at https://bit.ly/33qlBaJ

Charles Mwanguhya Mpagi and Angelo Izama v Attorney General Uganda. Miscellaneous Cause No. 751 of 2009

Collaboration on International ICT Policy for East and Southern Africa (CIPESA) (April 2017) 'The state of access to information in Uganda.' Position Paper

Global Financial Integrity, TrustAfrica, Tax Justice Network-Africa (TJN-A), Pan African Lawyers' Union (PALU), Centre Régional Africain pour le Développement Endogène et Communautaire (CRADEC) and Civil Society Legislative Center (CISLAC) (2017) *Accelerating the IFF Agenda for African Countries.* Available at https://bit.ly/2MW4l7C

High-Level Panel (2015) I*llicit Financial Flow: Report of the High-Level Panel on Illicit Financial Flows from Africa.* Commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development. The 4th Joint African Union Commission/United Nations Economic Commission for Africa (AUC/ECA) Conference of African Ministers of Finance, Planning and Economic Development was held in 2011. This Conference mandated the ECA to establish the High Level Panel on Illicit Financial Flows from Africa. Available at https://bit.ly/3067zt3

OECD (2014) *Illicit Financial Flows from Developing Countries: Measuring OECD Responses.* OECD Publishing: Paris. Available at http://dx.doi.org/10.1787/9789264203501-en

OECD (2018) 'Jurisdictions participating in the Convention on Mutual Administrative Assistance in Tax Matters.' Available at http://www.oecd.org/tax/exchange-of-tax-information/

Report of the Committee of Experts on the Fourth Joint Annual Meetings of the AU Conference of Ministers of Economy and Finance and ECA conference of African Ministers of Finance, Planning and Economic Development. Available at https://bit.ly/31z4UrQ

Resolution on the Right to Freedom of Information and Expression on the Internet in Africa ACHPR/Res. 362(LIX) 2016

Socio-Economic Rights and Accountability Project v Nigeria. FHC/IKJ/CS/248/2011

Southern and East African Trade Information and Negotiations Institute (SEATINI) (2015) *Assessing Uganda's Legal and Institutional Framework in Curbing and Preventing Illicit Financial Flows and Tax Evasion.* Available at https://bit.ly/2YZMAdQ

FEATURE

Emerging Opportunities for Economic and Social Rights Adjudication: Exploring the Inquiry Procedure of National Human Rights Institutions

Meskerem Geset Techane

National human rights institutions (NHRIs) play a distinct role in the promotion and protection of human rights at the domestic level. It has been argued increasingly that their role is instrumental in monitoring compliance with economic and social rights (ESR) obligations. NHRIs across the globe, from Asia Pacific and Africa to Europe and Latin America, are using national inquiries to address and redress a wide range of ESR issues, such as health, housing, land, employment, and water and sanitation.

Considering how intricate the judicial adjudication of ESR is in many national jurisdictions, this article aims to explore the alternative avenue for ESR adjudication that may be offered by NHRIs' inquiry procedures. The article looks at specific examples, and, as part of its account of the role of non-judicial mechanisms in the protection of ESR, it endeavours to shed some light on the nature, advantages and effectiveness of national inquiries as ESR redress mechanisms.

NHRIs as ESR review mechanisms

NHRIs are domestic mechanisms with a constitutional or statutory mandate to promote and protect human rights. The Paris Principles (1991), which define the roles and responsibilities of NHRIs, prescribe review or adjudicative functions – that is, compliance monitoring (investigation) and complaints handling – as well as advisory and educational functions.

As non-judicial independent state institutions 'created to narrow the gap between human rights standards and their practical application' (De Beco 2013:7), NHRIs occupy a central position in the domestic implementation of human rights norms. Even though various legal, political, financial and other factors may affect NHRIs' operations and effectiveness, their unique place and crucial role within the national and international human rights system have been recognised unequivocally (Smith 2006; De Becko 2013; Lindholt 2013; Corkery & Wilson 2014).

As a matter of general principle, NHRIs are vested with the power to promote and protect all rights without distinction by virtue of the Paris Principles (Principle 1(a)), which further stipulate that NHRIs should be given the broadest possible mandate, including with respect to the ESR (Principle 2(a)). Given the indivisibility and equal importance of all rights, 'it must be considered implicit that

[the Paris Principles] apply equally to all aspects of human rights, without any specification or qualification [...] and [...] must be considered as providing equal weight to [ESR]' (Lindholt 2013: 46).

In General Comment No. 10, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) has already emphasised the key role of NHRIs in ESR implementation, in addition to which it highlighted activities that NHRIs may undertake in the promotion and protection of ESR. The activities range from educational activities and technical advice to reviewing laws and administrative acts, setting national benchmarks, carrying out research, and conducting inquiries. Corresponding emphasis is given in the Maastricht Guidelines on violations of economic, social and cultural rights (para 25) and in the 'Principles and guidelines on the implementation of Economic, Social and Cultural Rights' in the African Charter on Human and Peoples' Rights (para 49).

Nevertheless, the role of NHRIs in ESR enforcement is still an emerging subject in contemporary discussion. The reason for this lies in the fact that human rights practice is conventionally inclined not only towards civil and political rights but to judicial enforcement of rights. In counter-reaction, the role of the judiciary in ESR enforcement has become a subject of extensive scholarly exposition (see, for example, Gargarella et al. 2006; Guari & Brinks 2009; Langford 2008; Liebenberg 2008; Michelman 2011; Ramcharan 2005; Young 2010).

Challenging the traditional discourse, Gomez (1995:163) has argued that '[t]he very nature of socioeconomic rights demands that models for their realization not be confined to a complaints-oriented model such as the court process'. Apart from the debate on the legitimacy of judicial review of ESR, the limitations of the judicial process are a source of discontent. Given that courts are confined to dealing with complaints brought before them, their success is dependent on active litigation, a situation calling for non-judicial approaches utilising a broader set of tools. While the important role of the judiciary in ESR enforcement should not be ignored, other, non-judicial means continue to be necessary for addressing the underlying structural factors of ESR violations (Yamin 2005: 1220).

In this regard, Kumar (2006) affirms that NHRIs are well positioned to fill the gap as a non-judicial ESR enforcement mechanism, arguing that they are particularly suited for undertaking policy analysis (which is especially important in addressing ESR violations attributable to failures in government policies) and that governments would be more open to assessments by NHRIs than those by other role-players. 'Uniquely positioned between government, civil society and [international] human rights system', NHRIs can convene state and non-state actors in identifying indicators and collecting data (Quashigah 2013: 113). Over and above their quasi-judicial, or complaint-handling, competence, NHRIs leverage a wider range of tools than the judiciary, and hence their working methods make them well suited to orchestrating ESR enforcement (Quashigah 2013: 113; De Beco 2013: 7). At times, these methods have proven handy in cases where 'the traditional institutions of justice (the courts) were hopelessly inadequate in addressing human rights violations' (Burdekin 2013: 188).

Notwithstanding the fact that most NHRIs lack an express ESR mandate anchored in their countries' national law, ESR should inherently form part of the mandates of NHRIs (even in the absence of explicit formal authority) by virtue of the role these institutions play in monitoring compliance with international obligations. Furthermore, it has been maintained that '[a]n NHRI should employ all available means to respond to inquiries related to the advancement of [ESR], whether or not its enabling statute or national constitution recognises [ESR] as justiciable' (Commonwealth Secretariat 2001: 33-34). The broader mandate of NHRIs thus needs (as of a right and duty) to incorporate all categories of rights, without the necessity that there be express legal authority for this (Nowosad 2005).

NHRIs and national inquiries

An inquiry procedure is an important means by which NHRIs play their fundamental role in the protection of human rights. As part of their monitoring function, NHRIs have the power to examine state compliance with human rights standards both at a legislative and policy

level as well as in practice. They may therefore conduct public inquiries to evaluate the broader implications of laws, policies and public or private acts for the enjoyment of human rights. National inquiries are non-judicial hearings or investigations into widespread or systemic human rights abuses; in these investigations, NHRIs document violations and recommend measures to remedy human rights compliance (Burdekin 2007: 112-116; Brodie 2015: 1227).

In terms of the Paris Principles, NHRIs should have broad powers of investigation in order to facilitate access to state and non-state entities in the undertaking of large-scale investigations to address human rights issues. The Principles clearly establish that NHRIs must be free to consider any question falling within their competence as well as to hear any person, and so obtain any evidence, relevant to their human rights mandate (section III, 1 a-b). The CESCR also clearly identified that the activities NHRIs could undertake in relation to ESR include conducting 'inquiries designed to ascertain the extent to which particular [ESR] are being realised, either within the State as a whole or in areas or in relation to communities of particular vulnerability', monitoring compliance with the rights under the Covenant, and providing reports to public authorities (General Comment No. 10, para 4).

In this regard, NHRIs may have formal authority of inquiry enshrined in their enabling law (as is the case, for instance, in Australia, India, Kenya, New Zealand and South Africa), while in other instances, where they are devoid of an explicit 'inquiry power', they can be creative in leveraging their general investigation or monitoring powers for conducting national inquiries (Brodie 2015: 1239).

It is argued indeed that '[a]mong the most significant powers enjoyed by many NHRIs [...] is the formal power of inquiry [...] into systemic human rights concerns' (Corckery & Wilson 2014: 482). This can often be as strong as judicial authority in that it bestows a statutory power of subpoena compelling state departments to cooperate with NHRIs, consequently empowering NHRIs, unlike civil society organizations, with unlimited access to information from both state and non-state entities. These broad and significant powers authorise them to inquire into sensitive questions, to gather information, and to report to government

National inquiries have several advantages over other ways of redressing human rights violations

authorities, and thus make NHRIs exceptionally well-placed to facilitate ESR enforcement (De Beco 2013: 20-21).

National inquiries have distinctive attributes: they are public, dialogic, dynamic and reformist in nature. Inquiries are interactive processes held in public, engaging a range of stakeholders and facilitating interaction between all affected and concerned groups with a view to resolving systemic issues and bringing about positive change. As Brodie (2015: 1219) explains,

> *[a]t the centre of national inquiries conducted by NHRIs are grievous human rights violations. While the specific aims of each inquiry will differ, all national inquiries seek to create change: to stop systemic or widespread abuse, and to encourage the internalisation of human rights norms. As part of the process, NHRIs provide a platform for the voices of victims to be heard, gather evidence and stories to educate the community, and facilitate dialogue with violators.*

National inquiries have several advantages over other ways of redressing human rights violations, advantages that are pertinent to ESR. In summary, they are as follows:

- Unlike litigation, inquiries are generally dependent on NHRIs' discretion (that is, their proactiveness) to initiate the process by identifying a trend of concern in individual complaints before them, cases before courts, public outcries or media reports. Since NHRI inquiries do not involve a complaint-triggered procedure, they are dynamic in reaching marginalised or disadvantaged people 'who for various reasons, including disability, isolation or ignorance of the NHRI mandate or even its existence' would not have approached the institution (Burdekin 2013: 184).
- NHRI inquiries provide a cost-effective forum for

complainants (that is, the affected groups) as well as for the NHRIs themselves. A substantial number of individual complaints, wide-ranging issues and a huge amount of information can be handled in a less costly manner on a national or large-scale basis through hearings, submissions and research. No prohibitive cost of litigation is involved, whereas most ESR litigation has proven to be very expensive (with cases often having to be sponsored by NGOs, as has happened, for example, in prominent ESR litigation in South Africa).

- The flexible, non-adversarial style of the procedure does not require the complainants, victims or witnesses to resort to lawyers and legal complexities. They simply have to tell their stories, and without strict formality. Referring to the Ghanaian NHRI, Quashigah (2013: 110) describes it as a mechanism that ordinary citizens find more approachable and accessible than they do the courts – which in turn highlights that, even for the well-to-do, the court process is not only expensive but complex and laborious.
- The dialogic, interactive nature of the procedure facilitates broad participation in the adjudication process, both by the public as well as state and non-state actors, and creates the context for 'robust, frank, open debate' (SAHRC 2008: 4). As Brodie (2015: 1226) notes, 'dialogue is often central to the inquiry process', one in which NHRIs focus on seeking and gathering contributions from all groups concerned, including wrongdoers as well as victims.
- The process can often offer a negotiated remedy or solution as it fosters meaningful deliberation on measures to be taken to realise ESR progressively. NHRIs can engage with affected communities to deliberate on the changes that are needed and convene concerned public officials and organisations to discuss how to implement recommendations and proposed remedies (De Beco 2013: 22; Brodie 2015: 1218). As such, NHRIs can facilitate justice with regard to ESR by stimulating deliberative processes in the design and implementation of legal rights and seeking to negotiate and coordinate solutions. This was demonstrated by the famous Australian Human Rights Commission inquiry into mental illness (Burdekin 2013).
- Inquiries, arguably, 'can most effectively address systemic violations of human rights' by analysing individual violations as well as scrutinising laws, policies and programmes causing the violations (Burdekin 2013: 184). They may not necessarily result in immediate or individual remedies, but they do tackle underlying factors and catalyse structural change. The experience of Latin America and the Asia-Pacific region, for example, demonstrates the potential of NHRI inquiries in exposing and redressing systemic and widespread human rights violations (Corkery & Wilson 2014; Brodie 2015).
- Inquiries offer a key opportunity for the application or domestication of international standards, by using such standards 'as benchmarks against which national laws, policies and programmes can be assessed' as well as the basis for developing new policies or legislation (Burdekin 2013: 184-188). This has proved particularly advantageous for enforcing ESR on the same footing as civil and political rights, even in jurisdictions where ESR are not enshrined in the constitution or recognised as justiciable rights (for example, Australia, Canada and India).

An important question concerns the effectiveness of this procedure, in particular with respect to the implementation of the recommendations emanating from it. Evidence shows that if inquiries are widely publicised, they have the power to build up pressure for political will. Burdekin (2013: 185), referring to the Australian experience, argues that 'community awareness and political pressure generated by a well-publicized national inquiry maximizes the likelihood that [an] NHRI's recommendations to the parliament and/or government will produce practical results'. Media coverage of inquiries is key; equally so is the power of an NHRI to make its reports public. By giving ESR concerns prominence on the public agenda, '[a] national inquiry can be the start of a national conversation [on systemic human rights issues]',

one that triggers long- term remedies and structural reforms enabling the realisation of ESR (Brodie 2015: 1226).

Furthermore, for inquiries to be effective, NHRIs need to have a structured follow-up mechanism in place. This is particularly important given the non-binding nature of the recommendations emanating from a non-judicial process. In this regard, the Ghanaian experience is worth noting as a good practice, seeing as the Ghana Commission on Human Rights and Administrative Justice (CHRAJ) instituted a tracking programme to monitor compliance with its recommendations (Quashigah 2013: 122-124).

Similarly, the cooperation of civil society organisations (CSOs) cannot be underestimated. As highlighted by the Kandy conference (1999), NHRIs rely on the support of CSOs to publicise matters at domestic and international level, facilitate media coverage, as well as lobby for and follow up on the implementation of recommendations.

The independence of NHRIs is key to ensuring the effectiveness of their inquiry power (Brodie 2015: 1218). In addition, technical capacity and adequate funds are necessary preconditions for a successful inquiry mechanism. Monitoring ESR generally requires technical capacity on these rights and can be resource-intensive as it depends on the collection and in-depth examination of large amounts of data relevant to the issues at stake (De Beco 2013: 23, 30). NHRIs need to be adequately resourced both financially and technically to be able to engage in impactful inquiries.

A glance at African experiences

The Malindi Inquiry (Kenya)

In 2005, the Kenyan National Commission for Human Rights (KNCHR) launched an inquiry (the Malindi Inquiry) to investigate alleged human rights violations arising from the activities of salt manufacturing companies in the Magarini Malindi district. Following a simple hearing process, the five-day inquiry gathered oral and written evidence from communities, companies, local and national authorities, and experts. The investigation looked into several ESR issues, including evictions, land rights, health and water matters, and workers' rights, and found evidence of, among other things, a denial of land rights; unjust compensation (even no compensation); destruction of property; denial of access to water resources or clean water; and unfair labour practices, such as extremely poor working conditions, excessively low wages, and restrictions on unionisation (KNCHR 2006).

The KNCHR called for accountability by public and private actors, making detailed recommendations in this regard for each its finding. The recommendations included legal and policy reform, institutional or regulatory framework reform, investigation and prosecution of perpetrators of violations, and community participation in designing interventions. Over and above garnering increased attention from the relevant actors and catalysing long-term interventions in the issues concerned, the inquiry reportedly also led to a more concrete remedy for workers by facilitating, among other things, the provision of safety equipment and negotiations for better pay.

The housing and evictions inquiry (South Africa)

Among the several inquiries conducted by the South African Human Rights Commission (SAHRC) involving ESR is the housing, evictions and repossessions inquiry of 2007. It covered evictions that took place in Gauteng province due to bond default; affected persons had not been informed of the eviction proceedings, which left many households homeless, blacklisted with credit bureaux, and burdened with the legal cost of the eviction.

The inquiry allowed submissions from large numbers of individuals, experts, CSOs and institutions, with the process bringing to light

incidents of illegal eviction and showing the most affected to have been those from vulnerable groups. The inquiry involved an extensive examination of all the role-players concerned, including banks, the police and Department of Housing, and highlighted the measures they should take in order to play a positive role in realising the right to housing in South Africa. While the SAHRC brought increased attention to systemic problems in this aspect of housing, the Commission's findings and recommendations also applied more widely beyond the specific scope of the inquiry.

The Bumbuna Inquiry (Sierra Leone)

The Human Rights Commission of Sierra Leone (HRCSL) undertook an inquiry into human rights violations that occurred in the Northern Province town of Bumbuna in 2012 in relation to the operation of African Mineral Ltd (AML). The inquiry was preceded by a strike by workers of AML and members of the Bumbuna community. The inquiry investigated the state of labour rights and issues of rights to water, finding that workers and the community had long-standing grievances, respectively about working conditions and access to water (due to AML's interference with water sources). It also dealt with alleged police atrocities in response to the strike.

The Commission heard personal statements of victims, members of the community, the police and others concerned. It received written submissions through an open call and at public hearings. In addition, the Commission conducted focus group discussions to document detailed accounts of events as experienced by of the community. The process allowed for dialogue and the participation of victims and community members, and took into account their views on causes, impacts and solutions. The inquiry offered relevant recommendations to strengthen AML's accountability and the community's access to remedy.

The experiences related above show that while the national inquiry process may not necessarily result in individuals being granted enforceable remedies (though such remedies that do arise cannot be ignored), it does certainly engage with the underlying problems that cause systemic human rights violations. As the examples demonstrate, through a simple, accessible and relatively fast adjudicative process – one that also allows the use of human rights standards (both national and international), facilitates dialogue, and covers large numbers of affected people and a range of fundamental ESR issues in a cost-effective manner – it is possible to bring about accountability and negotiated solutions for ESR violations. Clearly, national inquiries orchestrate reform towards ESR realisation, with their impact being manifested in laws and policies reviewed, standards set, new policies introduced and implemented, budgets allocated, new frameworks established, and practices and behaviours changed (Brodie 2015: 1245).

Conclusion

National inquiries offer an alternative avenue for adjudicating ESR in a proactive, cost-effective (that is, less costly) and dialogic manner, addressing systemic violations and resulting in a negotiated remedy or solution. They deal with large numbers of individuals and are flexible and accessible. If the necessary requirements are fulfilled, such as independence, a broad mandate and adequate budget and human resources, inquiries, as proven in several cases, hold strong potential for adjudicating widespread ESR violations. Ideally, the enabling legislation must facilitate NHRIs' power of inquiry, while NHRIs in turn should use their general investigation or monitoring mandate innovatively. If NHRIs remain proactive in conducting impactful national inquiries, and, equally, persist in following up to ensure compliance with their recommendations, their 'inquiry powers' can and do produce positive change for ESR enforcement, facilitating both individual remedies, whenever possible, as well as structural ones.

Meskerem Geset Techane is based at the Human Rights Centre, University of Padova.

References

African Commission on Human and Peoples' Rights (2010) *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights.* Available at https://bit.ly/2y4K2ib

Brodie M (2015) 'Uncomfortable truths: Protecting the independence of national human rights institutions to inquire.' *UNSW Law Journal,* 38(3), pp. 1215-1260

Burdekin B (2007) *National Human Rights Institutions in the Asia Pacific.* Martinus Nijhoff

Burdekin B (2013) 'The role of national inquiries in the protection of social and economic rights.' In E Brems, G De Beco, and W Vandenhole (eds), *National Human Rights Institutions and Economic, Social and Cultural Rights.* Intersentia

CESCR (1998) *General Comment No. 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights.* 19th Session, 16 November-4 December 1998. UN E/C.12/1998/25

Commonwealth Secretariat (2001) *National Human Rights Institutions: Best Practice.* Available at https://bit.ly/2KykXkl

Corkery A and Wilson D (2014) 'Building bridges: National human rights institutions and economic, social, and cultural rights.' In E Riedel, G Giacca, and C Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges.* Oxford University Press

De Beco G (2013) 'The role of national human rights institutions in the promotion and protection of economic, social and cultural rights: Historical, theoretical and critical perspectives.' In E Brems, G De Beco, and W Vandenhole (eds), *National Human Rights Institutions and Economic, Social and Cultural Rights.* Intersentia

Gomez M (1995) 'Social economic rights and human rights commissions.' *Human Rights Quarterly*, 17(1), pp. 155-169

HRCSL (2012) *Bumbuna Inquiry Report (2012).* Available at https://bit.ly/2MevgvY

KNCHR (2006) *The Malindi Inquiry Report: Economic interests versus social justice: Public inquiry into salt manufacturing in Magarini, Malindi district (2006).* Kenya National Commission on Human Rights. Available at https://bit.ly/2NvxO8K

Kumar CR (2006) 'National human rights institutions and economic, social, and cultural rights: Toward the institutionalization and developmentalization of human rights.' *Human Rights Quarterly,* 28(3), pp. 755-779

Lindholt L (2013) 'National human rights institutions as independent actor in relation to economic, social and cultural rights.' In E Brems, G De Beco, and W Vandenhole (eds), *National Human Rights Institutions and Economic, Social and Cultural Rights.* Intersentia

Maastricht Guidelines on violations of economic, social and cultural Rights (1998). *Human Rights Quarterly,* 20(3), pp. 691-701

Nowosad O (2005) 'National institutions and the protection of economic, social and cultural rights.' In BG Ramcharan (ed), T*he Protection Role of National Human Rights Institutions.* Martinus Nijhoff

Quashigah K (2013) 'The monitoring role of the Ghana Commission on Human Rights and Administrative Justice (GCHRAJ) in the protection of economic, social and cultural rights.' In E Brems, G De Beco, and W Vandenhole (eds), *National Human Rights Institutions and Economic, Social and Cultural Rights.* Intersentia

SAHRC (2007) *Report on the Public Hearing on Housing, Evictions and Repossessions.* Available at https://bit.ly/2z630mF

Smith A (2006) 'The unique position of national human rights institutions: A mixed blessing?' *Human Rights Quarterly,* 28(4), pp. 904–946

Yamin AE (2005) 'The future in the mirror: Incorporating strategies for the defense and promotion of economic, social and cultural rights into the mainstream human rights agenda.' *Human Rights Quarterly,* 27(4), pp. 1200-1244

CASE REVIEW

Reverend Ndoria Stephen v The Minister for Education & 2 Others

Amar Roopanand Mahadew

Reverend Ndoria Stephen challenged the Minister for Education, Kenya National Examinations Council and the Honourable Attorney General of the Republic of Kenya before the High Court of Kenya in October 2012 (Ndoria Stephen v Minister for Education and others, Petition No. 464 of 2012; hereafter, the Ndoria case). The crux of the matter was the hardship that children living in what are considered marginalised areas of the country – namely, the north and north-eastern regions and parts of the coast and Rift Valley – were facing in accessing education on the same basis as those in more developed parts of Kenya. The petitioner contended that this situation had arisen due to the government's allegedly discriminatory educational policies.

Accordingly, he requested that, pending the hearing and determination of the case, the Court restrain the respondents from conducting Kenya Certificate of Primary School Education (KCPE) and Kenya Certificate of Secondary Education (KCSE) examinations in 2012 anywhere in the country. The Court was also asked to order the respondents to produce the quotas and policies they were using to ensure that learners from the marginalised areas were not disadvantaged or discriminated against by the KCPE and KCSE exams. In July 2015 the Court gave its decision, one considered of essential importance in the interpretation of the right to education provided by section 43 of the Kenyan Constitution. This article outlines the main arguments of the contending parties and the rationale the Court followed in reaching its decision.

The case for the petitioner

The petitioner, Reverend Stephen, said the petition was brought on behalf of the marginalised communities of Kenya on the ground that they have been deprived of equality of opportunity due to unequal access to education and to consequent advancement in society. He argued that children coming from geographically disadvantaged and marginalised areas have been side-lined and discriminated against by educational policies that do not allow them to compete fairly with children from the rest of Kenya in securing seats in secondary schools and public universities. Consequently, these learners have been performing badly in examinations, as evidenced by several commissions set up by the government to find a solution to the problem.

The petitioner maintained, furthermore, that the Ominde Commission identified Garrisa, Mandera, Isiolo, Tana River, Wajir, Samburu, Turkana, Taita Taveta and West Pokot as regions that required a greater allocation of funds to facilitate access to education. According to him, schools in the marginalised areas were deserted because children were compelled to travel miles to reach schools, where they were without proper sanitation and access to water. He was of the opinion that requiring this category of learner to sit for the same examinations as the rest of the children in the country was discriminatory.

The petitioner illustrated the government's discriminatory practices in education by citing the fact that, whereas a countrywide teachers' strike had resulted in national examinations being

postponed by three weeks, tribal clashes in Tana River County and other areas did not result in any such postponement even though schools remained closed during the clashes. He also mentioned that many students who had been displaced after Kenya's 2008 election violence were still in camps and learning under extremely difficult conditions. Accordingly, it was discriminatory for the government to subject such learners to the same examinations that learners elsewhere in the county would be sitting.

Reverend Stephen argued that, ever since independence, the respondents had failed to devise policies and strategies to ensure that children from marginalised areas were treated fairly and on an equal footing with their counterparts in the rest of the country. He challenged the action of the government purporting to establish admission quotas to public universities and secondary schools on the basis that such a system did not benefit the affected children but instead those from districts or provinces where parents could otherwise afford to enrol their children in private schools and tuition; such parents enroled their children in the affected only in order to benefit from the quotas.

The legal basis upon which this case reposed was articles 53(1)(b), 56(b), 27, 10 and 26 of the Constitution. In terms of article 53(1)(b), '[e]very child has the right to free and compulsory basic education'. Article 56(b) in turn stipulates that '[t]he State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups are provided special opportunities in educational and economic fields'. Article 27 concerns equality and freedom from discrimination; article 26 deals with the right to life; and article 10, with national values and principles of governance.

The petitioner argued that the right under article 53 is supposed to be achieved immediately and is not subject to progressive realisation. Citing General Comment No. 13 of the Committee on Economic, Social and Cultural Rights (CESCR), he contended that the essentials of the right to education – such as availability, accessibility and adaptability – are not to be achieved progressively but with immediate effect. In this regard, the petitioner held that teaching materials were not made available immediately in the marginalised areas at the same level as in other parts of the country. Arguing that children were being subjected to the same examinations despite significant differences in materials and facilities for education, he appealed to the Court that the national examinations should be abolished.

The case for the respondents

In their response to the petitioner's argument, the Minister for Education and the Attorney General contended that the government had undertaken various interventions to guarantee access to education for the children of the marginalised areas. They highlighted measures such as financial support, the provision of meals to encourage children to go to school, and the availing of mobile schools for pastoralist communities. Their argument, in brief, was that the government had indeed adopted policies to ensure that children sitting for national examinations from the marginalised areas do so in a conducive environment.

The second respondent, the Kenya National Examination Council (KNEC), opposed the petition and emphasised that its role is to ensure that examinations are carried out based on agreed syllabuses that are prepared by the Kenya Institute of Curriculum Development. The KNEC said that when exam papers were set after the completion of an accepted and approved syllabus, there was an assumption that children were all exposed to a conducive environment. It stated, furthermore, that it was the government's obligation to guarantee the right to education, whereas its was limited to setting examinations.

The Court's ruling

The High Court of Kenya agreed with the petitioner that in some marginalised areas access to adequate learning facilities and teaching materials is very difficult. It also noted that the respondents had not disputed the point that the Constitution provides that the right of every child to an education is to be realised immediately, not progressively, and in a way which is non-discriminatory. The Court reiterated that the central dispute in the matter before it was

the question of whether the respondents had failed to provide for equitable learning facilities to children from marginalised areas and had thus violated the constitutional provisions cited above.

The petitioner had cited the views of the Committee on the Rights of the Child and the CESCR to the effect that although the right to education is a progressive right and is subject to the availability of resources, the prohibition against discrimination and inequality is subject neither to progressive realisation nor availability of resources but applies fully and immediately to all aspects of education. It was also argued that sharp disparities in spending and allocation of funds between marginalised areas and the rest of the country infringed the provisions of the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights (ICESCR) concerning protection against discrimination.

The Court considered the reply of the respondents to determine whether there was a case of discrimination. In terms of evidence, the respondents submitted facts such as the grants offered to children from marginalised areas, namely the Pockets of Poverty Grants, Infrastructure Grants, Service Gratuity Grant and National Schools Expansion Programme. It was also noted that the Directorate of Basic Education had been disbursing funds, such as the Free Primary Education Infrastructure Improvement grants and various funds related to Emergency Response, Non-Formal Schools and Centres, Mobile Schools, Low-Cost Boarding Primary Schools and Special Needs Schools. In addition, with regard to girls from marginalised areas, the government, in collaboration with UNICEF, had allocated 60 slots to girls from the north-eastern region to enable them to study in high-perfuming schools.

In considering the petitioner's claim that the respondents' education practices were discriminatory, the judge in the case, Justice Mumbi Ngugi, held that there was no basis for alleging discrimination against the children by the government, as the petitioner's argument did not meet the legal definition of discrimination. She cited a paragraph from the case of Peter K. Waweru v Republic [2006] eKLR, where the following had been observed:

> *Under Section 82(3) of the Constitution of Kenya, discriminatory means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.*

Judge Ngugi stated that it was undisputed that there had been disparities in access to education for children in marginalised areas. However, the government had reacted and taken steps in the form of the multiple policies and grants that had been cited – the petitioner's contention, by contrast, was that such policies had not been implemented and that this had led to differential access to education. The Court did acknowledge that it had only the respondents' testimony to go by as to whether the government's policies and strategies for enhancing access to education were being properly and fairly implemented. In this regard, the Court noted that it had no way of establishing whether the systems in place were indeed operated as the respondents claimed or as the petitioner alleged.

However, Judge Ngugi stated that, as provided by the Constitution, the formulation and implementation of policies fell within the province of the executive. She was satisfied by the mere fact that the respondent had averred that the government had established policies and that these were being implemented. Judge Ngugi held that she was unable to find that the state had failed in its obligations to set policies that would accord children in marginalised areas access to basic education.

She then adjudicated, as summarised below, on each of the petitioner's requests. In response to the request for a declaration that children from marginalised areas were entitled to special provisions in the admission to secondary schools and public universities, the Judge said that the respondents already had a quota system in place. The petitioner also sought a declaration that the respondents had violated the right to education of the children concerned. In reply, the Judge said there were not

enough facts before her to give such a declaration. She added that the evidence before her showed the government was taking measures such as providing grants, bursaries and mobile schools, albeit that their effectiveness had not been debated or that evidence in this regard had been adduced. The other requests – for a declaration that the respondents were discriminating against children from marginalised areas and for an order to abolish the KCPE and KSCE – were also rejected by the Court.

Concluding comments

This case provided an opportunity for the Kenyan judiciary to adjudicate on arguably one of the most important socio-economic rights there is: the right to education. The Constitution of Kenya guarantees the right to education as an enforceable and justiciable right, whereas in other constitutions in Africa this right is either presented merely as a directive principle of state policy or is simply absent (as in, for example, the Constitution of Mauritius). Be that as it may, the Court did not give full consideration to the right as one which is to be achieved progressively, as per article 2 of the ICESCR, yet which also has significant components that are subject to minimum core obligations and are therefore meant to be realised immediately. The Court was bound by the arguments and evidence produced before it, as it acknowledged in its judgment.

However, one may argue that the government's policies and strategies to enhance access to education could have been assessed in terms of their reasonableness as measures. This is the approach that the Constitutional Court of South Africa has taken in several cases, notably in the ***Grootboom*** case – where the reasonableness of a low-cost housing programme was assessed in view of progressively realising the right to housing – and in the *Treatment Action Campaign case*, in which the reasonableness of the measure of providing Nevirapine only in selected state hospitals was assessed with the aim of progressively realising the right to health.

In the same way, the measures taken by the Kenyan government could have been assessed to find out whether they are reasonable and effective enough to progressively realise the right to education of children from the marginalised areas. This argument was not advanced by the petitioner, nor did the respondents adduce evidence relating to it, as the Judge noted.

It may be argued, nevertheless, that the Court could have exercised its discretion and requested such evidence, thereby adjudicating on the matter in a way that shows judicial activism. The petitioner requested that the Court declare the government in violation of the constitutional right to education; it was thus incumbent on the Court to direct the respondents to show how effective and reasonable the measures cited were for it not to grant an order making such a declaration.

Although the Court reached a sensible judgment, in some respects, then, the Kenyan judiciary missed an opportunity to adjudicate more probingly on such an important matter as the right to education. Inspiration could have been drawn from the jurisprudence of the Constitutional Court of South Africa, as well as from the general comments and communications of quasi-judicial bodies such as the CESCR.

Amar Roopanand Mahadew is a senior lecturer in the Department of Law at the Faculty of Law and Management, University of Mauritius.

References

Government of the Republic of South Africa & Ors v Grootboom & Ors 2000 (11) BCLR 1169 (CC)

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

Ndoria Stephen v Minister for Education & 2 others [2015] eKLR

Peter K. Waweru v Republic [2006] eKLR elk

United Nations Committee on Economic, Social and Cultural Rights (1999) *General Comment No. 13 – The Right to Education (Article 13 of the Covenant).* UN Doc. E/C.12/1999/10 8 December 1999

UPDATES

Deprivation of Liberty and the Right to Health: Report of the United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Dainius Pūras (10 April 2018)

Robert Doya Nanima

At the 38th session of the Human Rights Council, held on 18 June to 6 July 2018, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Special Rapporteur) addressed the General Assembly. His report formed part of the Agenda as item 3, which covered issues on the promotion and protection of all civil, political, economic, social and cultural rights, including the right to development.

The purpose of this update is to offer a summary of the Special Rapporteur's report with regard to five thematic areas. These areas included the right to health in the context of confinement and deprivation of liberty; the relationship between mental health and forced confinement and deprivation of liberty; children deprived of liberty; women's right to health and issues of confinement, and need to end public confinements through an engagement with the community.

The right to health in the context of confinement and deprivation of liberty

This thematic area was examined on two grounds: the intrinsic links and systemic omissions that affect the right to health when an individual's liberty is curtailed on one part, and an overview of the right-to-health framework on the second part.

The intrinsic link to the right to health was informed by the need to uphold the dignity of an individual through the protection of the right to health in prison. According to the Special Rapporteur, the enjoyment of the right to health in prison requires the enjoyment of other guarantees such as the non-deprivation of liberty; the right to a fair trial; the prohibition of arbitrary detention, torture and cruel, inhuman or degrading treatment; and the right to life.

He highlighted five systemic omissions that come to light in the deprivation of liberty and subsequently affect the right to health. First, the failure to have a comprehensive system of health

care from childhood leads to inequalities, poverty and discrimination, which continues into adulthood. Consequently, the lack of health care in prisons and areas of incarceration is due to the lack of a comprehensive policy that addresses all the stages of development from childhood to adulthood. This is evident in research findings which show that most of the affected people in closed settings come from marginalised and low-income communities.

Secondly, the existence of punitive legal frameworks and public policies makes incarceration a likelier alternative than the realisation of the right to health. This occurs where governments make laws that criminalise behaviours based on one's identity or status (including sexual orientation or HIV status) or selectively enforce laws against loitering, public disorder or vagabondage.

Thirdly, the use of detention and confinement as a response to public safety monopolises resources and creates a predisposition towards increased numbers of incarcerations. The situation would be different if resources were redistributed to support the development of robust health-care systems, safe and supportive schools, programmes to support healthy relationships, access to development opportunities, and an environment free from violence.

Fourthly, a person who is incarcerated finds it challenging to enjoy the right to health because detention in prison informs the continuing violation of the right to health. As a result, poor health, due to poor conditions of detention, poor or no provision of health care, and lack of access to health care, is exacerbated by the psychosocial pain and hopelessness that follow the deprivation of one's liberty, sometimes with dire consequences such as suicides and premature deaths in custody.

The last link between the right to health and deprivation of liberty is the devastating impact of the continued detention of the breadwinners and primary caregivers in young and low-income families. In addition to the impact that the detention has on the social and economic standing of such a family, once the breadwinners or caregivers are released, they are not provided with support to reintegrate into society. Usually these ex-convicts have a criminal record and are subjected to post-release surveillance and commitment orders.

Once breadwinners are released, they are not provided with support to reintegrate into society

In view of the intrinsic links to the right to health above, the Special Rapporteur reiterated the need for states to engage a proper right–to-health framework that seeks to improve the enjoyment of the right to health in places of detention. He reminded states of their obligations to respect, protect and fulfil the right of everyone to the enjoyment of the highest attainable standard of physical and mental health under international law, and to refrain from denying or limiting equal access for all persons, including prisoners or detainees, to preventive, curative and palliative health services.

These two obligations, he noted, are instructive for ensuring care for persons detained in prisons according to the Minimum Standards for the treatment of prisoners (UN General Assembly, 2015). He noted that the fulfilment of these responsibilities and obligations supported the progressive realisation of the right to health in closed settings such as detention centres (UN Human Rights Council, 2018).

The Special Rapporteur recognises that the right to informed consent requires a voluntary and sufficiently informed decision that promote a person's autonomy, self-determination, bodily integrity and well-being. It is recommended that this right is respected, protected and fulfilled in cases of isolation and confinement. The risk to the right to consent is the continued subjection of vulnerable persons to harmful, coercive treatment such as compulsory drug testing and research trials.

He also highlighted how the discriminatory apprehension of incarcerated persons by the administrative staff of places of detention leads to discrimination and inequitable provision of services. This was evident in the denial of health care, such

as anti-retroviral therapy or contraceptives, because of the incarceration of an individual. He called for staff training on alternative approaches.

Other issues covered in the report include the need for international cooperation and assistance, the underlying determinants of health, the state of heath care in detention centres, and the need for participation and accountability in respect to the right to health.

The relationship between mental health and forced confinement

Deprivation of liberty has effects on mental health that can amount to a violation of human rights. A case in point is solitary, protracted or indefinite detainment in prisons or other closed settings, which negatively affect the mental health and well-being of an individual. The deprivation of liberty leads to the potential exposure to inhumane, conditions, and abuse.

Children deprived of liberty

The Special Rapporteur called for an investment in the use of community-based services as an alternative to child prisons and large care institutions. This would avert the magnitude of children's suffering in detention. In view of neuroscience research that shows that the brains of adolescents continue developing in many critical ways, there was a need to question the justifiability of the States' use of punitive methods of control on children.

Women, the right to health, and confinement

The Special Rapporteur noted that the violation of the right to health is significantly greater in women than in men due to power and authority in places of detention. This is due to historical, patriarchal, and hyper-masculinist constructions of punishment and control. The problem is more dire where the women who are incarcerated have disabilities, are expectant mothers or have left children at home who struggle to cope. Other conditions such as overcrowding, discrimination and unsanitary conditions present serious health-care problems. States have to provide special accommodation for both prenatal and postnatal care and treatment in prisons.

From confinement to community: Ending public-health detention

At times confinement is used as a tool to control the spread of infectious diseases and viruses, or out of medical necessity. However, punitive measures such as confinement lead to the spread of further disease. States Parties should thus adopt community-based care practices that decrease the spread of infectious diseases.

Conclusion and recommendations

Deprivation of liberty and confinement lead to a violation of the right to health. Sustainable Development Goal 3 cannot be achieved if the dangers of detention to public health are not dealt with. International and domestic laws that promote non-incarceration and community-based alternatives should be embraced.

References

Report of the Special Rapporteur on Extreme Poverty and Human Rights on the International Monetary Fund (IMF) and Its Impact on Social Protection. UN Doc A/HRC/38/33 (8 May 2018). Available at https://bit.ly/2ydlCDm

UPDATES

The Role of the International Monetary Fund (IMF) in Relation to Social Protection: Report of the United Nations Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston (8 May 2018)

Gaopalelwe Mathiba

At the 38th session of the Human Rights Council, which sat from 18 June to 6 July 2018, the UN Special Rapporteur on extreme poverty and human rights presented the report under discussion, which focused on the International Monetary Fund (IMF) and its impacts on social protection.
The report finds that while the vast majority of low-income developing states are listed in IMF programmes, any assistance they receive constitutes only 13 per cent of their consumption needs. Moreover, the report notes that the poorest 20 per cent of them are not afforded any form of social protection by the IMF.

As a result, the poorest class of people suffer the deprivation of living in penury without social protection. The question that arises is: What role do their own governments play in response, and, by extension, what role does the international community play?

The IMF defines itself as an organisation aiming to foster global monetary cooperation, ensure financial stability through its fiscal policies, facilitate smooth international trade, promote sustainable economic growth, advance social protection and reduce poverty around the world.

However, the Special Rapporteur's report takes issue with the latter mission of the IMF, contending that for many years its position was that 'social issues' were not its concern and that it addressed itself only to macroeconomic matters, narrowly defined. The report points out that the IMF has long been criticised for its disregard of 'social issues' and its impact on developing countries, including the economic impoverishment brought about by its imposition of structural adjustment policies on African countries.

The report notes that the IMF survived a recession during the 1997 global financial crisis and that even once it returned to its central position in international economic governance in 2009, social protection remained in the realms of fantasy; however, in response to widespread criticism on this score, the IMF undertook a rigorous internal reassessment that involved the revision of aspects of its neo-liberal agenda and the construction of 'macro-criticality' theory.

Following this internal reassessment, the IMF regards itself as having changed fundamentally in its approach to a range of issues, among them the question of social protection, albeit that critics see this as a smokescreen. Against this backdrop, the Special Rapporteur set out to examine the impact of the IMF on the human rights of the poor through its work on social protection.

The current phrasing of the IMF founding instrument does not refer to today's most compelling issues

The legal framework and IMF mandate

The IMF derives its mandate from the instrument called the Articles of Agreement of IMF, which empowers it to exercise an oversight and advisory role in financial affairs around the world.

Its stated purpose is, among other things, to contribute to 'the development of the productive resources of all members as primary objectives of economic policy'. The founding instrument also requires the IMF to 'respect the domestic social and political policies of members' in its surveillance and lending; hence, it was concluded (after a review in 2010) that the IMF has been 'a monetary agency, not a development agency'.

The report finds that the current phrasing of the IMF founding instrument does not refer to today's most compelling issues, let alone to the integration of human rights in its decisions. However, the IMF remained deaf to this criticism and made the self-exculpatory remark that 'the Articles [that is, its founding instrument] are sufficiently flexible to accommodate major reforms'.

Mandate flexibility in practice

As mentioned, the IMF constructed a macro-criticality theory to use in practice in relation to social protection. This theory covers, among other things, the macro-criticality of human rights; corruption and military spending; and economic and gender inequality.

However, the IMF has not adopted an official position on human rights, and it is reported that its top official informed the Special Rapporteur

that it was not bound by human rights norms, 'except perhaps in cases of genocide'.

Secondly, the IMF has always been reluctant in fighting corruption, in that it would only react to specific instances of corruption when there was a reason to believe that they could have significant macroeconomic implications, such as when the amounts involved are very large. Even though the IMF is currently on a mission to intensify its anti-corruption policy, it is not fully committed to do doing so, since it apparently fears 'becoming involved in politically charged debates'.

Lastly, the IMF has been applauded for its efforts in tackling gender and economic inequalities.

The IMF is the single most influential international actor in relation not only to fiscal policy but to social protection

Conclusion

As a result of the reform the IMF has undergone, the acceptance of the macro-criticality theory of certain elements of social protection ensued. To that end, five recommendations from the 2017 report of the Independent Evaluation Officer are supported and hereby briefly articulated.

The report notes that in January 2018, a management implementation plan announced the preparation of a discussion paper by the Executive Board in February 2019 that would address (1) a definition of social protection; (2) the macro-criticality of social protection; (3) the affordability and efficiency of social protection systems; (4) the potential forms of IMF engagement with social protection; and (5) the position of the IMF on universal access to and targeting of social programmes and collaboration with other institutions.

The IMF is the single most influential international actor in relation not only to fiscal policy but to social protection. For its part, the human rights community must also start engaging seriously with the IMF. Its work has significant human rights implications, given that fiscal consolidation policies can either make or break rights. In a world that is suffering the consequences of the IMF's previously lopsided approach to globalisation and its single-minded pursuit of a model of fiscal consolidation that relegated social impact to an afterthought, the IMF not only bears responsibility for the past but will also determine whether the future will be different.

To date, the IMF has been an organisation with what the Special Rapporteur called 'a large brain, an unhealthy ego and a tiny conscience'. If it takes social protection on board seriously, rather than making a tokenistic commitment to minimal safety nets, it can show that it has actually learnt from its mistakes.

References

Report of the Special Rapporteur on Extreme Poverty and Human Rights on the International Monetary Fund (IMF) and Its Impact on Social Protection. UN Doc A/HRC/38/33 (8 May 2018). Available at https://bit.ly/2ydlCDm

EVENT

Colloquium on the Role of Regional/ Sub-Regional Human Rights Bodies In Advancing Sexual and Reproductive Health and Rights in Africa (28–29 June 2018)

Ebenezer Durojaye

From 28–29 June 2018, the Socio-Economic Rights Project (SERP) at the Dullah Omar Institute (DOI) at the University of the Western Cape, in conjunction with the Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN), organised a colloquium on the role of regional and sub-regional human rights bodies in advancing sexual and reproductive health and rights (SRHR) in Africa.

It was attended by representatives of regional and sub-regional bodies – namely, the African Commission on Human and Peoples' Rights, the African Children's Charter Committee of Experts, and the ECOWAS Court – as well as by civil society groups, academics and delegates of national human rights commissions. Participants hailed from Uganda, Nigeria, Ethiopia, Kenya, The Gambia and South Africa.

The objectives of this two-day event were:

- to review recent developments on SRHR at international, regional and national levels;
- to build the capacity of the personnel of regional and sub-regional human rights bodies on issues relating to SRHR;
- to explore the role of these bodies in ensuring that states are accountable for the realisation of SRHR;
- to foster partnership between these bodies and other stakeholders in order to advance SRHR; and
- to share experiences through case studies about the roles of regional and sub-regional human rights bodies in advancing SRHR.

The colloquium opened with a presentation by Prof Ebenezer Durojaye of the DOI on the evolution of sexual and reproductive health as a cluster of recognised human rights. He said this had come about thanks to a variety of actors, United Nations (UN) processes, international health authorities, and works of feminist scholarship. The presentation traced the history of SRHR from the first International Human Rights Conference in Tehran in 1968 to the International Conference on Population and Development in Cairo, 1994, where a comprehensive definition of sexual and reproductive health rights was adopted.

Prof Durojaye proceed to explore the link between reproductive health and sexual health, which are often conflated because of a lack of clarity in definitions provided in Cairo in 1994. While there seemed to be some similarity between the two, they should not be treated as one and the same.

Prof Durojaye noted in this regard that the rights to sexual and reproductive health already existed in international and regional human rights instruments. Among the applicable rights are the rights to life, health, dignity, privacy, liberty, non-discrimination, autonomy, and freedom from cruel, inhuman and degrading treatment.

Further sources of the right to sexual and reproductive health include the general comments of UN committees, the concluding observations of treaty-monitoring bodies, reports by UN agencies, and the decisions of national courts and regional human rights bodies.

Thereafter, a presentation by Nkatha Murungi of the African Child Policy Forum dealt with the framework for SRHR under the African human rights system. She explored the protection of SHRH in Africa from 1980 to date, the conceptual frameworks and normative standards regarding SRHR, and several key issues.

Ms Murungi observed that the normative framework has changed significantly, having seen a move from an era of total silence to an era in which there is a multiplicity of frameworks, including provisions in the African Charter, the African Charter on the Rights and Welfare of the Child, the Maputo Protocol, and the African Disability Protocol, and some clarifications provided thereto.

Her presentation drew attention to issues that had to be taken more seriously. For instance, SRHR had to considered throughout a person's entire life cycle as opposed to only at the reproductive stage. Also, sexual rights have been categorised purely as health rights, and there are questions about the autonomy of children in SRHR matters. Furthermore, most African frameworks on SRHR are tailored for the married heterosexual female, an orientation excluding alternative perspectives from coming to light in discussions that are under way about the continent's approach to SRHR.

Other issues have to do with policies on SRHR for persons, and particularly so women, with disabilities; a bias towards reproductive services that overshadows other aspects of SRHR; the role of men and boys in the SRHR discourse in Africa, both as enablers and barriers; the medicalisation of sexuality; and adolescent sexuality in Africa.

> **There is need for discussion about the distinction between reproductive health and rights ... and sexual health and rights**

The next presentation was by Obi Nnamuchi of the University of Nigeria, who considered the nexus between the Sustainable Development Goals (SDGs) and the right to health. He said each of them has important elements of health embedded in them, given that health is closely linked to poverty, the focus of the SDGs: poverty is both a cause and effect of poor health.

In the discussion that followed the presentations, it was noted that there is need for continued discussion about the distinction between reproductive health and rights, on the one hand, and sexual health and rights, on the other. The continuing barriers to the realisation of SRHR in Africa were also discussed. These include ignorance, the influence of culture and religion, the politicisation of SRHR, and Africa's dearth of experts in this field.

The second panel, devoted to specific SRHR issues, commenced with a presentation by Sasha Stevenson of Section 27, who examined the factors that led to the Life Esidemini tragedy. She emphasised the importance of advocacy and media coverage in highlighting the human rights violations that occurred.

> **Studies on involving men in SRHR showed positive outcomes for men, their partners and their children**

In her presentation, Dr Daphine Agaba of the School of Public Health at the University of the Western Cape, considered the role of the Health Ombudsman in ensuring accountability in the health-care setting. Using the Life Esidemini events as a case study, she said the Health Ombudsman is a recent creation under South African law, having been established by the National Health Amendment Act of 2013 within the Office of Health Standards Compliance (OHSC) to monitor misconduct by health-care providers and human rights violations experienced by patients in health-care setting.

Dr Agaba noted that the Life Esidemini tragedy led to a thorough investigation and the release of a detailed report by the Ombudsman, entitled *The Circumstances Surrounding the Deaths of Mentally Ill Patients: Gauteng Province*. This report was instrumental in triggering a chain of events that led to adequate redress and compensation for the patients concerned as well as for the families of those who died. The report points to important opportunities for strengthening accountability mechanisms in the health setting.

The presentation by Sibusiso Mkwananzi of Wits University focused on the role of men in realising SRHR in Africa and said they could be involved in SRHR discourse in several ways:

- As clients: This entails increasing the number of men accessing SRHR services.
- As equal partners: Through education, men could have an increased awareness of the SRHR of women external and internal to their relationships.
- As advocates of change: Men could mobilise other men's involvement.

She noted that studies on involving men in SRHR showed positive outcomes for men, their partners and their children. These outcomes include improving men's sexual health; increasing condom use; delaying sexual debut; decreasing the likelihood of multiple concurrent sexual partners; the promotion of gender equality and open sexual decision-making between partners; and decreased tolerance of gender-based violence, leading to increased willingness to do and take responsibility for domestic chores.

Dr Mkwananzi said, however, that barriers remained to men's involvement in the realisation of SRHR. These were of two kinds:

- barriers at the individual level, stemming from a low income and limited education and awareness; and
- barriers at societal and community levels, deriving from health-facility-related factors and socially inculcated perceptions.

Important questions were raised during the discussion. What were the costs of directing SRHR programming to men? How could the issue of involving men in SRHR be escalated to the regional level, especially in terms of policy-making? How could accountability in the maternal mortality sector be utilised?

The next panel, on the theme of regional and sub-regional human rights experiences, began with a presentation by Chrispine Sibande (University of Pretoria) on the legal and human rights issues of sex work in Africa. He examined laws on sex work across African countries, describing them as relics of colonialism and saying that the majority of the laws penalised activities related to sex work; a few permitted

them, and others occupied an in-between space.

He summarised his findings as follows:

- Sex work is illegal in Angola, Burundi, Cameroon, Comoros, Djibouti, DRC, Egypt, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea, Liberia, Mauritania, Niger, Morocco, Sudan, Rwanda, Seychelles, South Africa, Sudan, Swaziland, Tanzania, Uganda and Zimbabwe.
- Sex Work is legal in Algeria, Benin, Botswana, Burkina Faso, Central African Republic, DRC, Ethiopia, Ivory Coast, Madagascar, Malawi, Mali, Mauritius, Mozambique, Namibia, Reunion Island, Sierra Leone, South Sudan and Togo.
- Sex work has mixed status: It is illegal in Nigeria's northern states, but legal in its southern states.
- Sex work is legal and regulated in Eritrea, Tunisia and Senegal.
- There are no laws at all in this regard in Cape Verde and Guinea Bissau.
- Other legal issues relate to buying sex, brothels, procuring and solicitation. Some countries have laws specifically regarding one or more of these … so sex work may be legal or illegal: the situation is unclear.

Thereafter, Martha Tukahriwa (The Strategic Initiative for Women in the Horn of Africa) gave a presentation entitled 'Strategies for addressing child marriage in the Horn of Africa'. Using the 'Noura' case as the basis for her talk, she highlighted the prevalence of child marriage in the Horn of Africa and efforts being taken to address it.

Noura was a victim of child marriage and suffered persistent abuse and forced sexual acts at the hands of her much older husband, until she defended herself one day by stabbing him to death. She was charged and convicted for murder under article 130 of Sudan's Criminal Act, but her conviction is being challenged at a higher court. The Noura case illustrates the complexity of child marriage as a cultural and religious issue.

Ms Tukahriwa identified drivers of child marriage, among them poverty, lack of education, a weak legal framework, and gender inequality. She recommended law reform, along with the ratification and domestication of regional and international human rights instruments regarding women and children.

Sibongile Ndashe of the Initiative for Strategic Litigation in Africa (ISLA) focused on the role of regional human rights bodies in addressing violence against women in a presentation entitled 'Addressing violence against women as a human rights violation in Africa'. In particular, she examined various decisions of both the African Commission on Human and Peoples' Rights and the ECOWAS Court on violence, arguing that these human rights bodies have taken a less than satisfactory approach.

Referring to the cases of *Doebbler v Sudan and Equality Now v Ethiopia* (the African Commission) and Njemanze and Others v Nigeria (ECOWAS), Ms Ndashe said that – contrary to the approach of the CEDAW Committee and the broad definition of discrimination under the Maputo Protocol – the two human rights bodies had failed to recognise violence against women as a form of discrimination.

She recommended in conclusion that regional human rights bodies do much more to develop jurisprudence that regards violence against women in this light.

Teddy Namatovu (Makerere University) made a presentation on sexuality education as a human rights challenge. Taking Uganda as a case study, she examined some objections to sexuality education and said most of them are untenable, noting that the right to sexuality education can be grounded in existing rights such as the rights to information, education, health, dignity, privacy and life.

Ms Namatovu applauded Uganda's recent National Framework on Sexuality Education as

a welcome development in that it adopted UNESCO's definition. However, she identified certain problems in the document stemming from its emphasis on culture and religion and their interpretation of gender identities, roles and expectations.

The second day of the colloquium featured presentations honing on in different aspects of SRHR. Tambudzai Gonese (Southern African litigation Centre) delivered the presentation, 'Lessons from SRHR litigation in the SADC region', which looked at good practices in using litigation to secure SRHR in southern Africa.

Similarly, Linda Kroger (KELIN), in a contribution entitled 'SRHR as a tool for accountability in East Africa: The Kenyan example', showed how litigation has been used to hold the government accountable on HIV and TB issues in Kenya.

Ciara O'Connell in turn drew lessons from the SRHR experience of the Inter-American Court and Commission, notably the Court's decision in *IV v Bolivia* relating to forced sterilisation.

Other presentations dealt with the potential of the African Commission, African Court and African Committee of Experts on the Rights and Welfare of the Child to advance SRHR.

Vinodh Jaichand, an independent consultant, presented 'An analysis of the jurisdiction of the African court and the potential to realise the right to health', noting that the Court is yet to address any case on SRHR but may be called upon to do so in future. He said that one of the barriers to accessing the Court is the need for a declaration by a state before individual cases could be brought to the Court against the state.

In a paper entitled 'The Expert Committee on the Rights and Welfare of the Child and SRHR', Ayalew Assefa explored the many opportunities available to the Committee to advance the SRHR of children and adolescents in the region. These include issuing a general comment on ending child marriage and letters of urgent appeal to states where massive violations occur. He noted, however, that the Commission is faced with challenges ranging from political interference to a shortage of funds and skilled officers.

> **Useful suggestions for the way forward … include building the capacity of regional human rights bodies on SRHR issues**

The last two presentations of the day were by Suzanne Shatikha of the Kenyan National Human Rights Commission, who discussed the activities this institution has carried out to advance SRHR, and Berry Nibogora (AMSHER), whose paper, 'Advocating for the rights of key populations in Africa: Challenges and prospects', explored some of the strategies that have been used in overcoming challenges to addressing the SRHR issues of key populations in the region.

At the end of the colloquium, participants offered useful suggestions for the way forward. These include continuing to build the capacity of regional human rights bodies on SRHR issues; exploring strategic litigation on SRHR at the regional level; working to galvanise greater political will and budgetary allocation by African governments; learning from the experience other jurisdictions have had with SRHR litigation; and conducting advocacy on non-conventional SRHR issues.

EVENT

Community Leaders Training Workshops on Sexual and Reproductive Health and Rights (February – May 2018)

Aisosa Jennifer Isokpan and Ebenezer Durojaye

Between February and May 2018, the Socio-Economic Rights Project (SERP) of the Dullah Omar Institute (DOI) conducted training workshops on sexual reproductive and health rights for leaders in communities in Cape Town – among them Overcomers Heights, Hill View, Mandela Park, China Town, and Blikkiesdorp – as well as for a number of Congolese refugees. The aim was to equip community leaders with information so that they could in turn assist their community members.

The workshops were hosted as part of the Amplify Change Grant Project, 'Closing the gap: Advancing SRHR in Africa through Research, Advocacy and Litigation', which has three implementing partners, namely the Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN); the Initiative for Strategic Litigation in Africa (ISLA); and the DOI of the University of the Western Cape.

The Community Leaders Training Workshop held on **21 February 2018** brought together community leaders to educate them on the problem of sexual violence, with the emphasis on the need to respect the right to bodily integrity. Sexual violence is a critical problem in South Africa, given that its rate of incidence, particularly in informal settlements, is unacceptably high.

Prof Ebenezer Durojaye of SERP began the session on 'sexual violence and the right to bodily integrity' by defining different forms of sexual violence. They include rape within marriage and dating relationships; rape by strangers; systematic rape during armed conflict; unwanted sexual advances or sexual harassment; transactional sex; sexual abuse of mentally or physically disabled people; sexual abuse of children; forced marriage or cohabitation, including the marriage of children; the denial of the right to use contraception; and forced prostitution.

The underlying factor is the use of force and the involuntary nature of the sexual encounter with the victim. Prof Durojaye highlighted factors that make people vulnerable to sexual violence, such as poverty, the age of the victim, the use of alcohol and drugs, involvement in sex work, having been previously raped or sexually abused, and having multiple sexual partners.

The session was interactive and aimed to understand the meaning of the term 'violence' in the larger phrase, 'sexual violence'. Participants were able to point out the elements of violence, such as force, intimidation, and intentionality or deliberateness. They also demonstrated a good understanding of different types of violence, including gender-based violence, domestic violence, intimate partner violence, xenophobic

violence, homophobic violence, and child abuse.

Sexual violence is defined by Jewkes et al (2002) as 'any act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic or otherwise directed, against a person's sexuality using coercion by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work'.

The Community Leaders Training Workshop held on **17–18 April 2018** set out in turn to educate participants on HIV. It dealt with the nature of the disease, strategies for coping with it, human rights issues associated with it, at-risk groups, behaviours that spread the virus, and the conditions under which these behaviours flourish.

The workshop also highlighted the fact that South Africa is host to a large population of refugees and asylum seekers from other African states, with most of them hailing from Somalia and the Democratic Republic of the Congo, countries both affected by armed conflict. These groups are vulnerable to human rights abuses, usually as a result of difficulties relating to their documentation.

The workshop began by noting that while the HIV epidemic is a problem affecting all population groups, it is driven by behaviours that thrive under certain social conditions. As a result, some populations are more at risk than others due to their socio-economic status, for example people with limited education, the unemployed, and those living in informal settlements. Other important related issues are discrimination against and stigmatisation of HIV-positive people, and the link between HIV and the right to food.

> **Refugees and asylum seekers … are vulnerable to human rights abuses, usually as a result of difficulties relating to documentation**

Against this backdrop, the two-day workshop covered themes to do with sexual and reproductive health. On day one, there were presentations and discussions on the topics of HIV-prevention and coping strategies (presented by Olayinka Kana of the Public Health Association of South Africa); HIV risks among vulnerable and marginalised groups in the Western Cape (facilitated by Yanga Zembe of the Institute For Social Development); the link between HIV and food Insecurity (presented by Oluwafumilola Adeniyi of the DOI); and the legal and human rights issues of HIV/AIDS (presented by Prof Durojaye of the DOI).

The discussion led Olayinka Kana focused on the nature of HIV, its modes of transmission, it symptoms, and coping strategies for infected persons. Persons at risk of contracting HIV include sex workers, men who have sex with men, persons who inject drugs, children and orphans, children born to HIV-positive mothers, and women and adolescent girls who are in unequal power relations when negotiating sexual relations and the use of protection.

Ms Kana also highlighted behavioural risk-factors, such as gender-based violence (rape), the inconsistent use of condoms, having multiple sexual partners, and lack of education on or awareness of the disease. Among the environmental risk-factors are household poverty, high unemployment, and living in a community with a high prevalence of HIV.

In this regard, she stressed the importance of prevention methods such as PrEP (Pre-Exposure Prophylaxis) and PEP (Post-Exposure Prophylaxis). Ms Kana urged community

> **People should practise safe sex, take responsibility for their sexual health and avoid risky behaviour that predisposes them to HIV**

leaders to educate members of their communities to ensure they get tested and, where HIV-positive, take their medication. Pregnant women must of necessity know their status and follow the medical steps to prevent mother-to-child transmission, while people who are HIV-positive should join support networks. Generally, people should practise safe sex, take responsibility for their sexual health and avoid risky behaviour that predisposes them to contracting HIV.

The presentation by Yanga Zembe dealt with risks associated with HIV among vulnerable and marginalised groups in the Western Cape. She has conducted research on at-risk populations, as well as research looking specifically at young women and their risk of contracting HIV.

Ms Zembe said that while South Africa has the highest number of HIV-infected people in the world, Lesotho, Swaziland and Botswana have the highest rates of infection. The reason for this is that, over time, South Africa has been able to reduce the rate of new HIV infections significantly.

Nevertheless, the country is continuing to look for ways to bring the rate down even further, especially given the financial burden HIV prevention and control places on the state. As such, the emphasis is on treatment as a mode of prevention, since studies have shown that patients who are on medication and thus have much lower viral loads are at a reduced risk of infecting others.

Oluwafumilola Adeniyi's presentation examined how HIV/AIDS affects food security at the national, community, household and individual levels. HIV is not just a health challenge: it has links with other issues such as poverty and social justice. The poor are hardest hit by HIV, which has an adverse impact on their nutrition, food security and agricultural production.

During the group-activity and open-discussion sessions, the participants were given hypothetical cases of individuals in their communities affected by HIV issues. They were able to offer advice to them based on the knowledge gained in the first two sessions, for instance by encouraging them to get tested regularly and know their HIV status, particularly so if they are sexually active.

In the case of a hypothetical sex worker who was HIV-positive, they advised her to ensure that she is on treatment and practises safer sex, noting that HIV-positive persons who are on anti-retroviral drugs can significantly reduce their viral load over time and become less infectious.

Day two began with a discussion, facilitated by Prof Durojaye, of the international and national legal framework on refugees and asylum seekers. Thereafter, Naushina Rahim of the Legal Resources Centre spoke about legal support services for people in this situation. There was also a discussion of the Scalabrini Centre's work with refugees and asylum seekers, in addition to which Damaris Kiewiet gave a presentation of the promotion of social cohesion in communities.

Prof Durojaye opened day two's proceedings by explaining the principle of non-refoulement as well as the meaning of key terms such as

'refugee', 'migrant', 'asylum seeker', 'illegal immigrant' and 'undocumented immigrant'. A 'refugee', for example, is defined under the Refugee Convention of 1951 and the African Refugee Convention of 1969.

He explained that various international and regional human rights instruments set out the rights of such persons under international law, among them the right to life, liberty, dignity, freedom from torture, inhuman and degrading treatment and punishment, freedom from discrimination, and freedom of movement and association.

Naushina Rahim discussed issues to do with the rights of refugees and applications for refugee status. She also answered questions about the status of children born to foreign nationals and the assistance offered by the Legal Resources Centre, saying that the Centre provides support to refugees and asylum seekers in South Africa on matters such as securing permits and other documentation.

During the group activity and open discussion, participants were again given hypothetical scenarios, this time requiring them to consider the circumstances under which an imaginary person entered South Africa and then determine if he or she qualifies as a refugee – this they were able to do, by applying the definitions they had learnt.

Members of the Congolese community spoke of their experiences as refugees in South Africa. Notable challenges are delays in getting permits renewed and being able to produce documentation required from their home country. They also experience discrimination in accessing social services as well as in gaining employment in some universities, and encounter delays in having academic qualifications verified by the South African Qualifications Authority.

In her discussion, Damaris Kiewiet stressed that in a context of negative attitudes towards foreign nationals, it is important that communities are socially cohesive and be accepting of foreign nationals, who should be provided with assistance to where necessary. She urged community leaders to educate their members on the need to treat them with respect, especially given that many foreign nationals have fled to South Africa because of traumatic events in their home countries.

> **Foreign nationals … have valuable contributions to make through their skills**

The workshop presentations were complemented by three group-activity and open-discussion sessions. The activities gave participants an opportunity to share their views and experiences with each other in structured exchanges of information and opinion about topics of strong relevance to their communities.

There was a general consensus among participants that it is important to support foreign nationals and treat them with respect, particularly as some have valuable contributions to make through their skills. More fundamentally, as human beings they must be given an opportunity to enjoy their rights and freedoms guaranteed in the Constitution.

References

R Jewkes, P Sen and C Garcia-Moreno, 'Sexual violence' in ED Krug et al. (eds). *World Report on Violence and Health* (World Health Organization 2002), p 149.

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: www.dulahomarinstitute.org.za