ESR REVIEW

Economic and Social Rights in South Africa

Ensuring rights make real change

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Editorial

This is the first issue of the *ESR Review* for 2009.

For 42 years, monitoring of the implementation of economic, social and cultural rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR) was limited to consideration by the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR) of state reports and other information submitted to it, mostly by non-governmental organisations. Victims of economic, social and cultural rights (ESCR) violations did not have the means to lodge complaints with the UN CESCR until the end of last year.

A historic milestone was achieved when, on 10 December 2008, the General Assembly of the UN adopted, by consensus, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. The Optional Protocol provides a mechanism through which persons can petition the UN CESCR about violations of their rights guaranteed in the ICESCR.

The benefits of the Optional Protocol are numerous. In addition to providing individuals with access to remedies at the international level, it will ensure that those living in poverty receive due attention; lead to further clarification of the nature of ESCRs and the obligations they engender; encourage state parties to take steps towards the full implementation of ESCRs and to ensure more effective local remedies; promote the development of international jurisprudence that will in turn promote the development of domestic jurisprudence on ESCRs; strengthen international accountability; and counter arguments against the justiciability of ESCRs. The Optional Protocol will be open for signature at a signing ceremony to be held this year.

Adding his voice to those of other UN experts, the UN Special Rapporteur on the right to health views the Optional Protocol as an important mechanism for the better promotion and protection of the right to health (Report to the General Assembly, 2003, UN doc. A/58/427, para 83). In addition, equality and non-discrimination are fundamental elements of the right to health. The UN CESCR, in General Comment No 14, emphasised the "need to develop and implement a comprehensive national strategy

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for promoting women's right to health", so as to eliminate discrimination against women (UN doc. E/C.12/2000/4(2000), para 21). The CESCR also recommended that "states integrate a gender perspective in their health-related policies, planning, programmes and research in order to promote better health for both women and men" (para 20).

In this regard, the South African government is committed to addressing historical gender imbalances and inequities in access to health care. The National Health Act 61 of 2003 aims to establish a national health system that "provides in an equitable manner the population of the Republic with the best possible health services that available resources can afford". The need to protect and promote women's right to health becomes even greater in the context of HIV/AIDS, as women bear the brunt of this epidemic. An estimated 5.7 million South Africans lived with HIV/AIDS in 2008, 3.2 million of them women (UNAIDS, *South Africa: Country situation,* 2008).

Rebecca Amollo examines the government's laws and policies in the area of women's health in the context of HIV/AIDS. She notes that, though there is distinct development in law and policy on women's health, some of the responses are either gender-blind or gender-neutral. Amollo concludes that as long as efforts remain unresponsive to gender, improved access to health care services will remain a victory won at devastating cost to women.

This issue includes some papers that were presented at a conference on the role of public interest litigation in enforcing ESCRs held in Uganda in August 2008.

Lilian Chenwi, drawing from the experiences of the Community Law Centre, looks at litigating socio-economic rights through *amicus* briefs. Chenwi notes that this has been an effective way to conduct public interest litigation in order to advance the enforcement of ESCRs.

Joe Oloka-Onyango examines age-based discrimination in Uganda. He argues for a new paradigm in which the rights of older persons are given more serious and deliberate consideration.

Christopher Mbazira considers the enforcement of ESCRs in Uganda. Mbazira observes that the constitutionalisation of ESCRs in many countries, and their judicial enforcement even where they have not been constitutionalised, has elevated these rights to justiciable status.

Ben Twinomugisha looks at the extent to which the legal and policy frameworks related to the fight against malaria in Uganda enhance or inhibit the protection of the right to health in general and the right of access to malaria treatment in particular. He highlights a number of strategies that could enhance the protection and promotion of the right to health, including access to malaria treatment.

In this issue, we also provide a summary of the South African President's state of the nation address and Minister of Finance's budget speech, both delivered in February this year. We highlight some of the key commitments pertaining to socio-economic rights.

Finally, Lilian Chenwi examines a recent decision of the High Court

(Durban and Coast Local Division), dealing with the constitutionality of the KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Act 6 of 2007. She observes that the decision of the High Court to endorse the Slums Act failed to protect the rights of those in desperate need of housing and state assistance in eviction situations.

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

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

Advancing women's access to health services in South Africa

Legal and policy responses to HIV/AIDS

Rebecca Amollo

The Constitution of South Africa (the Constitution) provides that everyone has the right of access to health care services, including reproductive health care (section 27(1)(a)). Additionally, the Constitution guarantees other rights of pivotal importance to the realisation of women's right of access to health in the context of HIV/AIDS. These include: equality (section 9), human dignity (section 10), life (section 11), bodily integrity (section 12), privacy (section 14), property (section), housing (section 26), food and water (section 27), education (section 29) and access to information (section 32)

The Constitution further binds the courts to consider international law (section 39 (1)(b)) when interpreting it. At the international level, the right to the highest attainable standard of health is provided for in the International Covenant on Economic, Social and Cultural Rights (ICESCR, article 12). Both the Committee on Economic and Social Cultural Rights (CESCR) and the Committee on the Elimination of Discrimination Against Women (CEDAW) have interpreted this right and emphasised the importance of gender in realising women's health (see CESCR General Comment No 14 on the right to the highest attainable standard of health, UN doc. E/C.12/2000/4 (2000); and CEDAW General Recommendation No 24 on women and health, UN doc. A/54/38/Rev.1, chapter I).

One of the most important aspects of General Comment No 14 pertains to availability, accessibility, acceptability and quality as evaluation standards crucial to the attainment of the right to health (para 12(a-d)). As conceptualised, accessibility has dimensions of non-discrimination, physical accessibility (being within safe physical reach of all sections of the population, especially vulnerable or marginalised groups), affordability and information accessibility (the right to seek, receive and impart information and ideas concerning health issues). Normatively, therefore, the right to health is not narrowly viewed as relating to just medicines or clinics (Hassim et al, 2007: 4).

Against that backdrop, this article analyses South Africa's laws and policies in the area of women's health in the context of HIV/AIDS. The array of laws and policies affecting women's health in this regard is vast, but the focus is on those affecting access to health care services by women in the context of HIV/AIDS.

Women's health in South Africa: Contextual background

Apartheid South Africa was characterised by the segregation of health services and unequal spending on health services (Abbot, 1997). For a group that was already marginalised by socio-cultural factors, the situation of women during apartheid was therefore one of double jeopardy: race and gender. The beacon of hope for women lay in the restructuring of the health system through both law and policy. Although the law has been used to subjugate women, it constitutes an important tool for transforming society (and the

health system) in a manner that can benefit women, especially those affected by HIV/AIDS (see Artz and Smythe, 2007: 746).

South Africa currently hosts the largest number of HIV infections in the world, with the prevalence rate standing at approximately 11% (UNAIDS, 2007). HIV prevalence data collected from the latest round of antenatal clinic surveillance suggest that HIV infection levels may be levelling off, with the prevalence among pregnant women at 30% in 2005 and 29% in 2006 (UNAIDS, 2007). The prevalence of the epidemic varies considerably between provinces, from 15% in the Western Cape to 39% in KwaZulu-Natal (UNAIDS, 2007). While still concentrated in certain social groupings, HIV prevalence in the country and provinces is reported to be levelling and has become generalised (UNAIDS, 2008).

As in most parts of the continent, women in South Africa are the worst-affected group, with those in the age group 25-29 having a prevalence rate of 40% (UNAIDS, 2007). Several factors account for the disparity between men and women, notably gender, as discussed later in this article.

The state of South Africa's health system

A health system is the sum total of all the organisations, institutions and resources whose primary purpose is to provide health services (WHO, 2005). A health system needs staff, funds, information, supplies, transport, communications and overall guidance and direction. It also needs to provide services that are responsive and financially affordable, while treating people decently. Responsiveness entails taking into account gender as a health determinant.

The ultimate responsibility for the overall performance of a country's health system lies with the government, but good stewardship by regions, municipalities and individual health institutions is also vital (WHO, 2005). An emerging aspect in South Africa is the role of courts in the enforcement of the right to health (see, for example, *Minister of Health and Other v Treatment Action Campaign* 2002 (5) SA 721 (CC) (*TAC* case)).

Currently, South Africa's health system consists of a large public sector and a smaller, but fast-growing, private sector (Department of Health, 2007). The public health sector is under-resourced and thus constrained to deliver services to about 80% of the population. Despite this, most resources are concentrated in the private health sector, which sees to the health needs of the remaining 20% of the population (Department of Health, 2007). This dichotomy is crucial to understanding the situation of women, most of whom rely on the public sector for health services.

Unpacking the "gender" in the "health"

Simply put, gender refers to socially constructed differences between men and women which are reinforced by custom, religion, beliefs, laws and state policies (Akeroyd, 1996). The factors that make women vulnerable include poverty, culture, homelessness, social and geographical mobility, sexual violence, power imbalance, civil unrest and, in particular, gender inequalities. This article focuses on gender inequalities, which are now recognised as social determinants of health (CSDH, 2008).

A law or policy that has no differential impact on women and men, either positive or negative, can be categorised as gender-neutral. Where the gendered aspect is either ignored or deliberately not addressed, on an assumption that no gender-based differences apply, the term gender-blindness is used. The process of considering gender in the making and implementation of policy and law is called gender mainstreaming. It involves the (re)organisation, improvement, development and evaluation of law and policy processes so that a gendered perspective is incorporated at all levels by law- and policy-makers. In practice, this means considering the conditions and situations in which women live and their needs and priorities. Gender mainstreaming must become an ordinary part of the way things are done across all government departments and agencies.

In South Africa, constitutional values, policy and legal responses to HIV/AIDS can be understood in the context of apartheid and post-apartheid (Ngwena, 2003: 313). Ngwena argues that the responses to HIV/AIDS by the apartheid regime were informed by racism, homophobia, xenophobia and authoritarianism, rather than by a genuine public health concern. In contrast, responses in the new constitutional dispensation have largely been informed by the

values of human dignity, equality and freedom (Van Wyk, 1991: 81). In this light, argues Viljoen, a human rights approach to HIV/AIDS needs to manifest itself not only in legislation but also in the actual application and interpretation of the law in disputed cases (Viljoen, 2007: 598).

This article now turns to an appraisal of South Africa's laws and policies on women's access to health services and HIV/AIDS.

Laws and policies on women's access to health services and HIV/AIDS

The National Strategic Plan

The National Strategic Plan for South Africa 2007–2011 (NSP) is a national, multi-stakeholder plan to address HIV/AIDS in South Africa. The NSP is based on an integration of sexually transmitted disease, HIV/AIDS and tuberculosis (TB) care and response. It hinges the response to the epidemic on the strategies of prevention; treatment, care, and support; research, monitoring and surveillance; and legal and human rights.

The NSP also prioritises women's empowerment, including reducing gender-based violence, managing sexual assault and increasing access to the prevention of mother-to-child transmission (PMTCT) programme. The NSP is praiseworthy not only because it is responsive to women's issues, but because it was devised in consultation with women.

The Operational Plan

The South African national Department of Health adopted the Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa (Operational Plan) in 2003. The plan is part of the government's effort to combat HIV/AIDS. One of its important aspects, which has implications for women, is the reference to decentralisation, according to which provincial operational plans are to be based on the district health system in each province. This would facilitate physical access to the services as envisioned in General Comment No 14 (para12(b)).

The Operational Plan also considers some measures crucial to women's health, such as the continued use of nevirapine to prevent mother-to-child transmission of HIV (principle 3.2); providing a protocol for a comprehensive package of care for survivors of sexual assault, including post-exposure prophylaxis with antiretroviral drugs (principle 3.3); and improving the quality of care in line with international and local norms and standards and strategies on nutrition (principle 9.1). Under the plan, certain laboratories have been certified to provide support to the programme and pharmacovigilance centres have been established (principle 114-115). This is a step forward, given the need for pharmacological advancement in light of such new challenges as HIV-related infections among pregnant women.

The implementation of the Operational Plan has, however, been dogged by setbacks impairing its effectiveness. For example, human resources remain a challenge, together with sustainable drug procurement. These challenges have the overall impact of making health services inaccessible to women who are already disadvantaged in terms of mobility, education and finances.

The implementation of the plan was the subject of a court case in the Durban High Court in *EN and Others v The Government of South Africa and Others* 2007 (1) BCLR 84. The Court held that the government's implementation of the relevant laws and policies in this case was unreasonable in that it was inflexible and was characterised by unexplained and unjustified delays and irrationality. The case highlights some of the structural problems within the Operational Plan. It also highlights the lack of commitment from the government to implementing the plan with the "speed" and "expedience" needed for the delivery of health services (see the Limburg Principles on the Implementation of the ICESCR, UN doc. E/CN.4/1987/17, Annex, para 21).

The PMTCT programme

Mother-to-child-transmission of HIV takes place when HIV is passed on from a HIV-positive woman to her child during pregnancy, delivery or breastfeeding. The term is used because the immediate source of the infection is the mother, and does not imply blame on the mother (Department of Health, 2008). The PMTCT programme presents an opportunity to reduce maternal mortality and to ensure that women living with HIV/AIDS have access to treatment. The policy was conceptualised in 2000 and initially implemented at pilot sites, but has been rolled out since 2002 following the decision in the *TAC* case.

Currently South Africa has the largest PMTCT programme in Africa (Department of Health, 2008). The package includes primary HIV prevention programmes for women of childbearing age, routine offers of voluntary HIV counselling and testing to pregnant women, safe infant feeding, counselling and support, safe obstetric practices, single-dose nevirapine to mother and infant, and provision of infant formula to women who choose this route and can use formula safely and in an acceptable, feasible, affordable and sustainable manner. This policy is in line with General Comment No 14 in terms of facilitating access to health services (para 12(d)). One would therefore say that at a policy level, PMTCT is adequately provided for.

However, a recent evaluation of the PMTCT programme at three sites found that the impact of the programme depended on the degree of inequality in the health system as well as breastfeeding practices. This means that just providing nevirapine is not sufficient to improve the health of mothers and babies (Department of Health, 2008). There have also been recent concerns at the high level of AIDS-related maternal mortality (Women's Sector Progress Report and Plan, 2009).

Sexual health and HIV/AIDS

Falling pregnant while living with HIV/AIDS presents two critical medical conditions: maternity and exposure to AIDS-related illnesses. The situation is exacerbated by the current disconnect in polices on sexual health rights and AIDS (De Bruyn, 2005). Ideally, a comprehensive approach to HIV/AIDS should deal with both aspects. Women want to avoid pregnancy for several reasons: they fear giving birth to an infected child, they already have children, they want to avoid the reinfection with HIV that might accompany unprotected sex or they want to focus their resources on maintaining their own and their families' health and well-being (De Bruyn, 2005). Contraception therefore becomes a crucial possibility to be looked into for purposes of preventing unintended pregnancies. It has also been shown that contraception is the most effective way of reducing perinatal HIV transmission (Reynolds et al, 2006). It is therefore essential that women living with HIV receive adequate information about, and provision of, modern contraceptive methods and information about other sexually transmitted infections.

The Choice on Termination of Pregnancy Act 92 of 1996 was adopted to give effect to the right of access to reproductive health care. However, there are reports suggesting that some health care providers avoid performing invasive procedures, including abortion care, for women with HIV due to fears of occupational exposure to the virus. High fees have also been reported, together with the allegation that women are only "granted" an abortion if they consent to sterilisation afterwards (De Bruyn, 2005). All these practices take away the woman's autonomy, which is a crucial aspect of her health.

The Act refers in its preamble to "the right to ... have access to safe, effective, affordable and acceptable methods of fertility regulation of their choice, and ... the right [of women] to access appropriate health care services to ensure safe pregnancy and childbirth". This should be interpreted to include HIV/AIDS services. Alternatively, provisions relating to pregnancy being a threat to health and life should be interpreted to include HIV/AIDS. This way, a connection can be made between sexual health and HIV/AIDS.

Conclusion

Post-apartheid South Africa has seen marked development in the law and policy on women's health. Even though some responses have been wrought with gender-blindness and gender-neutrality, there has been a deliberate effort to stimulate a gender perspective in laws, policies and government action. However, there is still a need to update South African policies in accordance with the latest evidence-based contraceptive guidelines for HIV-positive women and pharmacological advancement in HIV/AIDS and maternal health. Furthermore, comprehensive management of the epidemic in a women's context calls for multiple intervention strategies and a synergy across sectors. As long as efforts remain unresponsive to gender, women's health remains a pyrrhic victory (one won at devastating cost to women).

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Litigating socio-economic rights through *amicus* briefs

Challenges and strategies

Lilian Chenwi

The Constitution of South Africa (the Constitution) is characterised by its extensive commitment to socio-economic rights. The courts are mandated to translate these rights into enforceable legal claims, primarily by deciding on the constitutionality of any law or conduct. This includes deciding whether a given law, policy or conduct is consistent with socio-economic rights.

Civil society organisations and other human rights institutions have influenced the development of law and policy concerning socio-economic rights in many ways, including through litigation. One such organisation is the Community Law Centre (CLC), through its Socio-Economic Rights Project, which has intervened in a number of public interest litigation cases. Due to the nature of CLC – being a research and academic institution without a litigation unit – litigating as an *amicus curiae* has been the only feasible way of conducting public interest litigation advancing socio-economic rights.

This article draws on the experience of CLC to highlight some opportunities, strategies and challenges that litigating through *amicus* briefs presents.

Many of these insights will be drawn from the cases in which CLC has intervened.

Litigating through *amicus* briefs

Amicus curiae literally means "friend of the court". The Rules of the South African Constitutional Court make provision for intervention in cases as an *amicus curiae* (rule 10). Any person interested in a case may be admitted as an *amicus* either on the basis of the written consent of all the parties concerned (rule 10(1)) or on the basis of an application to the Chief Justice (rule 10(4)). With regard to the latter, admission is entirely in the discretion of the Chief Justice.

The High Court Uniform Rules also make provision for *amicus curiae* interventions before the High Court in cases that raise constitutional issues (rule 16A). The Rules of the Supreme Court of Appeal, as well, allow for such intervention (rule 16).

In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), with reference to its own rules referred to above, the Constitutional Court pointed out that the principles governing the admission of an *amicus* in any given case are that, in addition to having an interest in the proceedings, the *amicus* must make submissions that are relevant to the proceedings and that raise new contentions that may be useful to the Court (para 9).

This approach has proved to be quite a useful way of using limited resources to achieve a greater impact on society or a given social group or community.

In the case of *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), the Court described an *amicus* in the following words:

> An *amicus curiae* assists the court by furnishing information or argument regarding questions of law or fact. An *amicus* is not a party to litigation, but believes that the court's decision may affect its interest. The *amicus* differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An *amicus* joins proceedings, as its name suggests, as a friend of the court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the court because of its expertise on or interest in the matter before the court. It chooses the side it wishes to join, unless requested by the court to urge a particular position. An *amicus*, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs. Whether there may be circumstances calling for departure from this rule is not necessary to decide in this case. Suffice it to say that in the present case no such departure is warranted (para 63).

Subsequently, in the case of *In re Certain* Amicus Curiae *Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC), the Constitutional Court clarified that the role of an *amicus* is "to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn" (para 5). An *amicus* therefore has a special duty "to provide cogent and helpful submissions that assist the court" and "must not repeat arguments already made but must raise new contentions based on the data already before the court" (para 5; see also rule 10(7)). The Court added that it was inappropriate for an *amicus* to introduce new contentions based on fresh evidence (para 5).

CLC interventions

The CLC's intervention in socio-economic rights cases as an *amicus curiae* is a means of contributing to developing jurisprudence on socio-economic rights that is responsive to the needs of the poor, homeless and landless. It acts in the interests of the broader society rather than of specific individuals, focusing on the broader implications of a case. This approach has proved to be quite a useful way of using limited resources to achieve a greater impact on society or a given social group or community.

Thus far, the CLC has intervened in seven socio-economic rights cases – five on housing rights and evictions, one on access to health care and the last on social security (old-age pension equalisation).

Socio-economic rights cases in which the CLC has intervened

- *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (*Grootboom*)
- *Minister of Health and Others v Treatment Action Campaign* 2002 (5) SA 721 (CC) (*TAC*)
- *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (8) BCLR 786 (CC) (*Modderklip*)

- *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) BCLR 643 (SCA) (*Rand Properties*)
- *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC) (*Olivia*)
- *Christian Roberts and Others v Minister for Social Development and Others* Case No: 32838/05 (High Court) (*Christian Roberts*)
- *Thubelisha Homes and Others v Various Occupants and Others* Case No: 13189/07 (CC) (*Thubelisha Homes*)

As noted above, the CLC's intervention in these cases was motivated by its commitment to the effective protection and enforcement of socio-economic rights by the courts, especially through the development of jurisprudence which is pro-poor and responsive to social and economic inequalities in South African society.

In these cases, the CLC intervened jointly with other organisations: in *Grootboom*, with the South African Human Rights Commission; in *TAC*, with the Institute for Democracy in South Africa; in *Modderklip*, with Nkuzi Development Association and the Programme for Land and Agrarian Studies at the University of the Western Cape; in *Rand Properties*, *Olivia* and *Thubelisha Homes*, with the Centre on Housing Rights and Evictions; and in *Christian Roberts*, with the Centre for Applied Legal Studies.

The role of the CLC and the partner organisations, in these cases was to provide the courts with insights on the interpretation of the rights in issue, drawing on international law and comparative constitutional law and advancing viewpoints that highlighted the systematic problems raised by these cases.

Looking at *Grootboom* for instance, the *amici*'s intervention was vital as it shifted the case from its narrow focus (the particular needs of the community – whether the government could provide housing to that community if they did not have housing) to the broader implications of the case. The important role of the *amici* in this case has been described by Justice Sachs in the following words:

> This *amicus* intervention swung the debate dramatically. Most of the preceding arguments had failed to really look socio-economic rights in the eye. There had been technical arguments and attempts to frame the case in terms of children's rights but [the *amici*] forced us to consider what the nature of the obligations imposed by these rights was. Although we didn't accept the entire argument of the *amici*, this wasn't vital. What was important was the nature of the discourse. It was placing socio-economic rights at the centre of our thinking and doctrine (Sachs, 2007: 18-19).

This case concerned the right to have access to adequate housing for those faced with evictions, and children's right to shelter. The High Court had decided the case on the basis of children's right to shelter in section 28 of the Constitution. But the *amici* urged the Constitutional Court also to consider section 26 of the Constitution – the right of everyone to have access to adequate housing – in its analysis of the state's housing policies. This shifted attention from considering a short-term solution to the case in issue through a negotiated settlement to a consideration of the broader implications of the issues at hand for others in the same position as the Grootboom community.

Irene Grootboom, who initiated the case, recently died, eight years after the judgment, while still living in a shack waiting for formal housing.

Challenges

Intervention in these cases has not been without challenges. These include non-compliance with, or ineffective or slow implementation of, court orders handed down in successful litigation on socio-economic rights. For example, although there has been some progress in implementing the *Grootboom* case, municipalities have still not assessed their housing needs in terms of the Emergency Housing Programme. Moreover, Irene Grootboom, who initiated the case, recently died, eight years after the judgment, while still living in a shack waiting for formal housing.

Another challenge is the reluctance of the courts to grant supervisory orders, which adds to the difficulties in ensuring the effective enforcement of court orders. To be fair to the courts, the nature of socio-economic rights litigation presents challenges in formulating an appropriate remedy in a given case.

Generally, the enthusiasm of organisations that use litigation as a strategy is increasingly frustrated by the decrease in funding for public interest litigation, which makes it

impossible to retain competent advocates and attorneys. Political pressure, coupled with animosity between the government and civil society organisations, is another inhibiting factor.

Strategies

The strategies that can be employed in ensuring effective socio-economic rights litigation include the following:

- The timing of a case is crucial. A case can be lost simply because it was not brought in the right political or social climate.
- It is important to look beyond individual victims to ensure that the ensuing judgment benefits other similarly situated persons.
- Focusing on what happens after the judgment is vital as this influences the kind of remedy one may seek from the court.
- Adopting a long-term strategy, for instance intervening in a series of cases on related issues, is advisable to address a systemic problem.
- Socio-economic rights litigation is particularly expensive as it entails an examination of wide-ranging and complex policies. Many organisations working on these rights cannot afford such legal expenses. Thus, *pro bono* litigation is critical to socio-economic rights cases.
- Choosing cases in which the state is not required to allocate more than minimal resources, or additional resources, is vital to winning a socio-economic rights case.
- An organisation should have expertise in the matter being litigated for a court to consider its position more seriously.
- For some cases, there might be a need to adopt broader political strategies (and a combination of strategies), such as litigation, social mobilisation and agitation, advocacy and public education. *TAC* is an example of a case in which litigation was combined with advocacy to achieve success.
- Cooperation between organisations with different areas of expertise and specialisation is an added advantage. As noted above, the CLC has always intervened together with other organisations with expertise in land policy and law, evictions, health matters, etc.

Conclusion

The enforcement of socio-economic rights is an ongoing process of struggle and engagement with different branches of government and civil society as a whole, which requires political will, responsiveness and commitment. Though litigation has been effective in enforcing socio-economic rights, it is certainly not a solution to all socio-economic wrongs and injustices. Civil society organisations and other institutions can most effectively influence the government and other parties to progressively implement socio-economic rights in such other ways as research, education and training, advocacy, monitoring and shadow reporting, naming and shaming, and social mobilisation. Furthermore, obtaining a positive judgment, particularly in relation to socio-economic rights, is only the first step, as ensuring effective implementation of the judgment is often a greater challenge.

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Age-based discrimination and the rights of the elderly in Uganda

Towards a new paradigm

Joe Oloka-Onyango

Uganda has a relatively large group of aged or elderly persons, also known as older persons. However, this group has not received serious attention until recently, arguably because, unlike women and the youth, it does not represent a significant, vocal (or vital) political constituency. Groups addressing the issues that concern older persons largely tend to adopt a welfarist approach rather than strategies underpinned by human rights. All in all, there are serious questions of human rights that are implicated in the situation of older persons.

This article analyses the issue of age-based discrimination in Uganda against the backdrop of the struggle by older persons for equal opportunities. It argues for a new paradigm in which the rights of older persons are given more serious and sustained consideration.

A conceptual framework

In Uganda, the number of older persons has doubled from 686 260 in 1991 to nearly 1 200 000 in 2005-2006 (Ministry of Gender, Labour and Social Development, 2007: 1). Thus, while older persons constitute a minority, they nevertheless form a significant percentage of the demographic profile in Uganda. Given these numbers, the key issue then becomes: in what kind of conceptual framework should the rights of older persons be placed?

There are two opposing responses. One is based on a market, or *laissez-faire*, orientation, in which pride of place is given to non-state actors and market forces to lay out the context for the realisation of economic, social and cultural rights (ESCRs) in general. State intervention is frowned upon as misplaced and arcane. ESCRs are regarded as "benefits" and not entitlements. Social groups, including older persons, are left largely to their own devices, or have to rely on charity.

The second response takes ESCRs as enforceable entitlements and emphasises the recognition of binding and enforceable state obligations. In other words, it emphasises the necessity of ensuring that all categories of persons – especially the most vulnerable, such as older persons – are protected against discrimination and abuse, have equal access to social services and facilities, and live their lives in dignity and security.

The globalisation of the market and neoliberal economic policies have resulted in restrictions on the welfare state and, as a consequence, put the rights of older persons in great peril.

The most important international document dealing with some of these issues is the Madrid International Plan of Action on Ageing (MIPAA), adopted by the United Nations in 2002. MIPAA comprises two parts – a non-binding political declaration and then the plan of action itself. Both parts note the rise in life expectancy and warn of the demographic implications of this, particularly in developing countries. The plan of action proposes a fairly comprehensive set of actions that states should take to ameliorate the plight of older persons.

MIPAA pays particular attention to issues of gender, social and economic disadvantage, and situations of emergency. It argues for extending the right to development to older persons, halving old-age poverty by 2025 and ending age-based discrimination. Overall, MIPAA is a progressive and comprehensive framework for protecting and realising the rights of older persons.

Apart from paying lip service to MIPAA and other international instruments and treaties, Uganda has given little attention to the rights of older persons until recently. This is particularly the case with respect to the human rights dimensions of the problem. However, before considering the case of Uganda in more detail, it would be helpful to briefly examine the situation of older persons in South Africa for comparative purposes.

Ageing and human rights: Lessons from South Africa

Of all African countries, South Africa has perhaps the most developed framework for addressing the rights of older persons. South Africa recognises that the past discriminatory practices excluded the majority of the black population from formal employment, and thus from social security and pension entitlements. To deal with this problem, a non-contributory old-age grant was introduced to assist older persons who have little or no income. Thus over two million individuals receive a monthly grant of R960 (approximately US$97) as of 2008 (*Government Gazette* No. 31630, November 2008; Wachipa, 2006: 7). While the amount may appear to be insubstantial, the old-age grant constitutes an important measure towards realising the right of older persons to have access to social assistance.

This right has been fortified by the Older Persons Act 13 of 2006, which was strongly influenced by MIPAA. Among other things, the Act aims to maintain and protect the status, well-being, safety and security of older persons, and to ensure the recognition of their rights.

Given that the issue of institutional care was of some prominence in South Africa, the Act also sought to shift the emphasis to community-based care and to ensure that older persons remained in their homes within the community for as long as possible. Despite that shift, one chapter of the law deals with what are described as "residential facilities", prescribing the specific rights of older persons within such institutions, and their establishment and operation, as well as providing for mechanisms to monitor them. Taken as a whole, the Act is an important example of a serious attempt to address the situation of older persons in contemporary Africa.

The situation in Uganda: The legal and policy framework

The most important document that provides an indication of the Ugandan state's perspective on the issue of older persons is the draft National Policy for Older Persons (Ministry of Gender, Labour and Social Development, 2007). Subtitled "Ageing with Security and Dignity", the draft policy seeks to ensure, for the first time, that the rights of older persons find a place within the overall policy framework of the government. While there are obviously many issues which affect the situation of older persons, the draft national policy seeks to prioritise the questions of poverty, social security, food security and nutrition, and health.

At the time of writing, the draft had not yet been adopted by the Cabinet. Nevertheless, it represents an important step in ensuring that the issue of the rights of older persons is given serious attention by the government.

However, a number of limitations are immediately apparent in the draft. In the first instance, it reflects a general bias towards ESCRs, in contrast to civil and political rights. The concentration on this category of rights is certainly welcome, given the general tendency not to regard such rights as enforceable. Furthermore, there is no doubt that for older persons, ESCRs are particularly important. At the same time, there is need for a holistic approach that emphasises the interconnectedness of both categories of rights.

Secondly, the draft states that it will promote "rights based programming by seeking to realize the rights of older persons who are often vulnerable". However, the rights-based approach is a concept that has not yet been fully internalised within the various organs and institutions of the state (Oloka-Onyango, 2006). Moreover, as is already clear from the preceding analysis, the issues affecting older persons are multisectoral, extending from the health and education sectors to those government departments concerned with infrastructure and physical services. The question then is: what actually needs to be done across all public sectors to effectively address the plight of older persons?

To be successful, the policy on older persons needs to be situated within a human rights context. One way in which the government has begun to implement its overall new thinking on the issue of the rights of older persons is through the framework of social protection, an issue that is taken up in the next section of this article.

New models of empowerment for older persons

The most prominent measure of social protection adopted in Africa has been cash transfers (Kakwani and Subbaroa, 2005). In Uganda, recent studies have begun to review the feasibility of a cash transfer scheme for older persons. Such

a scheme is currently being piloted by the Ministry of Gender in six districts to determine whether it can contribute to mitigating the effects of poverty.

Despite the plausibility of the cash transfer scheme, a number of concerns must be noted. The first is that the sources of funding are largely external (the Department for International Development of the British government being the most prominent). Indeed, the current model of cash transfers has been equated to "globalised charity", perpetuating aid dependency, in the absence of an obvious exit strategy. In other words, in the absence of external support, what would the chances be for the sustainability of such a scheme?

One may also question the very basis on which this scheme was designed. In the first instance, were the intended beneficiaries actively involved in the design of the scheme, or are they viewed merely as passive recipients of the largesse of the donors or the government? If there was consultation and involvement, what was the nature of that interaction? Who was consulted and how was the process executed?

Towards a new paradigm: Protection, participation and image

Protection refers to securing the physical, psychological and emotional safety of older persons, having regard to their unique vulnerability to abuse and ill treatment. Aside from the issue of social security, the major concern of older persons in Uganda with respect to protection has been with questions of health (specifically HIV/AIDS), poverty and nutrition. Older persons in general suffer from impaired mobility caused by orthopaedic problems in the legs, back and upper limbs. They are also afflicted by hypertension, cancer, cataracts, diabetes, dementia, Parkinsonism and other physical and mental ailments. Inadequate and poor nutrition is also a problem.

Participation refers to the need to establish a greater and more active role for older persons in society. In its broad sense, participation allows individuals an opportunity to articulate their views, needs and concerns. Curiously, there is no national council for older persons, while such councils have been established for the youth, women, people with disabilities and children. There are also many civil society groups and associations in Uganda, but very few, if any, have a focus on the rights of older persons. Very little use is made of retired older persons, with pressure coming from below by young people eager to fill their positions. It is important to note, however, that of all officially recognised vulnerable groups, it is only older persons who do not have special representation in Parliament, although they are represented in local councils.

Image refers to the need to define a more positive, less degrading and discriminatory perception of older persons and their capabilities. The draft national policy lays out the rationale for addressing this issue. It emphasises that "as people reach old age, they should enjoy dignified life and actively participate in economic, social, cultural and political life in their communities". It reiterates the government's determination to enhance the recognition of older persons and to eliminate all forms of neglect, abuse and violence.

There are many assumptions about the sexuality of older persons. Existing programmes on HIV/AIDS largely target adolescents, the youth and the middle-aged, ignoring the fact that many older people remain sexually active. Such issues as the menopause and impotence are vital to older people, yet they do not receive much attention.

Gender and ageing

The draft national policy acknowledges the truism that age affects women and men differently. Older women bear more burdens of ageing than men due to the different roles they play in society. Cultural practices of property inheritance and ownership affect the livelihoods of older women more adversely than older men. Gender roles as regards household chores and other responsibilities burden women more than men.

Yet there is very little systematic focus on the situation of older women. This is compounded by the lack of attention to the issue by mainstream women's rights groups as well as by women representatives in Parliament and other state bodies, not to mention organised labour. This needs to change. While there is a need to adopt a holistic approach to the problems of older persons, any intervention should fully consider the vulnerable position of older women in comparison to older men.

Conclusion

While there has been some progress on the issue of ageing, a great deal remains to be done, especially in the areas of participation, protection and image, as outlined above. The issues and causes underlying the disadvantages of older persons remain poorly defined. Consequently, the solutions adopted lack a comprehensive grounding in the lived conditions of older persons.

There is no doubt that the draft national policy will provide a more solid foundation on which the rights of older persons can be based. This will establish the basis for more concerted and directed action by the state to fulfil its human rights obligations with respect to this category of persons.

Following from this, specific legislation must be enacted to ensure a firm basis on which to secure the protection of the rights and autonomy of older persons. The government should give more serious attention to the formation of a national council for older persons, as well as to the issue of representation in Parliament. This would go some way in addressing the issue of the effective participation of older persons in public decisions, especially those affecting their lives.

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Enforcement of economic, social and cultural rights in Uganda

A brief overview

Christopher Mbazira

Uganda has ratified almost all the major regional and international instruments that protect economic, social and cultural rights (ESCRs). However, a reading of the Constitution of Uganda, 1995, and other laws shows that the rights have not been domesticated fully.

During the drafting of the Constitution, the Constitutional Commission was of the view that not all rights (referring to ESCRs) were amenable to judicial review. Consequently, only a few ESCRs were included in the Bill of Rights. These include the right to join or form trade unions, the right to strike, the protection of children from exploitation, and the equal treatment of men and women in employment, remuneration, economic opportunities and social development. The rest were incorporated as national objectives

and directive principles of state policy (NODPSPs), which are non-justiciable. The Constitution makes it very clear, though, that these principles are supposed to guide the state in applying or interpreting the Constitution or any other law and in making and implementing any policy or legislation.

To the extent that these principles can be used "in applying or interpreting the Constitution or any other law", they are justiciable. This position is strengthened by the 2005 amendment to the Constitution introducing article 8A. This article provides as follows:

> **8A National interest**
>
> (1) Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directives of state policy.
>
> (2) Parliament shall make relevant laws for purposes of giving full effect to clause (1) of this article.

This provision gives a very clear indication that the country is bound by the NODPSPs. Not only can they form part of human rights jurisprudence through interpretation, they may also be enforced through legislation.

This paper examines how the ESCRs have been enforced in Uganda. But first, a brief overview of the structure of the courts is provided.

Structure of the courts

The Supreme Court is the most superior and final court of appeal in Uganda. It is followed by the Court of Appeal, which also sits as the Constitutional Court. Below the Court of Appeal is the High Court, which has unlimited original jurisdiction in all matters. It also has appellate jurisdiction in respect of appeals from subordinate courts. In addition to the formal courts, Uganda has a unique system of local courts, called Local Council Courts, structured in accordance with a decentralised system of governance. Generally, these courts have jurisdiction in matters of a civil nature governed by customary law and those arising from by-laws and ordinances made under the Local Governments Act, Cap 243 Laws of Uganda, 2000.

Enforcement of ESCRs

Context

The Ugandan legal system has been very slow in responding to social problems. In spite of the changing social, economic and political context, the law has always lagged behind. This could be attributed to the many years of political instability during which Parliament and legislative processes were replaced with military proclamations. Nonetheless, the last two decades have witnessed relative stability and a continuous legislative process, exemplified by the promulgation of the 1995 Constitution. This period has seen the revision of a number of laws, even though many old laws remain on the statute book.

In the same context, evidence suggests that the government has failed to uphold the independence of the judiciary and has, in fact, sidelined it. It has failed to provide adequate resources in terms of logistics, finances and personnel. This is in addition to deliberate verbal assaults on the independence and integrity of the judiciary. For example, between 2004 and 2006, the government openly defied courts and on more than one occasion raided the sacrosanct premises of the High Court to try to rearrest suspects released on bail.

Another contextual factor relates to the expenses of litigation. Litigation in Uganda is very expensive, as is probably the case globally. This is caused by a shortage of legal skills, and delays in the delivery of justice resulting in part from the resource constraints in the judiciary. During the constitution-making process, many people expressed the view that justice had almost become a commodity to be bought and sold. Moreover, the ignorance of the majority of people regarding the law and their legal rights, coupled with the complexity of the judicial processes, has alienated the general populace from the courts.

It should be noted that the environment within which civil society organisations (CSOs) operate is also very constraining. CSOs are discouraged by the government, as well as by international financial institutions, from engaging in activities that are politically sensitive (Dicklitch, 1998: 10). CSOs also do not receive any financial support from the government, which, worse still, often expresses outright opposition to their activities.

The judiciary

The judiciary has begun to produce more pragmatic judgments and, generally speaking, is cultivating fertile ground for judicial activism. This has encouraged a number of CSOs and activists to seize the opportunity and bring to court cases challenging violations of environmental standards, for instance.

Litigation has also been encouraged by the provisions of article 50 of the Constitution, which

entitles any person who claims that a fundamental or other right or freedom guaranteed by the Constitution has been infringed or threatened to apply to a competent court for redress. Under this section, a person or organisation may also bring an action in respect of a violation of another person's or group's human rights. This provision has opened the gates to litigation, particularly public interest litigation (Tumwine-Mukubwa, 1999: 106).

Article 45 opens up the space for generous interpretation of the provisions of the Constitution and for the use of international human rights law to bolster the Bill of Rights.

A number of decisions have been handed down on article 50. For example, in *British American Tobacco* (BAT) *v The Environment Action Network* (TEAN) Civil Application 27/2003, the High Court, inspired by the South African Constitution, held:

> It is elementary that "persons", "organizations" and "groups of persons" can be read in Article 50(2) of the Constitution to include "public interest litigants", as well as all the litigants listed down in (a) to (e) of Section 38 of the South African Constitution. In fact, the only difference between the South African provision (i.e. Section 38) and our provision (under Article 50(2)) is that the former is detailed and the latter is not. That is my considered view based on the reality that there are in our society persons and groups of persons whose interest is not the same as the interest of those who Lord Diplock referred to as "spirited" persons or groups of persons who may feel obliged to represent them i.e. those persons or groups of persons acting in the public interest.

Such progressive decisions are also reflected in the approach to the interpretation of the Bill of Rights. Article 2 makes the Constitution the supreme law of Uganda, binding on all authorities and persons. The Constitution prevails over any other law or custom that is inconsistent with it. Article 45 states that the rights expressly recognised in the Constitution do not exclude those rights which are not specifically recognised. This opens up the space for generous interpretation of the provisions of the Constitution and for the use of international human rights law to bolster the Bill of Rights.

The Constitution also contains a general limitation under which any limitation of rights and freedoms must be acceptable and demonstrably justifiable in a free and democratic society (article 43).

Ugandan courts have emphasised that the Constitution requires different methods of interpretation from those employed for construing ordinary statutes. For example, in the case of *Attorney General v Major General Tinyefuza* Constitutional Appeal No 1 of 1997, the Supreme Court cited with approval a number of authorities from other jurisdictions that emphasise the unique status of a constitution.

The Constitutional Court has also stressed that the Constitution must be read as a whole and that no particular provision should be read in isolation or destroy another (see *Paul Kafero and Another v The Electoral Commission & Another* Constitutional Petition No 22 of 2006).

Furthermore, a number of cases show that some judges are prepared to read socio-economic rights into certain civil and political rights by drawing from the NODPSPs. The Constitutional Court in *Salvatori Abuki and Another v Attorney General* Constitutional Case No 2 of 1997, for instance, interpreted the right to human dignity and the prohibition of inhuman treatment to include elements of ESCRs. The petitioners had been convicted of practising witchcraft and being in possession of articles for witchcraft, contrary to the provisions of the Witchcraft Act, Cap 108 Laws of Uganda, 1964 (now Cap 124 Laws of Uganda 2000). As a result, they were sentenced to 22 and 36 months of imprisonment respectively and banished from their homes for ten years after serving their sentences. In the Constitutional Court, it was argued for the petitioners that the Witchcraft Act infringed various articles of the Constitution, including 21(1) (freedom from discrimination on religious grounds, among others), 24 (human dignity and protection from inhuman treatment), 26 (protection of property rights), 28 (right to a fair hearing) and 29 (freedom of movement).

Interestingly, it was argued on behalf of the petitioners that the banishment was inhumane, cruel and degrading as it deprived them of their livelihood. Justice Tabaro responded by quoting from the South African case of *S v Makwanyane* 1995 (6) *BCLR* 665 (CC) and emphasising the African value of *ubuntu*, a concept which embodies "humanness,

social justice and fairness and permeates fundamental human rights". In conclusion, he held that banishment constituted a violation of the right to dignity and of the notion of *ubuntu*, in that it would have had the effect of reducing the petitioners to beggars. In a very proactive manner, Justice Egonda-Ntende drew on an Indian case and the NODPSPs to hold that banishment would threaten the right to life or lead to the loss of life through deprivation of shelter, food and essential sustenance.

Conclusion

The constitutionalisation of ESCRs in many countries and their judicial enforcement even where they have not been constitutionalised have elevated these rights to justiciable status. The Ugandan Constitution protects ESCRs in a limited fashion. In spite of this, some cases demonstrate that the existing constitutional provisions may be interpreted innovatively to boost the protection of these rights. This notwithstanding, the courts still have a long way to go in developing remedies for the redress of violations of the fundamental rights.

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Protecting the right of access to malaria treatment in Uganda

Ben Twinomugisha

Malaria is a parasitic disease transmitted through the bite of a female anopheles mosquito. Over 80% of malaria deaths occur in Africa (World Bank, 2005). There are approximately 70 000 to 110 000 deaths yearly in Uganda as a result of malaria, and 25-40% of all outpatient visits and 9-14% of inpatient deaths are malaria-related (USAID, 2006).

Malaria severely impacts on the ability to work and causes absenteeism from school. It is both a cause and a consequence of poverty and its impact is more severely felt by the poor, who are unable to afford preventive measures and medical treatment.

This article teases out the extent to which the legal and policy frameworks related to the fight against malaria enhance or inhibit protection of the right to health generally and the right of access to malaria treatment

in particular. It also explores the modalities through which the relevant actors can be held accountable for violations of these rights.

Legal and policy framework

Uganda's legal framework does not specifically provide for the right to health. However, the 1995 Constitution contains some provisions which are relevant to this right.

The Constitution obliges the state to "take all practical measures to ensure the provision of medical services to the population" and to ensure that all Ugandans enjoy "rights and opportunities and access to ... health services" (Objectives XX and XIV(b) of the National Objectives and Directive Principles of State Policy (NODPSPs)). Although these provisions are in the NODPSPs, which are regarded as non-justiciable, there is emerging jurisprudence to show that the NODPSPs may be justiciable (see, for example, the case of *Keshavananda Bharati v State of Kerala* (1973) 4 SCC 225 Supreme Court of India). Some commentators have also pointed out that such principles, though not justiciable, are benchmarks for measuring the performance of the government (Okere, 1983). Thus, a bold and creative judiciary may vest NODPSPs with legal significance.

In addition, the Ugandan Constitution guarantees the right to life in article 22(1), which has implications for the right to health if interpreted appropriately. The state has a duty to take positive measures to protect and ensure the right to life through the prevention of death. The United Nations (UN) Human Rights Committee has explained that the protection of the right to life requires that states adopt positive measures aimed at, for example, the reduction of infant mortality and improvement of life expectancy (General Comment No 6, UN doc. HRI/GEN/1/Rev.6 at 129 (2003), para 5). It has also been held that a denial of access to health services and treatment may have serious ramifications for the right to life (see for instance, *Paschim Banga Khet Mazdoor Sanity and Others v State of West Bengal and Another* (1996) 4 SCC 37 Supreme Court of India; *Glenda Lopez v Instituto Venezulano de Seguros Sociales* (Constitutional Chamber 1997) Supreme Court of Venezuela).

Some judges in Uganda have also breathed life into the constitutional provision on the right to life. For example, in *Salvatori Abuki and Another v Attorney General* (Constitutional Petition 2/1997), the right to life was found to be threatened by the deprivation of shelter, food and essential sustenance.

The Constitution also provides for other rights not specifically mentioned. The respective provision reads:

> The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned (article 45).

The right to health care is also recognised in international and regional instruments to which Uganda is a party. It can thus be argued that the right is covered under those rights not specifically included in the Constitution. Article 20(2) of the Constitution obliges all organs and agencies of government and all persons to respect, uphold and promote human rights. On the basis of this provision, the state must respect the right to health care by adopting laws and policies that enhance access to malaria treatment.

With regard to national legislation, the main legislation on the protection of public health is the Public Health Act, Cap 281 Laws of Uganda, 2000. This Act has provisions that may be used in the fight against malaria. It empowers the Minister of Health to declare any part of Uganda that appears to be threatened by any disease an infected area. The Minister may also make rules for the purpose of destroying mosquitoes (section 29(j)). Part XI of the Act is dedicated to the prevention and destruction of mosquitoes. This part imposes obligations on owners and occupiers of premises to clear bushes and to ensure that such places as yards, cesspits and wells do not become breeding places for mosquitoes (sections 93-100). Certain actions in contravention of these provisions may be treated as nuisances (sections 29(j) and 57(h),(i)) and the culprit may be ordered to remove or abate the nuisance (sections 58-61).

One of the major weaknesses of the Act in general, and Part XI in particular, is that there is over-reliance on criminal sanctions as an enforcement mechanism. It cannot be denied that criminal law is a powerful tool that may serve several societal goals and may express a collective social view that a particular behaviour

is wrong. Criminal law may also be a means through which a social group obtains social validation of its views. However, criminal penalties may not be deterrent enough to achieve their intended purpose.

The enforcement of these provisions may also threaten some civil and political rights. The criminalisation of the acts or omissions of owners or occupiers of premises may, for instance, threaten the right to privacy as guaranteed by the Constitution (article 27) and international instruments to which Uganda is a party. Although this right is not absolute, its limitation must be proportional to the end sought and must be necessary in the circumstances of any given case (see *Toonen v Australia*, Communication 488/1992, UN doc. CCPR/C/50/D/488/1992 (1994) para 8.4). It must also not be "beyond what is acceptable and demonstrably justifiable in a free and democratic society" in terms of the Constitution (article 43(2)(c)).

It should also be noted that the Act is generally obsolete, having failed to keep pace with rapid and extensive changes in science and technology in prevention, treatment and care.

The National Drug Policy and Authority Act, Cap 206 Laws of Uganda, 2000 establishes the national drug policy and a National Drug Authority (NDA) to ensure the availability, at all times, of essential, efficacious and cost-effective drugs to the entire population of Uganda (section 2(1)(a)). The Act requires a continuous review of the needs, knowledge and resources regarding essential drugs (section 2(1)(b)). The NDA is charged with the implementation of the drug policy; in particular, to:

- estimate drug needs so that the needs are met as economically as possible;
- control the importation, exportation and sale of pharmaceuticals;
- promote and control the local production of essential drugs;
- control the quality of drugs; and
- promote the rational use of drugs through appropriate professional training (sections 5(a)-(k)).

The NDA and other regulatory and enforcement agencies have to prevent the importation or sale of substandard and fake anti-malaria drugs.

Another piece of legislation relevant to the right of access to malaria treatment is the National Medical Stores Act, Cap 206 Laws of Uganda, 2000. This Act establishes the National Medical Stores (NMS), charged with responsibility to ensure "the efficient and economical procurement of medicines and of certain other medical supplies of good quality primarily to the public health services" (section 4(a)). This is in addition to securing the safe and efficient storage, administration, and distribution of drugs (section 4 (b)). The NMS has a very important role of ensuring that drugs, including those for malaria treatment, are made available to public health facilities including hospitals and clinics. The NMS also has the duty to advise the NDA on the "estimation of drug needs and the distribution and use of medicines in the public service" (section 5). However, going by recent media reports, the NMS has not performed its statutory functions satisfactorily (Simson and Nabayunga, 2006). It has been reported that the NMS has been distributing expired drugs and drugs that are very close to their use-by dates (*The Daily Monitor*, 2008).

It should be noted that unlike the Medical and Dental Practitioners Act, Cap 272 Laws of Uganda, 2000, which establishes a council to deal with malpractices by the relevant health professionals (section 2-3), the National Medical Stores Act omits the establishment of such a body. Such a professional body could have been used to demand accountability from the board of directors of the corporation. The Ministry of Health is merely on the receiving end of drugs from the NMS, whose officials may not be subjected to ethical accountability by their peers.

At a policy level, the UN Committee on Economic, Social and Cultural Rights (CESCR) has observed that the realisation of the right to health and its components may be pursued through numerous complementary approaches, such as the formulation of health policies or the implementation of health programmes. These policies and programmes must be adequately informed by the right to health. According to the CESCR, it is incumbent upon states parties to ensure that there is a detailed plan for realising the right to health, including the provision of health care (General Comment No 14, UN doc. E/C.12/2000/4

(2000), paras 1 and 36). States are required to set appropriate benchmarks in relation to each indicator (paras 57–8). To this end, Uganda has developed a number of policies and programmes, with various indicators and benchmarks indicating how the state intends to tackle the malaria burden.

The Poverty Eradication Action Plan (PEAP)

The PEAP is Uganda's national planning framework. Its main purpose is to provide an overarching framework to eradicate poverty, within which sectors such as the Ministry of Health should develop detailed plans.

The Health Sector Strategic Plan (HSSP)

As one of the responses, the HSSP envisages the employment of preventive and case management interventions to tackle malaria. The plan outlines the indicators to measure the progressive realisation of the obligation to control malaria. The specific targets of the HSSP include:

- increase the proportion of pregnant women who have completed their second dose of intermittent preventive treatment (IPT2) from 34% to 80%;
- increase the proportion of households having at least one insecticide-treated net from 15% to 70%;
- increase the proportion of children under five getting correct treatment within 24 hours of the onset of symptoms from 25% to 80%; and
- reduce the case fatality rate among malaria inpatients aged under five from 4% to 2%.

The Uganda Malaria Control Strategic Plan (UMCSP)

The vision of the UMCSP 2005/06 to 2009/10 is that by 2010, malaria will no longer be the major cause of illness and death in Uganda and there will be universal access to malaria prevention as well as treatment. The plan focuses on the most vulnerable groups such as young children and pregnant women in highly endemic areas, internally displaced persons and persons living with HIV/AIDS. The specific targets to be achieved by the plan by 2010 include:

- increase the proportion of under-five children receiving correct treatment within 24 hours of the onset of symptoms from 55% to 85%;
- increase the proportion of pregnant women attending antenatal care services who have received IPT2 from 33% to 85%; and
- reduce the case fatality rate among malaria inpatients from 3% to 2%.

The implementation of the policy framework has encountered a number of challenges, including the inadequate funding of the health sector, resulting in a shortage of medicine. The UMCSP also takes a gender-neutral approach and, as a result, it fails to appreciate that women are affected by malaria disproportionately.

Strategies for the protection and promotion of the right

The protection of the right to health – including the right of access to malaria treatment – can be achieved through legislative, judicial, executive and other related strategies.

Pursuing a rights-based approach

Policy-makers and implementers should be guided by a human-rights-based approach in the execution of their obligations. This approach requires that poverty issues such as access to malaria treatment should be treated as human rights issues because of their importance to the life of individuals and groups (Tindifa, 2007; Hausermann, 1998). It means that malaria control or eradication is not simply a moral obligation but also a legal obligation. This is based on the principles of the human person as the subject of development, public participation, equality and non-discrimination, accountability and the indivisibility of all rights (Hausermann, 1998).

Increased funding for health

The state should provide adequate resources to ensure the timely procurement of generic malaria drugs so that their supply is not compromised. Parallel importation of generic pharmaceuticals may lower the prices of drugs. In Kenya, for example, the parallel importation of generics by the non-profit sector resulted in a fall in prices by 40% to 65% (Lettington and Munyi, 2008).

Tackling corruption

There is widespread corruption in the health sector (Twinomugisha, 2007). Recently, for example, money from the Global Fund to Fight AIDS, Tuberculosis and Malaria was misappropriated. One way of tackling corruption in the health sector is through the labelling of government-procured drugs to ensure that they do not end up

in private clinics. Improving health workers' remuneration and other working conditions would also go a long way towards eradicating corruption.

Increasing awareness

There is a need to raise awareness about the human rights implications of policies, focusing in particular on the right to health, among legislators, judges, human rights commissioners, pharmaceutical companies and civil society. These groups need to gain knowledge about strategies for malaria control generally and malaria treatment in particular so that they are equipped with the skills necessary for them to perform their roles adequately.

International reporting obligations

One of the principal mechanisms by which treaty bodies monitor compliance by states parties with their obligations under human rights treaties is through a mechanism of state reporting. Unfortunately, Uganda has not complied with its reporting obligations under the International Covenant on Economic, Social and Cultural Rights, 1966. As a result, the state has not benefited from the introspection that the state reporting process entails, nor from the comments and insights of the CESCR.

Utilising TRIPS flexibilities

Uganda has insufficient technical expertise and infrastructural capacity to implement most of the flexibilities under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). As a matter of fact, the country has a low manufacturing capacity, with only six active pharmaceutical manufacturing companies. Recently, Quality Chemicals Limited, a privately owned company, commenced local production of generic antiretrovirals (ARVs), and it also intends to produce anti-malaria drugs (see *Medical News Today*, 2008). Uganda can take advantage of the East African Community, which comprises Uganda, Kenya, Tanzania, Rwanda and Burundi. Regional economic blocs, half of whose members are states from the ranks of the least developed countries, are eligible to be treated as a "domestic market" for purposes of supplying generic medicines under a compulsory license (WTO General Council Decision of 30 August 2003, para 6).

Legislative reform

Socio-economic rights should be directly incorporated – as justiciable rights – in the Bill of Rights of the Constitution. There is an urgent need to explicitly recognise the right to health care in the Constitution. This should be followed by framework legislation that reiterates the state's obligations to respect, protect, promote and fulfil the right to health. The framework legislation should domesticate all the international and regional human rights instruments recognising the right to health that Uganda has ratified. As the CESCR has observed, the incorporation of these instruments in the domestic legal order can significantly enhance the scope and effectiveness of judicial or other appropriate remedies (General Comment No 14, para 60).

Judicial strategies

The judiciary can play a significant role in the struggle to realise the right to health generally and the right of access to malaria treatment in particular. Judicial strategies are important in a number of respects. Courts can clarify the nature, scope and content of human rights and their inherent obligations. The Constitution also empowers the Ugandan Human Rights Commission to "investigate, at its own initiative or on a complaint made by a person or group of persons against the violation of any human rights" (article 52(a)). It also has powers to recommend to Parliament effective measures to promote human rights (article 52(c)).

The role of civil society

Civil society organisations should follow up on how the allocated money for health has been utilised, especially for priority areas like malaria treatment. They may challenge the state to demonstrate that it has used all the available resources at its disposal maximally towards the realisation of the right of access to malaria treatment. At the same time, they may also spearhead public interest litigation. This is particularly important given that potential litigants may not be aware of their rights, let alone able to meet legal expenses.

Conclusion

Although Uganda has tried to provide access to malarial treatment, it has not met all its obligations. Neither the Ugandan Constitution nor any legislation expressly provides for the right to health and its various components. There is a need for an explicit recognition

of this right in the Constitution as well as for framework legislation on this right.

A number of strategies have been highlighted in this article that could enhance the protection and promotion of the right to health, including the right of access to malaria treatment. In addition, policy-makers must incorporate a gender perspective in the design and implementation of programmes and other interventions on malaria control. For these programmes and interventions to have a chance of success, the intended beneficiaries must be actively involved in their design, implementation, monitoring and evaluation.

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South Africa in 2009: What is in store for socio-economic rights?

As has become an annual custom, the President opened Parliament for its final term before the 2009 election with his state of the nation address. A week later, the Minister of Finance delivered the budget speech.

Both speeches were delivered in a gloomy economic climate owing to the collapse of financial systems in dominant economies such as those of the United States and the United Kingdom, affecting demand for commodities (platinum and gold). The effects have begun to be felt in South Africa, with major mining and motor vehicle companies announcing plans to lay off thousands of workers. As these workers become unemployed, some, if not most, will have to fall back on social services. This gloomy situation has been exacerbated by price fixing, particularly among dairy and flour milling companies, resulting in exorbitant prices for basic foodstuffs such as milk and bread that make them unaffordable to the poor (Peters, 2009).

Some key commitments and achievements pertaining to socio-economic rights in both speeches are summarised below.

The state of the nation address

The President acknowledged that the "well-being of our society depends, critically, on the progress we make in expanding the nation's wealth and ensuring that the benefits of economic growth are shared by the people as a whole".

He stated that in the coming few months, pending the national and provincial elections, the government would try to complete its mandate. Among the many detailed projects contained in the government's programme of action, it would pay particular attention to:

- creating the capacity necessary for improved service delivery and better integration within and across all spheres of government;
- continuing the "war on poverty" campaign and finalising the draft of the comprehensive anti-poverty strategy;
- implementing the comprehensive programme to eliminate the incidence of cholera in various parts of the country; and
- continuing the research and consultations on the comprehensive social security system, including national health insurance.

The President referred to the progress that had been made in the area of poverty alleviation. He also noted advances and achievements in the areas of housing, social security, health, water and sanitation and land reform, as well as challenges encountered in these areas.

Progress on poverty alleviation

The President referred to a recent study by a team of academics at the University of Stellenbosch led by Servaas van der Berg, which attested to the strides made by government on poverty reduction, particularly income deprivation. The study, as quoted by the President, found that

> money-metric poverty declined substantially since the turn of the century. The reduction is to a large extent due to a dramatic expansion in social grants expenditure from 2002 onwards. This improvement is mirrored in access to basic services – a rapid decline in asset poverty even preceded the decline in money-metric poverty.

Furthermore, it found that

> [a]mong households that include children (defined as those aged 17 and younger), the number of households reporting that a child went hungry declined dramatically (from just over 31 per cent to 16 per cent) between 2002 and 2006. This suggests that the poverty situation has improved remarkably, particularly among people experiencing the greatest degree of welfare deprivation. The prevalence of hunger among children has virtually halved over four years.

However, it concluded that

> although the reductions in poverty have been substantial, aggregate inequality increased during the 1990s [and] the dynamics underlying the poverty and inequality trends determine the broad policy outlook … [P]overty has decreased since the transition, but … inequality has not improved.

Housing and land reform

- The asset base of the poor has been improved in the form of housing. Approximately 2.6 million subsidised houses were provided.
- The land redistribution programme and post-settlement support need to be improved and fast-tracked.

Social security

- The number of grant beneficiaries was 2.5 million in 1999 and increased to 12.4 million in 2008.
- There were 34 000 child support grant beneficiaries in 1999 and 8.1 million in 2008.
- The age of children receiving state support grants is to be extended over time from 15 to 18 years.

Water and sanitation

- Access to potable water improved from 62% in 1996 to 88% in 2008.
- Access to sanitary facilities improved from 52% in 1996 to 73% in 2007.
- Difficulties with bulk infrastructure affected the 2007 deadline to eliminate bucket toilets.
- The government has committed itself to eradicating bucket toilets and achieving universal access to potable water by 2014.

Health and HIV/AIDS

- About 95% of South Africans now live within five kilometres of a health facility.
- Child immunisation coverage has increased to about 85%.
- Over 690 000 patients are now on antiretroviral treatment.
- However, many health facilities do not always have the required medicines, appropriate staffing levels and a constant supply of basic services such as clean running water and electricity.
- In some of these facilities, management and staff attitudes need improvement.

Education

- There has been a drop in the educator–learner ratio.
- The country has achieved almost universal access to enrolment at primary school level.
- However, there is an unacceptably high drop-out rate, particularly at secondary and tertiary levels.
- The educational system has yet to produce the kinds of skills needed by society.
- Infrastructure and administrative and teacher capacity remain least impressive in poor areas.

Budget speech

The Minister of Finance stated that this budget was intended, among other things, to advance the objectives of:

- protecting the poor;
- sustaining employment growth and expanding training opportunities; and
- building economic capacity and promoting investment.

Housing

Housing and the eradication of informal settlements remained at the forefront of the government's

infrastructure investment plans, and had a significant impact on both employment creation and poverty reduction. The budget provides for:

- an additional R3.7 billion for low-income housing projects;
- infrastructure grants to municipalities totaling R67 billion over the next three years; and
- R45 billion for the Breaking New Ground housing programme.

Education

Education accounts for R140.4 billion in the spending plans of provinces and national government for 2008–2009, and key priorities include:

- extending the no-fee schools policy from the present 40% of schools to 60%;
- R4 billion towards expanding the school nutrition programme;
- reducing average class sizes in schools serving lower-income communities;
- increasing expenditure on school buildings; and
- strengthening teacher training programmes.

Health

An additional R1.8 billion was budgeted for 2008–2009. The priorities include:

- introducing three new child vaccines that have proved effective in preventing infant and child deaths;
- additional resources to the tuberculosis and HIV/AIDS programmes;
- extending the screening of pregnant mothers coming into the public health system;
- providing for an increase in the number of people on antiretroviral programmes from the current 630 000 to 1.4 million by 2011–2012; and
- facilitating the completion of the 31 hospitals under construction, 18 of which will be completed over the next three years.

Social security

An additional R13.2 billion has been allocated to social grants. Plans in this area include:

- increasing old age, disability and care dependency grants by R50 to R1 010 a month from April 2009;
- raising the child support grant by R10 to R240 a month and the foster care grant by R30 to R680 a month from April 2009;
- extending the child support grant to children aged 15 years from January 2009; and
- considering the extension of the child support grant to children up to 18 years.

Land and rural development

Key to transforming rural livelihoods is to enable small-scale farmers to use land better and more productively. The government has earmarked:

- R20.3 billion for land reform and land restitution over the next three years; and
- R1.8 billion for rural development and small farmer support.

Basic services

The government has set aside:

- R2.5 billion to municipalities for basic services;
- R5.3 billion for municipal infrastructure and bulk water systems; and
- R1 billion for electricity demand management.

Conclusion

The two documents discussed above not only make bold promises, but also commit the Treasury to programmes that, if implemented, would radically improve the lives of the poor and the marginalised in South Africa. It is particularly encouraging that the government has committed additional funding to the competition authorities (which include the Competition Commission) to stamp out price fixing, especially among companies producing basic foodstuffs.

Bearing in mind the current global financial crisis and its impact on the country's gross domestic product growth prospects, it is disappointing that there still is no concrete plan to extend the age limit of the child support grant to 18 years, beyond the familiar promises. Finally, it must be emphasised that budgeting generously for social programmes is only the first step. As the Minister conceded in the budget speech:

> The quantum of the rands and cents allocated to these programmes is not what provides relief. No, we can only be satisfied when we know that the quality of life of the poor is improving, that children are being properly educated, that learners have access to food in schools, that mothers visiting clinics get proper and dignified treatment …

This summary was prepared by **Siyambonga Heleba**, a researcher in the Socio-Economic Rights Project.

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Housing rights of "slum" dwellers at stake

Lilian Chenwi

Abahlali baseMjondolo Movement SA and Another v Premier of KwaZulu-Natal and Others Case No 1874/08 (Durban High Court) (*Slums Act* case)

On 27 January 2009, the High Court (Durban and Coast Local Division) handed down judgment in the *Slums Act* case. The case concerned a controversial piece of legislation, the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 (Slums Act), which aims to eliminate slums in KwaZulu-Natal.

The Slums Act

The Slums Act came into force in October 2007. "Slum" is defined in the Act as "overcrowded or squalid land or buildings occupied by predominantly indigent or poor persons, without security of tenure and with poor or non-existent infrastructure or sanitation" (section 1). The Act aims to:

- eliminate slums;
- prevent the re-emergence of slums;
- promote co-operation between the department in the Provincial Government of KwaZulu-Natal responsible for housing (the department) and municipalities in the elimination of slums;
- promote co-operation between the department and municipalities in the prevention of the re-emergence of slums;
- monitor the performance of the department and municipalities in the elimination and prevention of the re-emergence of slums; and
- improve the living conditions of the communities in the province (section 3).

It prohibits unlawful occupation (section 4) and the use of substandard accommodation for financial benefit (section 5). According to the Act, a building is not fit for human habitation if it does not have access to natural light, running water and ablution facilities, if it is a health nuisance as defined in the National Health Act 61 of 2003, or if it is in a serious state of neglect or disrepair (section 5). Where there is unlawful occupation, the occupier may be evicted after the procedure set out in section 4, 5 or 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) has been followed (section 4(2). In the case of substandard accommodation, a municipality is required to give notice to the owner or person in charge to institute eviction proceedings, failing which the municipality may institute such proceedings itself (section 6).

In addition, a municipality may institute proceedings for the eviction of an unlawful occupier from land or buildings falling within its jurisdiction if this is in the public interest (section 10). Should a municipality decide to make alternative land or buildings available to persons relocated from slums, it "must take reasonable measures, within its available resources, to ensure that such alternative land or building is in reasonable proximity to one or more economic centres" (section 12). Furthermore, the Slums Act enables municipalities to set up transit areas for people evicted from their homes, which must have suitable accommodation and be equipped with the necessary basic infrastructure and sanitation (section 13).

Owners or persons in charge of land or buildings are required to take reasonable steps to prevent unlawful occupation. Failure to do so constitutes an offence (section 15). They are also required to institute proceedings for the eviction of unlawful occupiers. If they do not, a municipality "must" institute such proceedings (section 16).

One of the problematic features of the Slums Act is that it makes it an offence to unlawfully interfere with measures aimed at preventing unlawful occupation (section 20). Thus, it criminalises (non-legal) attempts to stop evictions. An offender can be fined up to R20 000 or imprisoned for up to five years or both (section 21).

The passing of the Slums Act was not welcomed by informal settlement dwellers and some civil society organisations and academics, especially as it encourages evictions, makes it mandatory for landowners to institute eviction proceedings and makes opposing evictions a criminal offence.

The Slums Act case

Following the enactment of the Slums Act, Abahlali baseMjondolo, an association working towards improving the lives and living conditions of shack dwellers in South Africa, instituted legal action before the High Court, asking it to declare the Act unconstitutional. The president of Abahlali baseMjondolo joined as the second applicant.

The respondents in the case were the Premier of the Province of KwaZulu-Natal, the MEC for Local Government, Housing and Traditional Affairs in KwaZulu-Natal, the Minister of Housing, and the Minister of Land Affairs.

Arguments of the applicants

The applicants challenged the constitutionality of the Slums Act on several grounds. First, they argued that the provincial government did not have the competency to pass it as the regulation of evictions, land tenure and access to land fell outside its legislative competence (para 4). Only the national government, they argued, was competent to legislate on these matters, so the provincial government had exceeded its constitutional powers by passing the Slums Act (para 6).

It was argued in the alternative that sections 9, 11, 12, 13 and 16 of the Slums Act were unreasonable and therefore inconsistent with section 26(2) of the Constitution, which requires the state to take reasonable measures to progressively realise the right of access to adequate housing (paras 4 and 7). These sections of the Slums Act give municipalities an open-ended discretion whether to upgrade informal settlements and whether to provide alternative accommodation, notwithstanding the constitutional obligation on the state to provide alternative accommodation where an eviction would result in homelessness (para 10). The applicants put it that the failure of the Slums Act to provide guidance to municipalities on how to exercise this discretion rendered the Act unconstitutional and invalid (para 10).

The applicants argued also that section 16 (allowing for the eviction of unlawful occupiers) was unconstitutional on the following grounds: it undermined security of tenure; it mandated the institution of eviction proceedings without consideration of the particular circumstances of prospective evictees; it did not require the state to provide alternative accommodation where the eviction would result in homelessness; and it did not promote the constitutional requirement of meaningful engagement, because the Act provided for such engagement after the decision to evict had already been made (para 9). The applicants argued that Chapter 13 of the National Housing Code provided for the upgrading of informal settlements, which had not been implemented in Durban (para 8). They also contended the Slums Act was "irreconcilable" with the National Housing Code (para 12).

The applicants further asserted that section 16 of the Slums Act was in conflict with the provisions of the Housing Act 107 of 1997 because the latter required that informal settlements be upgraded and that evictions should be sought as a last resort, while the former laid emphasis on evictions. Secondly, the Housing Act and decisions of the Constitutional Court required that there be meaningful engagement with the affected persons before an eviction order could be granted (see, for example, *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC)). It was also argued that section 16 of the Slums Act was inconsistent with the provisions of PIE in that it required the institution of eviction proceedings while PIE did not (para 11).

The applicants submitted that the National Housing Act and PIE provisions had to prevail over the provisions of the Slums Act, since they had been enacted to give effect to section 26 of the Constitution and provide uniformity in the areas of housing and evictions (para 12).

Arguments of the respondents

The respondents answered that the Slums Act was a measure to improve the living conditions in slums (para 14). They argued that the Act was in fact consistent with the government's international and constitutional obligations, and national and provincial housing laws and policies. They submitted that should the Court find the Act was inconsistent with section 26(2) of the Constitution, the Act should be held to be a justifiable limitation in terms of section 36(2) of the Constitution (para 14)

With regard to the applicants' argument that the Slums Act was beyond the legislative mandate of the province, the respondents argued that the Act related to housing, which was a concurrent competence of national and provincial government (para 16).

Concerning the argument on the wide discretion given to municipalities, the respondents maintained that municipalities were bound by national and provincial housing legislation and policies (para 18). They added that the Act was not a provincial plan to eradicate slums and that its reasonableness must be assessed against the principles laid down in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (*Grootboom*) (paras 19-20)

The respondents submitted further that meaningful engagement was a constitutional imperative, implying that the Slums Act did require consultation (para 21). They argued that there was no conflict between the Slums Act and such national legislation as PIE and the National Housing Code (para 22).

The Court held that it could not strike down the Slums Act without first giving the opportunity to implement it.

The decision

Judge Tshabalala handed down the High Court judgment, beginning by acknowledging the plight of those who were without adequate housing and the fact that the living conditions in slums were a universal problem (para 27).

The Court held that it could not strike down the Slums Act without first giving the opportunity to implement it. In the words of the Court:

> The province of KwaZulu-Natal must be applauded for attempting to deal with the problem of slums and slum conditions. This is the first province to have adopted legislation such as the Slums Act. The Slums Act makes things more orderly in this province and the Act must be given a chance to show off its potential to help deal with [the] problem of slums and slum conditions. This Court cannot strike the Act down before it has even [been] properly implemented (para 39)

With regard to whether the province had the competence to pass the Act, the Court observed that the main objective of the Act was housing and that land could not be dissociated from housing. Based on this, it did not find the argument that the Act was *ultra vires* to be valid (para 32).

The Court proceeded to consider whether the Slums Act violated section 26(2) of the Constitution. With reference to the *Grootboom* judgment, it stated that the question was whether the measures taken by the state to realise the right were reasonable. It noted that the Housing Act had been passed to give effect to the right of access to adequate housing. It required provincial governments to promote and facilitate the provision of adequate housing in their provinces within the framework of the national policy.

The Slums Act, the Court observed, provided a legislative framework for the implementation of housing policies in KwaZulu-Natal. It pointed out that the Act tried to facilitate the implementation of housing policies pursuant to national and provincial legislation (para 34). The Court added that the Slums Act did not duplicate PIE as the applicants contended, since it aimed to assist provincial and local governments in the provision of housing (para 34). It then found that the Slums Act constituted "a reasonable legislative response to deal with the plight of the vulnerable in our society" (para 36).

The Court also found no merit in the argument that the Slums Act was in conflict with national legislation, since the Act endorsed PIE and other national legislation (para 37). According to the Court, "the Slums Act does not envisage a random eviction of people", and "evictions will be carried out with a due consideration of whether it is just and equitable to do so" (para 37). Incorporating PIE in the Act implied that the relevant circumstances set out in PIE would be considered (para 38).

Some observations

The High Court's decision could result in the removal of poor people from areas within reach of their sources of livelihood, putting their housing rights at stake. UN-Habitat has argued that

> *in-situ* slum upgrading is more effective than resettlement of slum dwellers and should be the norm in most slum-upgrading projects and programmes. Forced eviction and demolition of slums, as well as resettlement of slum dwellers create more problems than they solve. Eradication and relocation destroys, unnecessarily, a large stock of housing affordable to the urban poor and the new housing provided has frequently turned out to be unaffordable, with the result that relocated households move back into slum accommodation. Resettlement also frequently destroys the proximity of slum dwellers to their

> employment sources. Relocation or involuntary resettlement of slum dwellers should, as far as possible, be avoided ... (UN-Habitat, 2003).

The problems highlighted by UN-Habitat are not alien to South Africa.

The Slums Act envisages a one dimensional solution to slums in KwaZulu-Natal – namely, relocation. It does not give room for the consideration of *in situ* upgrading, which would maintain community networks, minimise disruption and enhance community participation in finding durable solutions. Chapter 13 of the National Housing Code provides that relocation should be the exception rather than the rule, and discourages evictions. The High Court notes in this regard that while *in situ* upgrading is required, relocation is sometimes necessary to make way for essential engineering or in hazardous conditions (para 38). However, Chapter 13 does not envisage a "blanket" application of relocation. There would surely be instances in the province where *in situ* upgrading would be possible. The Slums Act, as well as the High Court, fails to acknowledge this reality.

One of the positive aspects of the judgment is that it underscores the importance of meaningful consultation and engagement with communities. However, the Court fails to see the importance of explicitly including this requirement in the Act.

Furthermore, it is a basic principle of international human rights law that evictions should be fully justified and undertaken only as a last resort. By contrast, the Slums Act mandates the eviction of unlawful occupiers as the first option. The Court failed to see this disparity. Hence, some have argued that the Slums Act is reminiscent of the apartheid policy of control and the Prevention of Illegal Squatting Act 52 of 1951, which empowered landowners to eliminate informal settlements (Huchzermeyer, 2008: 4; see also Huchzermeyer, 2007).

Of crucial concern is the fact that the Slums Act clearly makes the provision of alternative accommodation discretionary, even for those who will not be able to provide for themselves once evicted. This goes against the established principle requiring the provision of alternative accommodation, particularly in situations where people would be rendered homeless and are not able to provide for themselves (see generally Chenwi, 2008).

Conclusion

The applicants have applied for leave to appeal directly to the Constitutional Court. This case is crucial as it will influence the way in which provinces deal with informal settlement dwellers. The decision of the High Court in endorsing the Slums Act failed to protect the rights of those in desperate need of housing and state assistance in eviction situations.

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