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Economic and Social Rights in South Africa

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Editorial

This is the second issue of the *ESR Review* for 2007.

In the previous issue we covered speeches delivered at the celebration of the tenth anniversary of the Socio-Economic Rights Project of the Community Law Centre at the University of the Western Cape. In each of our issues this year we intend to continue celebrating this anniversary by publishing articles that reflect on the different themes pertaining to, and actors working on, socio-economic rights.

A golden thread in the previous issue was whether socio-economic rights are fulfilling their transformative potential ten years after the Bill of Rights came into effect. In that issue the contributors reflected on how the government had implemented, the courts had enforced, and the South African Human Rights Commission had monitored socio-economic rights under a transformative constitution.

In this issue we celebrate our anniversary by publishing a feature article that takes the discussion on this theme further. Gregory Alexander examines the potential of the right to property in achieving social transformation in South Africa. In essence, Alexander analyses the implications of the Constitutional Court's decision in the *First National Bank* case on the transformative potential of this right.

We also celebrate our anniversary by publishing articles that review four chapters of the *Sixth economic and social rights report* (2006) of the South African Human Rights Commission. The first article in this section introduces broad and cross-cutting issues and concerns about the report. Then different contributors critically review the following chapters of the report: the right to land (Siyambonga Heleba), the right to adequate housing (Lilian Chenwi), the right to social security (Marius Olivier), and the right to water (Christopher Mbazira).

Articles on the monitoring of socio-economic rights by the Commission will most probably continue to be featured for two reasons. First, the Commission is cur-

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rently in the process of reviewing its monitoring mandate and has, according to its Chief Executive Officer, Tseliso Thipanyane, suspended the monitoring unit until a concrete and comprehensive monitoring strategy has been developed. Second, a parliamentary committee, headed by Professor Kader Asmal, is currently reviewing all institutions in Chapter 9 of the South African Constitution and other statutory bodies and its report is due to be released in August 2007. These two developments will definitely have an effect on the manner in which the Commission monitors progress in the implementation of socio-economic rights in South Africa.

Elsewhere in this issue, Varun Gauri and Daniel Brinks examine the impact of legal strategies for claiming economic and social rights, with a particular focus on the enforcement of the rights to education and health in different countries.

In the pree release section, we publish the press release that was issued by the UN Special Rapporteur on Adequate Housing, Miloon Kothari, following his visit to South Africa in April 2007.

We trust that you will find this issue as interesting, stimulating and valuable as you may have found the previous ones. Many thanks to all who contributed to this issue.

Sibonile Khoza is the Editor of the *ESR Review*

THE *ESR REVIEW* COMPILATION BOOK ON SALE

A limited number of copies of the *ESR Review* compilation (1998–2006) are still available. To purchase a copy, contact the Socio-Economic Rights Project on serp@uwc.ac.za or 021 959 2950.

The potential of the right to property in achieving social transformation in South Africa

Gregory Alexander

The 1996 South African Constitution (the Constitution) paved the way for the development of social obligations of the state.

The right to property protected under section 25 of the Constitution includes an explicit commitment to land reform and racial justice. Equally striking, if not more so, are other provisions that create an array of posi-

tive socio-economic rights (sections 26, 27, 28 and 29). The result is a constitution that has been called "the most admirable constitution in the history of the world" (Sunstein, 2001: 261). Its overriding goal is to effect the fundamental transformation of a society that has suffered profound political and economic injustices not only during the apartheid regime that was formally created in 1948 but also in the years of de facto apartheid before that.

While the Constitution aspires to bring about a fundamental transformation in South African society, based in substantial part on a new regime of property, it is too soon, even after more than a decade, to say whether it will produce genuinely transformative results. It will take a number of years before we know what kind of society emerges in the new democracy. The extent to which the Constitution's transformative potential will be fully realised will depend largely on how the courts interpret and implement its most ambitious provisions, particularly those concerning property and related socio-economic rights.

This article seeks to shed some light on some of the key principles that may be employed to unlock the Constitution's express promise to transform South African society.

The property right clause

Section 25(1) of the 1996 Constitution, unlike its counterpart in the Interim Constitution (section 28), is stated in negative rather than positive terms. It provides that "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property". This provision therefore embodies a negative protection of property and does not expressly guarantee the right to acquire, hold and dispose of property. (*First National Bank SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank SA Limited t/a Wesbank v Minister of Finance* 2002 (7) BCLR 702 (CC) [*First National Bank*] para 48).

Section 25(2) further states that property cannot be expropriated without compensation. The property clause in subsections (4) to (9) also aims to redress one of the most enduring legacies of racial discrimination in the past – the unequal distribution of land in South Africa. For instance, in terms of subsection (5) the state is required to "take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis".

The South African Constitutional Court has referred to section 25 in a number of cases (see box). This article focuses largely on the *First National Bank* (2002) case, in which the Constitutional Court set out the basic parameters of how it will analyse claims under the property clause.

The First National Bank principles of analysing section 25

The First National Bank case involved commercial property of the sort that bore no relation to social transformation. What was at stake was a conflict between the government's need to enforce payment of tax debts and a lender's interest in securing repayment of its loan.

A bank had leased two vehicles

Constitutional Court cases on property rights

- *Ex parte Chairperson of the Constitutional Assembly, In re: Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) [*First Certification case*] ;
- *Harksen v Lane NO* 1998 (1) SA 300 (CC) [*Harksen*];
- *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC);
- *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) [*PE Municipality*];
- *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (2) BCLR 150 (CC) [*Mkontwana*]; and
- *Jaftha v Schoeman and others; Van Rooyen v Stoltz and others* 2005 (1) BCLR 78 (CC) [*Jaftha*].

Lower court decisions interpreting section 25

- *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd* 2004 (8) BCLR 821 (SCA) [*Modderklip (SCA)*];
- *DuToit v Minister of Transport* 2003 (1) SA 586 (C) [*Du Toit*];
- *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa 2002* (1) BCLR 23 (T); and
- *Geyser v Msunduzi Municipality* 2003 (3) BCLR 235 (N)).

and sold another under an instalment sales agreement to two companies. The bank reserved ownership until the last instalment was paid. One of the companies, Airpark, owed a large amount of money to the South African Revenue Service (SARS) for unpaid customs duties and other related levies. To secure payment of this debt, SARS imposed a statutory lien (the right to retain physical control of another's property as a means of securing payment of a claim on that property until the claim has been paid) on all moveable property, including the motor vehicles owned by the bank.

In the Constitutional Court's view, the question was whether it was constitutionally permissible to seize a third party's property for another person's customs debt.

The tax debt was unrelated to the vehicles in question but they were subject to the state's lien simply by virtue of being physically present on the tax debtor's business premises and therefore falling within the broad scope of the lien. The question was then whether the statute that authorised the state's detention and sale of the vehicles constituted an unconstitutional interference with the property of the bank as the unrelated and innocent owner.

The High Court held that the statute did not violate section 25 because it established a lien or tax rather than an expropriation. The case went on appeal to the Constitutional Court.

The Constitutional Court rejected the High Court's characterisation of the issue. In its view, the question was not whether the statute made the third-party a co-debtor with the original debtor, but whether the statute improperly interfered with any property interest of the affected third party. In other words, was it constitutionally permissible to seize a third party's property for another person's customs debt (para 37)? In addressing this question, the Court set out a formulaic seven-step mode of analysis. In any constitutional property right challenge under section 25, the Court said, the following questions must be addressed in this order (para 46):

(a) Does that which is taken away from [the party affected by the statute, ie the bank] by the operation of [the statute] amount to 'property' for purpose of section 25?
(b) [If yes, has] there been a deprivation of such property by the [state agency]?
(c) If there has, is such deprivation consistent with the provisions of section 25(1)?
(d) If not, is such deprivation justified under section 36 of the Constitution [ie the general limitations clause]?
(e) If it is, does it amount to expropriation for purpose of section 25(2)?
(f) If so, does the deprivation comply with the requirements of section 25(2)(a) and (b)?
(g) If not, is the expropriation justified under section 36?

The bulk of the analytical work is done at stage (c) – more specifically, that part of stage (c) where the court asks whether the challenged statute effects an arbitrary deprivation of property.

The implications of the First National Bank principles

Is the affected interest 'property'?

The threshold question is whether the government action affected a property interest within the meaning of section 25(1). The Court in *First National Bank* declined to give a comprehensive definition of property for section 25 purposes, opting instead to limit its decision to tangible moveable assets, which along with land, the Court said, was "at the heart of our constitutional concept of property" (para 51).

However, it is highly unlikely that the Court will confine the scope of constitutional property to these two obvious categories in the future. Indeed, it seems likely that the Court will seldom decide a section 25 case at this first stage, but will instead treat the affected interest (whatever it is) as property so that it can move on to the next stage.

On one hand, *First National Bank* suggests that the Court might take an approach that is based on, or at least is consistent with, a conception of property that is both purposive and inclusive of tangible and intangible assets. Such an approach conceives of property in increasingly abstract terms, facilitating a shift away from 'property as land' or 'property as things' to a conception that accommodates a wide variety of interests that serve particular political, social, and moral functions, especially personal security and self-development. Such an approach would closely resemble that followed by German courts under the property clause of the German Basic Law. It would also bring the South African courts in line with the ap-

proach to constitutional property rights increasingly predominant throughout the world.

On the other hand, traditional understandings of property in South African private law may be a counter-current to this more expansive approach. Roman-Dutch law has traditionally conceived of property in narrow, thing-based (physicalist) terms, taking land as the emblem of what property is. This conception is based on the Roman-Dutch theory of property, which still prevails in the minds of South African lawyers. It is unimaginable that this traditional South African private-law conception would be capable of embracing, for example, contingent state-conferred benefits as 'property'.

Has there been a state-induced 'deprivation'?

Assuming that a court finds that the affected interest is property for the purposes of section 25, the next question is whether the state's action has caused a 'deprivation' of that interest.

The Court declined to provide a comprehensive definition of 'deprivation', saying only that "dispossessing an owner of all rights, use and benefit to and of corporeal movable goods, is a prime example of deprivation in both its grammatical and contextual sense" (para 61). It did observe, though, that any law that interferes with the "use, enjoyment or exploitation" of property "involves some deprivation in respect of the person having title or right to, or in, the property concerned" (para 57). This suggests that the Court is unlikely in the future to devote much attention to whether a state interference with property is a deprivation or not. Even if the state's act interferes with only one or two twigs in the bundle of rights, the Court is likely to treat it as a deprivation and attach significance to the limited degree of interference at the stage of inquiring into the deprivation's arbitrariness.

The Court's readiness to find that a deprivation has occurred whenever a statute interferes with a twig in the bundle of rights was underscored by its subsequent decision in *Mkontwana*. That case involved a challenge to a statute that in effect prevented an owner of land from transferring her property unless utility charges due to a municipality were paid, even if the charges were for consumption by someone other than the owner. The Court held that the statute did constitute a deprivation of the owner's property under section 25(1). It stated that "at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation" (para 32). Applying that standard, the Court said that the decisive feature of the statute was the fact that the statute imposed a "substantive obstacle to alienation". The Court further observed that the right to alienate property is an important feature of its use and enjoyment (para 33).

The Court is unlikely in future to devote much attention to whether a state interference with property is a deprivation or not.

While the Court in *First National Bank* did not provide a comprehensive definition of deprivation, it did clarify the relationship between the deprivation and expropriation requirements. It stated that expropriations are a subset of deprivations, with the result that any law that provides for an expropriation of property must first satisfy the requirements of section 25(1). If these requirements are met, the law must then be tested under the requirements of section 25(2).

The effect of this view is to make the distinction between deprivations and expropriations somewhat less important because the question of whether the law is a valid expropriation will come up only if a court determines that the law either meets the section 25(1) requirements or, if not, is a valid limitation under section 36 of the Constitution. If it does not, as was the situation in the case itself, "that is the end of the matter", as the Court put it in *First National Bank* (para 58). This point is important because it is likely to be the outcome in most cases. A law that passes muster at the section 25(1) stage is unlikely to fail at the expropriation stage, and, conversely, a law that fails to meet the section 25(2) expropriation requirement is likely to fail to withstand scrutiny at the earlier section 25(1) stage.

Is the deprivation 'arbitrary'?

Before *First National Bank*, South African commentators had differed over the best way of interpreting the requirement that a deprivation of property not be 'arbitrary' within the meaning of section 25(1). Some had argued that the requirement of non-arbitrariness should be interpreted to be the same as rationality review (Budlender. 1998). Another view was that, even if it is rational in the sense that it has some plausible means-end relationship, a deprivation must satisfy the section 36 proportionality requirement (Van der Walt, 1997).

The Court in *First National Bank* rejected both of these approaches.

First, it rejected a thin, "mere rationality" approach, stating that the term "arbitrary" in section 25(1) "refers to a wider concept and a more controlling principle that is more demanding than the enquiry into mere rationality" (para 65). It also rejected a view that would conflate the section 25(1) and section 36 stages of scrutiny, stating that non-arbitrariness is not as intrusive a concept as the proportionality requirement of section 36 of the Constitution.

Instead, the Court steered a position between the two extremes, adopting an approach that clearly involves a degree of substantive review that pushes first-stage, section 25(1) analysis in the direction of second-stage, section 36 proportionality analysis.

The Court articulated a multi-step test for determining whether a law amounts to an arbitrary deprivation of property. It said that "deprivation of property is 'arbitrary' as meant by section 25 when the 'law' referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair" (para 100). On the facts of the *First National Bank* case, the Court held that the statute failed the test. Where, as in this case, the statutory means involved total deprivation of the owner's property, there must be a close nexus among three factors: (1) the owner and the transaction giving rise to the debt, (2) the property taken and the debt, and (3) the owner and the debtor (para 108). In this case, the Court found that the nexus did not exist.

Although the Court's test has the superficial appearance of formality, upon closer inspection it resembles in some ways the United States Supreme Court's multi-factor balancing approach to regulatory takings cases. Plainly, there is considerable room for judicial discretion. Where the law deprives the owner of land or movables of all or most of the twigs in the bundle of rights, judicial review will be intense. On the other hand, where only a few of the incidents of ownership are affected and the regulatory purpose is highly important, the level of scrutiny will be weak.

Section 36 limitation analysis

Assuming that a court finds that the challenged government measure amounts to an arbitrary deprivation of property under section 25(1), the infringement may, theoretically speaking, still be sustained under section 36 – the general limitation. However, the practice is likely to be different. Certainly, if the measure is held to be arbitrary because it is procedurally unfair or provides insufficient reason for the property deprivation, it will not meet the requirement of section 36(1) that it be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".

There was considerable uncertainty before the *First National Bank* case about the relationship between sections 25(1) and 36, which this case failed to clarify. The Court assumed, without deciding, that section 36 does apply when an infringement fails the section 25(1) test (para 110). Applying the limitation's analysis, though not in detail, the Court held that the infringement could not be justified because there was no relationship between the owner and either the asset or the debt in question. The owner was an entirely innocent third party who completely lost all rights in its vehicles. This result was "grossly disproportional" to the state's benefit of collecting the debt.

The case tends to confirm the view that sections 36 seems to have no meaningful application to section 25(1) (Currie and De Waal, 2005: 562). The analysis of section 36 by the Court focused on exactly the same factors as its section 25(1) test. This 'telescoping' effect creates potential problems for the next stage of analysis.

Does the deprivation constitute an expropriation?

If the Court determines (as it did not in *First National Bank*) that an arbitrary deprivation is justified under section 36, the next question is whether the offending act constitutes an 'expropriation' within the meaning of section 25(2). According to that provision, the state may expropriate property only if three conditions are met: first, through a law of general application; second, through a law that was enacted in pursuit of a 'public purpose' or is otherwise in the 'public interest'; and third, if the law provides for payment of constitutionally acceptable compensation.

However, after the *First National Bank* case, there is unlikely to be an inquiry into these factors. The Court's analysis effectively mooted the distinction between deprivation and expropriation. By treating expropriations as a species of deprivation, thereby requiring that even overt acts of expropriation go through section 25(1) analysis, the Court made it unnecessary in most cases for expropriation analysis under section 25(2).

The characterisation of expropriations as a subset of deprivations represents a departure from the analysis of expropriations in the earlier case of *Harksen* (1998). In that case, the Court had treated deprivations and expropriations as categori-

cally distinct concepts. In *Harksen*, the Court said expropriations involve a permanent acquisition by the state of some asset (usually an immovable). It also said that state actions in which the state did not actually acquire the asset or did so only temporarily are not expropriations but deprivations.

In *First National Bank*, the Court appears to abandon this view in favour of one that defines the two forms of state infringement as substantially overlapping rather than mutually exclusive. It is entirely possible, however, that the Court will refine its understanding of the relationship between expropriations and deprivations in the future in a way that leaves permanent physical acquisitions as a separate category, subject to section 25(2). Less certain are the prospects that the Court would recognise the intermediate category of government actions. These actions, known in American law as 'inverse condemnations' and in South Africa as 'constructive expropriations', find little room for recognition under either the *Harksen* or *First National Bank* approaches.

Following *Harksen*, there was some indication in lower court case law that a constructive expropriation doctrine might be recognised (*Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) [*Steinberg*]). The Court, in the *Steinberg* case, while refusing to find a constructive expropriation based on the facts at hand, said that "there may be room" for the development of the constructive eviction doctrine in South Africa. However, *First National Bank* makes that less likely.

An exporopriating law that is not for a public purpose or in the public interest will be struck down under section 25(1) as an arbitrary deprivation.

Does the expropriation pass muster under sections 25(2) and 25(3)?

Assuming that an infringement is found to constitute an expropriation, to be valid it must satisfy the requirements of sections 25(2) and 25(3). Basically, this means that the infringement must meet the public-purpose/public-interest requirement and provide for adequate compensation. The *First National Bank* analysis makes it extremely unlikely that either of these requirements will ever be addressed. An expropriating law that is not for a public purpose or in the public interest will be struck down under section 25(1) as an arbitrary deprivation.

Putting this problem aside for the moment, an important question is whether the state may legitimately exercise its expropriation power to transfer property, especially land, from one private party to another with no acquisition itself. If section 25(2) were construed to forbid that, South Africa's goal of transformative land reform would be virtually impossible to achieve. A fundamental aspect of its land reform programme is direct redistribution of land from one private party to another. Fortunately, section 25(4)(a) of the Constitution eliminates any doubt on the constitutional legitimacy of this programme, for it expressly states that "the public interest includes the nation's commitment to land reform".

The compensation requirement is a trickier matter. While the United States Constitution requires payment of fair market value, this may not always be the case under the South African Constitution. Section 25(3)(d) identifies several relevant factors, including the extent of state involvement, the use to which the property will be put, and the history of the state's acquisition, signalling that something less than market value might be paid. Lower courts have seen fit to do just that (*Khumalo v Potgieter* 2000 (2) All SA 456 (LCC); & *Ex parte Former Highland Residents, In re: Ash and others v Department of Land Affairs* 2000 (2) All SA 26 (LCC)).

An important and unresolved question is whether the reference in section 25(3) to striking an equitable balance between the public interest and the interests of the private owner justifies awarding materially less than full market value in cases where transformation of land rights is not involved. Arguably, the public interest factor should weigh differently in different contexts, leading to different compensation practices in land reform cases than in cases where the government's expropriation is for a more prosaic end. It remains to be seen how the Constitutional Court will use the public interest factor.

The relationship between section 25 and socio-economic rights

Section 25 and the socio-economic rights provisions in the Constitution are closely related – both in the way the courts analyse claims under them and substantively. The basic substantive relationship is that the constitutional socio-economic rights provisions make it evident, as do the land-reform provisions of section 25,

that the constitutional property right is nothing like a classical liberal property right. Plainly, they contemplate that the state may engage in a significant measure of wealth redistribution, which contradicts the classical liberal understanding of rights.

The property right clause, read in conjunction with the socio-economic rights provisions, underscores the intended transformative character of the South African Constitution.

Unlike the American Constitution, for instance, which treats the property right as strictly negative in function, subsections 5 to 8 of section 25 of the South African Constitution specify certain socio-economic rights as part of the overall constitutional scheme of property. Those provisions make the transformative purpose of the South African Constitution abundantly clear by undertaking such remarkable measures as imposing an obligation on the state to "enable citizens to gain access to land on an equitable basis" and granting restitution and other forms of redress for persons who were dispossessed of land as a result of apartheid. Such measures go far beyond anything found in most other constitutional property provisions, including those, like Germany's, that explicitly recognise the social obligations of ownership. The land and housing rights provisions in sections 25 and 26 are therefore part of a broader network of socio-economic rights provisions included in the Constitution.

One of the most pressing problems under the Constitution today is defining the interrelationship between sections 25 and 26. The Constitution envisions the property right clause as existing interdependently with the socio-economic rights provisions, especially the housing rights clause. But what is the proper balance between the need to provide decent housing and the obligation to protect property rights? The decisions dealing with that question are the cases of *Government of the Republic of South Africa and others v Grootboom and others* 2000 (11) BCLR 1169 (CC) [*Grootboom*], *PE Municipality* 2004 and *Modderklip* 2004 (SCA). These cases grew out of a common problem – the eviction of squatters from informal housing settlements.

Generally, *Grootboom* makes it clear, though not explicitly, that the state has a positive duty in relation to both the section 25 property rights and to socio-economic rights.

In *PE Municipality* the Court reasoned that, under the Constitution, land rights, housing rights, and the right not to be arbitrarily evicted are closely intertwined – "the stronger the right to land, the greater the prospect of a secure home" (para 19). The Court identified three "salient features" of the Constitution's "interrelationship between land, hunger, homelessness and respect for property rights" (para 20). First, the land rights of the dispossessed are generally not self-enforcing. Second, eviction of people living in informal settlements is permissible even if it results in the loss of a home. Finally, the need to seek concrete and case-specific solutions.

The Court therefore noted the need to establish an appropriate constitutional relationship between sections 25 and 26 (para 23). This discussion of the judicial function in eviction cases is remarkable. It is sensitive to the interests of all of the affected parties, explicitly rejecting any notion that the owner's interest is privileged over that of the occupant, or vice versa.

The *Modderklip* case posed an apparent conflict between two constitutional duties of the state: its duty to protect Modderklip's ownership rights under section 25 and its duty to provide access to adequate housing under section 26. The Court's resolution of this apparent conflict was premised on its assumption that the state had a constitutional duty to break the impasse by removing the main obstacle to the enforcement of the eviction order, namely the lack of available alternative land for the occupants. The Court treated the state's failure in this regard as simultaneously a breach of the occupants' section 26 housing right and Modderklip's section 25 property rights.

The basis for this conclusion was section 7(2) of the Constitution, which provides that the state is under a duty to "respect, protect, promote and fulfill the rights in the Bill of Rights". In the court's view, by failing to provide the occupants with alternative housing in accordance with section 26, the state failed to protect the owner's section 25 property right, as section 7(2) requires (para 52). This 'protective-duty' theory has yet to be fully developed by South African courts. If widely adopted, it has the potential to make South Africa's property become genuinely transformative.

Conclusion

It is unquestionable that the property right clause in the Constitution has a transformative potential. At present, 'social transformation' in South Africa primarily means land reform. Hence, the eventual outcome of the country's attempt to realise its verbal commitment to creating "an open and democratic society based on human dignity, equality and freedom" depends heavily on its ability to transform its land regime radically, not only

as a legal system but as a social reality.

The right of ownership would have to be viewed through the lens of the values expressed not only by the property clause, but also by the socio-economic rights provisions. There is considerable room for achieving greater social transformation in South Africa through the property and other socio-economic rights provisions.

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This paper forms part of a chapter called "From social obligation to social transformation? South Africa's experience with constitutional property" in Gregory Alexander's book *The global debate over constitutional property: Lessons for American takings jurisprudence*, published by the University of Chicago Press in 2006.

The impact of legal strategies for claiming economic and social rights:
A focus on education and health rights

Varun Gauri and Daniel Brinks

More and more (especially recent) constitutions recognise the existence of economic and social rights. At the same time, these rights are being used to a greater extent to justify claims against the state and other entities. Courts and quasi-judicial entities (such as human rights commissions) are increasingly becoming the venues in which these claims are made. In this article we examine the causes and consequences of economic and social rights litigation, with a particular focus on education and health rights. We analyse how much, and on which issues, civil society and other actors resort to courts; what conditions must be present for claimants to be able to make extensive use of legal strategies; and under what circumstances court cases generalise and affect social policy.

The extent and forms of litigation on education and health rights

We start off by comparing the extent and forms of litigation on education and health rights, and explain the reasons for variations, in five countries, which include both common law countries (Nigeria, India and South Africa) and civil law countries (Indonesia and Brazil).

Nigeria

The Constitution of the Federal Republic of Nigeria of 1999 delineates economic and social rights but recognises them as "Fundamental Objectives and Directive Principles of State Policy". This constitutional structure has been used to support the opinion, widely held in Nigerian courts, that economic and social rights are not justiciable. An examination of the case law in three Nigerian states over the past decade found no more than 20 cases dealing with the rights to education and health.

Almost all the education cases that reached the courts concerned university education. While it is clear that the state can license and accredit private educational institutions (Nigeria's Constitution, Second Schedule, Part I item 60[e]), the Nige-

rian courts have supported the right to establish and maintain private schools and universities on the basis of the rights to property and free expression (*Archbishop Okogie & Others v Attorney General of Lagos State* [1981] Nig Const L Reps 337, 340). Nigerian courts have also issued opinions that universities must grant due process rights to students before expelling them or withdrawing certifications or degrees (*Garba v University of Maiduguri* (1986) 1 Nigerian Weekly Law Reports (pt.18) 550; *Omodolapo Adeyanju v West African Examinations Council* (2002) 13 Nigerian Weekly Law Reports (Part 785) 479). However, there have been no challenges to the government's education policies that question educational financing, structure or quality. Neither have there been cases demanding greater or wider provision of education services.

There have been no challenges to the Nigerian government's education policies that question educational financing, structure or quality.

The majority of health care cases that have reached the Nigerian courts have involved the right to bail so as to obtain health care. Generally speaking, Nigerian courts have ruled that detained individuals should be temporarily released or transferred so that they can obtain appropriate health care (see, e.g., *Fawehinmi v State* (1990) 1 Nigerian Weekly Law Reports (Part 127) 486, 496-497). However, at least one High Court has ruled that general ill-health not characterised by a sudden attack or emergency is not a sufficient reason for granting bail on health grounds (*State v Donald Jaja,* CHARGE NO PHC/IC/97, Ruling of Honorable Justice Acho Ogbonna, 4 February, 1988).

But there have been no cases challenging the extent, quality, or financing of primary or hospital-based care in Nigeria.

Indonesia

The Indonesian Constitution, essentially rewritten in a series of amendments from 1999 to 2002, includes economic and social rights that mirror the rights contained in the principal international human rights treaties. When Indonesia's Constitutional Court was established in 2003, it opened the possibility, for the first time, of petitions for abstract review of legislation that might violate the constitutional rights of individuals.

A review of case law from 1995 to 2005 identified seven court cases concerning the right to health care. Three involved medical malpractice, a kind of legal claim not typically analysed under the rubric of the right to health, but which, when enforced by courts, can have a significant effect on healthcare quality, and which can transform into a more typical right to health claim. An example is a case in which a two-year-old boy was paralyzed after allegedly receiving poorly produced polio vaccine during an immunisation drive in a rural area (*Opik v Republic of Indonesia Government*, Civil Court, Cibadak, West Java Case Number: No 13/Pdt.G/2005/Pn.Cbd). In that case, as is common for all categories of legal disputes in Indonesia, the plaintiff withdrew his claim and negotiated a settlement with the defendant, the terms of which were secret.

In one education case, university students who had been suspended for protesting against new fee policies at their institution successfully argued that they should be reinstated (*In re Petition to Nullify Administrative Action of the President of the University of Indonesia* (Administrative Court, Jakarta) Case No 21/G.TUN/2001/PTUN-JKT). In another, a group of parents and teachers challenged a land swap deal in which a middle school would be relocated so as to accommodate new shopping areas, but lost the case (*Melawai Junior High School* (Civil Court, Jakarta) Case No PTJ.PDT.425.837.2004). In addition, a series of three cases challenged the constitutionality of the central government budgets of 2005 and 2006 on the grounds that the budget did not allocate 20% to (non-salary) educational expenditure, as required in the Constitution and in the basic law organising the education sector (*Judicial Review of the 2005 and 2006 State Budget Law* Case Nos 012/PUU-III/2005 and 026/PUU-III/2006 [*State Budget Law*]). The Constitutional Court agreed that the budget law was unconstitutional, but chose not to declare it null and void because of the resulting policy consequences. The central government's non-salary education budget has increased in recent years despite the lack of a remedy offered by the Constitutional Court, and some portion of this increase could be attributed to legal pressure (World Bank, 2007).

Two patterns are most apparent with regard to litigation over health and education rights in Indonesia. The first is that litigants in the ordinary courts typically win by losing. While the courts' decisions are adverse,

petitioners secure some relief from the government in negotiations that run parallel to the case. A group of refugees seeking medical assistance in Nunukan, for example, actually obtained that assistance shortly after losing their case (*53 Indonesian citizens acting for all Indonesian citizens v The Republic of Indonesia Government* [Civil Court, Jakarta], Case No 28/Pdt.G/2003/PN.Jkt.pusat).

The second trend is that the Constitutional Court appears to be a more robust forum for the assertion of health and education rights. This is evidenced most clearly in the court's treatment of the State Budget Law cases described above.

South Africa

South Africa's post-apartheid Constitution of 1996 explicitly includes the rights to housing, health care, food and water, education, and social security. Given the predisposition of the courts to enforce economic and social rights, the existence of a broad social consensus in support of social transformation and the redress of social inequities from previous decades, and the significant influence of the South African courts on constitutional theories in other countries, one would expect more litigation on economic and social rights in this country.

A review of cases in non-specialised courts, at the level of the High Court and above, found 37 economic and social rights cases dealing with health, education, water, social security, and housing since 1996, of which 24 relate to health and education. This does not include trial court or administrative agency decisions.

On health rights, a few cases have had a significant effect on government policies. These include those involving the government's failure to provide antiretroviral treatment to (medically) deserving HIV/AIDS patients in prison (*Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C) & *EN & Others v Government of the Republic of South Africa & Others* Case No 4576/06, 28 August 2006) and the barriers to pregnant women in accessing government programme to prevent mother-to-child transmission of HIV/AIDS (*Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) [TAC]).

South African litigation demonstrates that courts have been more involved in the adjudication of health rights than in that of education rights.

Furthermore, the courts have also intervened in broadly regulatory issues relating to the patenting and dispensing of medications (*Pharmaceutical Manufacturers' Association of South Africa v President of the Republic of South Africa* Case No 4183/98, High Court of South Africa [Transvaal Provincial Division] – withdrawn on 18 April 2001 ; and *Hazel Tau v GlaxoSmithKline South Africa (Pty) Ltd and Boehringer Ingelheim (Proprietary) Limited* Complaint before the Competition Commission of South Africa, Case No 2002 Sep 226 – settled on 9 December 2003).

On education, the courts have rendered somewhat contradictory decisions on the right to 'own language' education. In *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van* Onderwys 2003 (4) SA 160 (T), for instance, the conversion of an Afrikaans-medium school to a dual-medium school was seen as consistent with the right to education in the language of choice. But in *Western Cape Minister of Education v Governing Body of Mikro Primary School* 2005 (10) BCLR 973 (SCA), the Supreme Court of Appeal held that while the learners had a right to receive education in English and the state had the duty to fulfil that right, the learners did not have a constitutional right to receive an education at the particular school in question. It also affirmed the educational rights of asylum seekers in *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA).

South African litigation on health and education rights demonstrates that courts have been involved in the adjudication of the former more than they have in the latter.

India

Starting in the early 1980s, India's Supreme Court began to take the position that economic and social rights are judicially enforceable. But perhaps as important was a significant expansion in access to the courts that occurred in the same era. The Indian courts established a category of claims, called public interest litigation, in which applicants to courts need not demonstrate that they themselves have suffered harm in order to have standing. The courts also lowered the standard for a writ petition, so that even letters to the court could qualify. Furthermore, the Supreme Court began to examine social concerns on its own initiative.

A review of cases since the early 1980s found 209 involving the right to health and 173 involving the right to education. Cases reached courts in all regions of India, but it is notewor-

thy that only 14% of those cases originated in the poor and so-called BIMARU states (Bihar, Madhya Pradesh, Rajasthan, Uttar Pradesh), which together account for about 40% of India's population. Nationwide, applicants won 81% of the cases. Major areas of litigation have included reimbursement for medical expenses on the part of government employees, public health (including industrial pollution, sanitation, and potable water), HIV/AIDS prevention and treatment, medical negligence, university admissions and fees, and the establishment of private schools.

The Indian courts have used education and health rights to change government policies. This has been done as follows: by establishing new rules through which patients can claim medical negligence or misconduct; by helping to create a reliable blood bank, provoking some states to establish midday meal programmes in schools; by clarifying rules regarding university fees; and by limiting air and water pollution.

Two themes stand out in the Indian cases. First, most cases in India concerned government regulation of health care facilities or schools, or the relative liberties and obligations of service providers and service recipients; most did not involve claims for government provision in areas where the government was not already acting. Second, the majority of cases concerned the interests of the lower-middle or the middle classes, not the interests of the extremely poor. There were more cases involving university than primary education, and more cases in rich than in poor states.

Brazil

Brazil's Constitution of 1988 is a programmatic document that places significant emphasis on social rights. It regards education as a right of all people and a duty of the state and the family (Constitution of the Federal Republic of Brazil, art. 205). It further states that all public education, basic and higher, should be free of charge (art. 206 [iv]), and that the federal government should spend 18% of its resources on education while states and municipalities should spend 25% (art. 212). Constitutional amendment 29 (September 2000) similarly establishes minimum expenditures on health as a share of revenues for the federal, state, and municipal governments. National legislation further provides for all necessary health care services to be provided to the public without charge.

Since 1996 thousands have filed largely successful court cases in Brazil involving the rights to health care and education.

Since 1996 thousands of Brazilian claimants have filed largely successful court cases involving the rights to health care and education. Most of these have been demands for medications either not regularly provided by the various levels of government or provided in theory but not available in practice. There have also been a large number of cases invoking the right to health against private health insurance companies, arguing that a specific procedure should be reimbursable in spite of contractual language.

Right to education cases at basic and secondary levels have been far less numerous, but still number in the hundreds. Significant themes in right to education cases have been the mainstreaming of disabled children, and school repair in rural and urban areas. More than 90% of court cases on the rights to health and education have been decided in favour of the applicants.

Some of the cases, particularly those related to medications, have had significant budgetary consequences. For instance, it has been estimated that in São Paulo State the expenditure on judicially awarded medications constitutes 5–10% of the state health budget. These medication cases now serve as an informal feedback mechanism for the official pharmaceutical formulary, providing information to governments when formulary revisions are demanded.

Several patterns stand out in the Brazilian court cases. First, unlike cases in all the other countries, the great majority in Brazil have involved claims for direct state provision of services, particularly medications. Second, most of the cases have been individual cases in which claims are usually conceded. Third, Brazilian courts have usually relied on a variety of constitutional provisions – particularly the right to life and the existence of legislation implementing the constitutional provisions on the right to health care – when requiring the state to provide medications.

The causes and consequences of the legalisation of education and health rights

Conditions for the use of the courts

Under what conditions do actors, individuals and groups use courts to claim economic and social rights in

general, and health and education rights in particular?

Some analysts have argued that the existence of a legal support structure, consisting of well-funded legal organisations oriented to the advancement of the public interest, is a key and necessary condition for human rights litigation. We think that the answer is more complex.

The level of legal mobilisation is determined by demand, supply, and response variables. On the demand side are the capabilities and strategic calculations of those mobilising around a particular issue. On the supply side are the features of the legal system, including the likely judicial response, with which they must interact if they press a legal claim. On the response side are the characteristics of the entities to which potential demands could be addressed, including their likely level of resistance, their latent capacity, and their organisational development.

Reviewing the country's experiences in the light of this (very brief) account, it is apparent that in Brazil a favourable demand structure, a hospitable judiciary, and a state disposed to comply with judicial requests all contributed to the large number of cases documented in the country. Following the movement that precipitated the return to democracy in the late 1980s, and the mobilisation surrounding HIV/AIDS policies that began around the same time, the demands for health rights are relatively well organised in Brazil (Gauri and Lieberman, 2006). At the same time, the judiciary can employ legal principles clearly based on the widely accepted Constitution of 1988. The state is generally supportive of health care rights. Indeed, appeals of lower court judgments are usually not based on resistance to the court order but on disputes about which entity – federal, state, or municipal government – is responsible for providing the medication in question.

In India, it seems that supply-side changes, particularly looser rules of standing and a court-led effort to refocus the judiciary on issues of poverty, circumvented what at the time was a relatively weak demand for judicial services and eventually led to an increase in cases on economic and social rights in general (Sathe, 2002).

In South Africa, mobilisation by HIV/AIDS activists has led to a series of important cases in that policy area. But demand-side mobilisation in other policy areas has not been sufficient to overcome traditional rules of standing.

In Nigeria and Indonesia the courts are (socially and, in the case of Indonesia, geographically) remote from poor people; and organised civil society remains incipient outside the major cities.

What factors explain judicial support?

The content of national constitutions and legislation are not determinative, as the contrasting interpretations of similarly structured education and health rights in Nigeria and India reveal. Judicial attitudes are important, but probably driven primarily by the positions of the respondents. It is practically impossible for courts to enforce judgments in the face of determined political resistance (Rosenberg, 1993) or abject incapacity. With the possible exception of a few judgments in India, in no case did courts require a government to formulate and implement an entirely new social programme in an area in which none existed. Instead, even the most aggressive court decisions have tended to justify their rulings with the observation that the governments have already committed themselves to the policy directive being ordered.

Thus, the observed behaviour of courts is very far from a story of anti-democratic judicial usurpation. In reality courts have been extremely cognisant, perhaps to a fault, of the likely government, elite, and popular support for their rulings.

When do the benefits of legal strategies generalise?

Legal strategies, especially when they are successful, can lead to legislated policy changes that benefit all similarly situated individuals, regardless of their access to legal channels of demand.

A relatively small, predominantly urban non-governmental organisation (NGO) such as the Treatment Action Campaign in South Africa can trigger a nationwide change in policy on the free provision of antiretrovirals that benefits poor rural women.

The accumulation of individual demands for the supply of particular new medication at government expense in Brazil has led to their inclusion in public health posts and their routine dispensing even to those who do not file lawsuits.

Even unsuccessful litigation, such as the case involving the Nunukan refugees in Indonesia, can pressure the government to provide services to the litigants and to all those who are in a similar situation.

When does a course of litigation promote the interests of the poor?

Normally the rich and upper middle classes have access to the required legal resources to initiate litigation, and one would presume that the ju-

diciary would be most responsive to the concerns of people like themselves. There is evidence in support of this proposition in the cases we studied. For instance, there are more cases originating from urban than rural areas, more cases per capita in the rich than poor states of India, more cases on university than basic education, and more cases on health care (because the middle classes tend to use public health facilities) than in education (because the middle classes have typically exited the public school system).

Nevertheless, there are at least three pathways whereby a course of litigation can benefit poor people. First, the state or civil society can finance organisations whose objective is to promote the interests of poor people and of society as a whole, such as the Brazilian Ministério Público or certain capable NGOs in India. Second, after middle class patients have blazed the way in litigation, similar cases that follow are less costly and risky to mount. Hence, second generation cases can fall well within the budget constraints of groups of poor people. Something like this appears to have happened with the medication cases in Brazil. Third, where the middle classes and the poor have overlapping interests, as is the case with infectious diseases and industrial pollution, poor people can benefit indirectly from litigation for economic and social rights.

Conclusion

Constitutions and courts are a crucial, and in some ways even paradigmatic, means whereby economic and social rights in general, and education and health rights in particular, can mitigate poverty. The debate over the role of courts in promoting 'positive' rights has occurred largely in the abstract. A number of courts in developing countries have been ruling on and enforcing these rights for over a decade, and it is possible to examine that historical record to determine if the critics or supporters of their judicial enforcement have been more accurate.

An examination of five countries finds that alleged problems relating to judicial expertise, separation of powers, and usurpation of the other branches of government have not been significant consequences of, or impediments to, judicial activity. On the other hand, there appears to be foundation for the concern that the legalisation of these rights might not benefit the poorest and most destitute individuals, at least not initially. There appear to be conditions under which legal strategies for their enforcement will benefit poor people, but the conditions are far from universal, and it may take time before the benefits reach the people most in need of it.

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This paper is a synopsis of early findings from a forthcoming book edited by Varun Gauri and Daniel Brinks provisionally titled "The Impact of Legal Strategies for Claiming Economic and Social Rights", under contract with Cambridge University Press. Contributors, from whose work the country sections are drawn, include Chidi Anselm Odinkalu (Nigeria), Bivitri Susanti (Indonesia), Jonathan Berger (South Africa), Pratap Bhanu Mehta and Shylashri Shankar (India), and Florian Hoffmann and Fernando R.N.M. Bentes (Brazil).

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Review of the sixth report of the South African Human Rights Commission

An introduction

Sibonile Khoza

In August 2006 the South African Human Rights Commission (the Commission) released the much expected *Sixth economic and social rights report 2003-2006* (the sixth report), which was compiled in terms of its mandate to monitor progress in the realisation of socio-economic rights under section 184(3) of the South African Constitution of 1996.

Previous reports have been based on the monitoring time frame of one financial year. In contrast, the sixth report covers three financial years (2002/3 to 2005/6). This was not by design since only recently (after the launch of the sixth report) did the Commission decide to change its monitoring time frame "from one year to a three year financial cycle in line with the government three year funding cycle" (Thipanyane, 2007: 14).

This section of the *ESR Review* contains critical reviews of certain chapters of the sixth report that focus on the right to land, the right of access to adequate housing, the right of access to social security and the right of access to water. This review comes in the wake of two key developments relating to the Commission's monitoring mandate. First, the Commission is currently in the process of reviewing its monitoring mandate (Thipanyane, 2007). Second, a parliamentary committee, headed by Prof. Kader Asmal, is currently reviewing all institutions in Chapter 9 of the South African Constitution and other statutory bodies and its report is due to be released by August 2007. These two developments will undoubtedly shape the manner in which the Commission monitors progress in the implementation of socio-economic rights in South Africa.

The assessments that follow seek to make a contribution to the parliamentary review of the Commission's powers and role and to strengthen the Commission's monitoring mandate, particularly its reporting obligations.

They critically engage with the content and form of the relevant chapters of the sixth report, point out their weaknesses and strengths, and make recommendations for their improvement.

General issues

The Commission has performed its function of monitoring the realisation of socio-economic rights relatively well, for which it has earned considerable respect nationally. It is arguably one of the most effective national human rights institutions in the world. Over the years it has developed functioning processes and procedures for monitoring, and has consistently reported on the progress made by various government departments in realising socio-economic rights.

The Commission is arguably one of the most effective national human rights institutions in the world.

However, criticism has been levelled at the manner in which the Commission has executed its monitoring mandate. This negative commentary has focused on the exclusion of civil society in the reporting process, the inadequate use of existing institutional and organisational resources, the withholding from the public of information received from government departments, and the lack of follow-up on its previous recommendations. There has been no shortage of strong calls for reforms in the Commission (Community Law Centre, 2007).

Broad concerns about the sixth report and recommendations

A lot was expected from this report. The fact that it covers a longer period and embodies the additional methodology that was used to collect information raised the expectation that it would contain more comprehensive information than the previous reports. For the first time the Commission used field (community) research to collect information on the impact of government policies and programmes on communities.

Despite this, the report is astonishingly thin and arguably the weakest report the Commission has ever produced. While size is not a guarantee of quality, this particular report, as the reviews of individual chapters show, is lacking in substance and quality. Certain important information is missing, the data from the field research is meagre, and some key policies and items of legislation have not been adequately and critically analysed.

However, the Commission should be commended for conducting field research to assess whether government policies are making a tangible impact in communities. A common criticism has been that the state's policies are often well formulated but poorly implemented and do not reach the intended beneficiaries. The Commission's field research will help it to verify independently the information received from government departments. To intensify its data collection, the Commission should consider two things. First, it would benefit by attending imbizo's together with the government. Second, it should rigorously verify the information received from government departments by, among other things, seeking divergent views from various stakeholders, including civil society, academics and other statutory institutions.

It is unfortunate that the report is silent on important international developments.

Another glaring weakness of the sixth report is that it is not sufficiently linked to the previous reports. It is thus not possible to determine whether the Commission's earlier recommendations were implemented or, if they were, to what extent. Such linkage could be done through, for instance, having a dedicated section in the report on the state of socio-economic rights in South Africa to reflect the general level of implementation during the period of monitoring and to point out key achievements by the government during the period under review. Such information could prove very useful in tracking the progress made in the implementation of these rights.

Furthermore, each chapter of the report could include a section dealing with the extent to which previous recommendations have been implemented. Such a section could also highlight the long-standing recommendations that have not yet been implemented. For example, South Africa has not implemented the Commission's recommendation that it must ratify the International Covenant on Economic, Social and Cultural Rights (the Covenant), which was made in its second report. Keeping such recommendations in all reports will go a long way to ensuring that they are not ignored. It will also confirm that the Commission strongly believes in its recommendations and serve as a benchmark for determining whether the Commission is effective. It would have been useful for the Commission to have requested the government to explain why it had not yet ratified the Covenant and when it intended doing so.

In essence, the Commission needs to view its economic and social rights reports as a continuum rather than as stand-alone documents.

Measures to realise socio-economic rights include those that South Africa has adopted in the international arena, such as international declarations, plans of action and resolutions taken at key international conferences. Although these commitments are not legally binding, the Commission should persuade the government to implement them as part of the measures to realise socio-economic rights.

It is unfortunate that the report is silent on an important international development, namely the Voluntary Guidelines for the progressive realisation of the right to adequate food in the national context (2005). The South African government actively participated in the processes leading to the adoption of this unique document.

It is commendable that the Commission uses the standard of reasonableness in the sixth protocols for 2003–2006. However, the Commission's use of the standard in its assessment is rather lopsided in that it hardly considers whether the measures reportedly taken by government departments are "comprehensive, coherent, coordinated, flexible, reasonably formulated and implemented, and pay attention to the needs of those in desperate circumstances, transparent and allow for participation of relevant stake-holders". These elements should form an essential part of the standard for measuring state compliance with its social and economic rights obligations under the Constitution. Using this accepted standard would help government departments to understand what is expected of them and ensure that unnecessary court challenges are avoided.

The Commission has consistently reported that government departments have not always been co-operative in giving the information required for the reports – often pro-

viding inadequate and/or incorrect information or submitting it late – and this has led the Commission to invoke its powers to subpoena government officials. Such problems doubtless influence the quality of the reports and may have affected this report.

The sixth report, like the previous ones, fails to integrate the relevant Millennium Development Goals (MDGs) sufficiently in its assessment. MDGs are useful international benchmarks for measuring the realisation of a wide range of socio-economic rights. The Commission should seek information regarding South Africa's progress in achieving the MDGs.

Conclusion

The integrity and credibility of the Commission and respect for it depends on the manner in which it operates, its effectiveness, and the quality of its outputs. The Commission has played an important role as a guardian of human rights in South Africa's hard-won constitutional democracy. Given that socio-economic rights are partly programmatic rights, the monitoring role played by the Commission is indispensable. The reviews that follow offer some recommendations on how the Commission may better fulfill that role.

The Commission has faced many challenges in its operations since its establishment more than a decade ago but some of these are surmountable. For example, the lack of capacity at the Commission can be easily solved by an increase in its budgetary allocation to enable it to discharge its duties effectively and efficiently.

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The right to land

Siyambonga Heleba

Land deprivation has been identified as one of the ugliest legacies of the apartheid era. The government, through the Reconstruction and Development Programme (RDP) adopted in 1994, had set a target of returning up to 30% of the land (of the 80% that is in the hands of a white minority) to the landless by 1999. By 2007 it had managed to return only 4% of that land. The 'willing seller – willing buyer' principle, which the government has been using to redistribute land, has been blamed for the slow pace at which redistribution has occurred so far.

The land restitution programme, which has been implemented largely in rural areas, has mainly taken the form of cash compensation to beneficiaries and not the transfer of land.

Given the lack of progress on land reform, the land chapter in the *Sixth economic and social rights report 2003-2006* (the sixth report) of the South African Human Rights Commission (the Commission) is very important, especially the part outlining the challenges in realising the right to land. The present review of the land chapter will not be preoccupied with the statistical information about the small amount of progress that has been made, but will instead

provide an overview of the chapter and seek to augment it by identifying impediments to land reform and providing additional information that may be used to assess the progress achieved so far in realising land rights.

An analysis of the land chapter

Land redistribution

The land chapter correctly points out that land redistribution has largely been driven by the Land Redistribution for Agricultural Development (LRAD) programme. The programme was intended for emerging small-scale farmers and was never meant to complement other government programmes such as the RDP. One of the aims of the RDP is the procurement of land for human settlement purposes.

Realising that it had failed to meet its land redistribution target of 30% by 1999, the government recommitted itself to a new deadline. The land chapter of the Commission's sixth report points out that the government plans to meet the target of 30% by the year 2015. However, from the proceedings of the land summit held in July 2005 (Department of Agriculture and Land Affairs, 2005a) it appears that the government in fact aims to meet this target by 2014, a year earlier. In addition, from the draft recommendations of the 2005 land summit (Department of Agriculture and Land Affairs, 2005b) it emerges that the government would be able to achieve this target by discarding the much-criticised 'willing seller – willing buyer' strategy.

According to the Commission, the failure of the market-based strategy has led the government to enact new pieces of legislation such as the Expropriation of Land Rights Act (ELRA). However, this statement by the Commission is misleading since no such Act was passed after the adoption of the 'willing seller – willing buyer' principle after 1994. There is, however, the Expropriation of Land Rights Act of 1975. In fact, it appears from the land reform policy document of the Department of Agriculture and Land Affairs (the DLA) of 1999, entitled 'Policy and procedures for expropriation of land in terms of Act 26 and the Extension of Security of Tenure Act' (ESTA), that expropriation will take place on the basis of ELRA. However, owing to ELRA's silence on the procedures and guidelines to be followed, the DLA will employ the Land and Assistance Act of 1993 and ESTA when expropriating land.

Despite notable increases in the recent budgets for land reform, the only major progress in land redistribution was in 2002.

It is encouraging that South Africa saw its first case of expropriation in March 2007 with the expropriation of the Pniel Farm of 25 000 ha worth R35,5 million for the Pniel community in Kimberley.

The land chapter also points out that despite notable increases in the recent budgets for land reform, the only major progress achieved in land redistribution was in 2002. To speed up land redistribution, it has been suggested that the government must, in addition to providing adequate funding, replace its current reactive approach with:

> a means of engaging with "articulated" demand by the very poor, the destitute … and a proactive strategy to acquire and, where needed, subdivide land as it comes on to the market and, where this fails, to expropriate in areas of high demand (district- or area-based strategies). (Hall, 2005)

It is pleasing to note that on 15 May 2007 the Minister for Agriculture and Land Affairs, Lulu Xingwana, announced that her department would soon table for approval before the cabinet a "special-purpose vehicle" (SPV) to speed up and facilitate effective land reform (Mail & Guardian Online, 2007).

Land restitution

Land restitution is an important feature of South Africa's land reform policy, which is particularly true for rural claims. If the government hopes to reduce poverty and hunger significantly by 2015 in line with its commitment to the UN Millennium Development Goals (Goal 1 in particular), it needs to speed up the settlement of rural claims such as those in the provinces of Eastern Cape, Northern Cape, KwaZulu Natal, Limpompo and Mpumalanga. These are the areas in South Africa where poverty is most prevalent.

Where possible, restitution should take the form of land transfer – and not cash – with the necessary post-settlement support.

The land chapter hails as a breakthrough the passing of the Restitution of Land Rights Amendment Act of 2003, whose aim, among others, is to empower the Minister of Land Affairs to expropriate land, which promises to speed up the return of land to the landless. However, the chapter laments that there has been no case of expropriation between the time the Act became operational and the time of writing. But, as mentioned above, in March 2007 the DLA carried out its first expropriation in

the form of the Pniel Farm near Kimberly.

On progress in general the land chapter indicates that of the 79 694 claims validated in 2003, 59 345 had been settled by 2005, representing a cumulative 887 093 ha of redistributed land. According to Hall (2005), while up to three-quarters of the claims had been settled by 2005, only 6% of these involved rural land and settlement has been mainly through compensation. Consequently, with the current backlog involving mostly rural claims, land restitution has done little to achieve land reform.

Tenure reform and communal tenure

There seems to be consensus that the position of farm dwellers has become worse since the advent of democracy in 1994. While a few have been recipients of RDP housing, many have been driven to communal areas and a majority have moved to urban informal settlements.

The land chapter paints an alarming picture of evictions, notwithstanding various pieces of legislation aimed at curbing this practice. The chapter points to research by NGOs such as Nkuzi Development Association, which shows that between October 2001 and May 2005 there were 1 238 cases of eviction, 76% of which were unresolved. Owing to farm-dwellers' ignorance of the law, many have been victims of constructive dismissals by farm owners (fired by making working conditions intolerable).

The introduction of the Restitution of Land Rights Act 1994 (RLRA), the Labour Relations Act 1995 (LRA), the Labour Tenants Act 1996 (LTA), ESTA, and the Basic Conditions of Employment Act led to evictions of about 442 000 farm dwellers. In addition, the introduction of the Sectoral Determination for Agriculture and a minimum wage on farms resulted in the further eviction of 138 000 farm dwellers. All this leads to the conclusion that these items of legislation, instead of affording security and protection to farm dwellers, have had adverse consequences for them.

On the question of communal land tenure, it is generally agreed that land reform should place particular emphasis on the empowerment of rural communities – such as the former "homelands" – where 30% of South Africa's population live in abject poverty. The land chapter in this regard praises the introduction of the Communal Land Rights Act 2004 (CLRA), which, together with the Land Use Management Bill when it is passed, presents great hope for rural development.

Only 6% of rural claims have been settled so far and these have mainly involved cash compensation and not the return of land.

Post-settlement support

Post-transfer support is an important feature of the land reform programme. The land chapter points out that despite such programmes as the Settlement/Land Acquisition Grant (SLAG), the Land Reform Support Programme (LRSP) and LRAD, which were designed to provide post-settlement support, there has been no effective use of land by beneficiaries. This has raised concerns that inexperienced recipients of commercial farms cannot make effective use of them, which will lead to food shortage in the country (Mail & Guardian Online, 2007).

Regarding financial support, it has been noted by Hall (2005) that the Comprehensive Agricultural Support Programme (CASP) will provide much-needed support such as farmer credit. Even more encouraging is the recent announcement by the Minister of Agriculture and Land Affairs that, while the government will be proactively acquiring land and holdings and developing it in terms of the proposed SPV, the beneficiaries will be undergoing skills training (Mail & Guardian Online, 2007).

Challenges and recommendations

The land chapter correctly points out that the main challenge of land redistribution lay in the fact that the government put the programme at the mercy of market forces. This challenge has been compounded by driving land redistribution mainly through the LRAD, which was originally meant for acquiring land for emerging small farmers.

Furthermore, there is a huge backlog, particularly of the settlement of rural claims for land restitution. Only 6% of rural claims have been settled so far and these have mainly involved cash compensation and not the return of land. Landowners have also resisted parting with their land. The key challenge that remains is "to transfer high quality land in ways that genuinely empower claimants and enable them to pursue land use options of their choosing" (Hall, 2005).

The land chapter also points to studies showing that the position of farm dwellers has worsened and there have been thousands of evictions since 1994. It sees these as a reaction by farm to the various pieces of legislation, including ESTA. Hall

(2005) has suggested that there is a need for an "interventionist approach, both to prevent evictions and to secure long-term rights and development in the areas where they live".

On the question of communal tenure, the land chapter singles out the issue of resources as well as the availability of land as the key challenges for rural enhancement. According to Hall (2005), the implementation of the CLRA will create controversy for the following political and practical reasons:

- It will be extremely difficult to implement it on a large scale as it needs R1 billion a year, while only R55 million is currently available (in 2005).
- There is a lack of guaranteed rights for women as the content of the 'new order rights' and the 'titling for communities' have not been defined.
- There is a lack of democratic guarantees, in that land administration bodies will be constituted of traditional councils, except where these do not exist.

On post-transfer support, despite the great hope generated by the introduction of such initiatives as the CASP and, recently, the SPV, there remains more scope for private sector involvement in the land reform programme. One of the key challenges is "to develop a comprehensive system of farmer support that reaches even the smallest of farmers producing for household consumption" (Hall, 2005). Perhaps this will improve private sector involvement and address some of the challenges.

The land chapter makes the following key recommendations:

- The Communal Land Rights Bill must be passed into law and ESTA and LTA must be consolidated.
- Proactive monitoring mechanism must be put in place to assist future evictees.
- The DLA should adopt a comprehensive post-eviction strategy to accommodate evictees, which should include other state organs such as the Departments of Public Work, the Environment, Housing and Health. It calls for the Departments of Safety and Security, Home Affairs and Social Development to play a role.
- The state should explore the option of renting land on behalf of tenants while negotiations to buy the land continue.
- The state should begin to expropriate land, starting with unoccupied but fertile land.
- The DLA should have separate budgets for redistribution and tenure reform.
- The DLA should formulate a holistic land valuation framework, with a view to determining accurate assessment and pricing.
- The market-based 'willing seller – willing buyer' strategy should be abolished.
- The DLA should foster inter-departmental cooperation with a view to including all relevant institutions that deal directly with socio-economic rights.

It is hoped that the Commission will follow up on these recommendations and provide feedback in its next report.

On post-transfer support, there remains more scope for private sector involvement in the land reform programme.

Conclusion

The land chapter seems well researched and well presented. Its analysis of the progress on the three main fronts – redistribution, restitution and tenure – is in line with that of other experts in the field.

However, the land chapter fails to follow up on a recommendation made in the previous report that calls on the DLA to train and deploy field workers to remote areas where abuse and violations of farm workers' rights have occurred.

The chapter is also silent on its previous recommendation concerning the commencement of the Subdivision of Agricultural Land Act Repeal Act of 1998, which would make good quality land available to land reform beneficiaries. Despite making similar recommendations in the current report, there is no linkage with or reference to the previous report. These omissions are possibly a consequence of the decision to reduce the land chapter from 44 pages in the fifth report to only 15 pages in the sixth report. The reduction in size of the chapter implies that a majority of the problems raised in the fifth report have been resolved, but the current chapter does not explicitly confirm this.

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The right to have access to adequate housing

Lilian Chenwi

The right of access to adequate housing is important for the enjoyment of all human rights. A house is fundamental for human dignity and for physical and mental health, which are crucial for socio-economic development. The importance of this right is underscored in the South African Constitution of 1996 (the Constitution), which requires the state to respect, protect, promote and fulfil section 7(2) as well as to take reasonable legislative and other measures to realise the right to adequate housing progressively as set out in sections 26(1) and 26(2).

However, providing adequate housing is one of the greatest challenges facing the South African government. The country's housing situation is characterised by severe shortages, huge backlogs, and serious overcrowding in existing dwellings.

About 2.5 million households in South Africa do not have access to adequate housing. In addition, thousands of people have no access to housing or shelter of any kind. About 2.4 million households live in informal settlements.

The rate of delivery of housing is below the rate of formation of low-income households. Those most affected by the housing crisis are the poor and other vulnerable social groups. This crisis undermines the strides made by the government to implement and realise the right to adequate housing.

Monitoring the government's progress in providing housing is crucial in order to ensure that this right does not become a right merely on paper. This article provides a review of the housing chapter in the *Sixth economic and social rights report 2003-2006* (the sixth report) of the South African Human Rights Commission (the Commission).

The sixth housing protocol

The sixth housing protocol appears to be comprehensive. It contains a number of features that were not included in previous housing protocols. For example, while the previous housing protocol is more general on the issue of budgetary allocations for programmes and projects, the current

housing protocol goes further and lists the key housing programmes that have to be reported on. These programmes include the housing subsidy scheme, the hostel redevelopment grant, the human settlement redevelopment grant, the discount benefit scheme, and the schemes for emergency housing, farm worker housing, and medium-density and rental housing. However, with the exception of the subsidy scheme, the chapter does not adequately assess the listed programmes in term of their substance and the manner in which they have been implemented.

A second new feature is the section on communication strategies. Generally, the lack of communication between the government and affected communities has contributed to the housing crisis in South Africa. The Minister of Housing, Lindiwe Sisulu, has acknowledged that poor communication is the cause of protests against the slow pace of housing delivery (Sisulu, 2005a). Accordingly, the protocol requires government departments to report on how they disseminate information to the public about the programmes and policies that are available and how these measures can be accessed by the public. Again, the chapter neither contains feedback received from the departments on these nor provides any explanation on why this information is missing. Did the departments not respond to this aspect of the protocol?

The lack of communication between the government and affected communities has contributed to the housing crisis in South Africa.

Despite its comprehensiveness, the protocol leaves out two important issues, which should have been investigated. First, the protocol does not include a request for information on the progress made by government in the implementation of court orders relating to housing rights. During his recent visit to South Africa in April 2007, the UN Special Rapporteur on Adequate Housing, Miloon Kothari, recommended that court judgments concerning the right to housing should be implemented effectively and timeously by the government and that the implementation of these must itself be closely monitored (Kothari, 2007(b)).

Second, the Commission has been repeatedly criticised for not following up on its recommendations. Yet the housing protocol does not contain follow-up questions on the extent to which its previous recommendations have been implemented. Twelve recommendations were made in the previous report on housing. The current chapter says nothing about them.

An evaluation of the housing chapter

This chapter provides an overview of the housing environment, the budget allocations for the 2002/2003–2005/2006 financial years, and the policies and legislative measures at both national and provincial levels that have been adopted. It also makes a number of key recommendations. It starts by setting out the importance of the right to adequate housing. In defining the right, it uses the definition adopted in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) that housing entails more than just 'bricks and mortar'. In fact, it involves access to land, the provision of appropriate services such as water and sewage removal, and the financing of all these, including the building of the house itself (para 35). The provision of such a shelter is dependent on the prevalent social and economic realities.

In addition, the chapter discusses a new policy, the Comprehensive Plan for Sustainable Human Settlement, introduced in 2004 in accordance with the *Grootboom* order. It requires the government to redirect and enhance existing mechanisms to move towards more responsive and effective housing delivery. If properly implemented, the policy will go a long way towards achieving the Millennium Development Goals (MDGs) on housing.

The chapter refers to the housing needs of people with disabilities, which is commendable in the light of the growing need for the government to develop a comprehensive policy on the special housing needs of vulnerable groups.

Although it reveals that the Commission has been monitoring the implementation of the *Grootboom* court order, the chapter is silent on other judgments that have also not been fully implemented. For example, by July 2005 the court order in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (8) BCLR 786 (CC) [*Modderklip* (CC)] had not been implemented. This could be attributed to the lack of a specific question in the housing protocol on the enforcement of court orders.

The chapter notes the progress made and the challenges faced in improving the lives of the community

at Wallacedene, part of which constituted the litigants in *Grootboom*. It reveals that the government has started with the construction of houses for this community. At least 9 000 sites have been earmarked for development.

Unfortunately the chapter does not provide time frames, which would be useful in the Commission's subsequent assessment of the government's progress. Furthermore, despite the improvements noted in the report, the initial developments in Wallacedene still have inadequate basic services such as water, the settlement is still very dense, and some of the houses are in waterlogged areas.

Key legislation and policies

Unlike its predecessors, the chapter merely lists the key legislation and policies that have been adopted without analysing them. It should have examined in greater detail the implementation of the Housing Assistance in Emergency Circumstances Programme, especially since there have been concerns that the implementation of this programme has been rather slow (*City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2006 (6) BLCR 728 (W) [*Rand Properties*] paras 42-47). Furthermore, the Commission expressed concern about the sustainability of this programme in its previous report (p. 13).

Similarly, the chapter simply mentions the Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill 2005 (PIE), without discussing it against the concerns it has raised. The Bill proposes to narrow the ambit of PIE by excluding some unlawful occupiers, for instance ex-tenants and ex-mortgagors, from protection despite the fact that they are not currently protected by any other legislation.

Corruption

The chapter is silent on corruption in the housing sector. Corruption is widely regarded as one of the key challenges impeding the delivery of adequate and quality housing and related infrastructure (see Hlatshwayo, 2005; *Cape Times*, 2005; e.tv, 2005). This problem was noted in the previous report, which identified the reluctance of individuals to "blow the whistle" on corrupt activities – either for fear of retribution, or because they did not want to be labelled *impimpis* or traitors, or through lack of legal protection or support from the government – as a major obstacle to the elimination of corruption. However, the current chapter does not state whether corruption still remains a major challenge.

The main difficulty for the courts is how to avoid prescribing to other arms of government how to execute their constitutional duties, while at the same time ensuring those duties are fulfilled.

The previous report commended the Protected Disclosures Act 26 of 2000, which encourages employees to report wrongdoing by employers or corrupt colleagues. To improve the Act's effectiveness, it recommended that the Department of Housing should confront and eliminate a culture that scorns whistle-blowers; that employers in housing should be trained to implement a viable whistle-blowing policy that allows employees to raise concerns without fear of reprisal; and that workers themselves should know and understand their rights under the law in order to be able to report misconduct in a proper manner. However, the current report does not state whether these suggestions have been implemented or not.

Key challenges

The chapter identifies a number of challenges to realising the right of access to adequate housing. The fieldwork that was carried out reveals some of the challenges faced by many municipalities in their efforts to ensure housing rights. For instance, the Commission observed that the Madibeng Local Municipality in the North West Province, under its Integrated Development Plan, has approved 13 housing projects in areas that are close to economic opportunities in an effort to tackle the housing backlog. In spite of this, according to the Commission, the housing conditions of farm workers in this municipality are poor and in some cases they still lack access to sanitation facilities and accommodation with adequate ventilation.

The Namakwa District Municipality in the Northern Cape has provided houses in some areas that are of adequate size, partitioned into three rooms with a bath and toilet, and beneficiaries could choose between different roof types for their houses. The Commission links this achievement to the availability of land and the utilisation of local resources and inputs. However, it notes that the houses are of poor quality and are already falling apart. The Commission attributes this to the soil quality and the fact that geo-

technical and suitability studies were not properly carried out.

In KwaZulu-Natal, barriers to the provision of adequate housing in the Ilembe District Municipality include a lack not only of land but also of capacity and proper cooperation between municipal and government officials.

Another key challenge highlighted by the report is that people with disabilities still have difficulty accessing adequate housing and experience discrimination when applying for housing grants. Other problems they experience include inaccessible toilets in state-subsidised houses, lack of toilet facilities in informal settlements, inaccessible public toilets, public buildings and public transport that do not cater for their needs, and access roads that are uneven, muddy and not user-friendly for those with disabilities. The chapter notes that the subsidies awarded to 292 people with disabilities during 2003/2004 was insignificant, given that 2 255 982 people live with various forms of disability.

People with disabilities still have difficulty accessing adequate housing and experience discrimination when applying for housing grants.

Another challenge is ensuring access to the basic services that are necessary for the enjoyment of the right to adequate housing. In addition, the Commission observes that a number of factors impact on the state's ability to ensure adequate housing for all efficiently and successfully. These include globalisation; a high unemployment rate; the housing affordability ratio; rapid urbanisation; the rental housing option; inaccessibility of subsidy programmes by other groups; and the lack of adequate inter-departmental and inter-governmental relations.

Recommendations by the Commission

Although the substance and length of the housing chapter is limited, the recommendations made are far-reaching and wide-ranging. It would nevertheless be useful if in subsequent reports the recommendations could be directed at specific departments, as is done in the land and water chapter for instance, so as to facilitate their effective implementation.

The recommendations made by the Commission include the following:

- The state should carry out a study to consider the strategy for the development of affordable houses, which should aim to reduce the price of land for housing purposes and ensure that housing developers allocate a certain percentage of houses to middle-income categories.
- Housing projects undertaken by the government should take into account the special needs of people with disabilities by ensuring adequate access roads, the provision of houses and toilets that cater for those who use wheelchairs and other aids, and assistance in processing applications by disabled people.
- The state should develop a policy response on the process of urbanisation, which should ensure that there are no illegal land invasions and, in addition, should identify rural areas with economic potential with a view to developing economic activity in such areas.
- The state's housing policies should be informed by the current social and economic trends, and officials of the national, provincial and local housing departments, as well as traditional leaders, developers and beneficiaries, should be capacitated in this regard.
- Efficient public participation should aim primarily to inform the public about the activities of the government and ensure that the public adds value to the activities of the government.
- The state should establish a Housing Development Task Team to ensure that policies are coherent and that the resources of different departments are channelled towards developing adequate and sustainable human settlements. It should comprise officials from the Departments of Housing, Provincial and Local Government, Land Affairs, Environment, Agriculture, Water Affairs and Forestry, Health, and Population Development.

Conclusion

It is important that the Commission, when monitoring the right to adequate housing, should address all the pertinent issues and challenges involved. This has evidently not been the case in the housing chapter of the sixth report.

Moreover, it is important for the Commission to create a link between its reports, as this will enable one to see whether the findings and recommendations in the previous reports were taken seriously. In this regard, the protocol must include questions on the implementation of the recommendations in the previous reports.

The Commission should also consider relevant documents in its monitoring of the progress towards adequate housing. For example, the UN Special Rapporteur on Adequate Housing has identified indicators to monitor the implementation of the right to adequate housing and has developed a questionnaire on women and adequate housing, which is useful in collecting information from governments and civil society groups (Kothari 2007a, annexures II and III).

Finally, the Commission should creatively integrate the MDGs in its monitoring process. The MDG 7 is particularly relevant to housing, stating that by 2020 the lives of at least 100 million slum dwellers must have been significantly improved. Although the chapter makes reference to the policy aimed at upgrading informal settlements, this is not analysed with reference to MDG 7.

The indicators to monitor MDG 7 are the proportion of people with access to a) improved sanitation and b) secure tenure (Kothari 2007a, para 3). When reporting on the upgrading of informal settlements, the chapter should thus provide the proportion of people with access to improved sanitation and secure tenure in these settlements.

Obtaining information from the Department of Housing on the specific progress it is making to meet MDG 7 would not be burdensome as, normally, the government is supposed to report to the relevant UN agencies on its progress in meeting the MDGs (South Africa 2005). Moreover, the government itself often speaks of its commitment to achieving these goals.

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The right to have access to social security

Marius Olivier

This review examines the salient aspects of the chapter on social security in the *Sixth economic and social rights report 2003–2006* (the sixth report) of the South African Human Rights Commission (the Commission).

Content and context of the right to access to social security

The report refers to the concept of social security employed in the White Paper for Social Welfare of 1997, which broadly defines it as covering a wide range of public and private measures that provide cash or in-kind benefits, in order to deal with income support crises or to maintain children. It correctly points out that social protection does not only cover social security, but also encompasses developmental strategies and programmes to ensure at least a minimum acceptable living standard, and to increase the people's capabilities and opportunities.

The Constitutional Court has repeatedly held that the most vulnerable must not be excluded from socio-economic policies.

The term social security in section 27(1)(c) of the Constitution essentially refers to contributory-based social insurance and budget-based social assistance (Olivier, 2003).

One would therefore have expected the social security chapter to comment on the social insurance framework of social security. This would have required the Commission to comment on the unemployment insurance framework, compensation for occupational injuries and diseases, the Road Accident Fund system, and the occupational-based and private retirement framework. The previous report did have a section on social insurance.

The crucial role that social security, particularly social assistance, plays in reducing poverty has been widely acknowledged in various documents, including the Consolidated Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (also known as the Taylor Committee Report, 2002). It is not surprising that there has been a rapid expansion of the social grant system, which currently covers approximately 12 million poor children, old people and people with disabilities.

However, the chapter in the sixth report demonstrates that the proportion of households living in poverty has not changed. On the contrary, it reveals that poverty has in fact deepened for those households. The United Nations Development Programme's (UNDP) Human Development Report on South Africa (2003) corroborates this finding. It indicates that the Human Development Index has worsened (from 0.73 in 1994 to 0.67 in 2003); poverty still engulfs 48.5% of the population (21.9 million in 2002); income inequality has increased (from 0.60 in 1995 to 0.63 in 2001); the majority of households have limited access to basic services; and the official unemployment rate has sharply increased to more than 30% in 2003. The employment rate, excluding so-called discouraged workers, was more than 25% in 2006, but with the inclusion of discouraged workers it stood at over 40% (NALEDI, 2006; Knight, 2006). In addition, income disparity and poverty remain high (Knight, 2006).

These statistics cast doubt on the ability of South Africa to meet some of the poverty-related Millennium Development Goals, in particular the first goal, which requires countries to halve the proportion of people whose income is less than $1 per day by 2015.

The Constitutional Court has repeatedly held that the most vulnerable must not be excluded from socio-economic policies (see, for example, *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169 (CC) [*Grootboom*]). The social security chapter suggests that vulnerable groups in South Africa include the elderly, people with disabilities and poor children (under 14 years of age). All of these are currently catered for in the social assistance system.

Furthermore, the chapter highlights the need to develop a national policy for orphans and child-headed households. It also urges the government to consider introducing a different form of the Basic Income Grant, which is not a universal grant for all, but rather for those who fall below the poverty line.

However, unlike the chapter in the previous report, the current one

does not mention other vulnerable groups, such as children living in the streets, juvenile offenders and the chronically ill.

The state may not be able to extend protection to everyone at the same time. However, in paragraph 45 of *Khosa & Others v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) the following is stated:

> It is also important to realise that even where the state may be able to justify not paying benefits to everyone who is entitled to those benefits under section 27 on the grounds that to do so would be unaffordable, the criteria upon which they choose to limit the payment of those benefits (in this case citizenship) *must be consistent with the Bill of Rights as a whole* (emphasis added). Thus if the means chosen by the legislature to give effect to the state's positive obligation under section 27 unreasonably limits other constitutional rights, that too must be taken into account (para 45).

There is another conceptual aspect of the social security chapter that deserves comment. With a few exceptions, the chapter stresses and evaluates the compensatory elements of social security (and mostly social assistance). This must of course be understood against the background that the South African social security system is characterised by a lack of emphasis on issues of *prevention* of exposure to social risks and the *integration* and *rehabilitation* of those who have fallen victim to a particular social risk (Olivier, 2003).

This, in my view, begs the constitutional question: does social security do much more than merely compensating victims? I would like to think that it embodies both compensatory aspects as well as preventative, rehabilitative and (re)integrative elements.

(In)sufficiency of and reliance on protocols

Some weakness in the protocols have already been alluded to above. To these must be added the fact that the labour protocol does not request information on some aspects of unemployment insurance, such as those concerning occupational injuries, diseases and retirement. As a result, the chapter does not report on these.

Moreover, while it touches on some public unemployment insurance schemes, such as the Unemployment Insurance Fund, it does not consider occupational-based schemes and specialised inter-governmental arrangements for unemployment insurance to cater for such groups as migrant workers. In fact, one wonders whether it is prudent to limit this protocol to labour (i.e. employment-related) matters. The Road Accident Fund forms an important part of the social insurance framework similar to that of employment-based social insurance, medical care (covered in Chapter 3 of the sixth report) and health insurance (not covered in the sixth report).

Interestingly, none of the protocols make reference to the human rights framework relevant to informal social security and its (developing) links to the formal system of social security. Many people in this country rely on informal social security (Olivier and Kaseke, 2007).

Administrative justice provides the basis for a substantial part of the jurisprudence on social security (in particular social assistance) in South Africa. Unlike its predecessor, the current social security chapter does not reflect on this jurisprudence.

Substance of the chapter

The social security chapter covers certain important areas, such as the need to introduce a poverty reduction framework for those excluded from the social security system and develop a national policy for orphans and child-headed households. The discussion on the Expanded Public Works Programme and its failure/inability to make a meaningful impact on poverty in South Africa is particularly illuminating.

However, there are several areas not sufficiently covered or not addressed at all. Some of these have already been referred to above. The following sections discuss other areas of concern.

Relevant international human rights instruments

Apart from discussing the relevance to South Africa of the United Nations Committee on Economic, Social and Cultural Rights' minimum core obligations concept, the chapter fails to mention and reflect on South Africa's compliance with a number of other important and relevant international human rights instruments. For example, South Africa's non-compliance with the Convention on the Rights of the Child has been extensively reported on by the UN Committee on the Rights of the Child (2000). This is of particular significance for the area of social security for children, for example the need to extend social security support up to the age of 18 years. It would appear that little has been done to implement the recommendations made by this committee.

In addition, SADC head of states adopted the Charter of Fundamental Social Rights in SADC (known as the Social Charter) in 2003. The regional document contains several crucial provisions on the right to social security or protection (article 10) and on particular social security domains and affected categories of vulner-

able people, eg elderly people (article 8), protection of children and young people (article 7), equal treatment for men and women (article 6), persons with disabilities (article 11), and protection of health, safety and the environment (article 12).

In addition, there is also now a Code on Social Security in SADC, the provisions of which are of assistance to the further development of social security systems in all of the SADC countries, including South Africa. It is, for example, clear that South Africa falls short in terms of the provision in the Code that member states should progressively provide for paid maternity leave of at least 14 weeks and cash benefits of not less than 66% of income (article 14.3).

Progressive realisation

Chapter 5 correctly stresses the obligation of the state to realise the right of access to social security progressively. However, exclusion and vulnerability may be such that other relevant fundamental rights are simultaneously infringed – such as the right to equality and the right to human dignity. From the Constitutional Court's jurisprudence, in particular *Khosa* (2004), which is quoted above and discussed in the Commission's fifth report, it is clear that where intersecting rights are affected, progressive realisation as a defence may not always succeed. The infringement of the rights may be so serious and the group(s) affected so marginalis-ed and vulnerable, that immediate rectification is required.

Pleading the unavailability of resources may not be useful as the state has to ensure that the criteria, on the basis of which payment of benefits is made to certain groups only while others are excluded, are consistent with the Bill of Rights as a whole.

Problems with current grants

The sixth report does not take the discussion of problems with the current grant categories (e.g. the Care Dependency Grant) forward. This is unfortunate because in the period of reporting no real progress has been made to address these concerns.

Access to justice

Finally, the unavailability of appropriate access to justice within the framework of social security, in particular for poor people, is one of the core issues in need of fundamental reform in South Africa. This flows partly from the very limited availability of legal aid, and partly from the absence of an appropriate adjudicating institution (Olivier, 2006). One would suggest that this is an area that should capture the attention of the Commission.

Conclusion

There is a fair amount of information, reflection and analysis in the social security chapter that is commendable. The critical engagement of the Commission with the Expanded Public Works Programme is an example.

However, there are also areas of deficiency, some of which have been raised here. Perhaps these flow from the deficiencies in the protocols used for collecting data and the paucity of responses received by the Commission. It is recommended that, for the purposes of future reports, the Commission should pay attention to

- the link between the existing social security framework and South Africa's human rights obligations under the Constitution and international law;
- the range of vulnerable groups who should be brought within the social security system;
- several critical areas of human rights concern, such as non-compliance with administrative justice principles and lack of access to justice; and
- the impact of relevant international and regional rights-based instruments on the development of the South African social security system.

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The right of access to sufficient water

Christopher Mbazira

This article analyses the report of the South African Human Rights Commission (the Commission) on the realisation of the right of access to sufficient water in South Africa presented in chapter eight of its *Sixth economic and social rights report 2003-2006* (the sixth report).

While the report provides valuable information on a number of positive developments in the provision of water services, it is deficient in a number of respects.

The most visible deficiency is its lack of comprehensiveness and its failure to verify most of the information it relies on both to credit and discredit the government. It is argued that these deficiencies can be attributed to the sixth protocol on the right to water (the water protocol), which fails in some important respects to elicit information in ways that would allow a deeper analysis of the state's performance.

Normative protection of the right to water in South Africa

As with all other socio-economic rights, access to water in South Africa has historically been linked to race. Previously access to water was linked to private ownership of land: those who did not own land, mainly black South Africans, had very limited access to water (Kok and Langford 2006: 56B-1). It is against this context of deprivation that the 1996 South African Constitution guarantees everyone the right of access to sufficient water (section 27[1][b]). The state is obliged to realise this right progressively through reasonable legislative and other measures within its available resources [section 27(2)].

The obligations that attach to this right are fleshed out in the Water Services Act (No. 108 of 1997). It is notable that, while the Constitution uses the phrase "the right to ... sufficient ... water", the Act refers to the right of access to a "basic water supply" and basic sanitation (section 3[1]).

The Act defines "basic water supply" to mean "[t]he prescribed minimum standard of water ... necessary for the reliable supply of a sufficient quality of water to households, including informal households, to support life and personal hygiene" (section

1[iii]). Regulations to the Act have defined this water to be a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month (Regulations Relating to Compulsory National Standards and Measures to Conserve Water 2001, Reg. 3).

One eye-catching provision of the Water Services Act is section 4(3)(c), which provides that procedures for the limitation or disconnection of water services must not result in a person being denied access to basic water services for non-payment, where that person proves that he or she is unable to pay for the basic service.

From the report it is not clear whether the policies have achieved their objectives and if not, why they have failed to do so.

The government's commitment to realise the right to water is evident in its policy and practices. South Africa is, for instance, one of the very few African countries to commit a higher percentage of its Gross Domestic Product (GDP) to water and sanitation than to military expenditure: approximately 2% and 1.8% respectively (UNDP 2006: 62). While the government should be commended in this regard, it does not mean that the right of access to sufficient water has been realised for all South Africans. There are still many gaps that need to be filled, some of which are outlined in the sixth report.

An analysis of the chapter on water

Policies and programmes adopted by government

The chapter on water in the sixth report (the chapter) demonstrates that the state has adopted policies that are intended to advance the right of access to sufficient water. The first policy is the Strategic Framework for Water Services, 2003 (SFWS) of the Department of Water Affairs and Forestry (DWAF). The second is the Department of Provincial and Local Government's Municipal Infrastructure Grant Framework (MIGF). These two policies, according to the Commission, have been used to develop institutional and regulatory strategies to guide the water services sector.

The chapter reports that the National Department of Provincial and Local Government has been implementing the MIGF to help municipalities achieve their obligation of providing services and speeding up the provision of water and sanitation. This programme, together with the Consolidated Municipal Infrastructure Programme (CMIP), has helped reduce the backlog of people without access to water beyond the targets set by DWAF. The following achievements by the government are highlighted:

- the reduction of water backlogs;
- the allocation of funds to provinces to reduce sanitation backlogs;
- the restriction of water with a view to promoting water conservation;
- the transfer of water between basins to address the effects of drought;
- building the capacity of municipal staff with regard to the institutionalisation of the municipal infrastructure grant; and
- the reduction of rates charged for water in many rural areas.

Other positive developments include the commitment made by the Northern Cape and Mpumalanga to eradicate the use of bucket toilets. The Mpumalanga government set aside R35 million for this purpose and the Northern Cape government was to rid the province of 22 000 bucket toilets by October 2006.

In spite of this, the chapter does not discuss some recent policies such as the National Water Resources Strategy (NWRS) 2004. The NWRS is a very important policy because it obliges the government, among other things, "[t]o ensure that potable water and safe sanitation are accessible to all" and to subsidise previously disadvantaged water users. Information on the extent to which measures have been put in place to implement this policy would have been useful, since at the time of writing the sixth report the policy was two years old.

The chapter also does not adequately assess whether the policies it refers to have been implemented effectively. Although it uses some case studies to show the extent to which the policies have been implemented, the information provided is scanty. There is also no evidence to suggest that such information, most of which comes from DWAF, was verified independently by the Commission.

One believes that a monitoring process should look beyond paper policy and target implementation. From the report it is not clear whether the policies mentioned have achieved their objectives, and if not, why they have failed to do so. In addition, no mention is made of any solutions that might have been proposed to overcome the challenges. It is the duty of the Commission to look behind the statistics and synchronise them with the realities on the ground.

The chapter demonstrates that

there has been a decline in DWAF's expenditure over the three years under review by approximately R2,27 and R1,53 million per year. While the figures appear negligible, the Commission associates the decline with a reduction in water resources and water quality, with water and sanitation services backlogs, and with inflation. No further elucidation is provided to explain the link, which raises the presumption that it is merely speculative. Such a conclusion is inevitable considering the skeletal nature of the 11-page chapter.

Weaknesses in the water protocol

The failure to monitor the implementation of the policies effectively could, among other things, be the result of gaps in the protocol. While the protocol elicits information on the policies that have been adopted to realise the right of access to sufficient water, it is deficient in eliciting the kind of information that is necessary to assess their implementation. Under the heading "Progress in implementing key programmes, sub-programmes and projects", the protocol places emphasis on the size of the budgetary allocations to implement the relevant programmes. One could argue that while budgetary allocations are an invaluable indicator for the purposes of determining implementation, without other forms of qualitative and quantitative indicators they are inconclusive. The funds allocated could have been spent on items not connected to the services being provided, or they could have been mismanaged, misappropriated or squandered through corruption.

Under the heading "Indicators for the 2003/2004 Fiscal Year" the protocol makes a commendable effort to elicit quantitative information on access to water. The questions under this heading may elicit invaluable information on the implementation of any programme or policy. For instance, they require information on the number of households with access to piped water in the house, the number of households with communal piped water, the number of household with flush toilets, the size of the population receiving free basic water, and the size of the population receiving less than 25 kilolitres of free basic water per month.

However, despite these quantitative questions the sixth report does not provide adequate statistics to establish the level of access to water services and no explanation is offered for this. While it gives some statistics, these are based mainly on the 2003/2004 financial year and there is nothing on 2004/2005 and beyond. This information could have been used by the Commission to assess whether, in quantitative terms, the right of access to sufficient water is being realised on a progressive basis. Evidence of retrogression would have been condemned, as was done with the declining budgetary allocation trends.

When one compares the water chapter with its predecessor in the fifth report (2002/2003), the differences in the information provided are glaring. The previous report gave statistical information on such aspects as the water infrastructure backlogs, the sanitation infrastructure backlogs, the number of poor households with free basic water, the municipalities offering free basic water, and the average municipal retail tariffs per province. While the current chapter gives statistics on basic water, these are based on a case-study of one district municipality, which can hardly represent the overall situation in the country.

Updated information on the number of poor households accessing free basic water countrywide, and the backlogs in this regard, would have been worthwhile. Such information would have helped not only to establish how many have access but also how many who qualify for free basic water do not yet have it. This is particularly relevant given that the policy on free basic water has not been implemented effectively in all provinces (Mbazira 2006: 77). This problem is mainly associated with financial deficits facing poor rural municipalities.

The chapter quotes DWAF as saying that the backlog in rolling out the free basic water policy is decreasing. DWAF says that in the 2003/2004 financial year the provision of free basic water had increased by 17.5%, resulting in an increase of 42% to poor households. The report unfortunately denies readers statistical or other evidence to verify this, yet the case-study in the chapter presents an opposing picture, showing that, instead of providing the statutorily prescribed 6,000 litres of water per month, only 3,000 litres were being provided. DWAF could, therefore, be basing its conclusion on statistics in terms of the number of households accessing this water, yet the amount falls below the prescribed standard.

Section 7[2] of the water protocol ("Assessment of outcomes in relation to constitutional obligations)" may have provided the opportunity to elicit the qualitative information referred to above. However, this protocol is very broad and does not offer precise guidance on what information ought to be provided.

The respondents are required to provide an overall assessment of how they have met the obligations to respect, protect, promote and fulfill

the rights as outlined in section 7(2) of the Constitution. Apart from sketchy definitions of these duties in a footnote, there is no assessment of the state's compliance with these obligations. The Commission should therefore elicit information that enables it to determine, using the expertise at its disposal, whether the obligations in section 7(2) have been discharged.

The Commission needs to use the principles emanating from the jurisprudence of the courts on the nature of the state's obligations in relation to socio-economic rights. The reasonableness approach is an indispensable guide in this regard. The Commission should seek information that enables it to assess whether the measures undertaken by the government are "comprehensive, coherent, coordinated, flexible, reasonably formulated and implemented, and pay attention to the needs of those in desperate circumstances, transparent and allows for participation of relevant stakeholders" (see *Government of the Republic of South Africa and others v Grootboom and others* 2000 (11) BCLR 1169 (CC) and *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC)).

Problem of prepaid meters

The chapter also fails to assess the human rights implications of using pre-paid water meters by some municipalities as a means of ensuring that water bills are paid. Some studies have revealed the negative implications of using these meters in poor communities (Deedat and Cottle, 2002; and Ruiters, 2002; Mbazira, 2006). The meters allow for disconnection from the service without the user being given the requisite legislative notice of disconnection. Comparative jurisprudence from the United Kingdom (UK) suggests that these meters may be illegal (*R v Director General of Water Services ex parte Lancashire County Council and ors* EWHC, Admin 213 (20 Feb 1998) [UK]). It is also on this basis that a challenge has been launched in the High Court of South Africa against these meters (*Lindiwe Mazibuko & Others v The City of Johannesburg & Others* No 06/13865, High Court of South Africa, Witwatersrand Local Division [pending]).

Assessing the country's international commitments

In spite of the critical place occupied by access to water and sanitation in the Millennium Development Goals, there is evidence that the world, and particularly the developing world, will not meet the target of reducing by half the proportion of people without access to water and sanitation (United Nations, 2006: 18). The Southern African Regional Poverty Network (SARPN) in 2005 published a report indicating that South Africa was well on course to meeting the MDGs and had by 2004 extended water to 78% of its population (SARPN 2005: 49).

Notwithstanding this positive development, the SARPN report shows a discrepancy in access between rural and urban populations and does not make a qualitative assessment of the statistics beyond these variables. There is no way of determining, for instance, the quality of the water and sanitation services being provided. The Commission is well suited to making such assessments and determining on both a statistical and qualitative basis South Africa's commitment to the MDGs.

The Commission needs to use the principles emanating from the jurisprudence on the nature of the state's obligations in respect of socio-economic rights.

The chapter demonstrates that DWAF has undertaken steps to ensure that water is safe and of good quality. DWAF has developed a monitoring programme that focuses on monitoring the quality of water in terms of microbials and toxicity. The only problem noted by the Commission is that the programme focuses on what have been described as "hot spots and high-risk areas". As a result, the Commission states that cases of unsafe water because of faecal content leading to such diseases as typhoid have been reported at some water points. DWAF is, however, planning to extend its quality monitoring to all points. The chapter also notes that effective monitoring is being hampered by capacity problems not only in DWAF but at the water boards as well.

Recommendations of the Commission

The chapter makes a number of recommendations. These include:

- the need for the state to provide capacity building at the municipal level;
- the need for the DWAF to focus on the effect of climate change and drought;
- the need for local government to provide information on infrastructure developments when reporting to the Commission;
- the need for local government to support municipalities through adequate budgetary allocations to enable them to provide free basic water; and

- the need for the state to create educational and promotional activities on water conservation, hygienic use of water and protection of water resources.

One of the weaknesses of the Commission, however, has been the failure to follow up on its recommendations (Thipanyane 2007: 14). There is, for instance, no information on whether the Commission has followed up on the recommendations it made in its previous report. Unless there is such follow-up it will remain difficult to determine whether or not the reporting process is achieving its purposes.

Conclusion

The water chapter provides useful information on the extent to which the government has realised the right of access to sufficient water. It details some of the policies that the government has adopted to realise this right. The Commission also makes a number of recommendations on what in its opinion ought to be done to realise the right effectively.

However, the chapter suffers from deficiencies: it is scanty and fails to provide vital information and statistics. Some of these deficiencies arise from the water protocol, which fails adequately to elicit all the relevant quantitative and qualitative information. To improve its monitoring of the right of access to adequate water,the Commission therefore needs to:

- revise its water protocol to ensure it elicits all relevant information for effective monitoring of the right to water;
- produce more comprehensive reports that properly analyse the information obtained from the state by assessing it both qualitatively and quantitatively; and
- follow-up on its recommendations made in previous reports.

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United Nations expert on adequate housing concludes visit to South Africa

The Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, issued the following statement:

Geneva, 7 May: From 12 to 24 April 2007, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, conducted a mission to South Africa to examine the status of the realisation of the human right to adequate housing, paying particular attention to aspects of gender equality and non-discrimination.

During his visit, the Special Rapporteur visited urban and rural areas such as Platfontein (Northern Cape), Sterkwater, Ga-Pila and Mothlohlo (Limpopo), Johannesburg, Pretoria and Ekurhuleni (Gauteng), Durban (KwaZulu-Natal) and Cape Town (Western Cape). Throughout his visit, he met with high-level representatives at State, Provincial and Municipal levels including ministers, judges and parliamentarians. He also met with civil society members, including NGOs, social movements, academics and women's groups.

The Special Rapporteur acknowledged efforts made by the South African authorities at all levels to address issues related to the realisation of the right to adequate housing since the end of apartheid in 1994, in particular the progress towards democratisation and the genuine attempts by law and policy makers to address issues of racial segregation, inequality and systematic human rights violations. He also recognised the challenges faced by municipalities as they cope with rapid urbanisation across the country.

He commended South Africa's legal provisions guaranteeing the right to adequate housing and highlighted that South Africa is one of the few countries that has made a legislative and constitutional commitment to the recognition and protection of socio-economic rights, including the right of access to adequate housing (Sections 25 [1] and [2] of the South African Constitution). He also noted the important contribution of the South African Constitutional Court [to] the interpretation of this right since 1996. He highlighted one of its landmark judgements, on the *Grootboom* case, where the Court found the State was constitutionally required to assist people living in crisis and emergency conditions and the impact that it had in the promotion of the right to housing not only in South Africa, but around the world.

He also welcomed the work of the South African Human Rights Commission in promoting economic, social and cultural rights.

The Special Rapporteur was impressed with several housing and land initiatives designed to help secure an adequate standard of living for all South Africans. He noted the National Housing Subsidy Scheme ('NHSS') that has financed the construction of over 2.4 million households since 1994. He also welcomed the National Department of Housing's ambitious policy, 'Breaking New Ground', which seeks to promote sustainable human settlements and cites a commitment to socially inclusive and integrated housing projects and developments and the many policies developed at the provincial and municipal levels.

Nevertheless, a number of problems persist throughout the country. **Few mechanisms are in place to ensure that well intentioned policies are implemented.** The Special Rapporteur stressed that success cannot be measured merely through the number of houses built but also needs to take into account quality of housing and access to services, especially for the poor.

Despite the legislative framework that bolsters and complements the right of access to adequate housing, it appears that **evictions** are taking place regularly throughout South Africa, sometimes in the interest of gentrifying urban areas and promoting urban regeneration and devel-

Additional information on the mandate of the Special Rapporteur, as well as thematic and mission reports, can be found at: http://www.ohchr.org/english/issues/housing/index.htm

opment. It appears that many such evictions are being executed in breach of procedural requirements and through inappropriate use of 'urgent eviction' provisions, where evictions are justified on the grounds of health threats to occupants. The Special Rapporteur is concerned about proposed amendments to procedural protections around evictions. Evictions affect also **black farm dwellers** in rural areas where over 2 million[1] displacements have taken place since 1994 and **backyard shack dwellers who have** insufficient tenure protection, as there is currently no regulation of this landlord-tenant relationship.

During his visit, the Special Rapporteur visited a number of **informal settlements** and was disturbed to see large numbers of people living in desperate conditions, despite the plans of many municipalities for upgrading informal settlements.

Regardless of the origin of new settlements, as a result of large development projects, land restitution claims or the Reconstruction and Development Programme (RDP), the Special Rapporteur observed a **failure at all levels of government to provide adequate post-settlement support**. In many such cases, communities do not receive even the most basic support services, including proper sanitation, water, access to schools, and access to livelihood options. Moreover, there are few follow-up support mechanisms such as regular maintenance or service repair facilities in cases of resettlement.

The Special Rapporteur also visited large development projects (for instance in Limpopo Province, the Anglo Platinum's PPL mining project), and had the opportunity to meet **communities affected by mining** operations. In these meetings and others during his visit, the Special Rapporteur noted that there appears to be insufficient **meaningful consultation** between government officials and affected individuals and communities. Residents spoke with frustration about the lack of information on resettlement and relocation and of participation in resettlement planning and implementation. As acknowledged in 'Breaking New Ground', programmes aimed at delivering housing and creating sustainable human settlements will only succeed where they are directly informed by the people who they affect, and where they are responsive and targeted to the specific needs of a given community.

The Special Rapporteur was disturbed to see large numbers of people living in desperate conditions in informal settlements.

The Special Rapporteur also noted with concern the **large-scale privatisation and outsourcing of public services** including basic ones such as electricity and water. There also appears to be few accountability and monitoring mechanisms to ensure that public and private entities involved in the design and delivery of housing programmes and basic services are performing their functions in compliance with law, policy, and human rights standards.

In addition, certain features of cost-recovery policies – such as allocating free water on a household rather than an individual basis – may jeopardise enjoyment of human rights and thus be possibly contrary to the provisions of the Constitution.

The Special Rapporteur was pleased to see the extent of **land that has been redistributed to communities that had been dispossessed during the apartheid era.** Ninety per cent of land that had been claimed has already been released. The Special Rapporteur welcomes the establishment of administrative mechanisms, such as the Land Claims Commissioner and land acquisition strategies. Commendable goals have also been set to achieve redistribution of 30% of white-owned agricultural land by 2014. In order to achieve these goals the Special Rapporteur recommends that the 2005 Land Summit's recommendations should be adopted and implemented without delay. In this context, the Special Rapporteur would like to emphasise the indivisibility of human rights, in particular the right to enjoy an adequate standard of living, which implies adequate access to the means that enable its full enjoyment.

The Special Rapporteur is disappointed by the lack of implementation of the recommendations of the **Special Rapporteur on the rights of indigenous peoples** following his visit to South Africa in 2005,[2] in particular with regard to the issue of land restitution.

The Special Rapporteur acknowledged efforts being made by the Government to meet the goal of delivering 30% of **housing to women-headed households**. How-

ever, the high prevalence of violence against women, lack of affordable housing, lack of timely access to public housing, and inadequate Government provisions for long-term safe and secure housing, particularly in rural areas, means that many women are forced to either remain in or return to situations of domestic violence, and continue to live in inadequate housing where they risk their own safety as well as that of their children. Such housing problems increase women's vulnerability to domestic violence as well as to HIV/AIDS.

Regarding housing for **groups with special needs** (including persons with disabilities, those living with HIV/AIDS, orphans and young people and the homeless), the Special Rapporteur noted insufficiency of support in access to housing and related services, as well as the absence of information. The Special Rapporteur was disturbed to know how long it could take for a person with disabilities to access housing.

Reaffirming the crucial role of **civil society,** the Special Rapporteur recommended a stronger and closer collaboration between Government and civil society organisations, not only in terms of service delivery, but also in terms of developing avenues for advocacy and dialogue addressed to the authorities in order to elaborate strategies and respond to social problems.

At the end of the visit, several preliminary recommendations were made by the Special Rapporteur including:

- to improve coordination amongst all government departments including housing, water, health, and social services to ensure the promotion of an indivisibility approach to housing;
- to promote a socially and economically inclusive society in the process of rehabilitation of urban areas;
- to consider intervention in the market to regulate the current high and unaffordable prices, and to check against land and property speculation;
- to provide legal aid to people who allege their rights have been breached to ensure they have access to affordable and quality legal representation;
- to implement rigorous monitoring and evaluation of policy, including meaningful consultation with the involvement of affected communities;
- to consider a moratorium on evictions until all national, provincial and local legislation, policies and administrative actions are brought into line with Constitutional provisions and relevant Constitutional Court judgements that protect the right to adequate housing and against evictions[3];
- to prosecute farmers who illegally evict farm workers;
- to reconsider the privatisation of essential services, including the installation of the water prepaid meters, as it may seriously compromise enjoyment of human rights;
- to create a separate waiting list procedure and formulate a national policy for special needs housing;
- to consider ratifying of the International Covenant on Economic Social and Cultural Rights and implement the concluding observations of treaty bodies.

The official report of this mission, including the final recommendations, will be presented by the Special Rapporteur to the United Nations Human Rights Council.

Notes

1. Still searching for security – the reality of farm dweller evictions in South Africa. (Social Surveys and Nkuzi Development Association 2005).
2. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen: Mission to South Africa E/CN.4/2006/78/Add.2. See http://www.ohchr.org/english/issues/indigenous/rapporteur/
3. Throughout the mission, the Special Rapporteur drew attention of relevant authorities to the Basic principles and guidelines on development-based evictions and displacement A/HRC/4/18. See http://www.ohchr.org/english/issues/housing/index.htm

Miloon Kothari was appointed Special Rapporteur on adequate housing by the UN Commission on Human Rights in 2000. One of his tasks as Special Rapporteur is to undertake fact-finding missions to different countries to study obstacles to the realisation of the right to adequate housing and to recommend practical solutions to this end. Since his appointment in 2000, the Special Rapporteur has undertaken missions to Mexico, the occupied Palestinian territories, Romania, Peru, Afghanistan, Australia, Kenya, Brazil, Iran, Cambodia, Australia, Spain and South Africa.