ESR REVIEW

Economic and Social Rights in South Africa

Ensuring rights make real change

vol 9 no 1 March 2008

Editorial

This is the first issue of the *ESR Review* for 2008.

Economic and social transformation is gaining more momentum in the second decade of South Africa's democracy.

We begin this year with a firm undertaking by the government to "speed up change" in socio-economic rights, among other areas, so as to improve the lives of South Africans "sooner rather than later". This will be done in an unusual manner – "business unusual" – not by changing established policies and programmes but by implementing them speedily and in more efficient and effective ways. What remains is for the government to implement its plan of action.

The courts also continue to play a crucial role in enforcing socio-economic rights, through the granting of remedies aimed at improving not just the lives of the litigants before it, but those of South Africans as a whole.

The remedies that the courts grant are influenced by different notions of justice. Christopher Mbazira examines how corrective and distributive forms of justice influence those remedies in socio-economic rights cases. He argues that though the South African Constitution does not explicitly prescribe distributive justice, it is implicit in its provisions that this is the ideal form of justice that is envisioned. He further observes that South African courts have sought to focus their remedies beyond individual litigants and to grant remedies that advance constitutional rights and extend collective or group benefits.

David Bilchitz comments on Mbazira's research, questioning certain ways in which he characterises the models of justice. In Bilchitz's view, the distinction between corrective and distributive justice is by no means clear-cut, and the relationship between them needs to be developed further. He contends that socio-economic rights are essentially individual rights that need to be considered in light of the equal importance of all individuals in the community.

Lilian Chenwi and Sandra Liebenberg review a recent decision by the South African Constitutional Court relating to the eviction of residents of "bad buildings" in the inner city

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of Johannesburg. Chenwi and Liebenberg argue that eviction should be used as a last resort, and if it cannot be averted, local authorities should provide alternative accommodation – at least to those in desperate need – that is affordable and in close proximity to livelihood opportunities.

This issue includes an update on recent international and national developments relating to socio-economic rights. We also provide an update on Acts, Bills and policies related to health and housing rights.

Finally, George Kent reviews a book by Margot E Salomon, *Global responsibility for human rights: World poverty and the development of international law* (2007), published in New York by Oxford University Press. Kent observes that the book clarifies the responsibilities of the international community with regard to other nations, especially poor ones.

We acknowledge and thank all the guest contributors to this issue. We trust that readers of the ESR Review will find this issue stimulating and useful in the advancement of socio-economic rights.

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In addition to extending special thanks to Mr Sibonile Khoza for helping us edit this issue, the Project bids him farewell and pays tribute to him.

Mr Khoza joined the Project in March 2002. From 2004, following the appointment of the founder and former coordinator of the Project, Professor Sandra Liebenberg, to the H F Oppenheimer Chair of Human Rights Law at Stellenbosch University, Mr Khoza became project coordinator.

He has made an immense contribution to the work of the Project and takes care to maintain a high standard of integrity. Professor Liebenberg puts it this way:

> I appointed Sibonile as a researcher in the Project in 2002, and he quickly became a mainstay both in the work of the Project and to me personally. He developed his own research niche in the area of food and social security rights, and contributed enormously to both the funding and management of the Project. He also pioneered a number of important collaborative projects between the Project and other organisations working in the sphere of socio-economic rights in Africa and in South America. Since my departure from the Project at the end of 2003, Sibonile has exceeded my most ambitious aspirations for the Project, and has built it into a flagship research and advocacy project on socio-economic rights which is acknowledged both nationally and internationally. All this he achieved with integrity and a warm, easy-going style of interacting with his colleagues as well as a broad range of organisations.

Mr Khoza's contribution to the discourse on and advancement of socio-economic rights in general, and food rights in particular, in South Africa and abroad is invaluable. He continuously explores new trends and knowledge. He has produced high-quality and cutting-edge research in these areas, and he has a talent for accessible and user-friendly writing.

His research outputs include the celebrated book, *Socio-economic rights in South Africa: A resource book* (2007), which is a useful and practical guide for human rights organisations, institutions and practitioners involved in education,

training, giving advice, advocacy, lobbying, monitoring and mobilising in areas relevant to socio-economic rights. He is the editor of the book, wrote a chapter and co-authored another chapter. As observed by Albie Sachs, a judge of the Constitutional Court, "This book finds the balance – which is very difficult to achieve – between profundity and seriousness on the one hand and accuracy, accessibility and openness on the other hand." The book "exemplifies Sibonile's fine personality and style", Sachs added.

This book finds the balance – which is very difficult to achieve – between profundity and seriousness on the one hand and accuracy, accessibility and openness on the other hand.

In addition, Mr Khoza has published widely on food and nutrition rights and socio-economic rights in general in peer-reviewed journals such as the *African Human Rights Law Journal* and the *South African Journal on Human Rights*, as well as books and other publications. He has also written several articles for the *ESR Review*, of which he was co-editor from 2002 to 2003 and editor from 2004 to February 2008.

Mr Khoza has presented his research at several prominent international and national conferences, seminars and workshops. He has also served as consultant on human rights issues to a range of institutions, including the World Bank, the South African Human Rights Commission, the Medical Research Council, Street Law (South Africa) and the UN Food and Agriculture Organization. He is currently a board member of Impumelelo Innovations Award Trust, RAPCAN (Resources Aimed at the Prevention of Child Abuse and Neglect) and Street Law (South Africa).

He has presented guest lectures on socio-economic rights issues at academic and other institutions in South Africa and abroad. He has also given lectures on socio-economic rights in general, and the right to food in particular, as part of the Master of Laws Programme on Human Rights and Democratisation in Africa offered by the Centre for Human Rights at the University of Pretoria, in partnership with seven other universities in Africa, and the same Centre's Good Governance Programme.

In addition, Mr Khoza has been involved in a number of advocacy activities. For example, he participated in the basic income grant campaign and was the chairperson of the Basic Income Grant Coalition from July 2005 to December 2006. The Coalition advocates the introduction of a universal basic income grant in South Africa. Mr Khoza has also been involved in the right-to-food campaign in South Africa. As part of his involvement in this campaign, Mr Khoza was the editor of the lay publication *Knowing & claiming your right to food* (2004), which explains what the right to food means, provides information on the various government programmes and how to access them, and suggests strategies to promote and defend the right to food. He has also participated in international lobbying and advocacy initiatives for the adoption of the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food.

Under his leadership as project coordinator, the Project has intervened in some key socio-economic rights cases. These include *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* (Supreme Court of Appeal and Constitutional Court), *City of Johannesburg v Rand Properties (Pty) Ltd and Others*, *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*, and *Christian Roberts and Others v The Minister of Social Development and Others*. Mr Khoza was part of the team that conducted research in preparation for the heads of argument of the Community Law Centre in these cases.

Over the years, Mr Khoza has become a valuable asset to the Project and the Community Law Centre. We are pleased that there is still the prospect of continuing to work with him. Mr Khoza has taken up a new appointment as the Director of Intergovernmental Relations and Constitutional Responsibilities in the Policy Development Unit of the Western Cape Department of the Premier.

The Socio-Economic Rights Project, on behalf of the Community Law Centre, would like to congratulate Mr Khoza on his new appointment and wish him all the best in his future endeavours.

Lilian Chenwi is the editor of the *ESR Review*.

Enforcing socio-economic rights as individual rights

The role of corrective and distributive forms of justice in determining "appropriate relief"

Christopher Mbazira

Different notions of justice influence the remedies that courts grant in socio-economic rights litigation. The two theories of justice discussed here derive from the philosophies of corrective and distributive forms of justice.

Corrective justice demands that victims be put in the position they would have been in but for the violation of their rights. Distributive justice, on the other hand, is based on a recognition of the constraints of corrective justice. Unlike corrective justice, distributive justice focuses not solely on the interests of the victim, but on society at large.

These theories of justice influence a host of other factors such as the relationship between rights and remedies, the form and procedures of litigation, and the manner of implementing remedies. They also influence the liability rules adopted by the courts to determine wrongfulness and whether the plaintiff has suffered as a result.

Defining corrective justice and distributive justice

Corrective justice

The corrective justice theory is guided by the vision of libertarianism, which is based on the view that each person has the right to live his/her life in any way he/she chooses, so long as that individual respects the rights of others. The government exists only to protect people from the use of force by others. From this perspective, individual freedom cannot be sacrificed for the sake of the common good (Sandel, 1998: 16; Rawls, 1999: 3). The primary function of the court is therefore the resolution of disputes in order to achieve fair results from human interaction and to maintain individual autonomy.

Libertarians define human rights in a negative manner: all we need are rights that guarantee non-interference from others in our enterprise of seeking autonomy. In this philosophy, litigation is viewed as a vehicle to restore the autonomy of those whose rights have been violated. Thus those who believe in the philosophy of corrective justice recognise the fact that stopping legal wrongs completely is impossible. However, they perceive the law as a tool for restoring those who have been wronged to the position they would have been in but for the wrong. Indeed, corrective justice, in Aristotle's definition, "plays a rectifying role in a transaction between man and man" (Aristotle, 1908: V:2).

Distributive justice focuses on society at large.

In modern private law, corrective justice is most prominent in tort (delict) law, but applies also in property and contract law. When parties enter into a contract, it is assumed that they begin as equals with corresponding rights and duties. Omission by one party to discharge his/her duties – for example, by not paying the price or delivering the goods – destabilises the equality of the parties. It leads to an unjustifiable gain by one party and a corresponding loss to the other party. The effect of such conduct is that it changes the position of both parties, unfairly advantaging one and disadvantaging the other. This is what is meant by "destabilisation" of the parties' equality. The purpose of the law in this case becomes to restore that equality. The same equality could be assumed with respect to delictual wrongs because of the alteration of the victim's position as a consequence of the wrongdoer's conduct. The victim will have to endure physical, emotional, financial or other loss which would not have occurred had the wrong not been committed.

It is not enough, however, to prove that the victim's status has been altered to claim a remedy under the corrective justice theory; there must be proof that the alteration has resulted from the defendant's wrong. Additionally, a judge's discretion is limited to those remedies that, as much as possible, restore victims to their previous position.

As it focuses on the victim at hand, litigation based on corrective justice is generally not suited to resolving structural or systemic violations (violations that occur and endure in a sustained manner as part of an institution's behaviour) arising from organisational behaviour. However, this does not mean that it is completely irrelevant to redressing violations resulting from such behaviour. It may, for instance, be used to address discrete wrongs suffered by individuals at the hands of state officials. Where a constitutional violation arises from a "one-shot" wrong and is suffered by an identifiable victim at the hands of an identifiable wrongdoer, corrective justice can be used to correct such harm.

Distributive justice

Distributive justice is concerned with the distribution of benefits and burdens among members of a given group. The benefits may accrue to such members either simply by virtue of their membership of the group or as a result of some entitlement.

The notion of distributive justice is supported by the philosophy of utilitarianism, which is based on the belief in an individual's well-being, and also lays emphasis on the common good of society and the well-being of all its members. An act is just only if it maximises the well-being of everyone else.

From a utilitarian perspective, the law and the courts have very important roles to play in the enterprise of realising social cooperation. According to this view, courts have to consider interests other than those of the parties before them.

Unlike bilateral corrective justice, distributive justice is multilateral in that it has community-wide implications. As a result, the court in a given case, far from limiting its remedy to addressing the wrong between the parties before it, also focuses on what has been described as collateral interests (Cooper-Stephenson, 1991: 19). This arises from the recognition that not all interested persons may be party to a suit, yet their interests may be affected by the outcome of that suit.

Where the state is the duty bearer, it may be necessary for the court to look at the wider obligations of the state and not just liability in the case at hand.

Distributive justice is also based on an acknowledgement that it is not possible in all cases to put the victim of a wrong in the position he/she would have been in but for the violation. It is not always possible to identify discrete wrongs and the wrongdoer with precision. Harm may be inflicted on groups of people, not only on an individual victim, and may arise from conduct that cannot be associated, in liability terms, with a specific defendant. Where the state is the duty bearer, it may be necessary for the court to look at the wider obligations of the state and not just liability in the case at hand. Without asking whether or not the government is guilty, the court can, in some circumstances, dedicate its efforts to getting solutions that may do away with the harm.

Rather than being guided by strict rules of procedure and bound by the existing causes of action and remedies, distributive justice allows the court very wide discretion to fashion causes of action and remedies as the needs of justice demand. Distributive justice puts equity in its right place by treating it as a primary source of law. For instance, courts are not bound by the requirement that equitable remedies will only be available where common law remedies are proven to be inadequate.

Because of the necessity to avoid repetition of the same conduct, distributive justice allows remedies to have a future direction and focuses on the needs of the community as a whole. This should be contrasted with corrective justice, which is backward-looking and focuses on the individual claimant in order to address past wrongs. It is true that the process of administering distributive justice may begin with a pronouncement on the legal consequences of past actions. Unlike corrective justice, however, distributive justice will use such past actions as a basis for determining future actions.

It insists on a full correction of the violation "absent special circumstances". "Special circumstances" are circumstances which may impact on the remedy, such as the costs associated with the implementation of the remedy.

It should be noted further that under distributive justice, the court focuses not only on the nature of the injury but also on the distinctive character of the parties in the court case. It also focuses on the character of

persons who, though not parties to the case, would be affected by its results. For instance, though they may inflict the same kind of harm, violations perpetrated by private individuals and those perpetrated by the government are generally of a different nature. The reasons leading to such violations are usually also quite different, and so are the benefits that may be obtained by the violator.

The nature of the remedies needed to deter the state may be different from those sufficient to prevent private violations. For example, damages may be an effective remedy against a private wrongdoer but not against the government, which would pay them from public coffers.

South Africa: Distributive or corrective justice?

The South African courts have sought to focus their remedies beyond the individual litigant and to grant remedies that advance constitutional rights and extend collective or group benefits. Though vindication and compensation of the victim has been acknowledged as a fundamental objective of constitutional litigation, it is not the only objective that has to be achieved. The interest that society has in the protection of the rights in the Constitution and the protection of the values of an open and democratic society based on equality, freedom and human dignity is a precept that the courts have sought to advance. The courts have also considered the impact of proposed remedies on the defendant and their effect on the relationship between the defendant and the plaintiff.

To protect the constitutional values, the courts have, in some cases, awarded plaintiffs relief in circumstances where they might have not deserved it (see *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* 2006 (8) BCLR 971 (E)). The Constitutional Court has in other cases leaned towards putting victims of constitutional violations in the position they would have been in had the violation not occurred. In the same cases, however, the interests of the community and the interests of the defendant too have featured in what the court has called "a balancing process" (see, for instance, *Hoffman v South African Airways* 2000 (11) BCLR 1211 (CC) [Hoffman]).

The Constitution demonstrates a commitment to the establishment of a society based on social justice, among other things.

Though the South African Constitution does not, in express terms, prescribe distributive justice, it is implicit in its provisions. In terms of social justice, the Constitution is premised on the need to realise an orderly and fair redistribution of resources. The Constitution in this respect demonstrates a commitment to the establishment of a society based on social justice, among other things.

In addition to protecting individual rights, the Constitution guarantees a number of socio-economic rights directly linked to social justice. While socio-economic rights have elements that are capable of extending individual entitlements, they also include entitlements that can only be enjoyed by a group. This is especially true of the positive elements of these rights which compel the government to take measures to realise them. Obligations of this nature require the government to provide goods and services for the benefit of all members of society or groups of people.

It is especially in respect of socio-economic rights that the transformative nature of the Constitution has been underscored. The Constitution is perceived as, among other things, an instrument to transform South Africa's society from one based on socio-economic deprivation to one based on an equal distribution of resources (Klare, 1998: 147). The provision of services, which was racially skewed under the apartheid system, is therefore considered to be central to the transformative project of the Constitution (Langa, 2006: 351).

However, even when socio-economic rights are accepted as justiciable, there is always the question of whether they should be enforced as conferring individual benefits or as conferring group benefits. In the Constitution itself, most socio-economic rights are crafted as individual rights – "everyone has the right to ..." and "every child has the right to ...". Nonetheless, the question remains whether the prevailing social and economic context allows for the

enforcement of these rights as conferring individual benefits on demand, in which case corrective justice would be applicable.

It is only after appreciating the historical, social, political and economic settings that one can understand the challenges of enforcing socio-economic rights as conferring individual rather than collective benefits (De Vos, 2001: 262).

In South Africa, socio-economic rights assume their importance in a context characterised not only by racially institutionalised poverty but also by a commitment to alleviate or eradicate such poverty. The majority of South Africans live in extreme poverty, a legacy of apartheid. The available resources are not adequate, however, to facilitate the immediate provision of socio-economic goods and services to everyone on demand. Holistic approaches to providing socio-economic goods and services that focus beyond the individual are the most desirable in the circumstances. One therefore has to rethink the traditional idea that remedies must be immediate and that the courts can order one-shot remedies that achieve corrective justice (Roach, 2005: 111).

The realisation of socio-economic rights in contexts of scarce resources requires careful redistribution of the resources to benefit all in need.

The realisation of socio-economic rights in contexts of scarce resources requires careful redistribution of the resources to benefit all in need. It is at this stage that the notion of distributive justice becomes relevant. Courts have to focus beyond the needs of the individual and consider the interests of society or groups of people. Individual rights therefore have to be balanced against collective welfare. It has been submitted, for instance, that it would have been senseless to extend expensive treatment to Mr Soobramoney "at a time when many poor people ... had little or no access to any form of even primary health care services" (De Vos, 2001: 259-60, commenting on the case *Soobramoney v Minister of Health, KwaZulu Natal* 1998 (1) SA 765 (CC)). In this case, the Constitutional Court deferred to the hospital to decide how best to utilise scarce medical resources in a distributive manner without prioritising the needs of an individual at the expense of others.

It is on the basis of this approach that in *Government of Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) (Grootboom), the Constitutional Court rejected the submission that the socio-economic rights provisions in the Constitution conferred individual entitlements on demand. It rejected the submission that the Constitution had to be interpreted as establishing a minimum core of goods and services claimable individually on demand. It also dismissed the argument that section 28 of the Constitution guaranteed an unqualified right on the part of every child to have access to basic nutrition, shelter and health services.

Instead, the Constitutional Court chose to locate the claims of all individuals, adults and children, within the broader context of society's needs. The Court held that all that the state is obligated to do is to put in place a reasonable programme to achieve the progressive realisation of socio-economic rights. The programme must be inclusive of the needs of all people and must address short-, medium- and long-term needs.

The Constitution also contains the underlying values of South Africa's new-found democracy. Indeed, courts are constitutionally obliged to promote these values whenever interpreting the Bill of Rights. While some of the values may be used to promote individual welfare, the Constitutional Court has used the concept of values to advance the common good of society. Even when protecting individual rights, the Court has on some occasions used values that promote general welfare to justify such individualised protection (see the use of the concept of *ubuntu* in *S v Makwanyane* 1995 (3) SA 391 (CC)).

Distributive justice-based remedies

As argued above, the Constitutional Court's use of the ethos of distributive justice is reflected in its approach to granting remedies for human rights violations. The Constitution gives courts very wide remedial powers to "grant appropriate relief, including a declaration of

rights" and to make "any order that is just and equitable" (sections 38 and 172).

It is argued that the definition of an "appropriate, just and equitable remedy" depends on, among other things, the notion of justice favoured by the court. In this respect, the phrase could assume two meanings. It could refer to a remedy that is required by an individual whose rights have been violated. It could also mean a remedy that focuses on all interests implicated in the case and balances these interests against those of the individual plaintiff (Roach, 1994: 3-4).

Even where an individual victim is clearly identifiable, any subsequent remedy is likely to have an impact on other persons and on society at large.

The Constitutional Court has taken cognisance of the fact that when constitutional rights are violated, though a litigant may have suffered special harm, society as a whole is injured (Hoffman, para 43). If any remedies are to be obtained for such violation, they should be aimed not only at vindicating the victim but also at advancing the interests of society as a whole. Even where an individual victim is clearly identifiable, any subsequent remedy is likely to have an impact on other persons and on society at large.

It is on this basis that the Constitutional Court has adopted an approach that spreads the benefits of constitutional litigation beyond the parties in a particular case. This explains why, for instance, the Court has on some occasions rejected proposed out-of-court settlements between the parties where it was found that they would likely benefit the parties to the case only. In *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) (Khosa), the Court held that an offer to settle a dispute could not be sanctioned, even if accepted by the other party, if it could not resolve the unconstitutionality of the impugned provisions and the impact that they had on the broader group of persons who might qualify for a similar benefit. The Court has also on occasion declined to award remedies even where a violation of a constitutional right has been proved, if the interests of justice so required (*East Zulu Motors (Pty) v Empangeni/Ngwelezane Transitional Local Council and Others* 1998 (2) SA 61 (CC)).

The Court has observed that the balancing process must be guided by the objective, first, of addressing the wrong occasioned by the infringement of the constitutional right; second, of deterring violations; and third, of making an order that can be complied with (Hoffman, para 45).

In *Dikoko v Mokhatla* 2007(1) BCLR 1 (CC), the Court held that the principal objective of the law was "the restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms" (para 68). The Court held that instead of awarding damages that merely put a hole in the defendant's pocket, the law of defamation should strive to re-establish harmony between the parties. This is because an award of excessive damages would have implications for free expression, which is the lifeblood of a democratic society. According to the Court, if the plaintiff's rights can be vindicated and restoration achieved using remedies less burdensome to the defendant, this approach should be adopted.

Conclusion

In the context of socio-economic rights litigation, one cannot use only the situation of the litigants to judge whether the remedy of the court is "appropriate, just and equitable" as is suggested by some authors. Instead, one should assess the overall impact of the remedy on the state's policy or policies touching on the right in issue. One should ask, for instance, whether the state has overhauled its policy to reflect the elements of a reasonable policy as defined by the Constitutional Court.

Taking the example of the Grootboom case, the judgment may not have resulted in tangible goods and services for the Grootboom community. Generally, however, the decision has forced the government to shift its housing programme to cater for the needs of people in intolerable conditions and those threatened with eviction (Budlender, 2004: 41).

The government has adopted an emergency housing policy to cater for people who may find themselves in situations similar to that of the Grootboom community. Whether this policy is being implemented is another issue.

Christopher Mbazira is a lecturer in the Department of Public and Comparative Law at Makerere University, Uganda.

This article is extracted from a paper that is to appear in the *South African Law Journal*.

The paper is based on Mbazira's doctoral dissertation titled Enforcing the economic, social and cultural rights in the South African Constitution as justiciable individual rights: The role of judicial remedies, completed in May 2007 at the University of the Western Cape under the supervision of Professor Pierre de Vos.

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Judicial remedies and socio-economic rights

A response to Christopher Mbazira

David Bilchitz

Christopher Mbazira has produced a lucid, well-researched and thorough study of judicial remedies in cases concerning socio-economic rights. This response seeks to engage critically with Mbazira's claims by raising certain questions and issues stimulated by his work that could be developed further.

Mbazira seeks to investigate the normative underpinnings of judicial remedies and contends that there are two main models in this regard: first, the model of corrective justice and second, the model of distributive justice. Corrective justice, he argues, is linked to the philosophy of libertarianism, while distributive justice is supported by the philosophy of utilitarianism.

The problem with strong binary oppositions is that, although they can be theoretically illuminating, they

are rarely as rigid as they appear. Mbazira's theoretical framework appears to me to create an overly strong distinction between these two models. Certain ways in which he characterises these models may also be disputed.

First, corrective justice seeks to correct wrongs that have been done. When we are dealing with socio-economic rights, we are talking about wrongs in relation to the distribution of social goods and resources. The notion of "corrective justice" is thus premised upon the idea that there is some moral order in terms of which the "wrong" is defined. It is thus arguable that in order to determine what needs correction, one needs a theory of distributive justice in the first place. Corrective justice may thus be parasitic upon a theory of distributive justice in the context of wrongs that relate to individuals who have insufficient resources.

Secondly, distributive justice in political philosophy generally refers to the distribution of benefits and burdens among individuals. There are different theories as to what distribution of resources may be regarded as just. It is not accurate to see all forms of distributive justice as premised upon utilitarian theory. Rather, utilitarianism is a particular theory of distributive justice which defines a just distribution as one which produces the greatest amount of happiness (or utility) for the greatest number.

This theory has been subjected to a number of telling criticisms. Rawls, for instance, points out that the utilitarian principle is not primarily concerned with the distribution of happiness among individuals: the aggregating focus of the principle can thus leave some very badly off, provided the general happiness is maximised. Thus if neoliberal economic policies promote the general welfare but leave some very badly off, utilitarianism could promote such policies, and yet we may think it is incorrect to do so.

Rawls famously sets out an alternative theory of distributive justice in his book *A theory of justice*. He outlines two principles of justice: a distribution will be just, according to his theory, if it provides equal liberty rights to everyone and if it only allows for inequality in social and economic resources where such inequalities are to the benefit of the least advantaged. Rights-based theories – such as that of Rawls – seek to avoid the utilitarian problem by ensuring that individuals at least have certain basic rights and resources that they do not lose.

Libertarianism is traditionally regarded as a rights-based theory of a kind that posits certain strong negative rights. In Nozick's most famous modern version of this theory, a just distribution is one in which every individual is entitled to hold the resources they possess. Nozick outlines principles of acquisition and transfer that provide for when entitlements are legitimate. Corrections to existing distributions are generally only legitimate where they arise from fraudulent or coercive transactions.

Thus, for Nozick, there is an existing set of entitlements that exhaust the claims of distributive justice. Corrective justice is really only a form of distributive justice in that it is a method of making good unjust distributions. For instance, given the unjust removal of many black people from their land in South Africa, land reform is required as a form of corrective justice that would aim to repair the injustices perpetrated in the past.

Thus it seems to me that the distinction between corrective and distributive justice is by no means clear-cut and the relationship between them needs to be developed further. This is of importance to Mbazira's broad thesis in relation to judicial remedies for the following reason. Social rights, as Mbazira recognises, generally raise distributive questions which can be related to different possible philosophical foundations (and not simply a utilitarian theory). The particular distributive theory one adopts could perhaps have an impact on the nature of the remedies that will be provided by courts.

This is perhaps an area for future research. Do the remedies that are given by courts support a particular version of distributive justice? Would one theory of distributive justice require more stringent or different remedies from others? It is perhaps arguable that a Rawlsian approach (focusing on the worst off) might require more interventionist remedies, such as the structural injunction, than a purely utilitarian approach would. However, this requires further investigation.

It also seems to me that there are at least two possible justifications for ensuring that social rights are realised in South Africa. First, there is a type of "corrective justification" which suggests that socio-economic rights are essentially in the Constitution to correct the injustices of apartheid,

which sought to deprive a large segment of the population of land and resources as well as other rights. What we should seek to do, according to this approach, is to correct these historical injustices. Socio-economic rights provide one way of ensuring that each individual gets at least a certain amount of resources to correct the wrongs of prior deprivation. Such an approach, it seems, would be focused on the historical wrongs of apartheid and particularly upon previously disadvantaged groups.

Another more "universalistic justification" for socio-economic rights recognises that they are based in the fundamental interests of all individuals, a justification I have sought to develop in my book (Bilchitz, 2007). A society that seeks to treat individuals with equal importance or dignity, I argue, must recognise that each is entitled at least to a certain amount of resources with which to live their lives. I believe it is important for such an approach to distinguish between a minimum core threshold (or the most urgent needs of a being) and a higher threshold that should be realised progressively. Thus, in the context of housing, each individual would be entitled to at least shelter from the elements, which could then be developed over time so as to provide a more extensive form of state-subsidised housing.

At times Mbazira suggests that the resource implications of socio-economic rights are too great for such rights to be realised. This, though, does not seem justified empirically, particularly if only a minimum package of goods is required initially. The universalistic approach may also have an impact on the kinds of remedies a court will develop and the level of intrusiveness of the remedies. I therefore agree with Mbazira's argument that the content of rights and the nature of judicial remedies need to be tied closely together.

I have one more point to make about the individualistic nature of distributive remedies. Mbazira says that socio-economic rights require a consideration of collective or societal interests. This is perhaps influenced by his understanding of distributive justice as linked to the "general happiness". Yet it seems that these notions are not so apposite in this context. What Mbazira is acutely aware of and draws our attention to is that remedies in socio-economic rights cases cannot be ordered in isolation, for one individual, without the impact on others also being considered.

The courts should seek to adopt principled normative standards towards these rights and then give effect to those standards by adopting workable, effective and creative remedies.

This is perhaps the major flaw in the approach of the Brazilian courts. Essentially, for example, when an individual comes to court requesting medication, the courts order that the medication be provided. Those orders, however, distort the budget to such an extent that other individuals cannot acquire the life-saving medicines. The point is that an order for one individual will impact on other individuals. This is why it is necessary to adopt a more holistic view that embraces the wider impact of a case on a range of individuals.

However, it is equally important to resist the rhetoric that socio-economic rights exist at the "societal" or "general" level. We also need to be wary of the notion that a "societal" or "collective" interest can limit these rights. The interests protected by socio-economic rights remain those of individuals: what collective interest can be more important than ensuring individuals in a community do not starve or dehydrate?

Socio-economic rights, therefore, are essentially *individual* rights that nevertheless need to be considered in light of the equal importance of all individuals in the community. Such a consideration should not prevent courts from intervening in cases, nor overwhelm them with the complexity of the determinations in issue. The courts should rather seek to adopt principled normative standards towards these rights and then give effect to those standards by adopting workable, effective and creative remedies. This perhaps provides a good reason for the use in this context of structural injunctions which allow for the expertise and participation of other branches of government in devising just outcomes.

Mbazira has completed an impressive work that will help

our judges (and the academic community) think through the underlying assumptions as to which remedies should best be deployed in particular instances. He has worked on what is perhaps one of the most important elements of making socio-economic rights really count: namely, the very implementation of these rights. Hopefully, recent academic work on the normative content of socio-economic rights, together with this important work on remedies, will have the result that socio-economic rights no longer just exist on paper, but are translated into reality for the countless individuals who need their protection.

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The constitutional protection of those facing eviction from "bad buildings"

Lilian Chenwi and Sandra Liebenberg

The Constitutional Court's judgment in the *Olivia* case, handed down on 19 February 2008, represents a victory for the occupiers of "bad-buildings" in the inner city of Johannesburg as well as other poor people facing eviction for health and safety reasons.

Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others CCT 24/07 (*Olivia* case)

This case has been discussed in previous issues of the *ESR Review*: 7(2), 8(1) and 8(3).

The judgment gives effect to South Africa's constitutional commitment to housing rights. It also affirms the obligation on local authorities, in all evictions, to seek reasonable ways to avoid homelessness by engaging meaningfully with the affected communities.

Central to this case are the provisions of the National Building Regulations and Building Standards Act 103 of 1977 (NBRA), which empower local authority officials to issue a notice to occupiers to vacate premises when they deem it necessary for the safety of any person (section 12(4)(b)). Failure to comply with such a notice constitutes a criminal offence for which the offender can be fined up to R100 for each day of non-compliance (section 12(6)).

Facts and decisions of lower courts

This case began in the High Court, where the City of Johannesburg (the City), relying upon section 12(4)(b) of the NBRA, sought the eviction of over 300 people from six properties in the inner city on health and safety grounds (*City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2006 (6) BCLR 728 (W)). Section 12(4)(b) is in fact regularly used in Johannesburg to clear residents of what the City regards as residential "sinkholes" or "bad buildings".

The occupiers opposed the eviction order and brought a counter-application aimed at securing alternative accommodation or housing as a precondition to their eviction. Judge Jajbhay held that the City's housing programme failed to comply with its constitutional and statutory obligations, and ordered the City to produce a programme to cater for those in desperate need. Pending the implementation of the programme or the provision of suitable adequate alternative accommodation, the eviction of the occupiers could not take place.

The City then appealed to the Supreme Court of Appeal (SCA) against the High Court's

judgment (*City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) BCLR 643 (SCA)). The SCA authorised the eviction of the occupiers based on the finding that the buildings they occupied were unsafe and unhealthy. It ordered, however, that temporary accommodation be provided to those occupiers who were in desperate need of housing assistance. The temporary accommodation was to consist of a place where they could live without the threat of another eviction in a waterproof structure that was secure against the elements and with access to basic sanitation, water and refuse services. The Court also ordered the City to determine the location of the alternative accommodation after consultation with every respondent that requested it.

Not satisfied with the SCA judgment, more than 400 occupiers of two buildings in the inner city of Johannesburg approached the Constitutional Court for leave to appeal against the decision of the SCA.

Issues raised before the Constitutional Court

In the application for leave to appeal, the occupiers raised the issue of whether the SCA had been right in granting an order for the eviction of all the occupiers. As noted by the Constitutional Court, this broad question encapsulated five contentions:

- Section 12 of the NBRA was inconsistent with the Constitution because it provided for arbitrary evictions without a court order.
- The City's decision to evict was unfair because it was taken without giving the occupiers a fair hearing.
- The administrative decision to evict was not reasonable in all the circumstances as it did not take into account the fact that the occupiers would be homeless after the eviction.
- Section 26(3) of the Constitution precluded their eviction.
- The standards set by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) were applicable to these evictions.

Another issue that was raised was whether the City's housing programme "made reasonable provision for the occupiers or for the many thousands of people living in deplorable conditions within the inner city" (para 8).

The interim order and its implementation

The Constitutional Court deemed it necessary to make an interim order after hearing argument in the case because "it was not appropriate to grant any eviction order against the occupiers, in the circumstances of this case, unless there had at least been some effort at meaningful engagement" (para 22). It was clear from the arguments in the Court that the City had not made any effort at all to engage with the occupiers during the eviction proceedings. The interim order was therefore aimed at ensuring that the City and the occupiers engaged with each other on certain issues. The order directed the parties to engage with each other meaningfully in an effort to:

- resolve the issues raised in the application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality, and the rights and duties of the citizens concerned; and
- alleviate the plight of the applicants who lived in the two buildings concerned by making the buildings as safe and conducive to habitation as was reasonably practicable (interim order dated 30 August 2007).

The parties subsequently reached a settlement which involved interim measures to secure the safety of the building and provide the occupiers with alternative accommodation in the inner City of Johannesburg (agreement signed on 29 October 2007). In fact, the agreement underscores the importance of the provision of suitable alternative accommodation in eviction cases, especially for those who are desperately poor and vulnerable and therefore cannot provide for themselves.

The parties agreed on a range of interim measures to improve the conditions in the two buildings pending relocation to the alternative accommodation. These included the provision, at the City's expense, of toilets, potable water, waste disposal services, fire extinguishers and a once-off operation to clean and sanitise the properties.

As with the order of the SCA, they agreed that the alternative accommodation would consist of, at least, security against eviction, access to sanitation, access to potable water, and access to electricity for heating, lighting and cooking. It was further agreed

that, once relocated, the occupiers would occupy the temporary shelter until suitable permanent housing solutions were developed for them. The nature and location of the permanent housing options would be developed by the City in consultation with the occupiers.

The Constitutional Court endorsed the settlement on 5 November 2007 and indicated that the residual issues arising from the parties' reports would be considered in the Court's judgment. The settlement was endorsed because, as the Constitutional Court stated in its judgment, there was no doubt that it represented a reasonable response to the engagement process. The Court commended the City for its response and for adopting a more humane approach as the case proceeded through the different courts (para 28).

The Court held that it would not always be appropriate for a court to approve all agreements entered into consequent upon engagement (para 30). This case is in fact the first time the Constitutional Court has approved a settlement where the parties required its approval before important aspects of it came into operation.

The judgment

The issues that the Constitutional Court considered in its judgment were determined by certain developments that occurred after the application for leave to appeal was granted: the granting of an interim order and the subsequent settlement agreement and its contents, as discussed above.

As the question of temporary accommodation had already been addressed in the agreement between the parties (para 32) and the City had shown a willingness to engage with the occupiers (paras 34 and 35), the Court did not find it necessary to consider whether the City had failed to formulate and implement a housing plan for the occupiers and other similarly situated persons, or the question of finding a permanent housing solution for the occupiers.

The Court also did not find it necessary to go into a discussion on the "reach and applicability" of sections 26(1) to (3) of the Constitution. Nor did it consider it necessary to deal with whether PIE applied in the present case, or to expand on the relationship between section 26 and PIE. According to the Court, "The question may never arise if the City engages meaningfully with those who would become homeless if evicted by it" (para 38).

The Court essentially decided to focus on the three main issues, discussed below.

The duty to have meaningful engagement

The first concerned its reasons for making the "engagement order". In explaining its reasons, the Court noted that the City ought to have been aware of the possibility, even the probability, that people would become homeless as a direct result of their eviction at its instance. The Court added that, in these circumstances, those involved in the management of the City ought, at the very least, to have engaged meaningfully with the occupiers both individually and collectively (para 13). The objectives of such engagement, as stated by the Court, would have been to ascertain:

- what the consequences of the eviction might be;
- whether the City could help in alleviating the situation of those in dire need;
- whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period;
- whether the City had any obligations to the occupiers in the prevailing circumstances; and
- when and how the City could or would fulfil these obligations (para 14).

The Court stated that engaging with the people who might become homeless because of an eviction was in line with the constitutional obligations of municipalities to provide services to communities in a sustainable manner, promote social and economic development and encourage the involvement of communities and community organisations in matters of local government (section 152(1) of the Constitution); to fulfil the objectives in the Preamble to the Constitution; and to respect, protect, promote and fulfil the rights in the Bill of Rights (section 7(2) of the Constitution). The Court highlighted the special significance in this context of the rights to human dignity and to life (sections 10 and 11 of the Constitution).

The Court also located this duty in section 26(2) of the Constitution, which requires the state to take reasonable legislative and other measures to realise the right of access to adequate housing. In this regard, it noted that reasonable conduct of a municipality pursuant to section 26(2) included the reasonableness

of every step taken in the provision of adequate housing as well as its response to potentially homeless people with whom it engaged (paras 17 and 18).

Therefore it held that it was unconstitutional for a municipality to evict people from their homes without first meaningfully engaging with them (para 16).

It is clear from the Court's judgment that meaningful engagement has to be tailored to the particular circumstances of each situation: "the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement". The Court added that, in the circumstances prevalent in the City, ad hoc (unplanned or informal) engagement was entirely inappropriate (para 19).

In addition, the engagement process should not be shrouded in secrecy. According to the Court:

> the provision of a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality within the process would ordinarily be essential (para 21).

Relevant circumstances

The second major issue dealt with by the Court was whether the City was obliged to take into account the availability of suitable alternative accommodation or land for the occupiers prior to issuing the notices to vacate in terms of section 12(4)(b) of the NBRA.

The Court observed that though the SCA had concluded that the right of local authorities to act under section 12(4)(b) did not necessarily depend on the right of access to adequate housing, that did not mean that it was "neither appropriate nor necessary for a decision-maker to consider at all the availability of suitable alternative accommodation or land when making a section 12(4)(b) decision" (para 43). According to the Court:

> Any suggestion that the availability of alternative accommodation need not be considered carries the implication that whether a person or family is rendered homeless after an eviction consequent upon a section 12(4)(b) decision is irrelevant to the decision itself.

This reasoning, the Court added, rested on the false premise that there was no relationship between section 12(4)(b) of the NBRA and section 26(2) of the Constitution (para 43). The Court thus found it regrettable that the City, in making the decision to evict, did not take into account the fact that the people concerned would be rendered homeless (para 44).

The Court observed that the various departments in a municipality could not function separately.

The Court observed that the various departments in a municipality could not function separately, "with one department making a decision on whether someone should be evicted and some other department in the bureaucratic maze determining whether housing should be provided" (para 44). The housing provision and the health and safety provision therefore had to be read together. It thus held that the SCA had been incorrect to find no fault with the City's failure to consider the availability of suitable alternative accommodation or land for the occupiers in the process of making a section 12(4)(b) decision. It was thus incumbent on local authorities to consider the possibility that they would render the affected residents homeless in the process of issuing an eviction notice in terms of section 12(4)(b).

The constitutionality of section 12(6) of the NBRA

Finally, the Court considered whether the automatic criminal sanction attaching to a failure to comply with a section 12(4)(b) notice infringed section 26(3) of the Constitution. This section prohibits the eviction of people from their homes or the demolition of homes without "an order of court made after considering all the relevant circumstances".

Given this constitutional guarantee, the Court held that:

> any provision that compels people to leave their homes on pain of criminal sanction in the absence of a court order is contrary to the provisions of section 26(3) of the Constitution (para 49).

It therefore found section 12(6) of the NBRA to be inconsistent with the Constitution.

However, the Court did not find it just and equitable to set aside the provisions of section 12(6) of the NBRA because, as it observed, it was appropriate to encourage people to leave unsafe or unhealthy buildings in compliance with a court order for their eviction – an effect that a criminal sanction has. It instead cured the constitutional defect through the mechanism of a reading-in order,

providing for a criminal sanction only after a court order for eviction has already been made. The Court added that a court would be obliged to take into account all relevant circumstances before making an order for eviction, and would also afford the occupier a reasonable time within which to vacate the property (para 50).

The Court then ordered that section 12(6) of the NBRA be read as if the following proviso had been added at the end of it:

> This subsection applies only to people who, after service upon them of an order of court for their eviction, continue to occupy the property concerned (para 54).

An evaluation of the judgment

The Constitutional Court's judgment underscores the interdependence and linkages between housing rights in section 26 of the Constitution and evictions that take place in terms of health and safety legislation. It highlights three important facets of section 26 in this context:

- the importance of "meaningful engagement" prior to eviction decisions being made;
- the obligation to consider all relevant circumstances, including the availability of suitable alternative accommodation or land, in the process of deciding whether to proceed with an eviction; and
- the requirement of judicial oversight over all evictions.

In this respect, the judgment reaffirms and elaborates the basic principles governing evictions laid down by the Court's earlier decision in *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) (PE Municipality).

However, the Court did not explain the relationship between the three subsections of section 26 and evictions. It is not clear, for example, why the Court reasoned that the duty to consider all relevant circumstances prior to issuing a section 12(4)(b) eviction notice arose from section 26(2) of the Constitution and not section 26(3). Clarifying the interpretation of section 26 is not merely a theoretical exercise; it would give greater guidance to both public authorities and those facing evictions as to the scope of their rights and duties.

A similar concern can be raised in respect of the Court's unwillingness to consider the applicability of PIE in situations of evictions for alleged health and safety reasons and its avoidance of the administrative justice arguments on procedural fairness guaranteed under section 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000. These issues were comprehensively canvassed in the arguments presented by the legal teams of both the occupiers and the *amici curiae* (the Community Law Centre and the Centre on Housing Rights and Evictions). The failure to deal with these questions represents a missed opportunity to establish a clear legal framework which would govern all future evictions on grounds of health and safety concerns.

Furthermore, the Court failed to support its reasoning by referring to the rich body of international law standards and jurisprudence on evictions, in spite of the clear injunction in section 39 of the Constitution to consider international law in interpreting the Bill of Rights. Considering international and comparative law should not simply be optional window dressing on a judgment. It may, for instance, reveal creative alternative approaches to a particular problem consistent with human rights norms and values.

Lastly, there is an almost complete absence of analysis of the historical, social and economic context of the occupation of buildings in the inner city of Johannesburg. This is in contrast to the rich contextual analysis in the *PE Municipality* case and the Court's own counsel in *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) that rights need to be interpreted and understood in their social and historical context (para 25). Again the Court had plenty of evidence on record to enable it to situate its judgment within such a context.

Despite these minor shortcomings, the judgment represents another important affirmation of the significance of the right to housing to those living in precarious conditions on the margins of our society.

Conclusion

This decision reaffirms the Constitution's transformative role. It defines the obligations of local authorities with regard to the occupiers of abandoned or derelict buildings. Local authorities must first give serious consideration to possibilities of restoring the buildings and rendering them safe for occupation before evictions of the people living in them, who may be rendered homeless, can take place. Under these

circumstances, evictions should be regarded as an exceptional measure to be used as a last resort.

Where an eviction cannot be averted, local authorities are duty-bound to ensure that alternative accommodation is provided to those who are desperately in need of it. Such alternative accommodation should be affordable to the occupiers and its location should be in close proximity to places where they earn their livelihood.

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The occupiers were represented by the Centre for Applied Legal Studies (University of the Witwaterssrand) and Webber Wentzel Bowens. The Community Law Centre and the Centre on Housing Rights and Evictions (COHRE) were joint *amici curiae* in the case (in both the SCA and the Constitution Court) and were represented by the Legal Resources Centre.

South Africa's commitment to realising socio-economic rights in 2008

In the second week of February each year, the South African President delivers the state of the nation address. Two weeks later, the Minister of Finance delivers the budget speech.

This year's state of the nation address was delivered in a new political climate. Less than two months earlier, the African National Congress (ANC) had held its elective conference at which President Thabo Mbeki failed in his bid to remain the party's president. The conference produced a new leadership widely perceived to be more pro-poor, leftist, and caring – and therefore, one would expect, more committed to realising socio-economic rights than its predecessor.

Specific, bold resolutions were made at the conference, especially in key socio-economic rights areas including social security, housing, health and education. Many commentators wondered whether these resolutions would feature in the current government's plan, and that is largely why this year's state of the nation address and budget speech attracted much public anticipation.

The three documents (the ANC resolutions, the state of the nation address and the budget speech) contain firm political commitments on a number of issues affecting South African society. They are a point of reference for the government's commitment to realising socio-economic rights in 2008. They constitute a benchmark against which we will hold the government and the ruling party accountable for its commitment to make people's lives better in 2008 and beyond.

Below we highlight some of the key commitments pertaining to socio-economic rights in each of the documents.

The ANC resolutions

The ANC identified the following as the central objectives of the government:

- to eradicate poverty and underdevelopment and address inequality;
- to create a developmental (rather than welfare) state that empowers individuals and communities to uplift themselves from poverty in addition to implementing anti-poverty interventions such as social security; and
- to prioritise education and health as the core elements of social transformation.

It therefore recommended the following:

Social security

- developing a minimum common basis on all social security interventions programmes by all departments;
- ensuring that social grants do not create dependency and that they are linked to economic activity;
- gradually extending the child support grant to 18 years;
- equalising the pensionable age for men and women at 60 years; and

- prioritising the welfare of children living in poverty.

Education

- extending the school nutrition programme to high school learners in poorer communities;
- expanding the no-fees schools to 60% by 2009;
- progressively introducing free education for the poor up to undergraduate level;
- focusing rigorously on the quality of education; and
- prioritising education as one of the most important programmes for the next five years.

Health

- intervening in the high cost of health care provision;
- accelerating the roll-out of the comprehensive health care programme, for instance by providing ARVs at all health facilities while at the same time strengthening capacity to monitor the side effects of ARVs;
- accelerating programmes for hospital revitalisation; and
- catering for those infected by HIV/AIDS in the comprehensive social security system.

Housing

- developing appropriate legislation to prevent the mushrooming of informal settlements;
- providing housing, including rental stock; and
- accelerating land acquisition through a dedicated housing development agency, to deal effectively with the challenges of human settlement.

Land

- regulating, but not prohibiting, ownership of land by non-South Africans;
- expropriating property where necessary in line with the Constitution and aligning expropriation legislation with the Constitution; and
- discarding market-driven land reform and immediately reviewing the "willing seller, willing buyer" principle so as to accelerate the equitable distribution of land.

The state of the nation address

The President identified "apex priorities" which call for "business unusual" on the part of all spheres of government. As explained by the President, "business unusual" does not refer to any changes in established policies but denotes "the speedy, efficient and effective implementation of these policies and programmes, so that the lives of our people should change for the better, sooner rather than later". The main priorities he identified relating to socio-economic rights were:

- speeding up the process of building the infrastructure needed to achieve economic and social goals;
- improving the effectiveness of interventions directed at the second economy and poverty eradication;
- enhancing the impact of programmes targeting education and training;
- accelerating the advance towards the achievement of the goal of health for all;
- strengthening the machinery of government to ensure that it has the capacity to respond to development imperatives; and
- enhancing the government's focus on key areas in international relations, with particular focus on some African issues and South-South relations.

War against poverty

- the elaboration of an integrated and comprehensive anti-poverty strategy that addresses sections of the population most affected by poverty, namely children, women, the youth, people living in rural areas and urban informal settlements, people with disabilities or chronic illnesses, and the elderly. Key proposed interventions are: expanding the public works programme, employment subsidies for direct job-creation for targeted groups, enhancing employment-search capability, improving education and training, improving services and assets among poor communities, specific interventions in poor households, and ensuring the effectiveness of institutions supporting women and other sectors;
- examining interventions required to deal with vulnerable children over the age of 14; and
- the better implementation of agricultural support services and household food support.

Education

- resourcing schools in the lowest three quintiles, freeing them from the responsibility to charge fees.

Housing and land

- providing 260 000 housing units per annum in order to establish sustainable human settlements;
- in addition to speeding up the development of sustainable human settlements, intensifying efforts to accelerate universal access to water, sanitation and electricity so that by 2014 there are decent human settlements and access by all households to these services;
- speeding up land and agrarian reform with detailed plans for

land acquisition, placing specific focus on areas with large concentrations of farm dwellers and those with high eviction rates; and
- speedily finalising the Land Use Management Bill.

Social security
- completing work on the comprehensive social security system; and
- equalising the age of eligibility to the old age grant for men to 60, thus benefiting half a million men.

Health
- intensifying the implementation of the National Strategic Plan against HIV and AIDS;
- reducing TB defaulter rates from 10% to 7%;
- training over 3 000 health personnel in the management of this disease; and
- ensuring that all multidrug-resistant and extreme drug-resistant TB patients receive treatment.

The budget speech

According to the Minister of Finance, Mr Trevor Manuel, the budget was informed by the abovementioned apex priorities. The government committed itself to the following.

Poverty reduction
- prioritising job creation, widening the social security net and extending the social wage, which includes services such as water, electricity, sanitation, education, health care and public transport;
- introducing an official poverty line index in March 2008; and
- accelerating the creation of jobs and increasing the budget for the implementation of public works programmes.

Social security
- progressively extending social security to fight poverty;
- adding R12 billion over the next three years to social assistance costs;
- increasing social grants in line with inflation, so that the disability and old age grants go up by R70 a month to R940 in April 2008, while the child support grant increases by R10 in April and a further R10 in October to R220 a month;
- addressing the difficulties of the present means tests;
- reducing the age at which men qualify for the old age grant from 65 to 63 this year, 61 in 2009 and 60 by 2010;
- extending the child support grant to those turning 15 with effect from January 2009; and
- in line with the notion of a developmental state, balancing growth in social assistance with progress in other fronts by pursuing a balance among various spending measures and progressively implementing reforms.

Health
- increasing spending on health by 10% a year over the next three years – the hospital revitalisation programme will receive additional allocations, conditional grants for HIV/AIDS will increase and tertiary health care will be prioritised; and
- adding resources for multidrug-resistant and extreme drug-resistant TB and for higher pay for nurses;

Education
- increasing the school nutrition programme by over 30%.

Conclusion

The documents discussed above express a formal commitment by the ruling party and the government to fight the poverty and underdevelopment that have continued to deprive a majority of the South African population of the full enjoyment of the freedom that came with democracy in 1994. Very bold political statements have been made, and programmatic and fiscal interventions designed, to tackle this challenge.

Some of the ANC resolutions have not been fully incorporated into the government's programme. For example, the government's plan is to extend the child support grant only to children aged 15 in 2009. It is not clear whether the grant will be extended to children aged up to 18 years soon. It should be noted that there is a case before the Pretoria High Court on the extension of the child care grant to teenagers between the ages of 14 and 17.

Of course, many will be very happy about the reduction in the qualifying age for men with regard to the old age social grant. It should be noted that there is already a case before the Pretoria High Court challenging the current differentiation in pensions between men and women, in which judgment is pending.

We hope that the government will honour these commitments and do "business unusual" to implement its plan of action and hence advance socio-economic rights in 2008 and beyond.

This summary was prepared by **Sibonile Khoza**, former coordinator and senior researcher, **Lilian Chenwi**, coordinator and senior researcher, and **Siyambonga Heleba**, researcher, in the Socio-Economic Rights Project.

South Africa: Acts, Bills and policies

Traditional Health Practitioners Act 22 of 2007

On 17 August 2006, the Constitutional Court handed down a judgment which declared invalid the Traditional Health Practitioners Act 35 of 2004, among other laws (*Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC)). The Act was declared invalid for lack of public participation, but the Court suspended the order of invalidity for 18 months to enable Parliament to comply with its constitutional obligation to facilitate public involvement before an Act is passed.

After extensive consultations, the Traditional Health Practitioners Bill was re-enacted as Act 22 of 2007. The date of commencement is yet to be proclaimed. The Act intends:

> To establish the Interim Traditional Health Practitioners Council of South Africa; to provide for a regulatory framework to ensure the efficacy, safety and quality of traditional health care services; to provide for the management and control over the registration, training and conduct of practitioners, students and specified categories in the traditional health practitioners profession; and to provide for matters connected therewith.

The HIV and AIDS and STI Strategic Plan for South Africa 2007–2011

The HIV and AIDS and Sexually Transmitted Infections (STI) Strategic Plan for South Africa 2007–2011 (NSP 2007–2011) flows from the National Strategic Plan of 2000–2005, which all stakeholders embraced as a guiding framework, as well as the Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa. It represents the country's multisectoral response to the HIV infection challenge and the wide-ranging impact of AIDS. The Department of Health is mandated to lead the process of developing the NSP 2007–2011.

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The plan has two broad aims – to reduce the number of new infections, especially among young people aged 15 to 24, and to reduce the impact of HIV/AIDS on individuals, families, communities and society.

The key priority areas of the NSP 2007–2011 are: prevention; treatment, care and support; monitoring and research; and human and legal rights. In his recent state of the nation address, President Thabo Mbeki said that accelerating the achievement of "health for all" meant intensified implementation of the plan.

Housing Development Agency Bill [B 1–2008]

The aim of the Housing Development Agency Bill is to establish the Housing Development Agency (HDA) and to provide for its functions and powers and other related matters. The functions of the HDA, in collaboration with relevant municipalities, include the following:

- to develop strategic plans with regard to the identification and acquisition of land that is suitable for residential and community development;
- to find, acquire, develop and release land for residential and community development;
- to assist municipalities in dealing with housing developments that have not been completed within the anticipated project period;
- to assist municipalities in upgrading informal settlements; and
- to assist municipalities in finding emergency housing solutions.

On 8 August 2007, Cabinet approved the Bill for public comment, and on 7 November 2007, the Bill was approved for submission to Parliament. It is currently before the Portfolio Committee on Housing for consideration. The Committee requested written submissions from interested individuals and organisations in February and public hearings have been held. The Committee expects to finalise the Bill by 27 June 2008.

This summary was prepared by **Rebecca Amollo**, a doctoral candidate at the University of the Western Cape and an intern in the Socio-Economic Rights Project.

The optional protocol to the International Covenant on Economic, Social and Cultural Rights

After the fourth session of the Open-Ended Working Group (OEWG) on an optional protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR), a revised draft of the protocol was produced (UN doc A/HRC/8/WG.4/2 of 24 December 2007).

The optional protocol to the ICESCR process has been discussed in previous issues of the *ESR Review*: 7(1) and 8(4).

During the first part of the fifth session of the OEWG, held in Geneva from 4 to 8 February 2008, delegates of governments, institutions and non-governmental organisations (NGOs) discussed the revised draft. A few key points should be noted.

- There was increasing support for a comprehensive approach. However, a few states continued to support the à la carte approach.
- The proposal by the NGO Coalition for an Optional Protocol to the ICESCR that a provision be included granting NGOs *amicus* standing was supported by many states.
- The provision allowing for communications to be received from NGOs in appropriate circumstances [article 2(1 ter) of the revised draft optional protocol] did not receive much support. The difference between article 2(1 ter) and article 2(1), which also allows NGOs to bring communications on behalf of individuals or groups of individuals, is that there is no victim requirement under the former.
- Proposals made at the fourth session to specify a list of local remedies – judicial, administrative and others – to be exhausted, instead of simply referring to "domestic" remedies, did not receive much support.
- A substantial number of states were in favour of including a provision for interim measures. Few, however, supported the view that this provision should be included in the rules of procedure instead.
- There was general support for retaining the provision on friendly settlement in a less detailed format. However, some states wanted it to be in the rules of procedure or applicable only in relation to interstate disputes.
- There were concerns regarding the specification of "unreasonableness" or the "broad margin of appreciation" of states as the applicable standard of review of state compliance with the provisions of the ICESCR.
- A provision on interstate communications was considered acceptable since it is optional.
- There was less enthusiasm about an inquiry procedure, but some states were open to it as long as it remained optional and retained a high threshold in its application.
- A provision on international cooperation and assistance was generally accepted.
- The provision for the establishment of a fund remained controversial: some states welcomed it while others wanted an explicit reference to its voluntary nature, and yet others preferred not to have it in the optional protocol at all.
- There were various opinions on whether the optional protocol should explicitly prohibit or allow for reservations, or be silent on them.

A new revised draft of the optional protocol has since been prepared (UN doc A/HRC/8/WG.4/3 of 28 February 2008). It is worth noting that, in this new draft, the provision on granting *amicus* standing to NGOs has been omitted despite the support it received, and there is a reference to the states' margin of discretion as part of the standard of review, despite the concerns raised about making such an explicit reference.

The fifth session of the OEWG is crucial as it is a decision-making phase. It is hoped, as expressed by the chairperson and some delegates, that the negotiation process will be finalised in the second part of the fifth session, to be held from 31 March to 4 April 2008. To facilitate this, Portugal has agreed to organise informal consultations beforehand, with the aim of getting states to reach consensus on some of the outstanding issues.

It is also hoped that states will honour the 60th anniversary of the Universal Declaration of Human Rights by adopting an effective optional protocol to the ICESCR. In fact, some of the delegates pointed out that the anniversary was precisely the occasion for adopting such a protocol.

This summary was prepared by **Lilian Chenwi**, the coordinator of, and a senior researcher in, the Socio-Economic Rights Project.

The draft optional protocol prepared after the first part of the fifth session is available on http://www2.ohchr.org/english/issues/escr/docs/A_HRC_8_WG.4_3.doc.

George Kent

The UN General Assembly launched the international human rights system with the adoption of the Universal Declaration of Human Rights (UDHR) on 10 December 1948. Over the past 60 years, human rights advocates have focused mainly on civil and political rights, and on the obligations of national governments in relation to the rights of people living under their jurisdiction. In recent years, however, the human rights field of vision has been widened.

Margot E Salomon, 2007. *Global responsibility for human rights: World poverty and the development of international law.* New York: Oxford University Press

More attention is now being given to socio-economic rights. There is also increasing recognition that human rights are not and should not be limited to the obligations of states with regard to their citizens and people under their jurisdiction. States are also bound to refrain from causing harm to people in other nations through their trade, investments and other international activities. They also have positive obligations towards people beyond their own jurisdictions. For instance, they are obliged to ensure that the global economic system does not disadvantage a large share of the world's population.

Margot Salomon's *Global responsibility for human rights* reinforces the expanding human rights vision. It also provides an international law perspective to globalisation.

Salomon's book focuses on the right to development, a concept that has been evolving since the UN General Assembly adopted the Declaration on the Right to Development in 1986. Drawing on analyses of the deliberations of the Working Group on the Right to Development, now operating under the new UN Human Rights Council, she shows how this right can contribute to overcoming some of the structural impediments to the enjoyment of other human rights.

Salomon focuses on the meaning and implications of the obligation for international cooperation that states have in international human rights law. It is sometimes taken to mean that nations are free to choose whether or not to work with other nations to contribute to their development, and, should they decide to do so, also free to choose which nations they work with. The United States, for example, has made it clear

Some emerging studies that contribute to this broad effort

- Barry, C and Pogge, T (eds) 2005. *Global institutions and responsibilities: Achieving global justice*. Blackwell Publishing.
- Clapham, A 2006. *The human rights obligations of non-state actors*. Oxford University Press.
- Coicaud, J-M, Doyle, M W and Gardner, A-M, (eds) 2003. *The globalization of human rights*. United Nations University Press.
- Kent, G (ed) 2008. *Global obligations for the right to food*. Rowman & Littlefield Publishers, Inc.
- Kuper, A (ed) 2005. *Global responsibilities: Who must deliver on human rights?* Routledge.
- Pinstrup-Andersen, P and Sandøe, P (eds) 2007. *Ethics, hunger and globalization: In search of appropriate policies*. Dordrecht.
- Pogge, T (ed) 2007. *Freedom from poverty as a human right: Who owes what to the very poor?* Oxford University Press.
- Salomon, M, Tostenson, A and Vandenhole, W (eds) 2007. *Casting the net wider: Human rights, development, and new duty bearers*. Intersentia.
- Skogly, S 2006. *Beyond national borders: States' human rights obligations in international cooperation*. Intersentia.

that while it is willing to provide development assistance to other nations, it does not accept that it is obligated to do so. However, article 28 of the UDHR states: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." This means that all nations ought to work towards the realisation of the human rights of all people, not just their own people. Though the UDHR does not impose direct legal obligations, it does express a clear objective that is central to the entire human rights project: the creation of an international order in which all rights are realised by all people.

The call for international cooperation acknowledges that there are choices regarding how the realisation of human rights should be achieved. In my view, however, there should be no choice regarding the outcome that is to be achieved. This is well illustrated by the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, adopted by the Council of the Food and Agriculture Organization of the United Nations in November 2004. These guidelines are based on the recognition that the right to adequate food must be realised, and that there are many possible paths for achieving that goal. The destination is fixed, but there is room for discussion regarding the path to it.

To put this into legal language, the "obligation of result" is unambiguous, but there is some latitude regarding the "obligation of conduct". Thus when some countries say that "there can be no binding obligation to transfer resources to poorer countries" (pp 78 and 98), the response must be that there is a binding obligation if there is no other way to ensure the realisation of human rights. Where there are multiple paths available, no particular type of action is required, but achievement of the goal is required.

The requirement cannot be satisfied with random bits of cooperation here and there. In my view, the requirement is for states to work with the international community, putting into effect those types and levels of cooperation that are needed to ensure the realisation of human rights.

The law will be helpful only when the powerful want to end poverty. People do not care because they have legal obligations; they accept obligations if they care.

In discussing the international community, it would have been useful if Salomon (and others) drew a clear distinction between communities based on collaboration designed to serve individual interests (as in business relationships) and communities whose members work together because they care about each other's well-being. The distinction is important. If the rich and powerful care little about the well-being of the poor and weak, parsing the details of international law is not going to bring about the transformational changes needed to end global poverty. The law will be helpful only when the powerful want to end poverty. People do not care because they have legal obligations; they accept obligations if they care.

Salomon emphasises the need to remove structural obstacles to the realisation of economic and other human rights. I would say there is a need for serious planning to address this issue at the global level. Article 4(1) of the Declaration on the Right to Development says:

> States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.

Thus both individual states and the international community have a duty to formulate suitable global development policies. As we have seen, however, while low-income countries are pressured by the International Monetary Fund and the World Bank to prepare poverty reduction strategy papers, there is no global poverty reduction strategy paper. There has never been a serious global development plan. We have nothing more than vague claims that neoliberal economics might someday automatically do the job. The UN Millennium Project raised great hopes, but on close examination one learns that there

is no global programme there at all. There is mainly advocacy: the rich nations saying that the poor ones ought to do better.

As Salomon observes, the governments of the rich countries prefer to talk about the obligations of the poor, while the poor tend to highlight the obligations of the rich (pp 98–100). That is not surprising. Probably the best way out of that conundrum is joint planning for joint action.

Global responsibility for human rights contributes to the clarification of the responsibilities of the international community with regard to other nations, especially poor ones. It helps us see that much remains to be done. Since a sound planning process might be the best tool for working out the responsibilities of all concerned, perhaps the facilitation of serious collaborative global-national-local planning for addressing poverty itself ought to be recognised as a primary global responsibility.

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CALL FOR CONTRIBUTIONS TO THE *ESR REVIEW*

The Socio-Economic Rights Project of the Community Law Centre at the University of the Western Cape welcomes contributions to be published in the *ESR Review*.

The *ESR Review* is a quarterly publication that aims to inform and educate politicians, policy-makers, NGOs, the academic community and legal practitioners about key developments relating to socio-economic rights at the national and international levels. It also seeks to stimulate creative thinking on how to advance these rights as a tool for poverty alleviation in South Africa and abroad.

Contributions

- should reflect contemporary debate or spark new debate;
- be opinion pieces or serve an advocacy function, rather than simply stating legal principles or being descriptive in nature;
- not be on a topic already published in the *ESR Review*, unless they take the debate forward;
- not be a marketing exercise for a particular project or programme; and
- be written in a simple, clear style that avoids technical language and legal jargon where possible, taking into account that the *ESR Review* is read by both legal practitioners and grassroots human rights organisations.

Contributions should be sent in electronic format (MS Word) to serp@uwc.ac.za or lchenwi@uwc.ac.za. Provide your full name and present position. Titles and qualifications are not necessary.

If the article has already been published elsewhere, give full details, including whether it has been shortened, updated or substantially changed for the *ESR Review* and whether the required authorisations have been granted.

Length

Contributions should be no longer than 3 000 words, except contributions for the Events section (1 500 words) and the Publications (Book Review) section (1 000 words).

References and notes

- No footnotes. Rather try to work explanations into the text.
- Use the abbreviated Harvard style of referencing, for example: "Child abuse is rising (Author, 1999: 10)," or "According to Author (1999: 10), child abuse is rising."
- Keep references to the absolute minimum – preferably only for publications from which direct quotes have been taken, or for backing up potentially contentious statements.
- Provide a list of the key references at the end of the contribution.

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