ESR REVIEW

Economic and Social Rights in South Africa

10th Anniversary

Ensuring rights make real change

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Editorial

Since 2004, South Africa has been going through a well-deserved and exhilarating phase of celebrations. Tenth-anniversary reviews have become fashionable and provide popular "sound bites".

It all began with the major celebration in 2004 of the first decade of democracy, which saw numerous reviews of post-apartheid South Africa's achievements and challenges in becoming a true home for all those who live in it. Given the number of institutions that were established and the countless processes that began in the years from 1994, there is no doubt that tenth-anniversary celebrations and reviews will continue for the rest of this decade.

This year South Africa celebrates three major such events concerning socio-economic rights. The first commemorates the coming into force, on 4 February 1997, of the South African Constitution and Bill of Rights. The second marks the tenth year of the monitoring of socio-economic rights by the South African Human Rights Commission (SAHRC).

The third is the tenth anniversary of the Socio-Economic Rights Project of the Community Law Centre at the University of the Western Cape. A celebration of this milestone was held on 12 April 2007 at the university. This issue covers most speeches delivered at that event. In fact, its publication was delayed so that they could be included.

The main articles offer a critical analysis of whether socio-economic rights are fulfilling their transformative potential ten years after the Bill of Rights came into effect. The papers by Sandy Liebenberg, Geoff Budlender, Vusi Madonsela and Albie Sachs are based on their contributions to a panel discussion on this topic. The authors examine the parts played by different actors. Sandy Liebenberg looks at role of the academic and civil society communities; Geoff Budlender focuses on that of the courts; Tseliso Thipanyane examines the monitoring mandate of the SAHRC; and Vusi Madonsela addresses the

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delivery challenges confronting the government in realising constitutionally entrenched socio-economic rights. Finally, Albie Sachs reminds us of the role that the CLC and the founder of its Socio-Economic Rights Project played in the Constitution-drafting process and continue to play in giving proper meaning to the socio-economic rights provisions in the Bill of Rights.

In our feature article, Johan Froneman explores the role the courts can play in advancing transformative constitutionalism in the light of Amartya Sen's theory of human capabilities.

These articles are followed by a review of the recent judgment of the Supreme Court of Appeal (SCA) in *City of Johannesburg v Rand Properties*. This case concerns the eviction of people in the Johannesburg inner city from so-called "bad buildings" in terms of the National Building Regulations and Building Standards Act. The Socio-Economic Rights Project intervened in this case as an *amicus curiae* jointly with the Centre on Housing Rights and Evictions (COHRE). In this article, Geo Quinot critiques the SCA's approach to the administrative law aspect of the case.

In the events and book review section, Lilian Chenwi gives an overview of the Project's activities and achievements since its establishment in 1997 and unveils its new motto, "Ensuring rights make real change". Sibonile Khoza introduces the second edition of *Socio-economic rights in South Africa: A resource book* (2007), which was formally launched at the anniversary event on 12 April. Finally, we publish the remarks Albie Sachs made at the launch of the book.

As Sandy Liebenberg warns in her article in this issue, these ten-year milestones are all worth celebrating, but they should not be causes for complacency. There are innumerable challenges that still face us, and the contributors to this special tenth-anniversary edition of *ESR Review* highlight some of them.

We therefore have to celebrate the achievements in our journey towards making these rights meaningful to people living in poverty. At the same time, we must be mindful of the fact that there is still a huge task ahead in addressing the persistent poverty, inequalities and unemployment that continue to deprive people of the opportunities which the advent of democracy and the Bill of Rights offer.

Therefore, once we finish celebrating, we have to get back to work and work even harder and smarter than we have done over the past ten years in overcoming the challenges of the second decade.

We hope that these articles will not only inform you of the journey we have travelled in translating socio-economic rights into realities in South Africa. Even more, we trust that they will inspire innovative ways of responding to the challenge of ensuring that "rights make real change".

The Socio-Economic Rights Project wishes to thank all those who attended the tenth-anniversary celebration and the launch of the new resource book.

It also wishes to express special gratitude to certain people who have supported the project and its staff unwaveringly over the past ten years. These include Prof Nico Steytler, Director of the Community Law Centre; Prof Brian O'Connell, Rector and Vice Chancellor of UWC; Prof Renfrew Christie, Dean of

Research and Chairperson of the Board of Trustees; and other members of the board. It also wishes to specially thank two members of the UWC Law Faculty, Prof Julia Sloth-Nielsen and Prof Pierre de Vos.

Special thanks go to former members of the Project, Sandy Liebenberg, Karrisha Pillay and Danwood Mzikenge Chirwa. Sandy and Danwood continue, despite their busy schedules, to work very closely with the Project.

At the end of May, we will bid farewell to our administrator, Unathi Mila, who is leaving the Project to further her studies. We wish her all the best. On a happy note, we welcome and wish to introduce you to a new researcher, Siyambonga Christopher Heleba, who joined us at the beginning of April.

Sibonile Khoza is the editor of *ESR Review*.

Socio-economic rights under a transformative Constitution

The role of the academic community and NGOs

Sandra Liebenberg

A transformative Constitution

Following Karl Klare's seminal article in the 1998 *SA Journal on Human Rights*, South Africa's Constitution has been widely described by the courts and in academic literature as a "transformative Constitution". While finding deep resonances in the South African community, the concept has also remained tantalisingly elusive. At one level, it implies an undoing of the multifaceted injustices inflicted by four centuries of colonial and apartheid rule in the political, social, economic and cultural spheres. At another level, it also implies the construction of a new and better society for the future – one which is founded, as the preamble of the South African Constitution of 1996 states, "on democratic values, social justice and fundamental human rights".

This indicates that transformation is not exclusively about undoing the racial legacy of apartheid, although that is, of course, critical. It also requires us to examine all political, legal, economic, social and cultural institutions of our society in the light of the Constitution's commitment to establishing a more just society based on human dignity, equality and freedom. When these institutions operate in ways that disadvantage certain groups and deny them their right to participate as equals in our young democracy, it requires us to undertake the painstaking work of restructuring them.

Fundamental transformation thus requires exposing all sources of public and private power to critical scrutiny, and developing new mechanisms of political and legal accountability. No exercise of power can be insulated from critical re-examination and re-envisioning in the light of the transformative commitments of the Constitution.

Socio-economic rights and transformation

Socio-economic rights were included in the Bill of Rights because a lack of access to social and economic resources and services constitutes a major impediment to people's ability to participate as equals in a democracy. More than ten years into our new democracy, large parts of our population are still unemployed and lack access to decent services and productive assets such as land. Poverty and social marginalisation are intensified by the HIV/AIDS epidemic ravaging the country. Moreover, South Africa still has one of the highest levels of income inequality in the world.

The socio-economic rights in our Bill of Rights invite all organs of state, the courts, the private sector and civil society to give substantive content to the core constitutional values of human dignity, equality and freedom. These rights remind us that human dignity, equality and freedom are compromised when people are deprived of the essentials for survival such as food, when they are forced

into relations of dependence on others because of economic need, and when they are deprived of education and the other means to participate as equals in our new democracy.

Transformation and democratic debate

There is consensus that the socio-economic rights in the Bill of Rights oblige us to undo the social and economic legacy of the past and to build a new and better society. However, as soon as one gets to the nuts and bolts of giving meaning to these commitments in policies, programmes, legislation and court judgments, there is substantial debate and contestation.

As we know, there is much controversy about the underlying causes of poverty and inequality in South Africa, as well as the nature and pace of the changes to the legal, political and economic systems that are needed to give effect to the transformative goals of the Constitution. This is reflected, for example, in the heated debate concerning the government's macro-economic and distributional policies. Critical voices in civil society have argued that the government has adopted an essentially neoliberal macro-economic policy which has failed to prioritise the needs and interests of the poor or effect a fundamental redistribution of resources.

In the legal sphere, there has been contestation regarding the interpretation of the socio-economic rights provisions in the Constitution and whether the courts have done enough to protect the rights of the poor in their evolving jurisprudence on these rights. A review of the academic and NGO literature reveals a robust debate on questions such as whether the courts should adopt the concept of minimum core obligations, whether "reasonableness review" assists or hinders the poor in gaining access to economic and social resources, whether socio-economic rights have played a sufficient transformative role in relation to the common law and, finally, whether the courts have crafted imaginative and effective remedies to protect these rights.

There is substantial debate and contestation about how to give meaning to the socio-economic rights in the Bill of Rights.

How should we view these contestations and controversies? Do they hold us back from giving effect to the transformative promise of the Constitution?

In a prestige lecture last year at the Stellenbosch University Law Faculty, Chief Justice Pius Langa suggested the contrary. Justice Langa described the conception of transformation embraced by the Constitution as follows:

> ...[T]ransformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional Constitution. This is the perspective that sees the Constitution as not transformative because of its peculiar historical position or its particular socio-economic goals but because it envisions a society that will always be open to change and contestation, a society that will always be defined by transformation. (Langa, 2006: 354)

This passage suggests four dimensions of the relationship between the transformative ethos of the Constitution and democratic participation. First, it suggests that active debate and contestation concerning the nature of the society we wish to create and the political and legal reforms necessary for achieving it should not be viewed as antithetical to transformation, but rather as its animating force. This understanding of transformation affirms that democratic participation is central in the ongoing processes of transforming the current status quo.

Second, this vision of transformation requires us to engage in the debate and processes of transformation with an open mind and a willingness to explore new and innovative solutions to the various forms of injustice that still pervade our society and the problems of poverty and marginalisation that confront us.

Third, it implies a willingness to explore what the foundational constitutional values of human dignity, equality and freedom mean in practice in the current political, economic and social context of South African society.

Finally, underpinning all of the three prior points is the notion that the constitutional text does not have a fixed, settled and authoritative meaning. Instead the meaning of constitutional rights is made and remade in an ongoing process of

engagement between all the actors in our young democracy. The idea that the content of socio-economic rights can be finally and authoritatively settled does not gel with the idea of transformation as a process of change in which all participants remain open to new interpretations and applications in the light of changing contexts and needs.

The "open community" of interpreters

However, the openness and revisability of this vision of constitutional interpretation seems to be at odds with the notion that the courts are the authoritative and final arbiters of the meaning of the constitutional text as well as with the doctrine of precedent, which seeks to preserve legal certainty and stability. While it is true that the courts are the final guardians of the Constitution and that consistency with previous decisions is a value in a legal system, it remains important to recognise that there are multiple participants and processes that contribute to developing the meaning of socio-economic rights. These participants include:

- the executive, in adopting macro-economic and socio-economic policies and programmes;
- the legislature, in enacting legislation such as the Social Assistance Act, the South African Schools Act and the Water Services Act;
- government departments and officials in all three spheres of government that are involved in administering the legislation;
- the Human Rights Commission and the Commission on Gender Equality, which have constitutional and statutory mandates to monitor and investigate human rights and educate people about their rights;
- the legal profession, in the types of cases they agree to take on and the arguments they advance in litigation;
- the courts, in giving judgments arising from socio-economic rights litigation;
- the private sector, in their commercial and business institutional practices;
- social movements that mobilise people around struggles for decent services and access to economic resources;
- human rights NGOs engaged in human rights advocacy, monitoring and litigation;
- the media, in reporting on poverty and human rights issues; and
- the academic community, in their research and commentaries in academic and popular journals.

Each of these actors has a distinct but interrelated role to play in relation to socio-economic rights. For example, if the executive and legislature adopted economic and social policies that were responsive to the needs of the poor, this would take some of the pressure off the courts in enforcing socio-economic rights.

The Constitution also envisages a system of mutual accountability and responsiveness. This is exemplified by the legislation that has been adopted to regulate private service providers and actors such as banks, medical aid schemes and private land owners. These laws seek to ensure that private institutions do not unfairly deprive people of access to rights such as housing, health care services and security of tenure.

While the courts are the final guardians of the Constitution, there are multiple participants and processes that contribute to developing the meaning of socio-economic rights.

The participants are not limited to the borders of South Africa. There are also transnational actors that influence the interpretation and implementation of socio-economic rights. These include regional and international human rights treaty bodies such as the African Commission on Human and Peoples' Rights (and the African Court on Human and Peoples' Rights, when it becomes operational), the UN Committee on Economic, Social and Cultural Rights, international financial institutions such as the World Bank and IMF, and transnational corporations.

To paraphrase Lourens du Plessis, my colleague at the Stellenbosch University Law Faculty, these all form part of the "open community" of interpreters of the socio-economic rights in the Constitution (Du Plessis, 1996: 214).

The meanings which we assign to the socio-economic rights in the Constitution have evolved and will continue to evolve through all of the institutions and processes set out above. For example, one need only reflect on the role of the Treatment Action Campaign in developing the meaning of the health rights entrenched in sections 27 and 28(1)(c) through a combination of mobilisation and education of people living with HIV/AIDS, advocacy directed both at

organs of state and at pharmaceutical multinational corporations, and litigation in relation to access to treatment (Heywood, 2005).

The Socio-Economic Rights Project has also contributed to the debate about what interpretations of socio-economic rights will best promote the interests of the poor. It has done so through its *amicus curiae* interventions in the *Grootboom, TAC, Modderklip* and, most recently, *City of Johannesburg* cases, as well as through its research and publications and its advocacy in areas such as social security, housing, food and water rights.

The concept of democratic transformation developed above also has implications for the role of the courts in interpreting socio-economic rights. It implies that the courts should develop the procedural aspects of litigation such as *locus standi* and the rules governing access to courts so that litigation processes can be more accessible to disadvantaged communities.

In addition, it implies that they remain open to new and innovative interpretations of socio-economic rights that better protect the interests and values underpinning these rights. This may entail a measure of sacrifice of the ideals of stability and certainty. However, the benefit of embracing a transformative adjudication of socio-economic rights claims is that the courts become active participants in deepening democratic participation by marginalised communities in our transforming society.

A transformative mode of adjudication of socio-economic rights claims also requires the judiciary to explain as clearly and comprehensively as possible the reasons and values that inform their decision to adopt a more or less stringent standard of scrutiny or a particular remedial approach in socio-economic rights cases. There is also much scope for court judgments to be debated more in the media by academics and NGOs, and for training initiatives that seek to make the jurisprudence more accessible to disadvantaged communities.

The resource book of the Socio-Economic Rights Project is an important initiative in this regard. Making our emerging jurisprudence on socio-economic rights more transparent and accessible enables the political branches and the public as a whole to become more involved in deliberating the implications of socio-economic rights for the formulation and implementation of social policy in South Africa.

The challenges of making socio-economic rights meaningful

Academics and NGOs are part of the community involved in giving meaning to the socio-economic rights in the Constitution. This implies that they also have responsibilities to help make these rights meaningful to a transforming society. Four areas pose special challenges to these organisations of civil society in the current South African context.

Engaging in strategic litigation and advocacy

The first challenge relates to strategic engagement in socio-economic rights litigation and policy advocacy by NGOs and research institutions. Many of us are guilty of focusing predominantly and somewhat uncritically on the courts as a forum for enforcing socio-economic rights at the expense of other institutions and processes that also have important roles to play in realising these rights.

It is important to recognise that while the courts' adjudication of socio-economic rights claims can enhance democratic participation by the poor, they also have the potential to undermine the participatory, deliberative model of democratic transformation promoted by the Constitution. This occurs in a number of ways. The courts can adopt overly narrow interpretations of the relevant provisions and an extremely deferential approach to decision-making by the legislative and executive branches of government. By interpreting certain needs as falling outside the scope of protection of the relevant provisions or excluding certain groups from access to the rights, the judiciary can undermine popular struggles to have these needs and groups included in social policies and programmes.

At the other end of the spectrum, democratic participation can also be impoverished when courts are inappropriately activist and dominate the conversation concerning the meaning and implications of socio-economic rights.

This undermines the institutional role and responsibilities of the legislative and executive branches of government, and may have the consequence that these branches abdicate their primary role under the Constitution of giving effect to socio-economic rights by adopting social policies and programmes.

In their interpretations of socio-economic rights, courts can also end up inadvertently disempowering claimants by positioning them as passive beneficiaries of social goods and services, instead of agents entitled to participate actively in the defining and meeting of their needs.

Moreover, litigation can reinforce

the public/private dichotomy by imposing strong duties of accountability on public actors for meeting socio-economic rights claims, while imposing weak or non-existent standards of accountability on private institutions.

Finally, by providing access to a limited set of social benefits, litigation can deflect attention away from the more fundamental reforms required to the underlying institutions and structures that generate poverty and systemic social inequalities.

Litigation can deflect attention away from the more fundamental reforms required to the underlying institutions and structures that generate poverty and systemic social inequalities.

It is also important to keep in mind that courts can only respond to the parties before them, and to the facts and arguments presented to them in particular cases. This is, paradoxically, both their strength and their weakness. Courts are well placed in socio-economic rights litigation to detect the impact of particular policies on individual claimants and the groups they represent, and to grant individualised remedies if appropriate. In this respect, they can signal to the legislature or executive that it has overlooked people's rights, or that its opposition to a particular claim violates their constitutional rights.

This enhances the democratic responsiveness that our Constitution cherishes.

On the other hand, courts are not well positioned to see the "bigger picture" – that there may be other groups whose needs are as urgent as or more urgent than those of the litigants before them, and that there may be a complex balancing exercise involved in fulfilling the rights of all in society when resources are limited.

Unless all the participants in socio-economic rights litigation are conscious of the institutional limitations of the courts and consider the possibility that some claims may be more effectively addressed through another forum, such as parliamentary advocacy, there will be the danger of an untimely or inappropriate resort to litigation, and judgments that impede rather than facilitate transformation.

On the other hand, without a full appreciation of the transformative potential of socio-economic rights adjudication, many opportunities to improve the lives of the poor and keep alive the constitutional vision of a more just society will be missed.

Bold and innovative interpretations

The second challenge concerns the willingness of academics and NGOs to be bold and innovative in their interpretation of socio-economic rights and in the policies and programmes they advocate to give effect to these rights. The appearance of inevitability and normality which court judgments have can blind us to the fact that other interpretations and responses that will better advance the transformative potential of socio-economic rights are possible.

As I have argued above, the legal community is only one part of the community of interpreters of the Constitution, and the interpretations generated by this rather enclosed, privileged community are inevitably limited and constrained.

As academics and civil society we should not be afraid of criticising court judgments or advocating different interpretations and responses. Even if these are not accepted in policy or legislative response or in jurisprudence, they deepen and enrich the debate around socio-economic rights and create the space for better and more inclusive interpretations in the future. For example, democratic culture and transformation in South Africa have been deepened through the arguments of civil society in favour of a basic income grant and of increased security of tenure for the landless and homeless, and by the research and arguments in favour of free basic education. Although there has not been full acceptance of the policy proposals of civil society, there have been initiatives in response to this advocacy that will expand access to socio-economic rights. These include:

- the mandate given to the Department of Social Development to investigate forms of social support for children between the ages of 14 and 18 who do not currently benefit from the child support grant;
- the Constitutional Court's decision in *Khosa & Mahlaule* extending access to social grants to permanent residents;
- land reform legislation such as the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act and the Extension of Security of Tenure Act, and the emergency housing assistance programme adopted in response to the *Grootboom* judgment; and

- the decision by the Ministry of Education to abolish school fees in the poorest 40% of schools.

This illustrates that transformation is not a sudden, quick-fix event, but an on-going process of struggle and engagement in the quest for a more just society.

Forging alliances

The third challenge relates to the responsibility of academics and NGOs to strive to build closer links with disadvantaged communities and groups. The danger of not doing so is that our research, advocacy and litigation in relation to socio-economic rights can end up being at best irrelevant, and at worst harmful, to the needs and interests of the poor. If transformation is about broadening and deepening participation in all spheres of our democracy, then civil society organisations must also take seriously their responsibility to allow the voices of those actually affected by poverty and marginalisation to be heard.

Civil society organisations must take seriously their responsibility to allow the voices of those affected by poverty and marginalisation to be heard.

The Constitutional Court has also recently highlighted, in *Doctors for Life International v The Speaker of the National Assembly and Others*, the importance and value of participation by marginalised groups in legislative processes:

> It [participatory democracy] enhances the dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legiti-macy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist (at par 115).

There are many examples of NGOs and academic research institutions working in partnership with community-based organisations around local struggles to improve access to water services, electricity, decent housing and social security. By engaging with the state in all three spheres of government in this manner, civil society plays a vital role in making socio-economic rights meaningful.

It is also worth recalling the critical role played by a broad-based alliance of NGOs, community-based organisations, trade unions, church groups and academics during the drafting of the 1996 Constitution. Unimaginatively named the "Ad Hoc Campaign for the Inclusion of Socio-Economic Rights in the Constitution", this alliance was instrumental in mobilising political and public support for the inclusion of socio-economic rights in the Constitution as fully justiciable rights. These are positive traditions that we should build on and deepen in the next ten years.

Responding to the challenges of globalisation

Finally, I wish to comment briefly on the challenges that globalisation poses to the realisation of socio-economic rights. Constitutional and international law rests on the foundation of nation-state responsibility for human rights violations. However, this does not reflect the realities of a globalised world. The power of states to adopt social programmes is increasingly constrained by the international financial institutions, global capital flows, multilateral and bilateral trading regimes, and the privatisation and outsourcing of many formerly public goods and services. The global economic environment can have a major impact on people's access to and enjoyment of socio-economic rights, but many of these operations are beyond the reach of international and constitutionally guaranteed human rights norms and institutions. Globalisation thus creates unprecedented challenges for NGOs and academics. New ways must be found to hold institutions operating globally and transnationally accountable for human rights violations.

In this context, civil society must seek ways to persuade the South African government to ratify the International Covenant on Economic, Social and Cultural Rights (1966). This is the only major human rights treaty we have not ratified to date.

Becoming a full state party to the Covenant is important if South Africa is to play a meaningful role as one of the key advocates for socio-economic rights internationally. It could also serve as a powerful counterweight to the erosion of socio-economic rights through international agreements relating to trade and investment, and serve to strengthen the domestic protection of these rights through policy, legislation and jurisprudence.

Conclusion

We would do well to remind ourselves of Joel Handler's observation about rights:

> Rights talk can change beliefs and expectations, but this may or may not lead to concrete change, or change in the desired direction. Rights consciousness has constitutive and transformative possibilities, but they are possibilities only (Handler, 1990: 968).

Whether the possibilities that socio-economic rights have created in South Africa can be translated into concrete social and economic policies and programmes that make a real difference to those for whom poverty is a lived reality depends on all of us.

Ten years of a transformative Constitution, ten years of socio-economic rights litigation and advocacy, and ten years of the Socio-Economic Rights Project of the Community Law Centre: these are all causes for celebration, but not for complacency.

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The role of the courts in achieving the transformative potential of socio-economic rights

Geoff Budlender

The courts have an important role to play in achieving the transformative potential of socio-economic rights. But two things prevent the courts from doing this as effectively as they might. One is the tendency to view these rights as exotic and fundamentally different from civil and political rights. The other is the difficulty which is sometimes experienced in finding appropriate remedies for breaches of these rights.

Are socio-economic rights different from other rights?

Some judges become anxious when confronted with socio-economic rights cases. They believe that these rights are fundamentally different from other rights (ie civil and political rights), and that there is something exotic and very difficult about them. This view is shared by many practitioners. In a recent case in the Grahamstown High Court, senior counsel on the other side seemed to think that he had disposed of our case when he said the matter involved the enforcement of socio-economic rights. He thought he did not have to say much more.

I suspect that in our zeal to promote socio-economic rights, we have not done enough to stress the commonality between these rights and civil and political rights. The more we make socio-economic rights "special", the more we run the risk of making them seem different, leading the courts to say they do not really understand them.

It seems to me that the important distinction, from the perspective of the courts, is not the classification of the right – in itself not always an easy matter – but the nature of the *obligation* which is at issue in the case. All human rights create both positive and negative obligations. They all impose, for example, a negative obligation on the government not to interfere with or obstruct the enjoyment of the right in question. They also all impose positive obligations on the government to take steps to enable people to enjoy the right, whether it is the right to vote in an election, the right to a fair trial in both civil and criminal proceedings or the right of access to adequate housing.

We all know that the positive obligations are very difficult to enforce in litigation because they raise difficult questions of "how much" and "who first". They involve questions about the allocation of resources. These questions are often difficult – but the Constitutional Court has shown that they can be answered.

We should acknowledge the difficulty, point out that it arises in all cases involving the state's positive obligation to fulfil a right, and then address the problem of an appropriate solution. Simply put, we need to demystify the issue of socio-economic rights.

It is a fundamental truth that human rights are indivisible: they work together to achieve a society in which we can all live with dignity.

Socio-economic rights *are* in the Constitution. The time has passed for mounting arguments which seek to justify that fact. As we enter the second decade of these rights, we need to move to emphasising the similarities rather than the differences, and to addressing the real problems, not the ideological disputes which are now an interesting part of our history. This brings me to the second matter I wish to raise, namely the question of appropriate remedies.

In our zeal to promote socio-economic rights we have not done enough to stress the commonality between these rights and civil and political rights.

What remedies are appropriate in cases of systemic breaches of rights?

The problem in litigation involving positive obligations – whether of socio-economic or civil political rights – is not usually in proving the breach of the right. More frequently, it is in establishing an appropriate and effective remedy for the breach of the right. This is particularly the case where the breach is systemic – that is, where the cause of the breach is a breakdown or malfunctioning of the system.

The obvious example of this is school education. Despite the efforts of so many inside and outside government and the school system, the fact remains that our schools are deeply divided, unequal to a shocking degree and widely ineffective. For many children who enter the school system, schools are simply not functioning effectively. We all know the sad and terrible truth that one can predict with some confidence, as each cohort of children starts the new school year, which of them will be failed by the system, and will not be enabled to achieve their individual potential, despite the best efforts of many. While they will be able to attend school, they will be denied their right to education.

The key question is whether the courts can do anything about that. This question has worried me for some years. The fundamental problem is not at the level of the individual school where, for example, it is a matter of improving the building or shifting a few extra resources into the school. The courts can fairly easily engage with these issues.

The really difficult question is what role the courts can play to address systemic failures. This is the question that requires creativity and energy. Currently all of us, including the

courts, are passive observers of a systemic and wholesale breach of the rights of those who are most vulnerable, and whose rights are most important to our ability to succeed as a nation.

I do not have an easy solution. But I do think we need to look much more thoughtfully, carefully and creatively at structural interdicts. In essence, these orders declare that there has been a breach and require the government to produce a programme on how it is going to remedy the breach. They provide civil society and other participants with an opportunity to comment on the design and implementation of the government programme. They sometimes provide for the court to exercise some supervisory role for a period.

A structural interdict should be a process for setting ambitious but achievable targets and monitoring the achievement of those targets. It brings the government, the courts and civil society into an interactive process. If done properly, it can address government programmes in a way which is fundamentally democratic.

The conventional criticism of structural interdicts is that because the judges are not democratically elected, it is somehow antidemocratic for courts to exercise these powers. But structural interdicts can be deeply democratising. They create spaces for a dialogue between the court, the government and civil society actors. In this way, they strengthen and deepen accountability and participation – the key elements of democracy.

We need to become much more innovative in the design of the remedies which we propose – and the courts need to be much less timid than they have been to date in accepting innovation in this regard. It is easy to find reasons to criticise structural interdicts. Anyone can do that. What is much more challenging is to find real solutions for real problems. That is as much the duty of the courts as it is the duty of the rest of us.

Many rights problems are not solved overnight. You cannot wish for a court order that will solve the school system like waving a magic wand. But a proper interaction between the government, civil society and the courts can go a very long way in taking us away from systemic breakdown, towards the systematic enforcement and realisation of the rights in the Constitution.

Geoff Budlender is an advocate at the Cape Bar.

The monitoring of socio-economic rights by the South African Human Rights Commission in the second decade of the Bill of Rights

Methodological issues

Tseliso Thipanyane

The South African Constitution gives effect to the struggle against poverty and the improvement of the life of all South Africans by entrenching socio-economic rights as justiciable rights. These rights include adequate housing, health care services, sufficient food and water, social security and social assistance, education and a clean and healthy environment. The state has the primary responsibility to give effect to these rights.

To ensure that these rights are realised, the Constitution creates several human rights monitoring institutions which include the South African Human Rights Commission.

The Commission has an explicit constitutional mandate to "monitor and assess the observance of human rights". It has powers to require information from relevant organs of state on the measures they have undertaken to give effect to the rights. It also has powers in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act and the

Promotion of Access to Information Act to monitor the progress made in promoting equality, addressing unfair discrimination (particularly on the grounds of race, gender and disability) and promoting access to information.

International principles and law

The human rights monitoring mandate of the Commission is in line with the Paris Principles adopted by the UN General Assembly relating to the status and functioning of national institutions to promote and protect human rights.

According to these Principles, a national institution such as the Commission has the responsibility to submit to the government, Parliament and any other competent body "opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights".

A number of UN treaty bodies have also expressed their views on the role that national human rights institutions should play in the promotion and protection of human rights. The UN Committee on Economic, Social and Cultural Rights, for example, in its General Comment No 10, has stated that these bodies should, among other functions:

- analyse existing laws and administrative acts, as well as draft Bills and other proposals, to ensure that they are consistent with the requirements of the International Covenant on Economic, Social and Cultural Rights;
- provide technical advice or undertake surveys in relation to economic, social and cultural rights, including at the request of the public authorities or other appropriate agencies;
- identify national-level benchmarks against which the realisation of covenant obligations can be measured;
- conduct research and inquiries designed to ascertain the extent to which particular economic, social and cultural rights are being realised, either within the state as a whole or in particular regions or in relation to particularly vulnerable communities; and
- monitor compliance with specific rights recognised under the covenant and provide reports thereon to the public authorities and civil society.

Stocktaking

2007 marks the tenth anniversary of the Bill of Rights and ten years of monitoring the realisation of socio-economic rights. The question to be asked in the context of this milestone is whether the monitoring of these rights by the Commission has been successful.

Our monitoring system is no longer playing its intended or desired role and its efficiency and quality are questionable.

While a lot can be said about the successes, failures and challenges in the realisation of socio-economic rights in the past ten years, this contribution will focus on the monitoring of these rights, and the role and challenges faced by monitoring bodies such as the Commission. It will also discuss various ways of improving the monitoring of socio-economic rights by the Commission in the second decade of the Bill of Rights.

Writing on the human rights system in Europe recently, Stephanie Lagoutte (2007:25) says that:

> Human rights are in turmoil, and the control mechanisms put in place to protect them cannot escape being affected too. The human rights system set up under the United Nations needs to be re-thought, and the control mechanism of the European Convention on Human Rights, generally considered the most efficient and developed regional human rights system, is arousing more and more concern. Since the mid-1990s the general tone and discourse surrounding the European Court of Human Rights has been anything but cheerful. The Court seems to be losing some of its credibility, among other things because the cases being brought before it are taking too long to resolve. Judges, experts and scholars are telling a depressing story of the European human rights system no longer playing its role, and they are questioning both the efficiency and the quality of the system, which has existed (with some modifications) since the 1950s.

Notwithstanding the groundbreaking and laudable work in the monitoring socio-economic rights by the Commission and other bodies over the past ten years, one can safely say, like Lagoutte, that our monitoring system needs to be "re-thought". It seems to be losing credibility, it is no longer playing its intended or desired role, and its efficiency and quality are questionable.

Challenges

Some of the challenges and problems that have affected the Commission in discharging its monitoring mandate are:

- the methodology of monitoring;
- a lack of cooperation by relevant organs of state;
- the role of other stakeholders;

- inadequacy of resources; and
- follow-up on recommendations.

Methodology

The first and most important challenges that confront a system designed to monitor socio-economic rights and other human rights in South Africa are what and whom to monitor, how, and when. The lack of benchmarks against which the monitoring of socio-economic rights can effectively be measured poses a major challenge for any meaningful and effective monitoring. This is further complicated by the lack of agreed-upon and comprehensive indicators, and inadequate data collection and collation systems.

The constitutional standards pertaining to the monitoring of socio-economic rights, such as "reasonable measures", "progressive realisation" and "within available resources", also add to the challenge of inadequate benchmarks and indicators. The minimum core content/obligation approach has not been settled or developed adequately in order to assist in the monitoring of socio-economic rights.

However, the UN Millennium Development Goals, the general comments of the UN treaty monitoring bodies and the various UN human development reports do offer some guidance in this regard.

In addition to the above, the scope of monitoring these rights from the perspective of the horizontal and vertical application of the Bill of Rights is a challenge. There is no satisfactory system for monitoring socio-economic rights in the private sector. In relation to the state, the local sphere of government, where much of the delivery of socio-economic rights takes place, is a difficult, if not an impossible, terrain to monitor. This is partly because of the unavailability of relevant information. Much of the monitoring has been confined to the public sector in the national and provincial spheres of government. This brings into question the appropriateness and efficacy of the monitoring system.

The Commission's overlapping monitoring mandates, though not yet a problem, will soon present a real challenge. The Com-mission now also has a mandate to monitor the observance of equality rights. Section 28 of the Promotion of Equality and Prevention of Unfair Discrimination Act requires the Commission to provide an annual assessment to the National Assembly on "the extent to which unfair dis-crimination on the grounds of race, gender and disability persists in the Republic, the effects thereof and recommendations on how best to address the problems". The impact this will have on the socio-economic rights monitoring mandate is that these three grounds of unfair discrimination – race, gender and disability – also have a bearing on socio-economic rights, and the Commission will need to reflect on how to address these real and serious overlaps.

The first and most important challenges are what and whom to monitor, how and when.

Cooperation by relevant organs of state

Several organs of state in the three spheres of government, particularly the local sphere, have not co-operated fully with the Commission over the past ten years. Despite the constitutional obligation to assist the Commission in carrying out its mandate, a number of organs of state have not even bothered to respond to the Commission's protocols. Many of those that do respond do not answer all the questions asked and give poor or inadequate responses. This is in addition to submitting their responses late. As a result, the Commission has not carried out its monitoring mandate in relation to organs of state adequately and satisfactorily, particularly in the local sphere of government.

Some of the reasons for the conduct and attitude of many organs of state are:

- a lack of appreciation of the importance of assisting and enabling the monitoring of socio-economic rights;
- a lack of information due to inadequate data collection and collation systems; and
- a lack of adequate skills and resources, both human and financial.

These problems have also affected the state's efficacy in preparing and submitting reports to various international treaty monitoring bodies. Indeed, reports to the Committee on the Rights of the Child and the African Commission on Human and Peoples' Rights are overdue.

The South African Human Rights Commission has tried in numerous ways to get the desired responses from organs of state, such as shaming those that have not responded by issuing subpoenas against them. This is in addition to informing the National Assembly of the above omissions, something that has not yielded much success.

Parliament has received six reports over the past ten years, but it has not tabled and debated these reports in the National Assembly. The relevant portfolio committees of the National Assembly have not been that helpful. Many have neither discussed any of the Commission's reports nor invited the Commission to appear before them in relation to its socio-economic rights monitoring mandate. A debate by the National Assembly would go a long way in raising awareness of the importance of the monitoring role of the Commission. Moreover, given the powers of the National Assembly to "maintain oversight of the exercise of national executive authority, including the implementation of legislation", it would put pressure on members of the Cabinet to ensure that their departments co-operate with the Commission.

Role of other stakeholders

The role of civil society and the media is crucial to the functioning and effectiveness of any national institution for the protection and promotion of human rights. In general, the Commission's interaction with civil society entities over the past ten years has not been satisfactory. This has certainly contributed to the current unsatisfactory state of the monitoring of socio-economic rights.

While concerns have been raised in some sections of civil society on the inability of the Commission to work adequately with organs of civil society and other bodies on the monitoring of socio-economic rights, civil society itself, in its various formations, has not adequately engaged and co-operated with the Commission in the realisation of this important national mandate.

Inadequate resources

The monitoring of socio-economic rights, particularly in the context of rights such as environmental rights, requires not only financial but also technical human resources. The problem is that the Commission has not had adequate financial or skilled human resources to give satisfactory effect to its monitoring mandate. As a result, the Commission's reports have always been produced late and, though found useful in many quarters, have not been of a satisfactory quality and scope.

Follow-up on recommendations

The Commission's failure to adequately follow up on the recommendations made in its reports has also been a major weakness. The reports of the Commission do not even refer to progress made on most of the recommendations contained in previous reports. One glaring example is the Commision's failure to follow up on its recommendation that the government should ratify the International Covenant on Economic, Social and Cultural Rights.

Reviewing the Commission's monitoring mandate

In the light of the above challenges and the unsatisfactory state of the Commission's monitoring of socio-economic rights, the Commission must, in this second decade of the Bill of Rights, address those challenges in a meaningful way so as to improve the monitoring of these rights. The Commission has already begun a process to review its monitoring mandate, and held a consultative workshop with stakeholders in December 2006 as part of that review.

One outcome of the review is the decision by the Commission to change the monitoring time frame from one year to a three-year cycle in line with the government's three-year funding cycle. This cycle will start with the 2006–2007 financial year.

The second significant development is the Commission's intention to extend its monitoring mandate to non-state bodies. This recognises the horizontal application of the Bill of Rights and the role played by non-state entities, particularly corporate bodies, in the realisation of socio-economic rights.

The third development is the Commission's intention to use its full power to ensure that all relevant organs of state and non-state entities comply with the obligation to provide the Commission with information necessary for the monitoring of socio-economic rights, and to ensure that its recommendations are taken seriously. In this regard, section 18 of the Human Rights Commission Act makes any conduct that obstructs, hinders or interferes with the performance or exercise of the Commission's powers, duties and functions a criminal offence, and the Commission will not hesitate to use this provision in future.

One way the Commission will ensure that its recommendation are taken seriously, as indicated in its input to the Kader Asmal committee (established by the National Assembly to review the Commission and other constitutional and statutory bodies), is to request reports from relevant entities on their action in response to the Commission's recommendations.

The methodological challenges pertaining to the "what" and "how" of the Commission's monitoring mandate are under consideration.

The following are issues on which

the Commission will soon take a decision.

On the "what", or the scope of the monitoring mandate, the current debate in the Commission is whether it should monitor all the socio-economic rights in the Constitution, as well as the rights to work and development, in all three spheres of government, while progressively extending this mandate to non-state entities. Here the Commission must take account of its capacity challenges, including those relating to skills and finances.

One view in this regard, which could be termed a minimalist or progressive approach, is that the Commission should focus on a few specific rights, such as those pertaining to shelter, food, health and water, and use these to refine and improve the socio-economic rights monitoring system, and then include other rights incrementally. The other view, a maximalist approach, is that the Commission should monitor all the socio-economic rights in section 184(3) of the Constitution and any other relevant rights. Both approaches will have to factor in the Commission's equality rights monitoring mandate.

Specialised committees

The decision on the "how" component of the methodological challenge to the Commission's socio-economic rights monitoring mandate will probably influence its response to the "what" or scope of the rights to be monitored. One view is that the Commission should stick to the old and tested approach of using its own staff members exclusively in monitoring and assessing the observance of socio-economic rights and compile its reports accordingly. However, this approach has not produced the necessary results and the Commission has started to move away from it.

The other view that is increasingly being favoured in the Commission is that external experts should assist in the monitoring process. In this context, the writer proposes that the monitoring mandate of the Commission should be modelled on the UN treaty monitoring system. This will entail setting up specialised committees to monitor specific socio-economic rights. These committees, established in terms of section 5 of the Commission's enabling legislation, should consist of members and staff of the Commission and suitable experts on particular socio-economic rights.

The Commission's monitoring mandate should be modelled on the UN treaty monitoring system.

These committees, like UN treaty monitoring bodies, will receive periodic reports on socio-economic rights from relevant organs of state and non-state entities based on guidelines or protocols to be developed and refined by the Commission in a much more consultative manner than its current protocols. The committees will have the power to request organs of state and non-state entities to appear before them to present their reports and answer questions. Failure to attend or report to these committees will be a criminal offence, something that does not apply to the UN treaty body monitoring system. The committees will also have the power to receive other reports ("shadow reports") from relevant organs of civil society and independent experts on socio-economic rights and even to allow them to appear before them. These committees would report to the Commission, which would have the final say on the content and nature of the final report to be submitted to the National Assembly and released to the public.

This proposed approach is quite similar to the way the Commission conducts its public hearings in terms of section 9 of its enabling legislation and is likely to find a lot of support in the Commission.

Whatever approach it eventually adopts, the Commission will need some internal research capacity in order to add value to the process. The Commission will also have to have sufficient resources to support and sustain the monitoring of socio-economic rights, and to ensure that its reports and recommendations are taken seriously by the National Assembly and other relevant bodies.

The Commission will have to revise its protocols and ensure that all bodies that are required to report to it do, in fact, report and, if necessary, are compelled to report.

Conclusion

The strengthening of constitutional democracy in South Africa largely depends on a stricter observance of human rights.

The realisation and monitoring of socio-economic rights are of the utmost importance in strengthening constitutional democracy in South Africa. If socio-economic rights go unrealised, instability will slowly creep in and eventually negate the gains made by our people in their struggles for freedom and human rights.

Sadly, as discussed above, the

monitoring of socio-economic rights and human rights in general has not been taken seriously in the first decade of the Bill of Rights. This is seen in aspects such as funding and the development of indicators and benchmarks, and in the lack of support for the numerous monitoring initiatives in the country, including those that are constitutionally mandated. This is largely due to an insufficient appreciation of the importance of monitoring human rights, particularly socio-economic rights.

The monitoring of socio-economic rights should in essence be about how a broad section of our society, the poor and marginalised, are assisted and encouraged through the provision of basic services. It is thus important that those in strategic positions support the monitoring of human rights. Those responsible for the success or failure of the monitoring process should be sensitised both on the importance of monitoring and on the prerequisites of a successful monitoring system, including accurate and timeous reporting, data collection and collating systems.

Tseliso Thipanyane is the Chief Executive Officer of the South African Human Rights Commission.

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Fulfilling socio-economic rights

The role of government*

Vusi Madonsela

*** This is an edited transcript of Vusi Mandonsela's remarks in the panel discussion.**

A vice president of the United States once said that the moral test of any government is how it treats those who are at the dawn of life, the children; those who are in the twilight of life, the aged; and those who are in the shadows of life, the needy, the handicapped and the sick. These are the words that should guide us in doing our work as the government.

In reflecting on what the government has done over the past ten years, one needs to understand the background of South Africa's history of political exclusion of the majority of South Africans, who are now included in terms of the South African Constitution of 1996.

The challenges

As the government, we face at least four big challenges. The first is how to effectively include the majority of South Africans, both socially and economically, in the affairs of the country. The life circumstances of these people are defined both by the lack of the means to survive without state intervention and the lack of access to opportunities created by the country's growing economy.

Socio-economic rights are concerned largely with these realities. These rights never existed until 1994. From that time on, and with the inclusion of all South Africans, the task of meeting the basic needs of the people has been enormous.

The second challenge is that the government does not have unlimited resources to meet these needs. It cannot meet all the basic needs at once for everyone. It has to prioritise which needs it must meet first within the resources it has.

The third challenge is that although the government's slogan "building a social contract with the people" assumes greater interaction between the government and the people, this has not happened properly in reality.

The fourth is that because of the enormity of the task, government does not always have the time to sit back and reflect on how it is meeting the needs, or in what order. The difficult conditions under which people live now, and have lived for decades, make it pressingly urgent for the government to simply deliver.

Closer interaction between government and civil society

There is broad agreement between the government and civil society that socio-economic rights must be fulfilled.

The differences are about how to do so.

Because of these differences, there has been a great deal of emphasis on litigation instead of engagement with the government in determining what the priorities should be. Civil society organisations have used litigation strategies to compel the government to extend access to social grants. At the centre of this approach is the belief that cash transfers are a poverty-eradicating panacea and that no other form of social development is any good.

Over the past few years, welfare services have been on the verge of collapse because 97% of social development in the provinces has consisted of social assistance benefits, to the exclusion of other services. Cash benefits alone cannot deal with the problem that South Africa faces.

The government has to perform an extremely difficult balancing act. As mentioned above, it has to prioritise within its limited resources. It has to develop the economy, on one hand, and meet the basic needs of the people, on the other.

I am neither certain the government is addressing basic needs issues as best as it should, nor convinced that advocates of socio-economic rights are helping government to perform that task .

Therefore there is a great need for closer interaction between government and the people, including civil society organisations and other players such the Socio-Economic Rights Project of the Community Law Centre, to look at what needs should be met first within available resources. My department is more than willing to interact closely with civil society and engage in policy debates.

We need to have constructive engagement through dialogue, not litigation, on a number of issues such as: What does the phrase "progressive realisation within available resources" in the sections protecting socio-economic rights in the Constitution mean? What is the comprehensive package of services needed to fulfil children's rights?

On the latter, it is important to point out that my department has been given a mandate to investigate the measures needed to support children older than 14 who are living in poverty. Children's survival needs cannot be met only through the child support grant, but require a range of services. Therefore the more comprehensive we are in our approach to children's rights issues the more important it will be to ask what resources are available to us to provide a comprehensive basket of services to children.

Vusi Madonsela is the Director-General of the Department of Social Development.

Concluding comments on the panel discussion

Albie Sachs

One of my favourite US Supreme Court judges is Robert Jackson, famous as a prosecutor at Nuremberg. He said: "We at the Supreme Court don't have the last word because we are infallible. We are infallible because we have the last word." So I thank the organisers for giving me this opportunity to have the last word.

Debate and dialogue

I want to look back on ten years and even before that. I feel genuinely strong emotions being here at the University of the Western Cape (UWC), hosted by the Community Law Centre. UWC and the Centre played a critical role in constitutional negotiations towards a democratic South Africa.

More than half of the members of the Constitutional Committee of the ANC worked from the Centre. We debated and dialogued on a whole range of issues pertaining to a future Constitution for South Africa.

A number of commissions were established – one on socio-economic rights, one on a future Constitutional Court for South Africa and one on the electoral system.

We invited a whole range of people to debate and dialogue with us on the shape of a future Constitution for South Africa. These debates were not limited to ANC members or supporters. The idea was to consult and deliberate as broadly as possible on these vital questions.

In the end, I think that this type of participatory research and advo-

cacy was of more value than having all the constitutions of the world on one's computer.

Socio-economic rights: the "left critique"

In her tribute to Sibonile and the past and current staff of the Socio-Economic Rights Project, Sandy Liebenberg mentioned two of the critiques of including socio-economic rights as fully justiciable rights in the Constitution. The first was that socio-economic rights would cast the courts in an inappropriate and unmanageable role, resulting in a breach of the separation of powers doctrine. The second predication was that justiciable social rights would amount to a dead letter – no more than window dressing to the Constitution or aspirational claims. It is important to remember that there was an even sharper critique that came from the left, arguing that we should not entrust the judges with power over socio-economic policy questions. These critics argued that questions of socio-economic development should be the exclusive preserve of Parliament and the democratic process; that judges, by the nature of their training and functioning, are remote and cut off. It was contended that judges live lives which are out of touch with the lives of ordinary people and so cannot be trusted to be sensitive to their socio-economic needs. Accordingly, they argued that these rights should rather be included in the Constitution in the form of unenforceable directive principles of state policy.

Sandy played a critical role in responding to this critique and, through her hard work and single-minded dedication to the cause of socio-economic rights, helped ensure that that this group of rights was included in the Constitution as enforceable entitlements.

Socio-economic rights foster the involvement of the poor in democratic decision-making.

Promoting participatory democracy

The importance of participatory democracy in our Constitution was underscored by the decision of the Constitutional Court last year in the *Doctors for Life* case. In this case, the Court struck down legislation because the National Council of Provinces, at the very last stage, having promised hearings in provinces on particular health measures, refused to go ahead with them because, they alleged, their timetable did not allow it.

We held the legislation to be invalid on the basis that our Constitution protects both representative and participatory democracy. The Constitution places an obligation on all the legislatures to facilitate public involvement in the legislative process. We held in the judgment:

> Participatory democracy is of special importance to those who are relatively disempowered in a country such as ours where great disparities of wealth and influence exist (par 108).

The jurisprudence of the Constitutional Court on socio-economic rights has also said that government policy-making must be transparent and that it cannot ignore the interests of poor people. In this way, socio-economic rights foster the involvement of the poor in democratic decision-making.

The significance of *Grootboom* and *TAC*

What was striking about the *Grootboom* case was the way in which all role-players in the case engaged with the Court in a constructive dialogue on the meaning of the socio-economic rights provisions in the Constitution. Adv Gauntlett, arguing for the government, acknowledged the importance of the socio-economic rights provisions in the Constitution but sought guidance on the meaning of phrases in the relevant provisions such as "access to" socio-economic rights, "progressive realisation" and "within available resources".

Adv Peter Hodes, appearing for Mrs Grootboom and the community, essentially said: "What must my client do? She has nowhere to go. She is sleeping out under the stars, and the winter rains are coming." Then he sat down. This placed sharply before us the socio-economic rights commitments in the Constitution and the very real dilemma of how these rights can be meaningful to people in the situation of the *Grootboom* community.

Then we were presented with argument by Geoff Budlender of the Legal Resources Centre acting on behalf of the *amici curiae* in the case – the Community Law Centre and the South African Human Rights Commission. 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 Geoff 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. The *Grootboom* case was really an example of dialogue, debate and argument in the Court by all the parties on what meaning we should give to socio-economic rights in our young democracy.

The *Grootboom* case hasn't solved the housing problem in this country. It hasn't even got close to doing that. I don't think it has even made a dramatic change or improvement to the housing problem in South Africa. But I think it's been enormously significant.

The "Four Freedoms"

Prof Cas Sunstein, a powerful emerging intellectual in constitutional law in the United States, wrote a strong legal polemic against making socio-economic rights legally enforceable. The argument was directed against socio-economic rights being included in the new constitutions of Eastern Europe (Sunstein, 1993: 35).

Upon reading the *Grootboom* judgment, he wrote a further article in which he acknowledged that there was a way of managing the traditional roles of the courts in evaluating government practices and policies without upsetting the balance between the three branches of government, whilst, at the same time, not abdicating the court's role under the Constitution to take the rights seriously and enforce them (Sunstein, 2001 : 123).

And not only did he write an article contradicting his earlier article, but he has written a book in which he elaborates on Franklin Roosevelt's "Four Freedoms" speech to Congress in 1941 (Sunstein, 2006). Roosevelt enumerated the following fundamental freedoms which humans "everywhere in the world" ought to enjoy:

- freedom of speech and expression;
- freedom of every person to worship in his own way;
- freedom from fear; and
- freedom from want.

Sunstein thus drew on old traditions in the United States – a country whose constitutional jurisprudence has been least responsive to the notion of enforceable socio-economic rights. In fact, the United States Constitution is perceived as a negative Constitution whose primary function is to impose limits on government. Although Sunstein does not explicitly refer to the notion of "transformative constitutionalism", he nevertheless argues that a Constitution can be affirmative and integrate the socio-economic dimensions of human life and living.

The greatest significance of *Grootboom* and the *TAC* case was to say that the quality of life matters.

Socio-economic rights and human dignity

I think that the greatest significance of *Grootboom*, and later the *Treatment Action Campaign* case, was to say that the quality of life matters. It is not enough for the government to show a statistical advance in access to housing, health care and so forth. There are cases in which the government infringes on human dignity in such a profound way in relation to socio-economic rights that intervention by the courts is justified. The *Grootboom* community was literally sleeping out under the stars with no shelter and no security. They were unable to return to their previous plots as others had subsequently occupied them. There was just nowhere for them to go. Thus the Court developed the notion of reasonableness in terms of which the government is obliged to have at least an emergency programme in place to cater for those who are living in intolerable conditions or crisis situations.

The *TAC* case was in many ways more dramatic, more politicised. You could feel the atmosphere in court. The court was packed with people wearing T-shirts that said, "HIV positive". There was cheering when we left the court afterwards. There were journalists from all over the world there. Some people say that the case initiated the turnaround which has ended with the recent developments in the government's HIV/AIDS policy. I don't know, but the point I wish to make is that it is important to have an institution such as the courts, which are able to speak when there is a serious infringement of people's dignity and socio-economic well-being.

The symbolic effect of socio-economic rights cases

Courts deal with very concrete and specific cases, and respond to the particular dispute between the parties. Cases are very important in themselves, but frequently they symbolise something much bigger. I think the *Grootboom* and *TAC* cases symbolised something much bigger. They say something about the nature of this country, what counts in this country and what our values are. They pose the question whether we should claim to be "a winning nation"

or rather "a caring society". Can a state be committed to transformation and development while people are sleeping under the stars with nothing? Socio-economic rights give people the right to demand some form of response when their deep basic needs are not attended to in meaningful fashion.

At the end of the day, possibly the biggest contribution that is made through these cases is not the instrumental and practical one, which is primarily the responsibility of the government, but the symbolical and philosophical one. They help remind us of the kind of country we want to live in. UWC and the Centre, in particular, have played an enormous role in reminding us about the qualitative aspects of human life, about what it means to be a human being.

The Socio-Economic Rights Project helps keep alive something that is intrinsic to this university, which was part and parcel of the liberation struggle. There will always be new challenges, problems, tensions and contradictions as we strive to give effect to our constitutional commitments. But these kinds of debates and the work the Project is doing will help keep alive the constitutional vision of a better and more caring society.

Albie Sachs is a judge of the South African Constitutional Court.

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Enforcing socio-economic rights under a transformative Constitution

The role of the courts

Johan Froneman

I wish to start by congratulating the Socio-Economic Rights Project of the Community Law Centre on its tenth birthday. Our country owes the Project and the Centre, as well as those who have worked so hard in its propagation of socio-economic rights, a huge debt. I believe that the inclusion of justiciable socio-economic rights in our Constitution will play an important role not only in the potential it creates for the alleviation of poverty, but also in how we view development, freedom and the role that the law plays in the struggle to achieve these goals.

Most lawyers tend to assume that the courts have a huge role to play in ensuring that socio-economic rights are enforced. This is undoubtedly true. But it is also necessary to realise that other democratic institutions have an equally important function in this regard. The complementary role played by the courts and other democratic role-players is illustrated below.

All three branches of government, including the judiciary, must give attention to at least three different, but interrelated, aspects in their handling of socio-economic rights. The first is to give proper content to those rights. The second is to deter-

mine how the substantive content given to those rights helps or hinders developmental aims or purposes. The last is how the process of giving content to the rights and the developmental process or model fit best with the democratic demands of the Constitution.

Lawyers traditionally see their role as the relatively narrow one of giving effect to socio-economic rights in the courts. However, it is my suggestion that we evaluate this role also from the wider perspective of how judicial enforcement fits in with the developmental and democratic aspects of what we now accept is our transformative Constitution.

Development as freedom

One cannot have a useful discussion of the role of the courts in enforcing socio-economic rights without articulating how these rights are understood in the transformation process.

Much of the underlying philosophy, or vision, for the inclusion of justiciable socio-economic rights in the Constitution rests on the acceptance of the notion that one cannot have true freedom if the material means to exercise or enjoy that freedom are lacking. There are many different ways of expressing this. A colloquial way is to say that ours is not a "Ritz Hotel" kind of Constitution in terms of which, in principle, both rich and poor have the right to eat and sleep in that luxury hotel, but, in reality, the poor have no such right.

Another way is to say that our Constitution envisages not only political freedom but also economic freedom. This includes not only the negative freedom from political interference in our private lives, but also the positive freedom of access to the necessities of life. The well-known book *Development as Freedom* (1999), by Nobel laureate Amartya Sen, encapsulates wonderfully the underlying vision of justiciable socio-economic rights in our Constitution.

But the philosophy of the development of all human capabilities as a precondition of freedom, or at least as an indispensable part of economic freedom, is a contested notion. It is not the language of the developed world, of the international financial institutions or of the forces that push globalisation.

South Africa is not a developed country. It is not rich. In per capita terms, it is a middle-income country. This means that South Africa is poor, but not dirt poor. Conventional economic wisdom tells us that the best hope of lifting the majority of South Africans from this relatively poor position to a non-poor situation within the next generation or two lies in sustained economic growth. What the Constitution tells all of us, including the judiciary and the legal profession, is that even if that is our goal, we need to accomplish it in a special manner.

One cannot have true freedom if the material means to exercise or enjoy that fredom are lacking.

For present purposes two aspects of this special way are important, namely that the goal must be attained by the development of the capabilities of our people and that this must be done democratically.

Making socio-economic rights a reality

In order to make socio-economic rights a reality in the courts, three things must happen. The first is that aggrieved individuals must have access to courts. The second is that substantive individual content must be given to the fundamental socio-economic rights necessarily expressed in broad terms in the Constitution. The third is that the rights, once given content, must in the case of a breach carry an enforceable remedy.

Access to courts

The basic need to have access to food, water, housing, health and social security is unlikely to be an isolated individual problem. More often than not the problem presents itself on a larger scale – whole communities, or discrete groups of people, suffer from the lack of one or more of these resources.

In most cases the people involved are poor and do not, on their own, have the expertise and knowledge of their rights to vindicate the possible breach of their rights in the courts. The Constitution recognises this in section 38 by extending the common law of standing in courts to include those acting in the public interest or in the interest of a group or class of persons. But to use this tool, quite a number of underlying conditions must be in place.

In order to give expression to the collective concerns of the affected community or group or class, it is beneficial to have some local civic and representative body that can articulate these concerns. Such an organisation, if effective, is the first prize in a working democracy as it puts pressure on the authorities responsible for the delivery of socio-economic services. The relevant

authorities are put on their toes and made responsive to the needs of the affected group or community. If the representative body is effective in getting the authorities to respond, the battle for socio-economic rights is won without the intervention of the courts.

This simplified example can be extended to the broader political system at local, provincial and national level.

If representative or even direct democracy works properly at these levels, the involvement of the courts in enforcing socio-economic rights diminishes. In that context, this is a good thing. It means that democracy is working at its primary level and the potential tension created by the constitutional separation of powers is unlikely to come to the fore.

If redress at this level does not succeed, other role-players in the democratic process need to be present. Here advice centres, paralegal services and other non-governmental organisations become important. They are the kinds of institutions that can take the unresolved needs issues on to the more formalised legal level.

If representative or even direct democracy works properly at local, provincial and national levels, the involvement of the courts in enforcing socio-economic rights diminishes.

Through them, public interest legal firms can formulate the relevant substantive socio-economic legal claims and bring the matter to court. This can be through individual "test cases", public interest litigation or class actions.

It is only when this infrastructure of democratic institutions works well that the provisions of section 38 of the Constitution can really come into their own.

Two examples from the Eastern Cape illustrate the good, the bad and the ugly of this point. When democracy arrived in 1994, the province had the unenviable task of having to integrate three different social security structures (Transkei, Ciskei and the old Cape Province) into one. Understandably, many problems arose in this process.

What made matters worse was a lack of initial capacity in the administration. This was unfortunately accompanied by an apparent lack of understanding, of, or disregard for, the province's constitutional accountability and responsibility to those in its jurisdiction who needed the social support system the most – the old and the disabled.

The "bad" lay in the fact that democracy was new to all of us. The ruling party had an overwhelming support base in the province, and it was unrealistic of those supporters to expect that they could openly challenge the unresponsiveness of their own leaders so soon after freedom had at last arrived.

Moreover, there were no vibrant civil society structures to challenge the authorities at a more localised political level. At the primary democratic level, the enforcement of recognised socio-economic rights, namely social grants, failed.

The "good" lay in the fact that there were structures at the next level to take the matter further. The Legal Resources Centre (LRC), relying on a wide range of support structures built up during the struggle against apartheid, used the newly recognised class action to enforce the right to social grants. The result was, on the whole, a relatively satisfactory one.

Once the battle for the recognition and acceptance of a class action had been won, agreement was reached between the class and the authorities on a court-supervised attempt at a resolution of the problem.

It took a long time though: the files in the offices of the registrar of the High Court were only finally shelved about a month ago, some eight years after the first legal steps had been taken.

The "ugly" part occurred because the underlying causes for the failure to address the problem of maladministration persisted. At the primary level of democracy there was still no effective representative or direct democratic pressure of a sustained nature to ensure enforcement on its own without court involvement. Administrative capacity problems persisted. The LRC could not on its own sustain the administrative oversight necessary to keep the overall system working in an accountable manner.

The result was that private legal firms saw an opportunity for themselves to fill the gap, something which, in my view, eventually spun out of control.

By the end of 2005, the Port Elizabeth motion court was inundated with anything from 300 to 500 review applications about social grant cases every week. Investigation showed that the state was paying about R5 000 in costs for each of these applications. That

amounted to something like R6 million to R 10 million a month.

The Judge President of the Eastern Cape took steps in the form of issuing a court notice to bring things under control.

In essence, the court notice set out certain procedural prerequisites, designed to ensure the genuineness of the identity of the claimant and the validity of the claim, to be met before the matter could be brought to court.

I will return to this when dealing with the role courts have to play in the enforcement of breaches of socio-economic rights.

The content of socio-economic rights

The courts have an important role in determining the content of socio-economic rights, but here again they do not have the primary role. In terms of the Constitution, the state must take reasonable legislative and other measures within its means to enable progressive realisation of the right to land, to adequate housing, to sufficient food and water, to health care services, to social security, to education and to an environment not harmful to human health or well-being.

As long as the primary democratic process ensures not only such effective legislative measures, but also their effective administrative enforcement, the role of the courts will remain minimal. When the realisation of the rights is ignored, the courts have the constitutional, but very difficult, duty to keep the other branches of government to their constitutional obligations of developing the capabilities of our people.

It is for many reasons a difficult task, but for present purposes the main difficulty for the courts is how to avoid prescribing to the other arms of government *how* to execute their constitutional duties while at the same time ensuring that those constitutional duties are in fact fulfilled.

It is the old problem of the distinction between review and appeal in another guise, but complicated further in these types of cases by considerations relating to the constitutional separation of powers.

I do not wish to enter the debate as to whether the reasonableness review model developed in *Government of the RSA and Others v Grootboom and Others* (2002) is the most appropriate or the best route to follow (see in this regard Liebenberg, 2007).

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

I would again prefer to mention some conditions that might make it easier for the courts to make socio-economic rights real in legal terms.

Compelling facts

On a purely practical level it is in my view more important to ensure that the facts of the case brought to court are so compelling that any court will almost have no choice but to grant some form of relief.

This should be contrasted with a case where the court has to be persuaded by way of legal argument to develop the law on a more abstract level where the facts might not speak so strongly for themselves.

Again, doing this properly depends on the existence of the same institutions mentioned earlier in relation to access to courts.

The best cases for advancement of the law in relation to socio-economic rights are the ones where real need exists and where there are community institutions to give voice to those needs: for instance, the illegal occupiers in the *Grootboom* case and in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (2004) and the evicted homeless in the *City of Johannesburg v Rand Properties (Pty) Ltd and Others* (2006).

The courts might want to avoid laying down fulfilment of basic needs as a legal requirement for government programmes, but they will find ways to deal with factual situations of basic need that come before them. The above-mentioned cases are illustrations of this.

Just as the facts on the ground form and shape the law that develops to meet those facts, so does the intellectual climate of the time. In this regard, the content given to socio-economic rights by the government in legislation is of some importance.

The more the primary democratic process of political participation ensures acceptance of the notion that the development of all human capabilities (as expressed in constitutional socio-economic rights) is necessary for freedom in its widest sense, the easier it becomes for the courts to make that notion part of the fabric of our common law. An example is the influence of recent

land and property legislation (eg the Extension of Security of Tenure Act 62 of 1997, and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998) on our conception of the common law of property: namely that the exercise of property rights is not absolute and that these rights are subject to the greater good of society (*Port Elizabeth Municipality v Various Occupiers*, 2005).

The whole focus of the current debate about the so-called direct horizontal application of fundamental human rights may also be redirected once the notion of the development of human capabilities is accepted as fundamental to the fabric of our society, so that it also becomes part of the very fabric of our law, including the common law.

The Constitutional Court leads the way in articulating the all-pervasiveness of such constitutional values as the very foundation or fabric of our law as a whole. Accordingly, this fact will also work the other way in influencing the making and content of legislation, and the execution of policy by the legislative and executive branches of government in conformity with this foundation.

Remedies

The third and final way in which courts play a direct role in the enforcement of socio-economic rights also finds its authority in section 38 of the Constitution. Once a party has been given access to the courts for the alleged infringement of a fundamental socio-economic right, and the court finds, on the facts before it, that there has been such an infringement, it must, in terms of the section, grant appropriate relief.

It is perhaps here, in the realm of appropriate remedies, that the role of the courts in the enforcement of socio-economic rights becomes of primary importance. That is so because, at this final stage, the primary democratic process of enforcement through political participatory processes would have proved futile.

It is in the realm of appropriate remedies that the role of the courts in the enforcement of socio-economic rights becomes of primary importance.

It is also often the most dangerous area for courts to enter, as it may be perceived as undemocratic or as an intrusion into the constitutional sphere of authority of the other branches of government. Therefore caution is required, but not the abdication of responsibility.

An example from the Eastern Cape illustrates this point. In the social grant cases, many orders for the payment of money were made against the provincial government. Relief in the form of declarations of contempt and explanations from the relevant officials for non-compliance with the orders were granted in some courageous decisions in Bisho and Umtata (*Mjeni v Minister of Health and Welfare, Eastern Cape*, 2000; *East London Transitional Local Council v MEC for Health, Eastern Cape, and Others*, 2000).

Some understanding was slowly developing about the province's constitutional obligation to comply with court orders.

Then, unfortunately, the wrong case (on the facts) was taken on appeal to the Supreme Court of Appeal. The appeal was rightly dismissed on the particular facts, but certain remarks made in the judgment were interpreted by those advising the province to mean that the courts were powerless to enforce their own money judgments (*Jayiya v MEC for Welfare, Eastern Cape, and Another*, 2004). It took another appeal to the Supreme Court of Appeal for this misconception to be rectified (*Member of the Executive Council: Welfare v Kate*, 2006).

The next, and hopefully final, step in this unfortunate saga was an innovative application to compel, firstly, the individual state functionaries charged with the running of provincial finances to perform their duties in this regard and report to court. This application called for a structural interdict requiring the state to report to the Court on what steps had been taken to comply with the statutory and constitutional obligation to satisfy money judgments against the state.

A second step was a further application for committal for contempt of court if the officials failed to fulfil their statutory and constitutional obligations. (*Magidimisi v The Premier of the Eastern Cape and Others*, 2006). The first part of the application did the trick: the point that state officials could be held personally accountable for non-fulfilment of their statutory and constitutional obligations came through loud and clear.

In the same period, the Judge President issued a court notice putting paid to the potential abuse in social grant litigation by private practitioners.

I would like to think that by these various measures, both the executive and the judiciary learned more of the workings and constitutional obli-

gations of each other, and that we now have a much better understanding of our mutual and complementary roles in enforcing those particular fundamental social rights.

The same point has been made in many Constitutional Court decisions. We are by now familiar with structural interdicts, constitutional damages, reading down of legislation and other "appropriate remedies".

It may not be enough for some, but in my judgment the Constitutional Court has at least given us good pointers and a better understanding to fashion further ways to strengthen the enforcement of socio-economic rights.

Conclusion

The argument here is that the true transformation of our society will best be achieved if we acknowledge that the development and enhancement of the basic capabilities and needs of all our people – the fulfilment of their socio-economic rights or potential, in other words – is fundamentally necessary to achieve true political, personal and economic freedom.

To do that most effectively, democracy must be fostered at ground level to keep all branches of government, including the judiciary, on their toes so that they keep their constitutional promises. Without this the courts on their own will find it difficult, and in the end probably impossible, to realise our constitutional dream.

The Socio-Economic Rights Project of the Community Law Centre at the University of the Western Cape was founded on that dream. I have little doubt that it will continue to play a vitally important role in keeping the dream alive.

Johan Froneman is a judge in the Eastern Cape Division of the High Court.

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Case review

An administrative law perspective on "bad building" evictions in the Johannesburg inner city

Geo Quinot

City of Johannesburg v Rand Properties (Pty) Ltd 2007 SCA 25 (RSA) (*Rand Properties*)

The recent judgment of the Supreme Court of Appeal in the *Rand Properties* case provides an opportunity to assess the use of administrative law arguments in advancing the realisation of socio-economic rights. The judgment itself disappoints in this respect by failing to grapple effectively with the potentially constructive interaction between section 33 of the Constitution and the various socio-economic rights provisions.

On 26 March 2007 the Supreme Court of Appeal (the SCA) delivered judgment in the appeals against the decision of Jajbhay J in *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W). It upheld the appeal and dismissed the cross-appeal.

The background to, and facts of this case, as well as the High Court judgment, have been concisely discussed by Stuart Wilson (2006) and I will not attempt to traverse the same ground here. In short, the *Rand Properties* matter dealt with eviction notices issued by the City of Johannesburg in terms of section 12(4)(b) of the National Building Regulations and Building Standards Act, Act 103 of 1977 (NBRA), against a large number of occupiers of dilapidated buildings (so-called "bad buildings") in the inner city. It is these notices that the City sought to enforce in its High Court applications.

The occupiers resisted the applications and brought a counter-application, arguing *inter alia* that section 12(4)(b) of the NBRA conflicted with section 26 of the Constitution and was accordingly unconstitutional, that the City had failed to honour its housing obligations towards the occupiers in terms of section 26 of the Constitution, and that the City's decision to issue the notices should be reviewed and set aside in terms of the Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA).

It is the last-mentioned administrative law dimension to this matter that I wish to focus on. The *Rand Properties* matter (if not the judgment) provides a good illustration of the potential use of administrative law arguments in the realisation of socio-economic rights.

Procedural fairness

The respondents' central administrative law argument was that the City's failure to afford them a hearing prior to issuing the section 12(4)(b) NBRA notices amounted to procedurally unfair administrative action. The SCA rejected this argument, declaring: "It is clearly desirable that there should be consultation in matters of this nature but this is not such a case."

With all due respect, Harms ADP's approach here seems to hark back to the narrow common law view of *audi alteram partem*, which we left behind with the adoption of procedural fairness in section 33(1) of the Constitution and the strong constitutional emphasis on consultation and participatory democracy.

Proper consultation in all administrative decision-making is now a constitutional duty that can be departed from only with the greatest circumspection.

It should no longer be necessary to come up with creative or forced arguments in order to ensure that those looking to government for socio-economic assistance are treated in a fair manner, as was too often the case in common law.

Proper consultation in all administrative decision-making is now a constitutional duty that can be departed from only with the greatest circumspection. It is certainly much more than a "desirable" aspect of administrative conduct, and it is one that deserves much closer consideration than the SCA seems to suggest.

The SCA's approach to the matter in common law terms is also evident from the further remark in paragraph 63: "In cases of crisis the *audi* principle can hardly apply." This approach is not in line with the new constitutional administrative law.

In respect of both the SCA's treatment of the sources and the substance of administrative law, one is reminded of the stern warning by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*, 2004, where O'Regan J said: "To the extent ... that neither the High Court nor the SCA considered the claims made by the applicant in the context of PAJA, they erred."

The respondents' procedural fairness argument should have been subjected to closer scrutiny in the context of PAJA than the off-hand references to the Act made by the SCA. In particular, the City's evident non-compliance with the mandatory procedural requirements found in section 3(2)(b) of PAJA when issuing the section 12(4)(b) NBRA notices should have been closely assessed against the requirements for departures found in section 3(4) of PAJA.

The SCA quotes this latter section without seriously engaging with its specific requirements. The Court notes two reasons for allowing the departure from section 3's mandatory procedures.

It first states that such departure is acceptable in "cases of crisis", which the current situation ostensibly is. In this statement the Court seems to contradict its earlier remark that the respondents are not in an emergency situation, but in "an ongoing state of affairs" (at par 45).

This argument is supposedly based on urgency in terms of the factors listed in section 3(4)(b) of PAJA to guide an assessment of the reasonableness and justifiability of departures.

However, on the facts of this matter, the City can hardly claim that the issuing of the notices was urgent. More than seven months separated its initial inspection and the issuing of eviction notices in respect of one of the buildings involved.

The second justification accepted by the SCA for the City's non-compliance with section 3(2)(b) of PAJA was "the problem in establishing the number, apart from the identity, of the occupiers".

The Court does not, however, seem to have much difficulty in overcoming this problem itself when it issues an order directing the City to provide temporary settlement to specific occupiers (see par 2.3 of the SCA's order).

If, alternatively, the identity and number of the occupiers were real problems, the City should have followed section 4 of PAJA, which specifically provides for procedural fairness in instances where "any group or class of the public" is affected.

One of the main criticisms, from an administrative law perspective, against *Rand Properties* is accordingly the SCA's failure to seriously engage with procedural fairness requirements as structured in PAJA. In particular, the factors listed in section 3(4)(b), aimed at assessing whether a departure from the procedural requirements of section 3 is "reasonable and justifiable in the circumstances", were largely ignored by the Court.

Those factors are specifically designed to achieve a proportional balance of competing interests in instances such as the present.

By failing to balance "the likely effect of the administrative action" (section 3[4][b][iii]) against the City's "need to take the ... action" (section 3[4][b][i]) the SCA failed to protect the procedural rights of the occupiers.

The importance of procedural fairness to the protection of socio-economic rights

The importance of procedural fairness rights in instances such as *Rand Properties*, involving the realisation of socio-economic rights for the poor, cannot be overstated.

It is firstly critical in bringing all the relevant considerations to the attention of the administrator before decisions are taken.

Consequently, a much more balanced approach to matters such as the current one is encouraged, which in turn must lead to higher rationality in administrative programmes. *Rand Properties* effectively illustrates the importance of this function of procedural fairness.

One of the main criticisms against *Rand Properties* is the SCA's failure to seriously engage with procedural fairness requirements as structured in PAJA.

The City's focus seems to have been largely on the buildings rather than the people involved. If it had afforded the occupiers an opportunity to respond to notices proposing eviction, the City might have realised that such evictions would result in the occupiers being worse off from a safety point of view.

It might have consequently realised that it should put in place realistic alternative housing options for these occupiers before issuing eviction notices, which would certainly have been a much more rational course of action. But by only inspecting the buildings and not listening to the inhabitants, the City seemingly failed to grasp the irrationality of its actions.

Secondly, procedural fairness can help reinforce the dignity of beneficiaries of state socio-economic programmes. Comprehensive socio-economic assistance from the state inevitably runs the risk of creating a culture of dependence. The problem is not so much dependence on the provision of the actual assistance (eg food, housing or social assistance), but the perception it may create of recipients as dependent, passive, weak, subjugated "external objects of judgment" (Nedelsky, 1989: 27). It is the latter perception that principally undermines such beneficiaries' dignity. By affording them the opportunity to actively participate in the provision of state assistance, procedural fairness can achieve much in giving such beneficiaries a sense of control, participation and, accordingly, significance and worth. Even where a hearing allegedly cannot achieve much by way of substantive outcome (as the SCA seems to suggest in *Rand Properties*), this important function of procedural fairness remains unaffected.

Relevant considerations and reasonableness

Finally, it is of interest to note some alternative arguments, based on administrative law, that might have assisted those resisting the eviction

notices in *Rand Properties* without getting them bogged down in the interpretative difficulties surrounding section 26 of the Constitution. These illustrate the potential use of administrative law arguments in such cases.

The first argument, which was, in fact, made by the respondents, is based on the duty to take all relevant considerations into account when taking administrative decisions (PAJA, section 6[2][e][iii]).

When an administrator takes any decision in the context of housing, the state's duties in terms of section 26 of the Constitution are obviously relevant considerations.

When the decision furthermore involves the poor, the specific housing obligations of the state as explained in cases such as *Government of the RSA v Grootboom* 2001 become even more relevant.

In fact, the SCA found in *Rand Properties* that the City had failed to honour its constitutional obligations towards those in desperate need as a result of the evictions.

It is accordingly difficult to understand how the Court could have found that the City had taken all relevant considerations into account when deciding to issue the eviction notices.

A second argument, based on reasonableness, focuses on the specific wording of section 12(4)(b) of the NBRA, which empowers an administrator to issue eviction notices when it "deems it necessary for the safety of any person ... to vacate such building". A reasonable decision which concludes that it is indeed necessary to vacate the building must take note of the impact of ordering the person to vacate.

It is difficult to understand how the Court could have found that the City had taken all relevant considerations into account when deciding to issue the eviction notices.

Can it be said that an order to vacate a building in the interests of the occupier's safety is reasonable if the effect of that order is to place the person in an even less safe position? Can it then be held *necessary* for her safety to vacate the building? Is it not rather necessary for her safety to remain in the building?

By focusing on the reasonableness of the assessment of the precondition to ordering eviction (ie the necessity of safety) one is able to largely avoid the much more difficult section 26 analysis.

Conclusion

In *Rand Properties* there was much scope for administrative law arguments to advance the protection of socio-economic rights.

Unfortunately, the SCA did not show much enthusiasm for the respondents' arguments in this regard.

The SCA's failure (or unwillingness) to seriously engage with administrative law arguments (in terms of the Constitution and PAJA) in this case undermines the development of a potentially constructive alliance between specific socio-economic rights and administrative justice provisions in the Constitution.

The respondents have, however, already filed notice of their intention to apply to the Constitutional Court for leave to appeal the SCA's judgment. One hopes that the administrative law dimension of this matter will receive better treatment in Braamfontein than it did in Bloemfontein.

Geo Quinot is a senior lecturer in the Department of Public Law, Stellenbosch University.

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Celebrating ten years of translating socio-economic rights into reality

The Socio-Economic Rights Project of the Community Law Centre

Lilian Chenwi

South Africa's democracy has all the building blocks in place to facilitate democratic development and the realisation of socio-economic rights. The 1996 Constitution provides a strong institutional framework within which socio-economic rights can be realised. However, although South Africa has a Constitution hailed as the most progressive in the world and a broad range of institutions, actors, legislation and promising jurisprudence designed to promote human rights, translating these rights into tangible realities for poor and marginalised groups still remains a major challenge.

The Socio-Economic Rights Project of the Community Law Centre at the University of the Western Cape was established to undertake this challenge.

The Project was founded in 1997 by Prof Sandra Liebenberg (currently the H F Oppenheimer Chair in Human Rights Law at Stellenbosch University). In her capacity as a member of the Technical Committee of the Constitutional Assembly on the Bill of Rights, she played an important role in the background research which informed the drafting of the relevant provisions protecting socio-economic rights in the Constitution.

Though the Project focuses on socio-economic rights, it recognises the mutual interdependency and interrelatedness of all human rights. For example, civil and political rights are important in protecting people's right to organise and mobilise around the realisation of socio-economic rights

This year, the Project celebrates ten years of contributing towards translating these rights into reality for all people living in South Africa, particularly groups marginalised by poverty.

Focus areas and strategies

Since its establishment, the Project has carved out an important niche for itself in the social transformation agenda of South Africa. It has established a national and international reputation for its work in advancing socio-economic rights as protected in domestic as well as international instruments.

It has focused on a broad range of themes pertaining to socio-economic rights, including the rights to housing, health, social security, food and nutrition, and water; the socio-economic rights obligations of local government; the socio-economic rights of children and older persons; poverty and development; equality; the socio-economic rights obligations of non-state actors; and the privatisation of basic services.

In addition to building alliances with other organisations, the Project employs a combination of strategies to advance socio-economic rights, including research, informing public debates, litigation, education and training, monitoring and shadow reporting.

Research

The Project has generated in-depth research around the implementation, monitoring and enforcement of socio-economic rights at both the domestic and international levels. Its research has been on the broad themes described above.

These research outputs have been published in accredited and non-accredited journals and books as well as in lay publications. In addition, Project members have been commissioned by a range of institutions, including the South African Human Rights Commission, the Medical Research Council, Street Law South Africa and the UN Food and Agriculture Organisation, to conduct research on a variety of human rights issues.

Informing public debate

The Project informs public debate through producing accessible, informative materials on key issues

relating to socio-economic rights, making submissions on law reform and policy developments, participating in media debates, and hosting conferences and seminars on socio-economic rights issues. Its contributions are aimed at improving public awareness and knowledge of socio-economic rights, and the mechanisms for implementing, enforcing and monitoring their realisation.

Publications

One of the aims of the Project is to translate its research outputs into accessible and user-friendly materials with the aim of empowering communities and marginalised groups to know, claim and defend their rights. These materials are also aimed at government officials so as to increase awareness of their responsibilities.

One of the flagship publications of the Project is its quarterly journal, the *Economic and Social Rights Review* (*ESR Review*). This journal seeks to highlight, in an accessible manner, relevant case law, policy and legislative developments, and international developments related to socio-economic rights. Thus far, 27 issues have been produced. These editions have been compiled into a book which can be purchased from the Project. Other publications of the Project include:

- *Water delivery: Public or private?* (2006)
- *Socio-economic rights in South Africa: A resource book,* (first and second editions, 2000 and 2007 respectively)
- *Realising the rights of children growing up in child-headed households: A guide to laws, policies and social advocacy* (2003)
- *Knowing & claiming your right to food* (2004)
- *Realising socio-economic rights in the South African Constitution: The obligations of local government – a guide for municipalities* (2006)
- *Accessing housing in the Western Cape: A guide for women vulnerable to gender-based violence and HIV/AIDS, and for organisations providing services to them* (2006)

These publications have been well received. For instance, with regard to the *ESR Review*, Justice Edwin Cameron of the Supreme Court of Appeal said: "I always appreciate receiving it and read its articles with interest and admiration."

In response to receiving the guide on the socio-economic rights obligations of local government, Bongiwe Kunene of the Office of the Deputy President said: "It is indeed very pleasing to know that there are institutions that are keen on working hand in hand with government to improve service delivery to our communities by the local government."

Also with regard to this guide, Mark Heywood of the AIDS Law Project noted: "This looks to be a very practical and useful document ... I think it would be very useful for our branch leaders as a guide for how to campaign with regard to local government."

National and international advocacy

Since its establishment, the Project has focused on influencing law reform and policy developments in the sphere of socio-economic rights. It has made numerous submissions to public institutions on law reforms, policy and programmatic developments. These include submissions to:

- the Truth and Reconciliation Commission, concerning the relevance of the socio-economic rights to the Commission's mandate (1997);
- the Portfolio Committee on Housing (National Assembly), on the Housing Bill (1997);
- the Portfolio Committee on Welfare (National Assembly), on the report of the Lund Committee on Child and Family Support (1997);
- the Equality Legislation Drafting Unit, on the equality legislation in relation to housing and health care services, and the inclusion of socio-economic status as a prohibited ground of discrimination in the equality legislation (1998);
- the Department of Health, on the draft regulations relating to AIDS notifiability (1999);
- the Ad Hoc Committee (National Assembly), on the Promotion of Equality and Prevention of Unfair Discrimination Bill (1999);
- the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (Taylor Committee), on the constitutional framework and implications for social security policy reform in South Africa (2001);
- the Portfolio Committee on Social Development (National Assembly), on the Social Security Agency Bill (2003);

- the Joint Ad Hoc Committee on Democracy and Good Political Governance – Africa Peer Review Mechanism Process, on South Africa's promotion and protection of socio-economic rights enshrined in the Bill of Rights and other African and international human rights instruments (2005);
- the national Department of Housing, on the Prevention of Illegal Eviction from and Unlawful Occupation of Land Bill and the Rental Housing Bill (2007); and
- the Parliamentary Ad Hoc Committee on the Review of the State Institutions Supporting Constitutional Democracy, on the South African Human Rights Commission and its monitoring of socio-economic rights (2007).

In addition to making submissions, the Project has issued press statements on the right to adequate housing in South Africa, in which it condemns arbitrary evictions that have rendered hundreds of people homeless and vulnerable to the violation of their human rights, and called upon the government to fulfil its obligations in this regard.

The Project has also endorsed press statements prepared by other international organisations such as the Centre on Housing Rights and Evictions (COHRE) that condemned the evictions in Zimbabwe which left thousands of people homeless.

The Project has been involved in research and advocacy in South Africa on the right to food. This includes participating in international lobbying and advocacy initiatives for the adoption of the UN Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security.

In this regard, the Project advised the Department of Agriculture on its position and formed part of its delegation to the open-ended session of the intergovernmental working group considering the development of the Voluntary Guidelines on the Right to Food held in Rome (Italy) in October 2003.

The Project also participates in the basic income grant (BIG) campaign, which advocates the introduction of a universal basic income grant in South Africa as a mechanism to realise the right of access to social assistance.

In this regard, the Project made a submission to the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (the Taylor committee). Through the Project coordinator's chairpersonship of the BIG coalition since July 2005, the Project continues to play a significant role in the campaign.

The Project's advocacy activities extend beyond South African borders. The Project has participated in preparatory meetings organised by the Human Rights Institute of South Africa (HURISA) for the sessions of the African Commission on Human and Peoples' Rights. In the 35th session (2004) of the Commission, the Project made a statement on the role of the Commission in promoting and protecting socio-economic rights and appealed to the Commission to call upon states to respect, protect, promote and fulfil their socio-economic rights obligations as enshrined under the African Charter on Human and Peoples' Rights (African Charter) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

For the 38th session (2005), the Project joined other organisations in writing a shadow report to South Africa's first periodic report on the African Charter.

In order to participate directly in the activities of the African Commission, the Project spearheaded the Community Law Centre's application for observer status with the Commission, which was granted in 2005.

In addition, the Project is participating in the campaign for the adoption of an Optional Protocol to the ICESCR providing for an individual complaints mechanism. A project member, Dr Lilian Chenwi, is a member of the steering committee of the NGO Coalition for an Optional Protocol.

As part of its involvement in the campaign, the Project participated in the UN open-ended working group session in 2004 and the 2006 civil society forum on an optional protocol.

Workshops and seminars

Hosting workshops and seminars has also been one of the Project's advocacy activities. Over the past ten years, a number of workshops and seminars have been held on social security and assistance, the privatisation of basic services, and strategies to promote the realisation

of socio-economic rights such as the right to food and nutrition, housing rights, health care services and social security rights.

In 2006, the Project initiated the holding of provincial seminars with the aim of stimulating awareness and debate on socio-economic rights in the provinces that are most affected by socio-economic deprivation.

These workshops are also aimed at building the capacity of local organisations and institutions to contribute meaningfully to the implementation of socio-economic rights in these provinces.

In organising provincial seminars, the Project works in partnership with key local organisations and institutions. The first provincial workshop was hosted in KwaZulu-Natal with local partners: the South African Human Rights Commission, the Commission on Gender Equality, Street Law South Africa, the Ombudsperson and Head of Investigations Office of the eThekwini Municipality and the Civil Society Advocacy Programme.

The key outcome of the seminar was the setting up of a task team composed of the seminar organising partners, which is mandated to devise a follow-up plan on the critical strategic issues identified at the seminar.

The Project has commenced the planning of a second provincial workshop to be held in the Eastern Cape.

In addition to hosting workshops and seminars, Project members have participated in key national and international conferences and seminars organised by government departments and other organisations.

These events provide a forum for the Project to share and exchange ideas and resources with colleagues from other organisations, to obtain feedback on our work, to disseminate or distribute Project outputs, to foster collaboration with other organisations working in the same or related areas, and to maintain the Project's reputation in the international community as one of the important stakeholders on socio-economic rights issues.

Intervening in court cases as an *amicus curiae*

Intervening as an *amicus curiae* (friend of the court) in court cases has also been a key activity of the Project. This activity is aimed at contributing to the development of a jurisprudence on socio-economic rights that is responsive to the needs of poor and marginalised groups and communities.

The Project has intervened in the following four crucial cases thus far:

- *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (*Grootboom* case);
- *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (*TAC* case);
- *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (8) BCLR 786 (CC); and
- *City of Johannesburg v Rand Properties (Pty) Ltd and Others*, an appeal case No. 253/2006 (not reported yet).

Three of these cases concerned the right to adequate housing for persons facing eviction from their homes, while the *TAC* case concerned the government's obligations to provide antiretroviral therapy throughout the public health sector to reduce mother-to-child transmission of HIV.

Recently, the Project and the Centre for Applied Legal Studies (CALS) have been admitted as *amici curiae* in another case: *Christian Roberts and Others v The Minister of Social Development and Others* Case No. 32838/05 [High Court] Transvaal Provincial Division. This case concerns a challenge to the constitutionality of a number of laws and regulations on social assistance which provide that women are entitled to a grant for the aged at the age of 60 whereas men are eligible at the age of 65.

The Project and CALS will argue, primarily, that the state has an obligation to fulfil the right of access to social assistance to all people who are unable to support themselves and their dependants.

They will also make submissions on the constitutional implications of the intersectional grounds of discrimination which affect men in the excluded age group.

The Project not only intervenes in these cases by making submissions in court, but monitors the enforcement of court orders. For example, it conducted an extensive research project on the implementation of the *Grootboom* judgment and assisted the community in obtaining the services of the Legal Resources Centre to represent them in securing their housing rights.

In the *Modderklip* case, the

Project has written to the Ekurhuleni Municipality requesting information regarding the enforcement of the order. It has visited the community with the aim of establishing what role the Project can still play in ensuring the adequate enforcement of the court order.

Engaging in teaching and training

Education and training are another strategy used by the Project in promoting socio-economic rights. Project members have presented guest lectures on socio-economic rights issues at academic and civil society institutions in South Africa and abroad.

The Project has been involved in lectures on socio-economic rights as part of the LLM programme on Human Rights and Democratisation in Africa. The programme is offered by the Centre for Human Rights at the University of Pretoria in partnership with the University of the Western Cape, the American University in Cairo (Egypt), the Catholic University of Central Africa (Cameroon), the Universidade Eduardo Mondlane (Mozambique), the University of Ghana, Makerere University (Uganda) and, recently, Addis Ababa University (Ethiopia).

The Project has hosted two PhD candidates thus far: Dr Danwood Mzikenge Chirwa (now a senior lecturer in the Law Faculty at the University of Cape Town) and Christopher Mbazira. The former graduated in 2005 and the latter aims to graduate this year.

The Project has also hosted interns from within South Africa and abroad who have not only benefited from the Project, but assisted in furthering the Project's goals.

Website

Finally, to ensure that our outputs are accessible to a wider audience, the Project has created a vibrant website through which its research, advocacy and other activities can be accessed: www.communitylawcentre.org.za/Projects/Socio-Economic-Rights/.

Challenges

The Project's achievements for the past ten years have not been without challenges. These include:

- the government's increasing intolerance of criticism by civil society;
- the continuing eviction of farm dwellers and residents of buildings considered to be unsafe;
- poor policy and programme implementation that result in the majority of the population continuing to be deprived of access to basic services – for instance, the failure of local governments to deliver social services adequately, which has sparked a wave of violent demonstrations by frustrated residents who believe that the government is not fulfilling either its constitutional obligations or its election promises;
- frustration with the lack of implementation of court orders in some important socio-economic rights cases;
- the difficulties of raising funds as donor funds become more restricted and are directed away from South Africa, forcing the Project and other civil society organisations to compete for a depleted pool of donor funds; and
- the scarcity of skilled personnel in the area of socio-economic rights and poverty eradication.

It is evident that much work remains to be done in translating socio-economic rights into reality.

The new Project slogan: "Ensuring rights make real change"

The Project's vision for the coming years is apparent in its recently adopted slogan, "Ensuring rights make real change."

The Project intends to continue its work and intensify its strategies in advancing socio-economic rights. It plans to dedicate more effort to the role of local government in realising socio-economic rights, as local government is central in this process and is closest to the people.

It is important that this sphere of government be supported to enable it to overcome some of the challenges that it faces in discharging its constitutional obligations to deliver basic services.

For the past ten years, the Project's Africa regional focus has been incidental. However, the integration and expansion of the regional focus is now a major part of the Project's vision for the coming years.

Lilian Chenwi is a researcher in the Socio-Economic Rights Project.

Introducing our new resource book

Sibonile Khoza

On 12 April 2007, the Socio-Economic Rights Project launched the second edition of the book *Socio-economic rights in South Africa: A resource book* (2007).

***Socio-economic rights in South Africa: A resource book*, edited by Sibonile Khoza, second edition, Cape Town, Community Law Centre (University of the Western Cape)**

For a printed copy, please contact the Socio-Economic Rights Project on tel: +27(0)21 959 2950/ 3708 or fax: +27(0)21 959 2411 or e-mail serp@uwc.ac.za or skhoza@uwc.ac.za. The book will be available online later in 2007.

Sandy Liebenberg and Karrisha Pillay were the editors of the first edition, which was produced in October 2000. They envisaged that a second edition would eventually become necessary "as new laws, policies and case studies emerge which impact on the realisation of socio-economic rights". The dramatic developments in socio-economic rights since October 2000 have indeed made it necessary to bring out a second, updated edition.

The resource book aims to be a useful and practical guide for human rights and development organisations, institutions and practitioners involved in education, training, giving advice, advocacy, lobbying, monitoring and mobilising in areas relevant to socio-economic rights. It seeks to raise awareness of the wide range of resources and tools that are available to understand and advance socio-economic rights.

The process of producing the second edition, which began in July 2005, has now come to fruition. Under my lead editorship, this edition covers seven main areas:

1. *The jurisprudence on socio-economic rights, which has evolved so dramatically in the past seven years.* A key feature of this edition is the discussion and demonstration that runs throughout the book of how the standard of reasonableness developed in the celebrated *Grootboom* judgment of the Constitutional Court, and applied and elaborated in subsequent cases, can be used to advance socio-economic rights even further. It discusses the opportunities and possible limitations presented by the current jurisprudence in improving the lives of the people of South Africa.
2. *Law reform initiatives that have shaped the implementation of socio-economic rights.* Major legislation under the spotlight in certain chapters include legislation that relates to specific rights (eg the National Health Act), legislation that relates to vulnerable groups (eg the Children's Act and the Communal Land Rights Act) and legislation pertaining to socio-economic rights more broadly (eg the National Credit Act). We discuss the importance of the various pieces of legislation for poor people and disadvantaged groups and highlight some of the entitlements and opportunities they create. We also highlight how poor people can claim and defend their rights through such laws.
3. *Policy and programmatic developments that have been implemented to realise socio-economic rights.* One of the major policies developed in the past six years is the National Housing Programme for Housing Assistance in Emergency Circumstances, which was developed in compliance with the *Grootboom* declaratory order. The implications of this and other policies and programmes are discussed and opportunities for advancing socio-economic rights through them are highlighted.
4. *Institutional developments that can assist in ensuring efficient and effective implementation of socio-economic rights.* Under the spotlight in the social security rights chapter, for example, is the establishment of the South African Social Security Agency, which took over the administration and payment of social grants from the Department of Social Development.

5. *The development of strategies to promote and protect socio-economic rights.* We highlight, in order to inspire creative thinking, how different actors in South Africa and abroad (particularly civil society organisations and social movements) have successfully taken full advantage of the institutions of democracy and human rights by using numerous strategies to achieve social justice. We illustrate, mainly in Chapter 2, the innovative methods, tried and tested strategies and best practices through court cases, examples and guidelines for ease of reference.
6. *Progress made in realising socio-economic rights.* We use the latest research studies, statistics and surveys as indicators of such progress in the spheres of poverty alleviation, the reduction of inequality, expanding access to housing, health care etc. This edition relies primarily on data gathered and documented since October 2000.
7. *International developments and their impact on South Africa.* Chapter 3 is dedicated to this theme and discusses key developments including new general comments from the treaty bodies, new institutions such as the UN Human Rights Council, international and regional policies such as the New Partnership for Africa's Development and the Millennium Development Goals, decisions of the African Commission and updates on the optional protocols to the International Covenant on Economic, Social and Cultural Rights. It also highlights the role that can be played by NGOs and other non-governmental formations in advocating for social justice at the international and regional levels. International developments specific to particular rights are also discussed in the chapters about those rights.

There is a saying, "Do not change the winning formula." In producing this edition, we have heeded this wisdom by retaining and building on the structure developed for the first edition. Part A has four general chapters on the following topics:

- introducing socio-economic rights in South Africa;
- advancing socio-economic rights in South Africa;
- protecting socio-economic rights internationally; and
- claiming resources for socio-economic rights.

The chapter on resources has been expanded to cover the specialised field of budget and resource allocation, which should be of special interest to readers working in the development and economic sectors.

Part B has eight chapters, one on each specific socio-economic right: environmental protection, land, housing, health care, food, water, social security (no longer social welfare) and education rights.

We attempted to strike a balance between the need to have chapters as stand-alone resources and the need to link chapters through cross references.

The book was written by an excellent team of authors who are experts, activists, researchers, practitioners and trainers in human rights and have a track record of working in the specific field of socio-economic rights. Of course individuals have different touches and tastes, so there are variations in the structure and shape of certain chapters owing to differences in content as well as author discretion and editorial recommendations.

Votes of thanks

We wish to thank a couple of institutions and people who helped this book come to fruition. First and foremost, we wish to thank our funders. The primary funding for this project was received from the Norwegian Agency for Development Cooperation through the Norwegian Centre for Human Rights. We also used supplementary funding from Atlantic Philanthropies and the Ford Foundation.

Then I wish thank a group of people who supported and encouraged me during the production of this edition. I express special gratitude to Julia Sloth-Nielson, the consulting editor, for her great and patient assistance to me and her unswerving commitment to this project during the content editing.

Special thanks must also go to Fiona Adams, who was an excellent and resolute production manager, from the conception to the printing stages.

Many thanks go to Derrick Fine for his hard and excellent work in language editing. His expertise with words made the book far more accessible and much less legalistic.

The authors deserve special credit for their dedication to this project, as evidenced by the wonderful chapters they produced.

I also wish to thank the Socio-Economic Rights Project members, Lilian Chenwi, Christopher Mbazira and Unathi Mila, for their support and encouragement. Special thanks go to Bryge Wachipa, a former Project member, and Jill Claassen, Community Law Centre librarian, for their research assistance during this project.

I also wish to thank the staff of the Centre for all their help during this process. I must single out Nico Steytler, the Director of the Centre, for his unswerving support, confidence in me and guidance throughout.

A special word of gratitude goes to the Project's former coordinator and founder, Sandy Liebenberg, for her inspiration and support throughout the production process and her comments on the first chapter.

I hope that you will find the second edition refreshing, insightful and empowering. I also hope that the book will stimulate creative thinking on how to improve the lives of the majority of the population who, 13 years after the advent of democracy and the institutionalisation of human rights, continue to live in the "shadow of history", unable to take advantage of the opportunities presented.

Sibonile Khoza is the coordinator of, and a senior researcher in, the Socio-Economic Rights Project. He is the editor of the second edition.

Remarks by Albie Sachs

I am going to make just two points. The first is that the book to me is a beautiful example of a very difficult project well accomplished. It demonstrates how to write seriously about serious matters in a way that doesn't dumb them down and make them so accessible and easy for people to accept that somehow the core gets lost. It also manages to be very accessible with good cross-references. The reader is not overwhelmed by pretty pictures, but there are enough illustrations to change the format of the page and make it interesting. Whilst being accessible, the book also succeeds in being accurate and precise. This is a kind of area that easily lends itself to mushy poetry. I love poetry, poetry has its place and, without it, law would be nothing. But if it is too mushy it does not convey much of substance. So a book of this nature should be based on solid research and be well structured. This book has all these features.

In addition, it contains a mass of useful information and resources in an appendix at the back which can be followed up. It's boring stuff, it's not exciting reading, but when you need to make that contact, when you need to get in touch with someone in relation to a socio-economic rights issue or problem, you want to have a good idea who to contact, what they do and their contact details. This book, along with all the substantive information, also provides this kind of practical detail.

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

The second point I wish to make is to thank and acknowledge the role of Sibonile Khoza as editor of the book and current Coordinator of the Socio-Economic Rights Project.

Sibonile took over the Project from Sandy, who had built a formidable reputation for the Project in the field of socio-economic rights. Sibonile has imparted his own unique talents, personality and style to the Project, whilst keeping the grace and humour which is very much a characteristic of UWC and those who work there.

This book exemplifies Sibonile's fine personality and style. It is the product of a large team working together. But at the end of the day, one person must take responsibility, and that is Sibonile. Congratulations on a job well done.

Albie Sachs is a judge of the South African Constitutional Court.