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Ensuring rights make real change

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COMMUNITY LAW CENTRE

Editorial

This is the first issue of the *ESR Review* for 2014. Its articles discuss various areas of socio-economic rights.

On 8 March 2014 the annual International Women's Day was celebrated. This year's theme is *Equality for Women is Progress for All*. The reason for commemorating International Women's Day is to create awareness of women's social and political struggles internationally and to inspire women to celebrate their achievements.

In an acknowledgment of the importance of gender equality, Dr. Phumzile Mlambo-Ngcuka, the United Nations Under-Secretary-General and Executive Director of UN Women emphasises that 'the inclusion of women in decision-making forums brings different voices to the table and the discussions and decisions better reflect and respond to the diverse needs of the society'. She also underscores the fact that, while women's contributions to peace and democratisation have been acknowledged as important, this has not translated into leadership roles for women in decision-making institutions. Despite widespread constitutional guarantees of equality, the reality for many women is that basic legal rights remain out of reach. Gender equality and the empowerment of women and girls remain vital to a more just, peaceful and secure future for all of us.

This issue of the *ESR Review* includes two feature articles. Sandy Liebenberg explores the potential of the International Covenant on Economic, Social and Cultural Rights (ICESCR) as a tool for poverty reduction in South Africa. Her article emphasises the point that proper implementation of the provisions of the ICESCR can transform lives. Natalie C Webb analyses Cape Town's housing rental sector and suggests lessons that the South African Rental Housing Tribunal can learn from New York's experience in the rental sector. Her insightful analysis of the situations in the two countries provides a good reading for academics and policy makers.

This issue also includes a brief update on the recent United Nations Security Council's Resolution 2122 on women, the rule of law and transitional justice, and a new report by the South African Human Rights Commission that highlights the issue of access to adequate water and decent sanitation in South Africa.

This issue concludes with an outline of the seminar by the ICESCR campaign on states' obligations in relation to implementation and reporting under the ICESCR and its Optional Protocol. It is noteworthy that Gabon has blazed the trail by becoming the first African country to ratify the OP-ICESCR. We hope other countries on the continent will follow soon.

We acknowledge and thank all the guest contributors to this issue. We trust that readers will find it stimulating and useful in the advancement of socio-economic rights, especially the rights of the poor and most vulnerable groups in society.

Gladys Mirugi-Mukundi (Co-editor)

The potential of the International Covenant on Economic, Social and Cultural Rights as a tool for poverty reduction in South Africa

Sandra Liebenberg

Introduction

Together the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR; hereafter 'the Covenant') represent the fundamental human rights commitments of the international community. They were adopted to give concrete legal force and effect to the human rights commitments in the United Nations Charter (1945) as well as the Universal Declaration of Human Rights (1948). The Covenant – ratified by 161 states – is based on the values of recognising the inherent dignity, potential and equality each person.

It seeks to give effect to these values in the context of people's basic material needs. There is a close synergy with the foundational values of the South African Constitution of human dignity, equality and freedom and the inclusion of economic, social and cultural rights as justiciable rights in the Bill of Rights. As former President Nelson Mandela said in supporting the inclusion of socio-economic rights in the Constitution:

> A simple vote, without food, shelter and health care is to use first generation rights as a smokescreen to obscure the deep underlying forces which dehumanise people. It is to create an appearance of equality and justice, which by implication socio-economic inequality is entrenched. We do not want freedom without bread, nor do we want bread without freedom. We must provide for all the fundamental rights and freedoms associated with a democratic society.

Ratification of the Covenant has been long delayed when one considers that it was signed over 20 years ago, on the occasion of the historic first visit of former President Nelson Mandela to the United Nations General Assembly. Its sister Covenant on Civil and Political Rights was signed at the same time, but ratified in 1998. In 2002 South Africa acceded to its two optional protocols, providing respectively for an individual communications procedure and the abolition of the death penalty. The delay in ratifying the ICESCR is out of sync with South Africa's own commitment to the interdependence of all human rights reflected by its integration of civil, political, economic, social, cultural and environmental rights in its holistic, internally renowned Bill of Rights. However, the accession process to the Covenant – as announced by Cabinet in its decision of 10 October 2012 – is now proceeding.

The question I focus on here is how this vitally important international human rights treaty can help in meeting South Africa's major goals of reducing poverty and inequality. I highlight three areas – expanding the scope of socio-economic rights; developing rights-based indicators for poverty reduction; and enhancing accountability for socio-economic rights violations.

Expanding the scope of socio-economic rights

There are many similarities between the rights protected in the Covenant and the socio-economic rights entrenched in the South African Bill of Rights. But there are also important differences. The right of everyone to have access to adequate housing, for example, is protected in section 26 of the Constitution, and the rights to have access to health care services, sufficient food and water, and social security (including social assistance) in section 27. In the Covenant, the right to health is protected separately (art 16), while article 11 incorporates the rights to adequate food, clothing and housing under the umbrella right of everyone to an 'adequate standard of living for himself and his family'. (The Covenant's male-orientated terminology reflects the era when it was drafted, but the UN Committee on Economic, Social and Cultural Rights [hereafter 'the CESCR'], which is the body responsible for supervising State's Parties obligations under the Covenant – has sought to rectify this in subsequent interpretations.)

The Covenant entrenches a right to 'the widest possible protection and assistance' to the family, while South Africa has derived protection for families indirectly through the right to human dignity in section 10 of the Constitution (*Dawood v Minister of Home Affairs*) and the rights of children in section 28.

These differences in formulation are not necessarily significant as there is no obligation on states to constitutionalise the rights in the precise form in which they are formulated in the Covenant. However, once we have ratified the Covenant, an international obligation will exist to give effect to these rights through legislation, policies, programmes and the creation of domestic remedies for their violation (CESCR, General Comment No. 9 [1998]). For example, the right to an adequate standard of living protected in article 11 of the Covenant can help ensure that

> The Covenant recognises the right to work, but the South African Constitution does not

efforts to realise socio-economic rights in South Africa cumulatively guarantee an adequate standard of living to all. South Africa will have to undertake a national process of dialogue and policy formulation to ensure the realisation of this significant Covenant right.

A key right that is recognised in the Covenant but not in the Constitution is the right *to* work. Section 23 of the Constitution protects rights *in* work, such as the right of everyone to fair labour practices and the associational and collective bargaining rights of workers and employers. However, there is no equivalent constitutional guarantee corresponding with the rights in articles 6 (and to a large extent articles 7) of the Covenant. Article 6 enshrines the right to work and places obligations on States Parties to take positive measures to ensure that everyone has the opportunity to gain her living by work which she freely chooses or accepts, and to achieve steady economic, social and cultural development and full and productive employment.

The CESCR has adopted detailed guidelines on the scope and implications of this right in General Comment No. 18 (2005). This General Comment points out how the right to work is both essential to the realisation of other human rights and helps secure the dignity of individuals as valued contributors to society and their communities. It also clarifies that the work as specified in article 6 must be 'decent work', defined as work that respects the fundamental rights of the human person as well as the rights of workers in terms of their conditions of work safety and remuneration.

Decent work also provides an income that allows workers to support themselves and their families, and respects the physical and mental integrity of the worker in the exercise of his/her employment. Work is a broader concept than work done in the context of an employment relationship for a salary and wage and is closely linked to the variety of means through which people pursue a livelihood (see Jan Theron, 2014).

The right to work is one of the most neglected socio-economic rights. By acceding to the Covenant, South Africa is afforded the opportunity to view employment and livelihood creation through a rights-based perspective and to draw on the resources and experience available through the Covenant and its supervisory body, the CESCR, to develop this central right in the struggle against poverty and inequality.

Developing rights-based indicators for poverty reduction

The main operational clause of the Covenant is article 2, which defines the nature of the state's duties in relation to all the protected rights. It reads as follows:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Although not identical, this article bears a close resemblance to the clause defining the nature of the state's duties under sections 26(2) and 27(2) of the South African Constitution.

In fact, the Covenant was a major source of justification and inspiration in both the inclusion and formulation of the socio-economic rights provisions in the South African Bill of Rights. What is the significance of these obligations for drafting the social policies and programmes that are necessary to reduce poverty?

In elaborating on the nature of states' obligations in General Comment No. 3 (1990), the CESCR noted that the concept of 'progressive realisation' allows a certain margin of flexibility in the timeframes for achieving the full realisation of the relevant rights, given potential resource and other constraints. However, it goes on to emphasise that progressive realisation simultaneously imposes concrete obligations on the state 'to move as expeditiously and effectively as possible' towards the goal of full realisation of the rights. In addition, any measures that reduce the enjoyment of the right (so-called 'retrogressive measures') must be justified in the light of the totality of the rights in the Covenant and in the context of the full use of the maximum available resources (CESCR General Comment No. 3, para 9).

In addition, the CESCR views the progressive realisation of the rights to commence from a floor or baseline of providing for minimum essential elements of each of the rights as a matter of priority – the so-called 'minimum core obligation' (General Comment No. 3, para 10). Although the South African Constitutional Court has not accepted an independent right on each individual to go to court to claim a specific minimum level of enjoyment of the rights, it has held in the famous *Grootboom* case that in order to pass constitutional muster a reasonable programme must incorporate short-term measures of relief for those in desperate need or living in intolerable circumstances. It has also left open the door for the recognition of minimum core obligations in the assessment of the reasonableness of the government's acts or omissions where evidence is placed before the court to determine the content of the relevant minimum core obligation, for example, in the context of housing, health care services, social security.

However, the fact that the Court – largely for reasons related to its perceptions of its own institutional limits and capacity – has not endorsed an independent minimum core obligation for the purposes of litigating socio-economic rights, does not imply mean that this obligation should not be reflected in the budgets, policies, plans and legislation of the state. On the contrary, once the Covenant is ratified it forms part of the international obligations of South Africa to define such a minimum core in relation to each right and to ensure that it is realised in practice. This is one of the aspects on which the state will be asked to account in the state reporting procedure.

It is therefore encouraging that the National Development Plan (NDP) makes 'a firm commitment' to achieving a minimum standard of living. It consciously does not seek to define such a standards in advance, but calls for participation and debate from all social partners (National Planning Commission, 2013:28). This work should be accelerated through research and broad public debate on defining such minimum standards of achievement in relation to each of the Covenant rights. These should then enjoy priority attention for implementation.

The General Comments of the CESCR also usefully elaborate on a number of process and substantive indicators for achieving progressively the full realisation of the rights in the Covenant – beyond the safety net of the minimum core. For example, the substantive indicators developed by the CESCR in assessing the 'adequacy' of the right to housing include: legal security of tenure; the availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy. Similar substantive indicators are developed in relation to a number of other Covenant rights, including water, social security, education and health care services. Overarching substantive indicators in relation to these rights include the availability of services, physical and economic accessibility, and acceptability (culturally sensitive).

The CESCR has also developed a detailed General Comment on what it means to guarantee gender equality in the enjoyment of economic, social and cultural rights (General Comment No 16 [2005]), and non-discrimination in the enjoyment of these rights (General Comment No. 20 [2009]).These General Comments elaborate on the steps that should be taken to ensure the equal enjoyment of socio-economic rights. As such, they are invaluable in providing guidance on integrating an equality perspective in the interpretation and implementation of socio-economic rights. This is necessary to deepen our understanding of poverty in South Africa not only as a deprivation of resources and social services, but also a product of unequal relationships of power and privilege in all spheres. To combat poverty on a sustainable basis will require breaking deeply entrenched patterns of systemic discrimination on grounds of race, gender, class, disability and others (General Comment No. 20, para 12).

Process indicators include the adoption of transparent strategies and plans of action for the realisation of the rights, incorporating indicators and benchmarks by which progress can be monitored, the periodic review of such plans and strategies, and the generation of disaggregated statistics which reflect the extent to which marginalised and vulnerable groups enjoy meaningful access to the rights. There are a number of synergies between these process indicators and the jurisprudence of the Constitutional Court on the obligation of the state to adopt reasonable programmes to give effect to socio-economic rights and to engage meaningfully with the beneficiaries of rights (see, for example, the jurisprudence listed in the references below). It also resonates with central concepts in the NDP of expanding human capabilities and nurturing active citizenship.

Many of these indicators are already being used by NGOs, research institutes and the Human Rights Commission to monitor progress in realising socio-economic rights (see reports listed in references). However, what is lacking is a more meaningful integration of these indicators within budgetary, policy and legislative processes (e.g. the exercise of parliamentary portfolio committee oversight functions) impacting on the realisation of these rights. These indicators are specifically rights-based indicators and, although there are some overlaps, they are not equivalent to general economic or developmental indicators. They reflect what it means to understand housing, social security, health care and so forth specifically as human rights, which South Africa undertakes to the international community to do upon ratifying the Covenant.

Through its participation in the state reporting procedure, South Africa will be able to benefit from the considerable experience of the UN Committee on Economic, Social and Cultural Rights in monitoring the fulfilment of States Parties' obligations under the Covenant. It will also afford structured opportunities to engage in dialogue with local and international NGOs (involved in the shadow reporting procedure), other States Parties and technical experts, and to benchmark its performance in relation to other States Parties with a similar developmental profile. Ratification of the Covenant will enable South Africa to access a wealth of experience, expertise and UN agency technical assistance (see ICESCR articles 22 and 23,. General Comment No. 2 [1990] on international technical assistance measures). This will support and provide fresh impetus to our poverty reduction strategies by linking them more closely to global efforts to achieve the full realisation of socio-economic rights. It will also provide fresh insights into the interpretation and implementation of the socio-economic rights entrenched in our own Constitution.

Enhancing rights-based accountability

The Optional Protocol

The final theme concerns the ratification of the Optional Protocol to the Covenant, creating a communications procedure for the enforcement of the rights in the Covenant. The entry into force of the Optional Protocol on 5 May 2013 was a landmark event in the international protection of human rights, and in redressing the historic imbalance in the

protection of economic, social and cultural rights. It allows individuals or groups of individuals under the jurisdiction of a State Party who claim to be victims of a violation by that state of any of the economic, social and cultural rights set forth in the Covenant to submit a complaint to the CESCR.

The Optional Protocol makes available an international remedy for those who claim that their economic, social and cultural rights have been violated. Most cases will be resolved and dealt with in the domestic legal system of a State Party, as a pre-condition for accessing the communications procedure is the exhaustion of available domestic remedies. By ratifying the Optional Protocol a state submits itself to a form of quasi-judicial international legal accountability for fulfilling its obligations under the Covenant. This is a form of accountability with real teeth and thus enhances the status and importance of economic, social and cultural rights. They are more likely to be taken seriously both by organs of state and by beneficiaries if meaningful avenues of redress exist both within the national legal system and through dedicated and experienced international forums.

Further, a communications mechanism helps generate clarity over time on the normative content of the relevant rights and the state's obligations in various concrete contexts which form the subject of communications. This normative clarity is invaluable to guide states on the necessary measures to respect, protect, promote and fulfil the rights, and to guide rights beneficiaries in monitoring and advocacy.

The Optional Protocol means that socio-economic rights are no longer second-class rights compared with civil and political rights. They enjoy equal status and protection at the international level. The question is whether South Africa will join the growing number of states that are endorsing this historic development in the international protection of human rights by ratifying the Optional Protocol. This is the highest sign of our commitment to the interdependence of all human rights and honours former President Mandela's insight that to fulfil our human potential both freedom and bread are necessary.

Conclusion

By joining over 160 States Parties to the ICESCR, South Africa is finally aligning its constitutional commitment to these rights with its international human rights obligations. In so doing, South Africa will become a full partner in a global dialogue on advancing the realisation of economic, social and cultural rights. In an age of globalisation, austerity measures resulting in the rollback of many critical social programmes, growing inequality between the rich and poor, and continued poverty, the need for renewed strategies to advance the realisation of these rights worldwide is more relevant than ever.

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This article is an abridged version of a paper presented on 28 March 2014 at the seminar themed 'State's Obligations in relation to Implementation and reporting under the ICESCR and OP-ICESCR'. The seminar was organised by the ICESCR Ratification Campaign, which is a civil society campaign to advocate for the ratification of the ICESCR and its Optional Protocol by the South African Government.

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Developing Cape Town's right to housing in the rental sector

How the Rental Housing Tribunal can learn from New York

Natalie Webb

The stability of a rental housing market is critical for any city. Rental laws must protect tenants in order to create secure, affordable housing as well as establish inclusive communities that provide equal access to social services, such as health and education. Likewise, rental legislation should encourage landlords to invest in rental property to provide this necessary and adequate housing.

The South African Rental Housing Tribunal ('the Tribunal') was created by the Rental Housing Act No. 50 of 1999 ('the Act') and formed in 2001. The Tribunal was established to settle disputes between landlords and tenants and one of its main objectives is to promote a stable rental housing sector. In its Preamble, the Act cites Section 26 of the Constitution, stating that everyone has the right to have access to adequate housing. It cites some of the unique features of South African housing laws, specifically that no-one can be evicted or have their home demolished without a court order made after considering all the relevant circumstances, and that no legislation may permit arbitrary evictions. These unique principles have been reinforced by landmark Constitutional Court cases such as *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (2011) (hereafter *Joe Slovo*).

Not only does the Act clearly state that it is the government's obligation to promote a stable and growing rental market, it specifically focuses this obligation on meeting the demand for affordable housing for poor people and people historically disadvantaged by unfair discrimination. Furthermore, it states that government must introduce incentives to improve conditions in the rental housing market, encourage investment in urban and rural areas and correct distorted patterns of residential settlement.

The Act and the Tribunal are progressive legal tools that have an incredible potential to improve the lives of millions of South Africans living in informal settlements and townships. As the Tribunal is still quite new, it is very important that it establishes itself in the most effective and efficient way possible. In doing so the Tribunal must take into account its role in the right to housing under the South African Constitution, its international obligations, as well as learn from other jurisdictions that already have established themselves in rental housing markets. One such jurisdiction is New York, which has extensive experience trying to establish a stable rental market in a high density, diverse, and economically very unequal environment.

To understand the importance of the Act's obligation to promote a stable and growing market, it is necessary first to understand Cape Town's brutal history and its current housing situation. Although it has been 20 years since the end of apartheid, Cape Town is still severely segregated

> The Tribunal must meet its obligations under the South African Constitution as well as its international obligations

and there is an extreme inequality of resources (Polgreen 2012, Geach 2013, Besteman 2008:64). Under the Group Areas Act No. 41 of 1950, the black and coloured populations were forcibly evicted from their land and pushed into townships. The white population, on the other hand, was allowed to buy up the majority of the land, including in the most desired areas. Eviction became a tool of the apartheid state to repress the black and coloured populations and for the white population to acquire prime real estate (Besteman 2008:64). At the end of apartheid, although there was a focus on affirmative action in other sectors of society, there was no programme to specifically redistribute the land or to integrate the neighbourhoods in any substantive way (Besteman 2008:64).

Instead, the initial programmes aimed at a once-off capital subsidy assistance to low-income households. This then developed into building subsidised housing developments at the periphery of existing townships. In 2004 the next idea in housing development was redeveloping the informal settlements under a policy known as Breaking New Ground (BNG) (Tissington et al 2013:16). BNG resulted in mega-projects in housing development but also coincided with the government's focus on 'slum eradication' and 'slum clearance'. The influential *Joe Slovo* case stated that the residents of the informal settlement in question could not be evicted from their land without a set plan for relocation to adequate, affordable homes, thus halting the developers attempt to redevelop the informal settlement into new, unaffordable housing. Although the BNG has been replaced by new government programmes, the focus continues to be on upgrading informal settlements rather than on integrating any of the former apartheid 'whites only' neighbourhoods, which are already equipped with good health and educational access. This has resulted in a continued system of segregation where the residents of the informal settlements continue to wait patiently for the government to eventually improve their informal settlements, while real estate values in 'white' neighbourhoods have skyrocketed, further entrenching economic inequality.

Given this context, it is understandable why Cape Town's Rental Housing Tribunal was established to deal with all forms of landlord/tenant disputes, including to protect the right to have access to adequate housing for low-income tenants. A tenant is entitled to lodge a complaint with the Tribunal if they feel an eviction constitutes unfair practice. As the Constitutional Court stated in *Maphango v Aengus Lifestyle Properties* (2012), 'the Tribunal has the power to rule that the landlord's action constitutes an unfair practice' (para 52). The Constitutional Court then defined an unfair practice as 'an act or omission in contravention of the Act, or a practice that MEC prescribes as "unreasonably prejudicing the rights or interests of a tenant or landlord"'(para 52). This power, to analyse each case and decide subjectively if the tenant's rights or interests are being unreasonably prejudiced, allows the Tribunal to 'nullify contractually agreed to termination clauses, overturn the termination of the lease, and reinstate tenants as lawful occupiers' (Maass 2012:44). This is a massive power granted by the Act and confirmed by South Africa's Constitutional Court. With this power, it is of utmost importance to ensure that both tenants and landlords are being protected to ensure a stable rental market.

In balancing this power, the Tribunal must meet its obligations under the South African Constitution (hereinafter the Constitution), as well as its international obligations. As described above, the Constitution states that 'everyone has the right to have access to adequate housing, the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right, and no one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances' (Section 26).

International law also obligates South Africa, and thus the Tribunal, to respect the right to housing. The Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights (2011) adopted by the African Commission state that the right to housing, although not explicitly provided under the African Charter, is protected through the combination of provisions protecting the right to property (Article 14), the right to enjoy the best attainable standard of mental and physical health (Article 16), and the protection accorded to the family (Article 18(1)). Furthermore, the Principles and Guidelines provide a detailed standard of adequate housing, specifically 'access to natural and common resources, safe drinking water, energy for cooking, heating, cooling and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services'.

The Protocol on the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) ('the African Charter')further obliges South Africa to ensure 'women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment' (Article 16). As South Africa has ratified the African Charter, as well as its Protocol, it is thus obligated to adhere to the above standards.

The International Convention on Economic, Social, and Cultural Rights (ICESCR) (1976) states in Article 11(1) that State Parties must:

> recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to continuous improvement of living conditions.

The UN Committee on the Economic, Social, and Cultural Rights further unpacked this article in General Comment 4 (1991), confirming that the state must ensure the right to housing must not be viewed as just a roof over one's head, but rather as the right to live somewhere in security, peace, and dignity (para 7). Although South Africa has signed but not yet ratified the ICESCR, these are the international standards that South Africa should be aiming towards. The South African Constitutional Court has interpreted the general comments of the ICESCR in landmark cases such as *Government of the Republic of South Africa and Others v Grootboom and Others* (2001), where the Court 'applied the [General Comment 4] standard of inclusion of all social groups in a governmental program' (Coomans 2005:190).

It is also important to note that Chapter Two of the South African Constitution, Section 39(1) specifically states that, 'when interpreting the Bill of Rights, a court, tribunal, or forum must consider international law'. This clearly demonstrates the necessity of the court to refer to international law, including human rights covenants, when interpreting the South African Constitution.

Additionally, the Tribunal can learn from other jurisdictions that have long-established landlord/tenant courts, and which also serve communities with high economic inequality. One such jurisdiction is New York, which can be seen as a model of both what to do and what to avoid when establishing a legal framework for rental housing. New York has a long history of being a renter's city and as such, its courts have dealt with a vast array of landlord/tenant disputes. While the Tribunal continues to establish itself and has the resources to expand, it is important to learn from other jurisdictions that already have an incredibly high volume of cases.

Currently the Tribunal receives about 300 complaints a month. In comparison, in New York, each of the 15 judges in Brooklyn alone has an average daily caseload of more than 30 cases, resulting in over 450 cases in Brooklyn each day. Due to the incredibly high volume of cases, many do not receive more than two minutes of the judges' time, especially in situations where the tenant is not represented by an attorney and has agreed to a judgment with the landlord's attorney in the hallway before even going into the courtroom. Although this is detrimental to the tenant's access to justice it continues due to a lack of resources. In contrast, each case that goes before the members of the Tribunal in Cape Town receives 1–1.5 hours of time. Another positive policy of the Tribunal is the specific schedule given to each case: if a case is set for hearing at 11:00, it will be heard at 11:00. This is not the custom in New York, where all 30 cases on a judge's daily calendar are scheduled for 9:30, resulting in very long waits and delays. Likewise, if a case is heard in the Tribunal, all efforts are made to resolve it the same day. In New York, it is not unheard of for cases to be adjourned multiple times, sometimes resulting in over a year of negotiations without a resolution. Finally, the Tribunal serves the entire Western Cape, and as such actually moves around the region to hear cases since not everyone has the ability or means to travel to Cape Town.

> Poor people's waivers allow indigent persons to initiate and appeal a case without having to pay filing and processing fees

This is an incredibly progressive mode of housing justice. However, it is important to remember that the Tribunal is not operating at its full capacity and it is likely it will receive more complaints when people are more aware of its existence and of their rental rights. Currently, the Tribunal relies on community workers to publicise its existence and educate tenants in low-income areas on their rights. Once more tenants become aware that they can invoke the jurisdiction of the Tribunal in their disputes, it is hoped that more complaints will be brought to it. Additionally, there are some issues that must still be resolved, to which New York laws and experience can contribute. Specifically, New York can provide an example of the use of poor people's waivers, warrant of habitability, affordable housing schemes, neighbourhood development projects, and rent stabilisation regulations.

Poor person waivers, as the name implies, allow indigent persons the ability to initiate and appeal a case without having to pay the filing and processing fees. With the Tribunal, there are no such waivers for poor people and the cost of reviewing a case can become unrealistic for many. Currently there is no appeals process within the Tribunal, which means that a party who is not content with the Tribunal ruling is forced to request a review from the High Court. The cost of requesting such a review can be extremely high due to fees for counsel, the costs of the necessary record which must be filed, and the risk of a costs award. This results in a lack of access to justice for people who cannot afford to pay such high fees, as well as an unfair obstacle for people who are trying to claim rental fees or deposits that are less than the cost of the review.

In New York, a tenant can start a Housing Part (HP) Action against their landlord if the apartment has extensive repairs and is not up to the warrant of habitability. New York legislature has set this standard and a landlord must adhere to it. However, in the Western Cape, it is case law that has established what 'adequate housing' entails. Currently, there is an amendment to the Act (Rental Housing Amendment Bill 2012) before Parliament that would include the language 'landlords must maintain the structure of and provision of utilities to the dwelling'. However, even with this inclusion, it is vague at best in establishing a standard of adequate housing. This is an area that must be set into law so tenants can easily enforce their rights.

The basis of most affordable housing developments in New York is to allow tax-break incentives for developers who include low-income housing units in their buildings. Although this is a contentious issue, the continuously

> History tells us that economic growth has been a powerful factor in reducing poverty, but it is not enough

developing programmes can offer a blueprint on new initiatives in inclusive, affordable housing developments for cities. One specific example is Hunter's Point South, a large-scale project to build around 925 permanently affordable housing units in a desirable neighbourhood of Queens. This project is being advertised as a prime example of how to incorporate different income levels within a well-serviced and safe neighbourhood, thus creating an inclusive community and, it is hoped, an equal one.

Finally, if the South African government wishes to integrate the historical 'whites only' apartheid areas, there needs to be regulation of sky rocketing rents, which creates a huge divide in who can live in the city centre with access to social services, and who must remain in the margins. New York has long-established rent stabilisation laws that set the maximum rent that can be charged, using a system that results in only a small percentage in rent increases each year. This ensures that despite the sudden popularity of a neighbourhood with economically privileged people, all members of the community can afford to remain there. In New York, this protects low-income tenants from the effects of gentrification. In Cape Town, which is still establishing neighbourhoods rather than dealing with gentrification, it would work towards integrating communities.

The above are just a few of the examples in which the Western Cape's Rental Housing Tribunal can learn from New York's housing laws and regulations in creating standards of adequate housing, integrating neighbourhoods, setting maximum rentals, and allowing greater access to justice for low-income complainants. It is essential that the Tribunal continues to establish itself in a progressive and effective manner in order to promote a stable rental housing market for the Western Cape. In doing so it must ensure that it takes Cape Town's specific history into consideration when analysing complaints, especially from low-income tenants who were historically disadvantaged by unfair discrimination. Additionally, the Tribunal and legislature should look to international law and foreign jurisdictions to gain insight into the most efficient and effective ways to ensure that both tenants' and landlords' rights will be protected in the Western Cape's rental housing sector.

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UN Security Council Resolution 2122 (2013)

Women, rule of law and transitional justice

Gladys Mirugi-Mukundi

The UN Security Council passed Resolution 2122 (2013) that aims to strengthen women's role in all stages of conflict prevention and post-conflict reconstruction. The resolution seeks to amplify women's voices at the peace negotiation table in societies emerging from conflict.

The resolution applauds and encourages the critical contributions of civil society to conflict prevention, resolution and the maintenance of peace and security and post-conflict peacebuilding, especially those of women's organisations and women leaders, including socially and/or economically excluded groups of women. The resolution further flags the importance of sustained consultation and dialogue between women and national, regional and international decision makers.

This resolution builds on the national, regional and sub-regional efforts by civil society organisations in the implementation of Resolution 1325 (2000). Resolution 2122 emphasises that UN entities should have collective and cohesive interagency cooperation and action, which will facilitate regular briefings and information sharing, to 'timeously analyses the impact of armed conflict on women and girls.' This would involve the

> consideration of gender-related issues in the discussions pertinent to the prevention and resolution of armed conflict, the maintenance of peace and security and post-conflict peacebuilding.

The resolution expresses its intention to facilitate

> meaningful participation and protection of women in election preparation and political process, disarmament, demobilisation and reintegration programmes, security sector and judicial reforms, and wider post-conflict reconstruction processes.

According to Phumzile Mlambo-Ngcuka, the Executive Director of UN Women, this will ensure that gender responsive transitional justice strategies are implemented in an effort to 'ensure that crimes against women are addressed in ceasefire and peace negotiations'.

The resolution encourages member states, UN entities and financial institutions to support local civil-society networks and national institutions, in particular the judicial and health systems, to provide sustained assistance (paras 11 and 7b).

Resolution 2122 (2013) complements resolution 1325 (2000), which will be subject to a 2015 high-level review to highlight regional and global implementation challenges as well as emerging examples of good practice. The review will further focus on the emerging trends and priorities for women and girls in conflict prevention, resolution protection and peacebuilding.

In the words of Ban Ki Moon, the Secretary-General of the United Nations, Resolution 2122 places women at the centre of post-conflict reconstruction 'to reassert the rule of law and rebuild society through transitional justice.' The resolution has been hailed by various stakeholders as being useful to

> strengthen the normative framework for empowering women and encouraging their full participation in all levels of decision making in conflict and post-conflict settings.

The resolution adds voice to the efforts at the national, regional and international level to:

> address obstacles in women's access to justice in conflict and post-conflict settings, including through gender-responsive legal, judicial and security sector reforms (para 10).

During the debate on the resolution at the UN Security Council, stakeholders acknowledged that:

> the respect of the rule of law, accountability and access to justice were critical in protecting women's rights in the aftermath of conflict.

The delegate from South Africa added his voice and suggested that in post-conflict settings,

> space must be opened for women in the political and socio-economic domains as a pre-requisite for building sustainable peace'.

In conclusion, the Secretary-General of the United Nations reiterated that this is

> a matter of gender equality and human rights, and crucial to achieving sustained peace, economic recovery, social cohesion and political legitimacy.

South African Human Rights Commission, 2014

Report on the Rights of Access to Sufficient Water and Sanitation

Gladys Mirugi-Mukundi

On 11 March 2014, the South African Human Rights Commission (SAHRC) launched a long-awaited report, titled 'Water and Sanitation, Life and Dignity: Accountability to People who are Poor'. It highlights the constitutional right in South Africa to access sufficient water and decent sanitation. SAHRC is constitutionally mandated to provide an oversight role by monitoring the realisation of socio-economic rights in South Africa.

The report analyses the status of access to water and sanitation in South Africa as well as the quality of sanitation services provided by local government across the country. It reveals that, despite government's belief that there is substantial country-wide access to water and sanitation, the reality is starkly different. The report contains alarming statistics that illustrate the point that although progress has been made service delivery remains a major challenge at the municipal level and in the poorest areas. According to SAHRC Commissioner Pregs Govender, 'desegregated statistics reveal that the majority of those who lack most rights, including water and sanitation, are in informal settlements or schools'.

This report is a culmination of the 2010–2013 SAHRC national water and sanitation campaign that was carried out to review the state of access to these rights. The review was prompted by extensive investigations in 2011 into two complaints about unenclosed toilets (in Makhaza in the Western Cape and iRammulotsi in the Free State), together with a report by the Department of Performance Monitoring and Evaluation on the right to sanitation in every municipality. The SAHRC findings in the two complaints reflected that millions of people who are especially poor lack adequate sanitation. The SAHRC emphasised a rights-based approach to service delivery and demonstrated the need for accountability in service delivery from all spheres of government.

As part of the campaign, from August to December 2012 the SAHRC held public provincial hearings in communities facing challenges in accessing water and sanitation services. Civil society organisations and community-based organisations had an opportunity to make submissions to the SAHRC during the these hearings. The provincial hearings were grouped into themes: access to water and sanitation, the quality of the services provided, the quality of the water infrastructure, and the impact of a lack of access to water and sanitation infrastructure.

The hearings revealed two main challenges: first, that many communities, in particular in the poorest areas, lack access to water and sanitation as a result of non-functional or broken infrastructure; and second, that a lack of access to basic water and sanitation infrastructure disproportionally affects marginalised people, especially women, children and persons with disabilities.

The provincial hearings further revealed that, despite government's belief that there is substantial access to water and sanitation across the country, the reality on the ground is starkly different. Despite the free basic water supply policy, it is of great concern that most of South Africa's water is used by business, especially agribusiness, mining, and other industries, at a relatively lower cost per kilolitre than the cost to poor households. Further, the level of access to sanitation in informal settlements remains dire; challenges include the continuation of the bucket toilet system in some areas as well as poorly maintained facilities or broken sanitation infrastructure, the overflow of sewage into the streets and leaking water pipes.

Most communities expressed concern over the lack of access to water and adequate toilet facilities for leaners in schools, particularly girls, which had an effect on school attendance and therefore had a huge impact on their education. The right to dignity is disproportionally affected by a lack of access to water and sanitation and exposes people to violence, especially women who are required to carry water from remote dams.

The report concludes with recommendations on how to improve access to water and sanitation, which include community partnership and monitoring, and governance from a human-rights based approach. These recommendations were made to relevant government departments including Human Settlements, Social Development, Education, Cooperative Governance and Performance Monitoring and Evaluation.

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Seminar, 28 March 2014

Stakeholders unpack state obligations under the ICESCR

On 28 March 2014, the Community Law Centre hosted a seminar on states' obligations in relation to implementation and reporting under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its Optional Protocol.

This seminar is part of the civil society campaign to advocate for their ratification by the South African Government. The seminar was attended by civil society representatives, community-based organisations, government officials and academics.

Since the announcement in October 2012 that South Africa would ratify the ICESCR, which it signed on 3 October 1994, civil society has followed with interest the events that have unfolded. In this regard, the seminar had two main objectives:

- To discuss the ICESCR and OP-ICESCR with stakeholders who would enrich the policy debates at parliamentary and political party levels and at the community level.
- To engage different stakeholders, including Parliament, civil society groups and South African citizens, regarding the benefits of South Africa's ratification of the ICESCR and its Optional Protocol.

In his opening remarks the director of the Community Law Centre, Prof Jaap de Visser, recalled how the civil society campaign to advocate for the ratification of the ICESCR was 'born' in response to government's failure to do so, despite having signed it in 1994. The campaign engages in several activities, including holding strategy meetings and engaging with Parliament, government and state institutions (through letters and meetings). He highlighted the importance of state accountability, especially by office bearers.

Gladys Mirugi-Mukundi gave a brief background to the ICESCR, its relevance in South Africa and the potential implications of ratification.

Prof. Sandy Liebenberg explored ICESCR's potential as a tool for poverty reduction in South Africa. She noted that it 'gives effect to these values in the context of people's basic material needs. There is a close synergy with the foundational values of the South African Constitution of human dignity, equality and freedom and the inclusion of economic, social and cultural rights as justiciable rights in the Bill of Rights.' In conclusion she noted former President Nelson Mandela's words, in his support for the inclusion of socio-economic rights in the Constitution: 'We do not want freedom without bread, nor do we want bread without freedom.'

Dr. Ebenezer Durojaye discussed the content and relevance of state reporting. He noted that monitoring the implementation of human rights treaties and compliance with human rights obligations is relevant in ensuring the enjoyment of rights. Thus, state reporting is one of the mechanisms through which the implementation of human rights treaties can be monitored in order to avoid any deficiencies resulting from the laxity of State Parties in complying with their obligations. However, although South Africa has an obligation to report regularly in terms of the human rights treaties it has ratified, its reports to treaty-monitoring bodies have often been delayed and some are currently overdue.

Ms. Fadlah Adams from the South African Human Rights Commission explored the role of the Chapter 9 institutions in the implementation of the ICESCR.

Claire Tapscott and Sharon Tshado from the Black Sash shared their organisation's experience with the Community Monitoring and Advocacy Project (CMAP) and highlighted the role of civil society in the monitoring and implementation of the ICESCR. The CMAP involved over 200 organisations in all nine provinces and has been hailed as an innovative project that has improved awareness of rights and active citizenship.

By the end of the seminar it was evident that South Africa needs to urgently ratify the ICESCR. Doing so will strengthen the domestic protection of economic, social and cultural rights through policy, legislation (laws) and jurisprudence (decisions of court).

On 1 April 2014, Gabon became the 13th country, and the only African country, to ratify the Optional Protocol to the ICESCR. In his closing remarks, Prof. Leslie London expressed the hope that next time there is similar seminar, 'South Africa will no longer be engaged but married'.

For a copy of the seminar programme and report go to: www.communitylawcentre.org.za/clc-projects/socio-economic-rights

Call for contributions to the ESR Review,2014

The Socio-Economic Rights Project of the Community Law Centre (University of the Western Cape) welcomes contributions to the *ESR Review*. The *ESR Review* is a quarterly publication that aims to inform and educate politicians, policy-makers, NGOs, the academic community and legal practitioners about key developments relating to socio-economic rights at the national and international levels. It also seeks to stimulate creative thinking on how to advance these rights as a tool for poverty alleviation in South Africa and abroad.

Contributions on relevant experiences in countries other than South Africa, or on international developments, are therefore welcomed. Contributions should focus on any theme relating to socio-economic rights, on specific rights or on socio-economic rights in general. In addition, we are currently seeking contributions on:

- the role of Parliament in advancing socio-economic rights;
- the African Commission and socio-economic rights;
- pursuing economic, social and cultural rights and combating inequalities and poverty, including in the context of the economic, food and climate crises;
- using international law to advance socio-economic rights at the domestic level; and
- South Africa's reporting obligations at the UN or African level, or both, in relation to socio-economic rights.

Contributions should be sent in electronic format (MS Word) to serp@uwc.ac.za or gmirugi-mukundi@uwc.ac.za.

Previous editions of the *ESR Review* and the complete guide for contributors can be accessed online: www.communitylawcentre.org.za/clc-projects/socio-economic-rights