ESR REVIEW
Economic and Social Rights in South Africa

Ensuring rights make real change

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Editorial

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

Socio-economic rights and related issues, such as poverty, are increasingly featuring on international and national agendas.

At the international level, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights opened for signature on 24 September 2009 at a ceremony at the United Nations (UN) headquarters in New York. Within two days, 26 states had signed the treaty and more are expected to do so. Once the Optional Protocol comes into force (following 10 ratifications), victims of economic, social and cultural rights violations will be able to submit complaints to the UN Committee on Economic, Social and Cultural Rights, after exhausting domestic remedies.

In addition, the South African President – Jacob Zuma – in his statement at the 64th session of the UN General Assembly on 23 September 2009, reiterated South Africa's commitment to take forward the fight against poverty.

At the national level (in South Africa), the Constitutional Court has suspended the eviction of residents of Joe Slovo 'until further notice'. It would otherwise have been the largest judicially sanctioned eviction in the country.

In this issue of the *ESR Review*, Danwood Mzikenge Chirwa examines children's rights to food and to basic nutrition. He notes the need for proper coordination of the measures aimed at realising these rights and for an interdepartmental structure to oversee their implementation.

Timothy Serie and Lilian Chenwi reflect on the possibility of litigating the right to food in South Africa. They identify the need to define the government's role, at all levels, in providing access to food for all.

Rebecca Amollo examines the proposed introduction of National Health Insurance (NHI) in South Africa. She observes that NHI promises to address the inequities in the current health system and will advance the right to health and the principles mentioned above.

Lilian Chenwi and Kate

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Tissington examine the recent decision of the Constitutional Court in which it ordered the eviction of Joe Slovo residents to make way for formal housing – an eviction that has since been suspended. They note that the decision contains some significant victories, but also has serious implications for the residents as well as for poor communities facing eviction as a result of formal housing developments.

In this issue, we also provide a summary of a recent report by the UN High Commissioner for Human Rights on the implementation and monitoring of economic, social and cultural rights. We provide a brief summary of a recent book, a pocket companion on land tenure law in South Africa, which legal practitioners, government departments, non-governmental organisations and community-based organisations dealing with evictions and land tenure, and agricultural associations will find very useful. Finally, Rebecca Amollo then reports on a seminar on gender, HIV and AIDS, organised by the Socio-Economic Rights Project of the Community Law Centre.

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

We also thank the guest editor of this issue, Siyambonga Heleba, who was a member of the Project for over two years, during which he made important contributions to the work of the Project and the discourse on socio-economic rights. He has now taken up a new appointment as a lecturer in the Law Faculty at the University of Johannesburg. The Socio-Economic Rights Project, on behalf of the Community Law Centre, would like to congratulate him on his new appointment and wish him all the best in his future endeavours.

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

Child poverty and children's rights of access to food and to basic nutrition in South Africa

A critical analysis of case law, legislation and policy

Danwood Mzikenge Chirwa

The South African Constitution (the Constitution) boldly protects the right of access to food as a self-standing right (section 27(1)(b)), departing markedly from established practice in comparative constitutional law and in international human rights law.

As if this were not enough, it specifically recognises the right of children to basic nutrition (section 28(1)(c)). Despite the obvious importance for children of the right of access to food and the significance the Constitution attaches to their right to basic nutrition, both these rights remain underdeveloped.

This paper aims to tease out the meaning of children's right of access to food as well as their right to basic nutrition. It analyses the significance of, and correlation between, these two rights as they have been defined under sections 27(1)(b) and section 28(1)(c) of the Constitution, respectively. It then examines what these mean for the state. This leads to an evaluation of the policy and legislative measures the South African government has put in place to realise these two rights.

Child poverty in South Africa

Many are familiar with the statistics on poverty in South Africa, but these statistics have not become any less appalling. According to the human development index of the UN Development Programme (UNDP), South Africa is ranked 121 out of 177 countries (UNDP, 2007/2008). UNDP's poverty index places South Africa at number 55 out of 108 developing countries (UNDP, 2007/2008).

About two-thirds of children in South Africa live in poverty (on R7.75 per day) (UNICEF, nd). According to the UN Children's Fund (UNICEF), the nutritional status of children has not improved over the past ten years. For example, in 2007, one in ten children was underweight, 15% of infants were born with low birthweight, and 10% of children under five were underweight (UNICEF, 2009: 124). UNICEF also estimates that the under-five mortality rate in 2007 was 59 per 1,000 live births while the infant mortality rate was 46 per 1,000 live births (UNICEF, 2009: 120).

The Constitution contains a wide range of rights that are relevant to the protection, promotion and realisation of the right to food, as well as making specific provision for the right to food

The depreciation of the South African rand in the second half of 2008 sparked a series of food price increases with unpleasant consequences for both poor families and those previously considered to be economically stable (UNDP *et al*, 2009). The financial crisis has hit South Africa's agricultural sector hard, with the result that the country has rapidly gravitated from being a net exporter to being a net importer of food. As companies face economic hardships, retrenchments have become inevitable, with the mining, real estate and motor vehicle sectors being some of the most badly affected. The financial hardships experienced by many families have not only impeded their access to food, but also led to the loss of homes, means of transport and the capability to care for children. Poor children face a host of problems, from persistent hunger, lack of access to education and inadequate housing to lack of access to health care, malnutrition and other forms of illness.

The right to food under the South African Constitution

The Constitution contains a wide range of rights that are relevant to the protection, promotion and realisation of the right to food. In addition to these general rights, it makes specific provision for the right to food in three main ways. Firstly, it enshrines the right of everyone 'to have access to sufficient food' in section 27(1)(b). Secondly, it protects the right of every child to 'basic nutrition' in section 28(1)(c). Thirdly, it recognises the right of everyone who is detained to 'conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment' (section 35(2)(e)).

This paper is concerned only with the first two guarantees – everyone's right of access to sufficient food and children's right to basic nutrition. Questions of central concern are: What is the significance of the latter right, given that the Constitution already recognises the right of everyone to have access to sufficient food? What is the relationship between the two rights? What specific obligations does the state have in relation to children's right to basic nutrition?

The implications of 'access'

In *Government of the Republic of South Africa and Others v Grootboom and Others* [*Grootboom*] 2001 (1) SA 46 (CC), the Constitutional Court suggested that 'to have access to housing' under section 26 of the

Constitution was different from the right to adequate housing under article 11(1) of the International Covenant on Economic, Social and Cultural Rights. It could therefore be argued similarly that the right to basic nutrition has different implications from those of the right *of access* to sufficient food simply because the former does not include the word 'access'.

However, the manner in which the Court defined the right of access to housing in that case did not clearly demonstrate that the *right to housing* and the *right of access to housing* meant different things. In particular, the Court emphasised in *Grootboom* (para 35) that 'access to' signified that it was not only the state that had the responsibility to provide housing but also private actors. It also stressed the obligation of the state to facilitate the realisation of the right of access to housing (paras 35 and 36). The idea of the obligations to respect, protect, promote and fulfil has rendered the words 'access to' in the socio-economic rights provisions superfluous, as each of these rights, irrespective of whether they use 'access to', engenders these obligations, including the duty to facilitate the realisation of these rights (an element of the duty to fulfil).

Meaning of 'food' and 'nutrition'

Again, in *Grootboom*, the Constitutional Court held that the terms 'housing' and 'shelter' were synonymous and therefore that the right of children to basic shelter did not imply a right to rudimentary housing (para 73). It could therefore be argued that the right of everyone to have access to sufficient food has the same meaning and implications as children's right to basic nutrition.

It is hereby argued that 'nutrition' cannot be synonymous with 'food'. Nutrition is a technical term in the field of health sciences which relates to issues of nourishment, food composition, dietary requirements, food nutrients and the assimilation of food nutrients by the human body. As a right, therefore, nutrition must be taken to impose obligations on the state pertaining to ensuring dietary variety and the quality of food in terms of its nutrient composition. The right of the child to basic nutrition means, therefore, that children are, at the very least, entitled to the minimum amount of food necessary to meet the dietary requirements for their development, health and wellbeing.

The general right of access to sufficient food, on the other hand, has broader import. It is concerned not only with nutrition, but also with many other important aspects of food, including the spiritual, recreational, social and agricultural functions of food, in addition to issues of accessibility, availability or security, and the quality and safety of food.

Children's right to basic nutrition under the South African Constitution is thus not a mere restatement of the right of everyone to sufficient food. If the right of everyone to sufficient food serves as a ringing reminder that matters of food security, nutrition and accessibility deserve specific programmes, policies and other measures, children's right to basic nutrition in turn calls attention to the need for general food measures and policies to have as one of their central concerns children's nutritional well-being and for the state to devise child-specific measures on basic nutrition.

The question of child prioritisation

It was initially thought that because children's socio-economic rights in section 28 did not have the qualifications found in sections 26(2) and 27(2) of the Constitution applicable to everyone's socio-economic rights, children were entitled to priority over everyone else in the allocation of basic services and goods. At least as regards housing, the Constitutional Court in *Grootboom* (para 71) cited legitimate concerns against this kind of reasoning, especially if it meant that children had an unqualified right to certain socio-economic rights.

The High Court's decision in *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C), insofar as it held that children were entitled to rudimentary shelter on demand based on section 28(1)(c) of the Constitution, represents one end of the spectrum which is pro-children, emphasising the need for prioritising children's socio-economic well-being. As the Constitutional Court correctly pointed out, the High Court's reasoning had absurd consequences, in that it meant that parents with children were to be accommodated with their children, while those who did not have any children would remain without any form of respite.

In contrast, the Constitutional Court's decision that the state did not have primary responsibility over children under parental care could be interpreted as representing the other end of the spectrum, which

consigns children's socio-economic rights to a status that is subordinate to everyone's rights. Children who are under the care of parents require no direct attention from the state, which, according to the Constitutional Court, must primarily concern itself with assisting the family in the sanguine expectation that children will benefit indirectly from those family-focused measures. This position too produces an absurdity of a different, but no less undesirable, kind. The statement that the state does not have primary obligations to children who are under the care of their parents implies that children's right to basic nutrition under the Constitution is superfluous and, more importantly, that children are not direct beneficiaries of the right of everyone to have access to food.

In *Grootboom*, the High Court was faced with the knotty dilemma of separating children from parents so that the children could be given some relief in the form of temporary shelter. Similarly, food is a very difficult right to implement if both children and their parents are hungry and poor. However, this does not mean that it is not possible for the state to fulfil its direct obligations to children who are under parental care in relation to such rights as the right to basic nutrition. A good example is the National School Nutrition Programme discussed later in this article. It is also possible for the state to take responsibility for children whose parents neglect them or are incapable of providing for them. The 'primary and secondary responsibilities' template can be misleading when one is trying to understand the obligations of the state and parents in relation to children's socio-economic rights. For a child's socio-economic rights to be fully realised, the state's obligations and those of parents must be implemented simultaneously at all times.

One of the challenges is the lack of an overarching institutional framework for coordinating, overseeing and monitoring policy and legislative programmes

In fairness, we must record that the Constitutional Court did emphasise the need to pay attention to vulnerable and marginalised groups in general measures for implementing socio-economic rights in its definition of the test of reasonableness. However, it did not underline the significance of including children and women in such general programmes, despite the fact that more than half of the plaintiffs in *Grootboom* were children and that the intended beneficiaries of the comprehensive programme on HIV and AIDS treatment in *Minister of Health and Others v Treatment Action Campaign* 2002 (10) BCLR 1033 (CC) were children. Recognising children's socio-economic rights in a separate section in the Constitution, if not intended to emphasise the priority of children's well-being, at least underscores the need to pay particular attention to children in general measures, policies and programmes on social provisioning and the need for child-specific measures.

Institutional arrangements

One of the challenges the right to have access to food and children's right to basic nutrition have faced is the lack of an overarching institutional framework for coordinating, overseeing and monitoring policy and legislative programmes concerning these rights (Brand, 2003: 11–18). South Africa does not have a department of food security or a department with an overall mandate on food and nutrition issues. In comparison, rights such as water, health and social security have independent departments. Thus many government departments have some role in food. These government departments have a vertical accountability structure, which entails the danger that policies concerning food and basic nutrition will always be fragmented.

The Integrated Food Security Strategy for South Africa adopted in 2002 (the Strategy) envisaged the establishment of a clear institutional structure and mechanism for coordinating policy development and implementation on food. At the top was a cluster of ministers whose departments had food-related mandates, followed by a National Food Security Forum and a cluster of directors-general of departments. Under these would follow the National Coordinating Unit, followed in descending order by provincial coordinating units. It is the type of institutional mechanism that has the potential to tackle seriously, forcefully, effectively and comprehensively the many food problems the country faces. But this institutional mechanism has not yet been fully established.

The newly created Department of Women, Youth, Children and People with Disabilities could serve as the coordinating point for all matters concerning

children and, by extension, their rights to food and basic nutrition. However, given the breadth of this department's mandate, it remains unclear whether it will be effective in dealing with these specific rights – unless, perhaps, a specific unit is created in the department for this purpose.

Specific food and nutrition measures

The Strategy has been described as 'the most comprehensive interdepartmental policy statement on food security' (Khoza, 2004: 681). Its primary aim was to streamline, harmonise and integrate the state's diverse food security programmes into one policy. The Strategy takes the right to have access to sufficient food as its point of departure and isolates, as its overall objective, the attainment of 'universal physical, social and economic access to sufficient, safe and nutritious food by all South Africans at all times to meet their dietary and food preferences for an active and healthy life' (p 6). As a specific target, it sets the goal of eradicating hunger, malnutrition and food insecurity by 2015. The Strategy identifies four priority areas and, as noted earlier, it proposes an institutional structure that would coordinate all the policy development and implementation envisaged in the area of food security.

The Feeding Policy is concerned with a narrow area of feeding practices and not child nutrition in general

The Strategy passes the constitutional test of comprehensiveness and, in broad terms, incorporates human rights concepts in its content. To the extent that it clearly spells out the departments which could lead certain interventions and proposes an overarching interdepartmental institutional mechanism, the Strategy underscores the importance of proper coordination in implementing the rights to food and basic nutrition. In terms of substance, the Strategy is a skeleton framework whose broad principles, goals and objectives need more specific policies to be developed and implemented. This underscores the need for an overarching institutional mechanism to pioneer policy development and implementation in a coordinated and holistic fashion. Overall, the policy may not pass the test of reasonableness because it does not provide for special vulnerable groups as well as for those in crises or whose needs are most urgent. In particular, it does not specifically and adequately address the specific concerns of children and issues of basic nutrition.

In sharp contrast to the Strategy, the Infant and Young Child Feeding Policy (Feeding Policy) adopted by the Department of Health in 2007 specifically concerns children. However, unlike the Strategy, the Feeding Policy is anchored neither in children's right to basic nutrition nor in the right of everyone to have access to food. It is not intended as a broad policy statement concerning children's right to basic nutrition. It is aimed rather at improving 'the nutritional status, growth, development and health of infants and young children by protecting, promoting and supporting optimal infant feeding practices'.

The Feeding Policy is concerned with a narrow area of feeding practices and not child nutrition in general. Because it does not deal with broad issues such as household food security, food distribution, children's access to food, child nutrition and the state's obligations to provide food to those who cannot afford it, a more comprehensive programme is still needed.

Other child-specific policies that the government has implemented include the National School Nutrition Programme and the Acute Protein Energy Malnutrition Programme, both authored by the Department of Health. The former is now being implemented by the Department of Basic Education. Both of them target specific groups of children, the former children at certain qualifying primary and secondary schools (in poverty stricken areas) and the latter severely malnourished children. Even when taken together, they fall far short of a comprehensive programme on child nutrition or children's access to food.

The Department of Health's Integrated Nutrition Programme is arguably a broader policy than the Feeding Policy insofar as it covers issues of nutrition in general. To this extent, the Programme seems to give effect to both the right of everyone to food and children's right to basic nutrition in particular. The Programme has a specific Directorate on Nutrition in the Department of Health whose mandate extends to facilitating intersectoral collaboration to ensure that nutrition problems are addressed. In essence, the Programme simply spells out the broad objectives

and general strategies that need to be implemented or developed to realise those objectives. It lacks a comprehensive policy foundation such as a White Paper or legislation. The objectives are stated in broad terms but the mechanisms for achieving them are not clearly spelt out. The Directorate has the potential to serve as the main mechanism for early warning on the nutritional needs of various groups, famine and hunger, as well as for identifying the causes of malnutrition and assessing the impacts of various programmes on access to food and basic nutrition. To realise this potential, it would have to develop strategies for gathering reliable and up-to-date information and the means of feeding this information into policies and implementation structures.

Legislative analysis

South Africa has a wide range of legislation that indirectly relates to the rights to food and basic nutrition. However, there is no specific legislation on these two particular rights. In comparison, the right to water is governed by the Water Services Act 108 of 1997, the right to social security and assistance is governed by the Social Assistance Act 13 of 2004 and the rights to health and housing are regulated by many Acts including the National Health Act 61 of 2003 and the Housing Act 107 of 1997, respectively.

The draft national Food Security Bill promised to be the main legislative mechanism for creating a comprehensive legal and policy framework for realising the rights to food and basic nutrition. However, for unknown reasons, no progress has been made on this draft Bill and it seems even to have been taken off the legislative ladder. Although the Constitutional Court has not yet made it a requirement to enact specific legislation on every socio-economic right, it has clearly stated that such legislation is essential to the implementation of national strategies on these rights. Needless to say, it is probably only the right to food that does not have specific legislation. For this particular right, legislation is vital especially because currently there is no specific department in South Africa with an overall mandate to implement the right to food. Legislation is needed to establish overarching principles, benchmarks, strategies and an appropriate interdepartmental structure that will coordinate all activities concerning the right to food in general and children's rights to basic nutrition in particular.

Conclusion

Many children in South Africa are trapped in extreme forms of poverty, malnourished and prone to all sorts of otherwise curable illnesses, with no or limited possibilities for accessing education. The global financial crisis has not helped the situation. This article has shown that the Constitution makes it a government priority to combat poverty, hunger and malnutrition by at least enshrining the right of everyone to have access to sufficient food and children's right to basic nutrition in sections 27(1)(b) and 28(1)(c), respectively.

This article has demonstrated that the right to have access to sufficient food and the right to basic nutrition are obviously interrelated but also serve different purposes. The former is concerned with issues of food security, adequacy, availability, safety and quality, while the latter is mainly concerned with the nutritional well-being of the child. Although the Constitutional Court has held that children's socio-economic rights do not create unqualified obligations on the state to provide certain socio-economic goods on demand, this does not mean that children's socio-economic rights have no meaningful implications for the state. At the very minimum, by recognising their right to basic nutrition, this article has argued that the framers of the Constitution intended to emphasise the need for child-specific policies on basic nutrition and the fact that general policies on the right to food should make adequate provision for children.

The rights to food and basic nutrition have been implemented largely through a hodgepodge of policies and indirectly by legislation. The Constitution specifically demands that programmes and measures to realise socio-economic rights should be comprehensive and well coordinated. As there is no single department in charge of these two rights, the need for proper coordination and an interdepartmental structure to oversee their implementation cannot be overemphasised. Currently, there are, admittedly, a number of child-specific policies concerning nutrition and access to food. The success of these policies will remain limited and short-lived as long as no comprehensive legislative

and policy framework is put in place to govern the complex terrain of food in general and children's basic nutrition in particular.

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Government documents

Integrated Food Security Strategy for South Africa: www.info.gov.za/view/DownloadFileAction?id=70243.

Infant and Young Child Feeding Policy: www.doh.gov.za/docs/policy/infantfeed.pdf.

Integrated Nutrition Programme: www.doh.gov.za/programmes/nutrition.html.

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For further reading on the subject, see *Research Series 7* of the Socio-Economic Rights Project (forthcoming, 2009).

Some thoughts on litigating the right to food in South Africa

Possibilities and challenges

Timothy Serie and Lilian Chenwi

Today, over one billion people do not have access to sufficient food. This worldwide hunger crisis has led to food riots in over 30 countries. Food emergencies in the world stem from a multitude of problems, ranging from drought and adverse weather conditions to civil strife and political crises (Clover, 2003: 8).

The G8 summit held in July 2009 allowed the international community to express its concern over access to food and food security. The G8 nations plan to provide about $20 billion over the next three years to assist developing countries in dealing with food shortages and developing agriculture. This commitment demonstrates a renewed focus on access to food and food security.

The right to food and food security are major issues in South Africa. Currently, the World Bank estimates that millions of people still do not have access to adequate food and nutrition (World Bank, 2005). Although hunger and starvation are less pronounced in South Africa than in other sub-Saharan African countries, access to adequate food is still a huge challenge (World Bank, 2005).

The South African Constitution guarantees the right to food. However, the Constitutional Court has not yet decided a case directly addressing and defining this right. It is only recently that the Court handed down a judgment that touched on this right in the context of access to (agricultural) land.

This article examines the right to food in the South African context and the possibility of enforcing it through the courts. It draws on the Indian experience in litigating the right to food and the jurisprudence of the African Commission on Human and Peoples' Rights (African Commission).

The right to food: Meaning and legal framework

The right to food is a fundamental right for all human beings. It is realised if food security exists. What, then, is food security? The World Food Summit Plan of Action, issued with the 1996 Rome Declaration on World Food Security, states: 'Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life'. The United Nations (UN) Committee on Economic, Social and Cultural Rights has also stated that 'the right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement' (General Comment 12 on the right to adequate food, UN doc. E/C.12/1999/5, para 6).

The right to food is enshrined in several international instruments. For instance, article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, states: 'The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food ...' The African Commission on Human and Peoples' Rights has implied the right to food in the African Charter on Human and Peoples' Rights (African Charter), particularly in the right to life (article 4), the right to the best attainable state of physical and mental health (article 16) and the right to economic, social and cultural development (article 22) (see *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Communication 155/96, (2001) *African Human Rights Law Reports* 60 (ACHPR 2001), paras 64-67 [*SERAC* case]).

Further, section 27(1)(b) of the South African Constitution provides: 'Everyone has the right to have access to sufficient food and water.' This right, like other socio-economic rights, is subject to the qualifications of progressive realisation and

availability of resources. In addition, South Africa has a national food policy framework, the 2002 Integrated Food Security Strategy for South Africa, which aims to ensure that food is accessible to and sufficient for all South Africans.

Enforcing the right to food

As shown above, the right to food requires that people must have access to sufficient quantities of good-quality food to satisfy their dietary needs. 'Accessibility' means that food should be both economically and physically accessible to all persons.

However, enforcing the right to food is challenging. As Dreze notes, the right to food may be universally accepted, but determining the rights and obligations associated with this right is challenging (Dreze, 2003: 10). Though South Africa has the Integrated Food Security Strategy and programmes aimed at implementing the right to food, such efforts remain ineffective due to lack of implementation (Love, 2003: 19).

These programmes have limited scope and are therefore not sufficient to deal with the problem of food insecurity.

They have also been poorly implemented, resulting in many South Africans lacking food security (Brand, 2007: 333). Moreover, they fail to make provision for the basic food needs of many who are in food crisis (Brand, 2007: 334).

The right to food may be universally accepted, but determining the rights and obligations associated with it is challenging

In addition to enforcing the constitutional right to food through legislation or policies, this right can also be enforced through national human rights institutions or the courts. For example, the South African Human Rights Commission (SAHRC) has the responsibility to monitor the realisation of socio-economic rights including the right to food (section 184(3) of the Constitution).

As the SAHRC has a broad and large focus, there is need for a state organ or institution specifically to oversee and enforce the necessary government interventions and the implementation of its food security measures.

Civil society has on more than one occasion contemplated bringing a test case on the right to food (Kallmann and Yakpo, 2003: 9). As noted earlier, a case concerning the right to food has not yet come before the Constitutional Court.

However, in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2008 (11) BCLR 1123 (CC), the Constitutional Court considered this right in the context of agricultural land.

The case was an appeal against a Supreme Court of Appeal (SCA) judgment interpreting a proviso to the definition of 'agricultural land' as contained in the Subdivision of Agricultural Land Act 70 of 1970.

The proviso provided that 'land situated in the area of jurisdiction of a transitional council ... which immediately prior to the first election of the members of such transitional council was classified as agricultural land, shall remain classified as such'.

Section 1 of the Subdivision of Agricultural Land Act defines 'agricultural land' as any land. This excludes 'land situated in the area of jurisdiction of a municipal council, city council, town council, village council, village management board, village management council, local board, health board or health committee . . . but excluding any such land declared by the Minister after consultation with the executive committee concerned and by notice in the *Gazette* to be agricultural land for the purposes of this Act' and 'land which the Minister after consultation with the executive committee concerned and by notice in the *Gazette* excludes from the provisions of this Act'.

Section 3 of the Act requires that for the sale or subdivision of agricultural land to be valid, the Minister must give written consent.

The trustees of the Hoogekraal Highlands Trust and Safamco Enterprises (Pty) Ltd were admitted as *amici curiae* and the Minister of Agriculture and Land Affairs (as the portfolio was called then) as an intervening party. The contentions of the *amici* and the Minister invoked, among other rights, the right to sufficient food and water (para 50).

The relevant question was whether the definition could be interpreted in a manner that preserved the role of the national government in the administration of agricultural land (para 84). In this regard, the Minister contended that

> an interpretation that preserves national ministerial power over municipal agricultural land would certainly improve the capacity of the State to fulfil two obligations imposed on it by our Constitution. The one is the duty to ensure the progressive realization of the right of access to food; the other is the task to ensure access to land (para 105).

This contention was supported by the *amici*. The Constitutional Court stated that 'land, agriculture, food production and environmental considerations are obviously important policy issues at national level' (paras 53 and 80). It added that 'excessive fragmentation of "agricultural land", be it arable land or grazing land, *may* result in an inadequate availability of food' (para 85).

Furthermore, it adopted the notions of availability and accessibility in defining the right to food. It stated that availability 'refers to a sufficient supply of food and requires the existence of a national supply of food to meet the nutritional needs of the population generally' and 'requires the existence of opportunities for individuals to produce food for their own use'.

State parties to the African Charter are obliged to protect and improve existing food sources and to ensure access to adequate food for all citizens

Accessibility, the Court continued, 'requires that people be able to acquire the food that is available or to make use of opportunities to produce food for their own use' (para 85). The Court also stated that there was an overlap between the state's obligation to facilitate access to land on an equitable basis in section 25(5) of the Constitution and its obligation to protect the environment in section 24 (para 85).

Nevertheless, the Court held that to preserve the power of the Minister to approve each and every sale or subdivision of agricultural land was not the only way in which agriculture was to be developed and food made more readily available (para 139).

Although this case makes some important statements on the right to food, its content and its relationship with other rights such as access to land, it does not define in detail the content of this right and the obligations of the state, mainly because it does not focus on the right to food *per se*.

However, this case highlights the important point that the state would be in breach of the right to food if it failed to facilitate access to agricultural land.

Experience from elsewhere: Any lessons for South Africa?

The African Commission

In the *SERAC* case, which raised several issues concerning human and peoples' rights under the African Charter, the African Commission made a number of important pronouncements on the right to food. It was alleged in this case that the Nigerian government had violated the right to food of the Ogoni people (the applicants) by destroying and threatening their food sources through a variety of means, such as engaging in oil development that resulted in contamination of the soil and water upon which Ogoni farming and fishing depended (para 9).

The African Commission noted that the obligation to fulfil the right to food required the provision of 'basic needs such as food or resources that can be used for food (direct food aid or social security)' (para 47). It also referred to the state's duties to respect and protect rights (paras 45 and 46) and reaffirmed the interrelatedness and interdependence between the right to food and other rights, particularly the rights to life, health and economic, social and cultural development (paras 64-67). In addition, the Commission stated that the right to food was inseparably linked to the dignity of human beings and therefore essential for the enjoyment and fulfilment of the rights to health, education, work and political participation (para 65).

As observed by the African Commission, state parties to the African Charter are obliged to protect and improve existing food sources and to ensure access to adequate food for all citizens. The Commission held that the minimum duties implicit in the right to food included the state's duty not to destroy or contaminate food sources, the duty not to allow private parties to destroy or contaminate food sources, and the duty not to prevent peoples' efforts to feed themselves (para 65). Nigeria thus was found to be in violation of these duties and the right to food (para 66).

The *SERAC* case is relevant as it spells out the state's duties in relation to the right to food and its obligation to provide food aid. South Africa is a party to the African

Charter and has therefore undertaken to fulfil these duties. A violation of these duties would be a valid ground for bringing a case against the government.

The Supreme Court of India

The Supreme Court of India considered the right to food in the landmark case of *People's Union for Civil Liberties v Union of India and Others* (1997) 1 SCC 301 [*PUCL* case]. In this case, the Court ordered the government to identify poor persons in need of food aid and implement various national food distribution schemes to address hunger among the most vulnerable groups in society, including children, mothers and the elderly. This case demonstrates that some aspects of the right to food may be enforced against the state (Dreze, 2003: 12).

In 2001, drought conditions led to widespread famine in some parts of India. A public interest organisation, the People's Union for Civil Liberties, brought a petition before the Supreme Court of India to address the growing problem of hunger and the right to food in those dry parts. It argued that federal institutions and state government were responsible for the widespread malnutrition and starvation occurring in India. As socio-economic rights are not guaranteed in the Indian Constitution, the petitioners relied on the right to life.

The petition focused on two separate aspects of the state's failure to respect the right to life. Firstly, it pointed out the failure of the public distribution system to identify the poor and provide them with adequate food supplies. The government used a system to identify poverty-stricken families that fell below a certain income level. However, this system kept a large number of people in need from receiving benefits. Secondly, the petition asserted that the government's relief works failed to adequately address the crisis situation when drought was declared and provide employment when the famine began. The government, it was argued, had a duty to provide economic opportunities for those struggling to afford food.

The petition also cited a number of studies, with data and statistics, in support of its conclusion that a hunger crisis existed in India and that the Indian government had the resources to address it but was failing to distribute any part of the large stocks of grain which it had. The petition identified one area in particular, Maharashtra, where millions of people were affected by the drought. The evidence about the existence of surplus grain effectively destroyed the government's main defence, that it lacked the resources to realise the right to food. Thus the petitioners sought an order that the government be compelled to provide employment in the drought-affected villages, provide relief to persons who were unable to work, raise the public distribution system entitlements available to each family, and provide subsidised grain to all families.

The Indian case shows that it is possible to litigate the right to food where the state does not have appropriate measures to ensure access to food and/or fails to implement those measures

The Supreme Court of India handed down a momentous interim order, which had the effect of extending the application of some nutritional benefit programmes (see also Gaiha, 2003). Furthermore, it compelled the government to introduce a cooked midday meal scheme for all primary schools. Importantly, the Court established a system to monitor and evaluate the implementation of the order.

The Indian experience could be seen as not very helpful in the South African context, as the circumstances that raised this case in India do not obtain in South Africa. As has been noted above, the main concern of the Indian case was that the government was sitting on huge grain reserves while ordinary Indians were starving. However, this case shows that it is possible to litigate the right to food where the state does not have appropriate measures to ensure access to food and/or fails to implement those measures. As noted above, the implementation of food security measures is a problem in South Africa. Litigation would therefore be useful in making the South African government take the right to food seriously.

Litigating the right to food in South Africa

With the current food insecurity in the country and the poor implementation of food security measures, bringing a test case on the right to food would be important in defining the government's role in ensuring food security under the Constitution. Socio-

economic rights are fully justiciable in South Africa. The Constitutional Court has made dramatic progress in advancing these rights in the past decade.

A lesson to be learned from the Indian case is that to bring a case on the right to food, a litigant needs to support his or her conclusions and arguments with strong factual evidence. This evidence must demonstrate that the government, through its actions or omissions, deprived a segment of the population of access to food. In the Indian case, the petitioners argued their point forcefully using studies, statistics and other information obtained from the government itself.

In South Africa, mounting a case of violation of the right to food simply on the basis of widespread starvation might be challenging. It is possible, however, to bring a case challenging the reasonableness of programmes on the right to food as well as their implementation. It is also possible to commence a case where there is evidence that the government is preventing people from producing their own food through its failure to facilitate their access to agricultural land. The right of access to food encompasses the right to produce one's own food for subsistence. In the past, the South African government expropriated farm land and licensed it for mining operations, creating bitter land disputes. Such conduct may constitute a violation of the right to food if the former owners are subsistence farmers who depended on the land to produce their own food.

Conclusion

Food insecurity still exists in South Africa, and is compounded by poverty and income inequalities. The country has been adversely affected by the recent food price hikes and the global economic crisis. This article has demonstrated that it is possible to enforce food rights through the courts, drawing from the experiences of the African Commission and the Supreme Court of India. The paper has also shown the willingness of the Constitutional Court to pronounce on the right to food. In addressing the challenges relating to the right to food in South Africa, there is a need to define the government's role, at all levels, in providing access to food for the people of South Africa, as well as in providing food aid.

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The Rome Declaration on World Food Security and the World Food Summit Plan of Action, 1996, are available at www.fao.org/docrep/003/w3613e/w3613e00.htm.

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In pursuit of health equity in South Africa

A critique of the proposed national health insurance

Rebecca Amollo

The right of access to health care services is guaranteed in the Constitution of South Africa (section 27(1)(a)). In addition, the Medical Schemes Act 131 of 1998 seeks to promote access to affordable private health care for those who are unable to pay for their health care. Also, the National Health Act 61 of 2003 mandates the Minister of Health to ensure the provision of health services within the limits of available resources (section 3). Furthermore, the Department of Health has adopted several policies, including the Policy on Quality in Health Care for South Africa, aimed at implementing this right.

However, due to inequalities and inefficiencies in the health system, a national health insurance (NHI) system has been proposed as a mechanism for achieving equitable access to quality health services in South Africa. Inequality remains an enduring characteristic of the country's health system. Despite several policy measures, the public health system is still affected by the challenges of inadequate and inequitable access to health services attributable to delivery inefficiencies, poor-quality care, underfunding and a lack of social solidarity within the system (Botha, 2008). The country is still characterised by wide disparities between the public and private health sector in the midst of escalating health costs. Furthermore, access to medical aid is still racially unbalanced, with only 20% of the population having private insurance coverage, most of them white (Shisana *et al.*, 2006: 814). The situation has been further exacerbated by the migration of health professionals and the HIV and AIDS pandemic.

An effective health system is a core institution in society, no less than a fair justice system or democratic political system

This article analyses the proposed NHI against the backdrop of the principles of equity, universality and comprehensiveness as well as availability, accessibility and quality, all of which are implied by the right of access to health care services. In doing so, it also considers issues, such as the financing of the health system, that could pose challenges to implementing NHI. The paper concludes that the establishment of NHI may take a while, but plans must be made towards it, especially in light of the existing health inequities in South Africa.

What is national health insurance?

A national health system comprises all organisations, institutions and resources devoted to improving people's health. According to Freedman, an effective health system is a core institution in society, no less than a fair justice system or democratic political system (Freedman, 2005: 1). Hunt and Backman have argued that it is not possible to secure sustainable development, poverty reduction, economic prosperity and improved health for individuals and populations without building and strengthening health systems (Hunt and Backman, 2008: 82).

NHI offers a mechanism for providing equitable access to quality health services, thereby promoting equal access, redistribution and sharing of resources. It provides for both contributors and non-contributors in a universal system and ensures universal health coverage.

'National health insurance' should be distinguished from 'social health insurance' (SHI), another form of national health system. SHI benefits contributors only and is usually mandatory for a specified group, such as those in formal employment at a particular income level. SHI is therefore not universal and only those who contribute are beneficiaries. SHI could be the starting point to achieving NHI.

Currently, South Africa does not have a national or social health insurance system. Rather, it has medical aid schemes systems provided by private health insurance providers. Here, health coverage is linked to income and ability to pay. Over the years, the number of South Africans who can afford private health insurance has fallen due to increases in health care costs (Botha, 2008). As a result, a majority of the population cannot access private health care, hence the proposal for NHI.

The history of national health insurance

Debate about the NHI predates 1994 (Botha and Hendricks, 2008). A point of disagreement, however, has been whether to choose NHI and SHI as a policy option. There have also been differences around funding models and the role of the private sector. These points of disagreement are elaborated on later.

The government's initial proposal in 1994 for an NHI system was severely criticised by the National Treasury and health professionals for being too costly and rigid (Shisana, 2008:1) This led to the establishment of the Committee of Inquiry into a National Health Insurance System in 1995. Its mandate was to investigate the appropriateness and economic feasibility of NHI in the South African context and to undertake detailed planning for its implementation. The Committee was also instructed to consider a range of structural and institutional frameworks for NHI, such as a single state or parastatal NHI system; a single privately administered NHI system; or an NHI system with the current medical aid schemes acting as the financial intermediaries. The Committee recommended medical schemes as a vehicle towards a national health system.

Dissatisfaction with the 1995 Committee's inquiry led to the establishment of another committee of inquiry in 1997, which revised the 1995 Committee's recommendations. The 1997 committee of inquiry proposed a phased approach towards ensuring 'access to health for all' by means of SHI, with NHI as a second step.

In 2000, the Cabinet appointed a Committee of Inquiry into a Comprehensive System of Social Security for South Africa, which investigated how to secure and enhance social protection for all South Africans. (The social protection concept is broader than the narrowly focused one of social security.) Health services and health care funding formed part of this inquiry. With regard to health, as one of its recommendations, the Committee advocated an incremental approach towards an NHI system. This recommendation envisaged the integration of the public sector and medical schemes in the context of a contributory system based on multiple funds as opposed to a single-payer model.

Equity, universality, comprehensiveness and social solidarity

Any reform in health care must pay particular regard to the glaring inequities highlighted above. Health policy should endeavour to conform to principles relating to equity, universality and comprehensiveness (De Negri, 2008). This includes social solidarity and efficiency. Health policy should also conform to the core elements of availability, accessibility, acceptability and quality (Committee on Economic, Social and Cultural Rights, General Comment 14 on the right to health, UN doc. E/C.12/2000/4, para 12(a)). Hence, in analysing the proposed NHI package, the above aspects have to be taken into account.

There is no universally accepted definition of equity, but one definition states that it means 'equal access to health-care according to need' (Green, 2007: 64). Equity measures inequalities using an ethical or moral judgment that is based on the broad concept of justice; it recognises and gives voice to existing inequities among social classes, social territories, gender, ethnic groups and ages. 'Universality' means that rights are for all without distinction. The social responses to inequity must be of a comprehensive nature for a radical change to take place and improve the underlying conditions of health, and to break down those factors that cause people to be excluded from exercising their rights and attaining equity.

Health inequities have been defined as those inequalities in health that are, all things considered, unnecessary and avoidable systemic differences. They are therefore unfair and unjust (Wilson, 2009). In this instance, the inability to access quality health services on the part of over 80% of South Africa's population is unfair and avoidable. Reforming the health system through NHI would go a step towards dealing with race, gender and social class inequities because of the universal component.

Social solidarity and the promotion of *Batho Pele* principles

The principle of social solidarity means that health care should be financed by individuals on the basis

of their ability to pay, but should be available to all who need it on roughly equal terms. It is therefore a form of shared responsibility.

In NHI, the solidarity principle has the best chance of prevailing over market principles. As it is, South Africa's health insurance system through medical schemes commodifies health. The government owes its citizens protection against the subjection of health and sickness to the vagaries of demand and supply. Pursuing an NHI system in which all citizens are guaranteed access to health services is one way of decommodifying health. This would also conform to the *Batho Pele* (People First) principles which were developed to guide public service delivery. One of the prime aims of *Batho Pele* is to provide a framework for making decisions about delivering public services to the many South Africans who do not have access to them. It also aims to rectify the inequalities in the distribution of existing services (Principle 3).

Financing models and comparative systems

As noted above, one area of concern in the NHI debate relates to financing. An NHI system can be funded in two ways: through tax or insurance. Hence, while some have argued for a tax-funded system, others have promoted an insurance system (Tshabalala-Msimang, 2008). Another aspect of the financing debate relates to whether an NHI programme should adopt a single-payer or multiple-payer system.

Tax versus insurance system financing

If the government is to adopt and implement NHI, it can be funded in two ways: general taxation or compulsory health insurance. Both routes are capable of achieving the solidarity principle in health care financing. The United Kingdom (UK) and Sweden have used the tax route while countries such as France, Germany and South Korea and some in Latin America have chosen the insurance route.

The UK established its tax-funded National Health Service in 1948. This system is governed by principles of universality and comprehensiveness (thereby covering everything and everyone). It is equitable and free at the point of use. However, problems in the UK system include overcentralisation with disempowered patients, a lack of national standards and underinvestment in the system. In addition, resource constraints lead to choices and prioritisation so that the concept of comprehensive and universal care becomes elusive.

South Korea introduced mandatory social health insurance for industrial workers in large corporations in 1977. It extended this to cover the entire population in 1989 (Kwon, 2009: 63-71). In relation to the tax-versus-insurance debate, therefore, South Korea's 31 years of national health insurance can provide valuable lessons on key issues in health care financing policy.

If the insurance route is taken, the question arises: should it be based on the individual or the employer? The South African government has taken an initiative through the Government Employees Medical Scheme (GEMS) to introduce the employer-based mandate. However, research reveals that companies are abdicating their responsibility with regard to the financing and provision of health care, which may make the mandate unachievable (Tshabalala-Msimang, 2008). It is suggested that in the medium term, medical scheme contributions should be mandatory for those who can afford to make some contribution towards their health care. Such individual-based mandates would have to be effected in a systematic and a phased manner, starting with either high-income earners or specific groups of employers.

Single-payer versus multiple-payer models

Another question is whether a single-payer or multiple-payer model should be adopted. Both have advantages and disadvantages. A single-payer model is one in which health care is financed by the government and delivered by privately owned and operated health care providers (Tuohy, 2009: 453-496). Typically it establishes one uniform remuneration scheme (Zweifel, 2004). Here the key player remains the government. This model has been used in Australia, Canada, Sweden and Taiwan.

A single-payer system generally promotes equality and universality. Its rationale is that the majority of people should not suffer because they lack health insurance. Economically, this model is also thought to be less costly. Its downside is that it is prone to underfunding by a hostile government, mismanagement and recession.

A multipayer system, on the other hand, is one in which health care is funded by private and public contributions. Hence it presents a choice of several

funds to provide a basic service (Hussey and Anderson, 2003: 215–228). It has been used by Germany, France and Japan. It is credited with providing diversity in insurance products and more flexible purchasing arrangements (Hussey and Anderson, 2003: 223). But risk selection is a big problem in this system as it leads to 'cream skimming' – a practice in which individuals with pre-existing conditions may not be offered a policy with coverage of that condition. Under this system, individuals with a high risk may tend to buy more complete insurance coverage than low-risk individuals, who will tend to opt for low-cost, low-coverage policies or no policies at all. This, in turn, affects quality (Hussey and Anderson, 2003: 218).

South Africa is leaning towards a multipayer system, through the expansion of private insurance as a supplement to the public single-payer system (Hussey and Anderson, 2003: 225). This system will cater for better-off individuals, as they will have the option to purchase supplementary private coverage, while still supporting the public system.

All in all, it has been argued that there is no universal paradigm for the design of health insurance (Hussey and Anderson, 2003: 226). South Africa will have to set its priorities in relation to its population and system of government. It will also have to bear in mind some of the challenges that low- and middle-income countries face in providing health insurance, such as the ability to raise public sector revenue as a GDP share, higher numbers in the informal sector, and disparities in income, resources and health status.

Conclusion

The adoption of NHI promises to address the inequities in the current health system. It will advance the right to health and the principles of equity, universality and comprehensiveness by addressing the plight of the poor and marginalised. It will also contribute towards fulfilling the 1994 Health Plan and the Reconstruction and Development Programme. Experience in other countries reveals that achieving universal coverage may take a long time; for example, it took Germany close to 100 years to achieve an inclusive social health insurance system.

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'Sacrificial lambs' in the quest to eradicate informal settlements

The plight of Joe Slovo residents

Lilian Chenwi and Kate Tissington

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others Case CCT 22/08 [*Joe Slovo*]

On 10 June 2009, the Constitutional Court of South Africa handed down judgment in the *Joe Slovo* case, an appeal against the March 2008 judgment of the Cape High Court (now Western Cape High Court).

The case concerned the eviction of 4 386 households (comprising approximately 20 000 residents) from their homes in order to facilitate housing development under the N2 Gateway Housing Project. This is a pilot project of the national housing policy 'Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements' (BNG), introduced in August 2004. An integral part of BNG is the informal settlement upgrading programme, under which the government seeks to eradicate informal settlements through structured in-situ upgrading which does not necessarily require relocation and involves minimal disruption to the affected communities.

The facts and background to *Joe Slovo* and the High Court judgment have been discussed in a previous issue of the *ESR Review* (Chenwi, 2008). Hence the following paragraphs briefly sum up the High Court judgment and then proceed to consider the Constitutional Court's judgment and its implications.

Summary of the High Court judgment

On 10 March 2008, the High Court granted an eviction order interdicting and restraining the residents of Joe Slovo, once evicted, from returning to the land for the purpose of erecting or taking up residence in informal dwellings there (*Thubelisha Homes and Others v Various Occupants and Others* Case No 13189/07, para 85). The High Court did not see the case as posing an issue of mass eviction. Rather, it considered the eviction a strategic move to relocate the affected people which would not result in homelessness, as alternative accommodation would be provided by the state. The High Court found the residents of Joe Slovo to be unlawful occupiers as defined in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) (para 41). This Act was enacted to give effect to section 26(3) (which prohibits arbitrary evictions) of the Constitution of South Africa (the Constitution). Among other things, it requires courts to consider all relevant circumstances before an eviction can be made.

The Constitutional Court case

A direct appeal to the Constitutional Court was brought by the residents of Joe Slovo (the applicants) against the decision of the High Court. The respondents in the case were Thubelisha Homes (responsible for developing the housing at Joe Slovo settlement), the national Minister of Housing and the Western Cape provincial Minister of Local Government and Housing. Though the City of Cape Town (the City) was the owner of the land in question, it did not participate in the eviction proceedings in the Constitutional Court. The Community Law Centre of the University of the Western Cape and the Centre on Housing Rights and Evictions were admitted as *amici curiae*. The Court found the submission of the *amici* to be extensive, helpful and valuable (paras 112, 297 and 328).

Issues before the Court

The *Joe Slovo* case raised issues relating to the state's obligation to provide access to adequate housing under the Constitution, and the interpretation and application of PIE. The Constitutional Court

observed that there were two key legal questions that had to be answered. The first was whether the respondents had made out a case for the eviction of the applicants in terms of PIE, which included whether, at the time the eviction proceedings were launched, the applicants were 'unlawful occupiers' in terms of PIE. The related question of whether the residents had tacit or express consent to occupy the land was thoroughly investigated by the Court. The second issue was whether the respondents had acted reasonably within the meaning of section 26 of the Constitution in seeking to evict the applicants (paras 3 and 15).

Judgment of the Court

Five judgments were prepared in the case, all in support of the eviction order. The judges also agreed on various grounds that at the time of the eviction, the applicants were unlawful occupiers in terms of PIE (paras 4 and 5). The Court's judgment underscored the obligation of the state to provide alternative adequate accommodation when it evicts settled communities from their homes and to engage meaningfully with those affected. Like the High Court, the Constitutional Court interdicted the applicants from returning to Joe Slovo for the purpose of erecting or taking up residence in informal dwellings (para 7(13)).

It rejected argument by the applicants that they could not be evicted under the provisions of PIE because they were not unlawful occupiers. The applicants' argument was based on the understanding that the City had either expressly or tacitly consented to their occupation of the Joe Slovo land by providing water, sanitation and electricity to that community and issuing 'red cards' to residents (paras 37 and 43). 'Red cards' indicated that the holder had applied for housing within the municipality (the City). The respondents in this regard argued that the services were provided for humanitarian reasons and there was no intention of granting a right to occupy the land to any of the applicants (para 47). Establishing whether there was consent to occupy is important since an eviction order can only be issued under PIE if it can be established that the applicants did not have consent to occupy the land in issue.

Justice Yacoob held that the applicants did not have consent (see paras 72–85), while Justices Moseneke, O'Regan and Sachs were of the view that they had tacit consent which was subsequently revoked when the City decided to implement the N2 Gateway Project (paras 149–160, 278–280 and 358). Justice Ngcobo was of the view that the applicants could not be seen as unlawful occupiers during the period they were allowed to remain on the land and until suitable alternative accommodation was found, and that consent was revoked once they were asked to move to Delft (para 180).

The Court then considered whether it would be just and equitable to evict the applicants in terms of section 6 of PIE, which regulates evictions instituted by an organ of state. Justice Yacoob found the eviction to be just and equitable, as it was a reasonable measure to facilitate housing development and to ensure the progressive realisation of the right to have access to adequate housing within the meaning of section 26(2) of the Constitution (paras 115 and 116). Justice Moseneke observed that on the facts of the case, it was difficult to conclude that it was just and equitable to forcibly evict the applicants and 'relocate them far away from their homes and modest comfort zones in order to give way to the construction of new subsidised homes' (para 138). However, considering that the applicants would benefit directly from the development, this rendered the eviction just and equitable (paras 139 and 175). If the applicants were *not* to benefit from this housing development, however, then their eviction would have resulted in them being, in the words of Moseneke, 'sacrificial lambs to the grandiose national scheme to end informal settlements' (para 138). On a closer examination of the case it unfortunately appears that Joe Slovo residents are indeed 'sacrificial lambs' in the state's quest to 'eradicate' informal settlements.

The eviction was found to be just and equitable as it was a reasonable measure to facilitate housing development and ensure the progressive realisation of the right to have access to adequate housing

The Constitutional Court was of the view that the government's decision not to undertake in-situ upgrading was acceptable, and according to Justice Ngcobo 'it is not for the courts to tell the government how to upgrade the area. This is a matter for the

government to decide' (para 253). It therefore endorsed the decision to relocate the Joe Slovo community to temporary residential units (TRUs) in Delft or another appropriate location. A relocation timetable was annexed to the Court's judgment, detailing the dates by which households would be relocated – 17 August 2009 until 21 June 2010 (Annexure A to the Order of Court dated 10 June 2009). Revisions to the timetable were permissible if agreed to by the parties following meaningful engagement with each other (paras 7(4) and (5)).

An important and positive, yet surprising, aspect of the Court's order in relation to alternative accommodation is that it specified in detail the quality and nature of the temporary housing to be provided, including the provision of services and facilities. The Court ordered that existing TRUs had to comply with certain specifications (and new ones had to be of equivalent or superior quality). They had to:

- be at least 24m^2 in size;
- be serviced with tarred roads;
- be individually numbered for identification purposes;
- have walls constructed with Nutec;
- have galvanised iron roofs;
- be supplied with electricity through a prepaid electricity meter;
- be situated within reasonable proximity of a communal ablution facility;
- make reasonable provision for toilet facilities, which may be communal, with waterborne sewerage; and
- make reasonable provision for fresh water, which may be communal (para 7(10)).

The Court specified in detail the quality and nature of the temporary housing to be provided, including the provision of services and facilities

In addition to requiring them to engage meaningfully on the time frame of the relocation as stated above, the Court further directed the respondents to consult with the affected residents on each individual relocation. Specifically, the engagement was to take place one week before the specified date for relocation. The Court went as far as specifying some of the issues to be included in the engagement, clearly pointing out that these were not exhaustive. The respondents were to engage with the residents on:

- ascertaining the names, details and relevant personal circumstances of those affected by each relocation;
- the exact time, manner and conditions under which the relocation would be conducted;
- the precise TRUs to be allocated to those relocated;
- the provision of transport for those to be relocated and for their possessions;
- the provision of transport facilities to those affected from the temporary accommodation to amenities such as schools, health facilities and places of work; and
- the prospect of the subsequent allocation of permanent housing to those relocated to temporary accommodation, including information on their current position on the housing waiting list and the provision of assistance to those relocated in the completion of housing subsidy application forms (para 7(11)).

On the question whether there had been sufficient consultation with the affected communities before the relocation, the judges differed. Justice Yacoob held that although there had been reasonable engagement almost all the way throughout the project (para 117), 'the state could and should have been more alive to the human factor and ... more intensive consultation could have prevented the impasse that had resulted' (para 113). Justices Moseneke, O'Regan and Sachs were of the view that meaningful engagement had not taken place, but found that the beneficial ends of low-income housing development had to be considered when condemning this 'deplored' deficiency (Justice O'Regan in para 301).

Justice Moseneke observed that the government had not given the Joe Slovo residents 'the courtesy and the respect of meaningful engagement which is a pre-requisite of an eviction order under section 6 of PIE' (para 167). According to Justice O'Regan:

> [t]he question we have to ask in this case is whether the failure to have a coherent and meaningful strategy of engagement renders the implementation of the plan unreasonable to the extent that the respondents have failed to establish a right to evict the occupiers. On balance I think not (para 302).

Like Justice O'Regan, Justice Sachs found that 'serious faults in the mode of engaging with the residents' had occurred (para 284). However, he held that while the lack of adequate engagement appeared to have been serious, it would not necessarily render the whole process a nullity as what mattered was the 'overall adequacy of the scheme as it unfolded' (para 280). Even the *amici* had criticised the state for not engaging sufficiently with the applicants (paras 112 and 300).

Despite its misgivings, the Court went ahead to sanction the eviction, departing from its own precedent that courts should be reluctant to grant an eviction order where meaningful engagement has not taken place (see generally *Occupiers of 51 Olivia Road and Others v City of Johannesburg* 2008 (3) SA 208 (CC)] ; see also *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC).

The Court order reafirrmed the importance of meaningful engagement and the provision of alternative accommodation

To mitigate the eviction, it ordered the respondents to ensure that 70% of the new homes to be built at Joe Slovo were allocated to current Joe Slovo residents, or former residents who had moved to Delft previously to make way for the N2 Gateway Project (paras 5 and 7(17)). The remaining 30% were to be allocated to people living in backyard shacks in the neighbouring township of Langa (paras 187, 248 and 307).

The government has stated it will build 1 500 BNG houses in Joe Slovo, and if this number changes, it has to report that to the Court. The advantage of this aspect of the order is that if the government fails to keep its promise to accommodate Joe Slovo residents in the new development, the responsible official will be liable to contempt of court proceedings.

Phases 1 and 2 of the project did not comply with the government's promise to accommodate 70% of Joe Slovo residents. Indeed, of the 705 'affordable' rental units built in Phase 1 only a handful of Joe Slovo residents benefited initially (until the rents were increased soon thereafter from between R150 and R300 per month to between R600 to R1 050), and the 35 credit-linked bond houses built in Phase 2 are unaffordable and inaccessible to Joe Slovo residents. Since mid-2007, tenants have been on a rent boycott because Thubelisha Homes refuses to address their concerns over unacceptable rent increases and poor living conditions in the Phase 1 flats. Hence the applicants had reason to doubt whether the government would, in Phase 3 of the project, keep its promise to ensure that 70% of the new homes built at Joe Slovo were allocated to the evicted Joe Slovo residents.

To ensure the effective implementation of its order, the Court placed a reporting obligation on the parties. It required them to report by 1 December 2009 on the implementation of the order and the allocation of permanent housing opportunities to those affected by the order (para 7(16)). Furthermore, the Court showed some flexibility in its order by allowing any party to approach the Court for an amendment, supplementation or variation of the order should the order not be complied with or give rise to unforeseen difficulties.

Some implications of the judgment

It is undeniable that the Court order does contain some significant victories for the applicants as seen above. For instance, it reaffirmed the importance of meaningful engagement and the provision of alternative accommodation. The Court attempted to render the eviction more 'humane' and set standards by which the appropriateness of the alternative accommodation provided to the applicants in Delft could be measured.

The judgment has serious implications not just for the Joe Slovo residents, but also for other poor communities facing eviction to make way for formal housing developments in South Africa. Hence the case has been described as a 'partial victory' (De Vos, 2009a). While the Court acknowledged the difficulty of balancing competing interests, it can be criticised for failing to properly assess the reasonableness of the government's policy choices and for displaying a particularly deferential attitude to the government. It allowed the eviction of a relatively large community based on a government project that had been implemented without proper consultation and did not make provision for affordable housing for the intended beneficiaries (Auditor-General, 2008).

Furthermore, as highlighted in the Auditor-General's special audit report on the N2 Gateway, the project fails to identify clearly the roles and responsibilities of the different spheres of government as was required in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) [*Grootboom*]. The project has been plagued by problems of mismanagement, overspending and underfinancing, among others. It can also be argued that the project is inconsistent with international best practices and South African housing law and policy, as it focuses primarily on relocation. In this regard, De Vos (2009a) notes that the Court's judgment 'endorses a government vanity project that seems to run counter to the government's own housing policy which states that informal settlements should be eradicated through in-situ upgrading where possible'. Indeed, throughout South Africa, there are signs of government's misinterpretation of the principles of informal settlement upgrading and the *indirect* ways in which informal settlements should be eliminated – that is, through upgrading and improving the lives of those who inhabit them, as opposed to destroying the physical symptom of a much larger and complex socio-economic problem (Huchzermeyer, 2008).

The project is inconsistent with international best practices and South African housing law and policy

As noted above, the Constitutional Court was unanimous in the conclusion that adequate meaningful engagement had not taken place. In this regard, Liebenberg (2009) observes that meaningful engagement is not just an expression of dignity of citizens but is indispensable to ensuring that the design and implementation of programmes to realise socio-economic rights are effective and sustainable. She therefore finds it problematic that the Court was willing to condone inadequate consultation processes merely because the objectives of the N2 Gateway Project outweighed the defects in the consultation process. She argues that unless the courts are serious about ensuring that meaningful engagement does not become a meaningless cliché, the realisation of socio-economic rights in South Africa will exhibit all the flaws of a top-down approach to development.

The *amici curiae* submission provided the Court with insight into how the N2 Gateway Project was contrary to South African and international housing law and policy. The *amici* also explained why the TRUs in Delft (located in what are known as temporary relocation areas [TRAs] or 'transit camps') did not constitute adequate alternative accommodation for Joe Slovo residents considering their lived reality. The Court, unfortunately, still ordered the relocation of the Joe Slovo residents to Delft. Justice Yacoob agreed with the *amici* that the relocation would entail 'immense hardship' and observed that the 'human price to be paid for this relocation and reconstruction is immeasurable'. He held, however, that the relocation would be reasonable – that '[t]here are circumstances in which there is no choice but to undergo traumatic experiences so that we can be better off later' (para 107). It appears that the Joe Slovo residents are, in fact, being used as 'sacrificial lambs'.

Indeed, the relocation to Delft or 'another appropriate location' has profound socio-economic implications. The move would severely disrupt the lives of Joe Slovo residents – their fragile livelihoods and important social and community networks would be destroyed. The Joe Slovo settlement is close to Langa, Pinelands, Epping and other economic hubs where jobs and food can be accessed relatively easily. Children attend school within walking distance, young adults can attend night classes thanks to their proximity, and *gogos* (older women) attend churches they have frequented for years. The settlement is close to the city centre and there is a cheap train network operating, making commuting to and from work easier for people. There is no train network in Delft, transport is expensive and the TRA settlement is 15km further from the City.

A study by the Development Action Group (DAG, 2007) attests to the concern about relocating the Joe Slovo residents to Delft. The study revealed that 63% of respondents were unhappy about living in TRAs, mainly due to the fact that they were on the periphery of the city, resulting in high transport costs, as well as general dissatisfaction with the inadequacy of TRA structures, the lack of basic services and overcrowding. The study also cites the enormous impact relocation has on household incomes and expenditure, and on social networks and security. According to DAG, relocation should be a last resort, as it not only has

a negative impact on those affected, but also places a burden on the government to provide a larger social safety net and to mitigate the social problems caused by the relocation. This is evident in the Constitutional Court's order requiring the government to engage with the communities on the issue of transport to schools, health facilities and places of work (para 7). The Court made this order believing that such engagement would go some way towards ameliorating the social and economic hardships mentioned above. However, whether this will be done efficiently in practice remains to be seen.

In the *Joe Slovo* case, the Constitutional Court sanctioned the largest eviction of a community in South Africa since apartheid

There is also the concern that Delft TRUs will become a permanent residential area for the relocated Joe Slovo residents, especially as not all of them would qualify for the BNG housing. The Court's observation that '[t]hose who cannot be accommodated in Joe Slovo after it has been developed will be allocated permanent housing in Delft' (para 188) appears to be problematic, given what is widely considered to be a disastrous state of affairs at the Delft site. If 70% of the planned 1 500 BNG houses to be built in Phase 3 are allocated to Joe Slovo residents, only 1 050 households will benefit. There are over 4 000 households currently living at Joe Slovo. The rest will remain in limbo indefinitely at Delft, most likely in TRAs which, without the benefit of a good location and community networks, are hardly 'better' than where they are currently living.

In addition, considering the problems about rentals in the initial phase of the project, as described above, it is unclear how Phase 3 would be affordable to most Joe Slovo residents, as it is also going to be rental housing, as opposed to fully subsidised RDP houses. The Court makes mention of 'low rentals' in its order (para 7(17)). However, it is not clear what constitutes 'low' rentals and how exactly the Court will enforce this important mitigating aspect of its eviction order.

Conclusion

In the *Joe Slovo* case, the Constitutional Court sanctioned the largest eviction of a community in South Africa since apartheid (Liebenberg, 2009). The case reflects some critical dilemmas in the provision of housing to the poor in South Africa. In a significant way, the Constitutional Court's judgment attempts to ensure that the impact of the relocation on the applicants is minimised by, among other things, ordering the state to provide alternative accommodation to the evictees as well as emphasising the importance of meaningful engagement in relation to the relocation. However, it remains to be seen how the engagement process, as outlined in the highly prescriptive order, will unfold. It also remains to be seen whether the government will comply fully with the Court's order.

Postscript

On 24 August 2009, the Constitutional Court reportedly quietly issued an order suspending the evictions 'until further notice' (Majavu, 2009). The eviction order was suspended after the Western Cape provincial Minister of Housing, Bonginkosi Madikizela, submitted a report to the Court stating that 'he had "grave concerns" that the "massive relocation" might end up costing more than it would to upgrade Joe Slovo' (Majavu, 2009; see also De Vos, 2009b). He also raised concerns about the absence of a plan regarding those who would not be accommodated in the new housing in Joe Slovo, since the houses would not be enough, and they would therefore be left behind in TRAs. The suspension of the eviction order has been welcomed by the Joe Slovo residents.

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For further reading on the N2 Gateway Project, see the recent report by the Centre on Housing Rights and Evictions, *N2 Gateway project: Housing rights violations as 'development' in South Africa*, available at www.cohre.org/store/attachments/ 090911%20N2%20Gateway%20Project%20Report.pdf

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UPDATE: Implementing and monitoring socio-economic rights

The United Nations High Commissioner for Human Rights (UNHCHR) recently released a report on the implementation and monitoring of economic, social and cultural (ESC) rights (UN doc. E/2009/90).

The report defines 'implementation' as 'the act of putting into effect a decision, or providing practical means to accomplish something'. This implies moving from the acceptance of international human rights obligations to the adoption of appropriate measures and eventually ensuring that the rights are enjoyed by all (para 3). 'Monitoring', on the other hand, is defined as 'a systematic gathering of information with a view to evaluating compliance with human rights commitments' (para 5). These concepts are interlinked. Implementation involves measures adopted and results achieved (process and outcome), while monitoring assesses whether appropriate measures have been adopted and applied and evaluates their results. Hence 'monitoring provides feedback for implementation' (para 8).

The report also discusses the various ESC rights obligations and ways of monitoring those rights. These are summarised below.

ESC rights obligations

ESC rights entail negative and positive obligations (para 10). A negative obligation requires states to refrain from certain behaviour such as taking measures that would result in illegal evictions. A positive obligation requires states to adopt measures aimed at realising these rights. The report also refers to the obligations to *respect* (requiring states 'to refrain from unduly interfering with the enjoyment of a right'); *protect* (requiring states 'to prevent, deter, stop or impose sanctions on third parties when they are unduly interfering in the enjoyment of a right'); and *fulfil* (requiring states 'to facilitate, provide or promote the enjoyment of a right when the right holders, for reasons that are beyond their willingness or capacity, cannot do so') (para 11).

It further notes the obligation of progressive realisation, which implies improvement over time. Hence, in many instances, the realisation of ESC rights would be gradual and depend on

the availability of resources (para 12). Comparisons over time to evaluate whether there has been progress, stagnation or retrogression would be required in monitoring progressive realisation (para 14). However, not all obligations are qualified by the notion of progressive realisation, as minimum core obligations are of immediate effect. The report cites the example of the right to adequate housing, which implies an immediate obligation to protect people from forced evictions (para 12).

Another crucial obligation is in relation to non-discrimination, which is contained in all core international human rights treaties. This obligation imposes both positive and negative obligations on states. States have the obligation to refrain from engaging in discrimination in law and fact. They also have the duty to eradicate discriminatory laws and practices (paras 17 and 18). To comply with these obligations, such a state is required to

> *detect existing discriminatory norms and repeal them, identify current discriminatory practices and adopt normative and other types of measures to eradicate them, and ensure the adequate application of such measures both to itself and to private parties* (para 19).

Furthermore, the report considers the implications of the different types of obligations discussed above for the implementation and monitoring of ESC rights (see paras 20–25). In this regard, it notes, for instance, that to evaluate the obligation of progressive realisation, monitoring efforts should measure achievements; detect failures, gaps and retrogression; and be geared at readjusting state action when necessary (para 24).

The report also urges states to identify, eliminate or revise discriminatory laws, policies, programmes and practices (para 25).

Approaches and methods of monitoring

Monitoring legislation and normative institutional frameworks

As stated in the report, two questions are central to monitoring legislation and normative institutional frameworks: first, 'whether legislative and other necessary normative measures have been actually adopted' (para 29); and second, whether the adopted legislative and normative measures comply with international human rights standards (para 30). The second question deals with the compliance of the measures with both substantive and procedural aspects of international human rights (paras 32 and 33).

Monitoring the realisation of ESC rights

The report identifies a number of ways of monitoring the implementation of ESC rights.

Human rights impact assessments

These are conducted before the adoption of policies, programmes or projects. They are used to predict the future consequences of proposed policies, programmes and projects so as to address their shortcomings before they are adopted and implemented (para 35). Though it is not possible to prescribe a single model for conducting human rights impact assessments, the report sets out the following practical steps to be considered:

> *(a) carrying out a preliminary check to determine the need for the assessment; (b) preparing an assessment plan, which should involve all the relevant stakeholders and provide them with the necessary information about the proposed measures and specific details of the rights and obligations at stake; (c) collecting the relevant information from the stakeholders; (d) performing a rights analysis by comparing the information collected with the relevant human rights obligations of the State; (e) circulating the draft analysis of the rights to all stakeholders and debating alternatives with them; and (f) making the final decisions, adopting policy measures according to the assessment and establishing mechanisms to evaluate the policy implementation and results* (para 37).

Indicators and benchmarks

The report states that indicators and benchmarks are important in monitoring progress, stagnation and retrogression in the realisation of rights (para 39). The office of the UNHCHR has developed a conceptual framework of qualitative and quantitative human rights indicators (para 40). Appropriate indicators have to be selected, as these facilitate the use of benchmarks to assess progress. Benchmarks are targets or measurable goals that states commit themselves to achieving in a given period of time: for example, to reduce the incidence of school dropouts by a specified year. They offer better parameters to monitor the

adequacy of the state's efforts to realise rights (para 41). Indicators and benchmarks can enhance the capacity of states to assess and improve the results of policies, plans and programmes; improve the effectiveness of international monitoring by treaty bodies; and enhance the transparency and accountability of state policies. They can also be used in litigation as a possible source of evidence in court settings (para 42). The report also identifies the limitations of using indicators and benchmarks, including a lack of information and difficulties in disaggregating data. Hence indicators need to be used with other sources of information (para 43).

Budget analysis

Since achieving ESC rights requires budget allocations, the report further considers budgetary analysis as a tool for monitoring the implementation of ESC rights (paras 44 and 46). A budget is useful in evaluating which normative commitments are taken seriously by states, as it demonstrates a state's preferences, priorities and trade-offs in spending (para 46). The report identifies ways in which budget analysis can be conducted. Static analysis evaluates a budget and provides direct information on the resources available for states to carry out their mandates (paras 48 and 49). Dynamic analysis, on the other hand, compares the evolution of budgets over time. It looks at variations in allocations and spending over different periods.

Monitoring violations of ESC rights

The report sees documenting ESC rights violations and making them public as an important tool for holding the responsible authorities to account (para 69). It notes different forms in which violations of these rights may occur, such as through state action, inaction or omission (para 58). As a way of tracking violations of ESC rights, the report recommends keeping records of complaints filed by victims before judicial and quasi-judicial bodies (para 64).

Conclusion

The report concludes by noting, among other things, that the monitoring of ESC rights at the international level will be strengthened by the entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 2008. The report is a very useful guide for those working in the area of ESC rights and monitoring the implementation of these rights.

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

The report of the UNHCHR on the implementation of ESC rights is available at http://daccessdds.un.org/doc/UNDOC/GEN/N09/362/90/PDF/N0936290.pdf?OpenElement

Gender, HIV and AIDS

Tracking the trends, progress and tribulations in South Africa

Rebecca Amollo

On 1 July 2009, the Socio-Economic Rights Project hosted a seminar on 'Gender, HIV and AIDS: Tracking the trends, progress and tribulations in South Africa'. The aim of the seminar was to take stock of recent developments and to reflect on progress made, and on setbacks and challenges encountered, when dealing with HIV and AIDS as it affects women. It also aimed at fostering conversation between different categories of stakeholders working on HIV and AIDS in South Africa. As participants included civil society organisations, health care practitioners and academics, the seminar looked at socio-medical, legal and policy perspectives. In particular, presentations were made on the double burden of HIV and tuberculosis (TB), food security and nutrition, sex work and legal reform; the AIDs care burden on women, and the recent national HIV prevalence, incidence, behaviour and communication survey. Here is a summary of the issues considered.

Double burden of HIV and TB

A presentation on this topic highlighted the fact that TB is a disease of poverty, which disproportionately affects women. It revealed that 70% of persons with TB are infected with HIV as well (co-infected). TB is one of the commonest opportunistic infections and is often the cause of death among HIV-infected persons. It recommended that all persons with TB should be tested for HIV in order to increase access to HIV treatment and hence decrease the risk of opportunistic infections including TB. Equally, the presentation recommended that all persons living with HIV should be screened for TB so that they can be treated accordingly.

Food security and nutrition

The presentation on this topic drew the link between HIV and AIDS, poverty and food security and revealed that HIV has led to poverty and that HIV and poverty have been worsened by the food crisis. The presentation brought to light the fact that HIV has adversely affected agriculture and food security systems. It bemoaned the fact that although South Africa boasts of food security at a national level, food insecurity persists at the household level. The presentation showed that children are suffering some of these effects: 20% of children aged between one and nine are stunted, and children aged between one and three consume less than half the recommended nutrients required for optimal growth. Malnutrition increases fatigue while at the same time decreasing the physical activity of HIV-infected persons. Consequently, HIV-infected persons eventually lose the ability to provide for their households. The discussion noted that food insecurity increases women's exposure to HIV as it induces women and girls to engage in transactional sex in order to generate an income to feed their families. The plight of orphans and child-headed households was also referred to. The presentation underscored the effect of food insecurity on the health of individuals, and consequently on economic growth.

Sex work and legal reform

This presentation explored the various definitions of sex work. The topic has received little attention in South Africa and, consequently, sex work remains illegal under section 20(1)(aA) of the Sexual Offences Act 23 of 1957. Sex work is often regarded as a social ill – that is, sex workers are viewed as immoral and as vessels for transmitting HIV and other sexually transmitted diseases. However, the presentation argued that no criminal sanction,

religious prohibition or moral condemnation will eradicate sex work. Sex work is inevitable where women are poorer than men, have less access to education, have less access to formal employment and are overburdened with looking after family members, children, the elderly and the ill. As long as they remain unprotected under the law, sex workers will continue to be victimised and abused by the police and other law enforcement agencies. They will also remain at high risk of contracting HIV and sexually transmitted illnesses.

Many factors make sex workers vulnerable to abuse and victimisation: the criminalisation of sex work, concurrent sexual relations, difficulties in negotiating safer sex, ongoing exposure to high levels of violence and stigma, and barriers to accessing health care services. Criminalisation increases stigma and limits access to health care and to legal and social services. The South African Law Reform Commission's discussion paper on adult prostitution gives four options on the law and sex work: total criminalisation, partial criminalisation, legalisation with regulated conditions and decriminalisation.

AIDS care burden on women

This presentation highlighted the fact that the role of women in caring for people living with HIV and AIDS has not been adequately acknowledged in law and policy. It revealed that 90% of HIV and AIDS care is home-based, with women shouldering 70% of it. This disproportionate care burden on women reflects the gender disparities and stereotypes which assign caregiving roles to women in a male-dominated society. For girls, this caregiving role adversely affects their education: fatigue reduces their concentration levels and the lack of time limits their participation in extra-curricular activities. It also leads to the phenomenon of child-headed households, where the responsibility for looking after the household is usually assumed by the girl child. The presentation highlighted the fact that most governments believe they cannot provide the social protection needed to resolve this problem, and showed that men are reluctant to use health services. It concluded that care deserves to be valued and recognised in law and policy so that appropriate measures are taken to assist the caregivers.

National HIV Prevalence, Incidence, Behaviour and Communication Survey

This presentation discussed some of the findings of the *South African National HIV Prevalence, Incidence and Communication Survey, 2008* – the third such study conducted by the Human Sciences Research Council, following earlier ones in 2002 and 2005. The survey sets out to present data for the midterm review of the HIV and AIDS and STI Strategic Plan for South Africa 2007–2011, and also to describe trends in HIV prevalence, HIV incidence and risk behaviour in South Africa from 2002 to 2008. It assessed exposure to major national HIV communication programmes and proposed indicators to be used to monitor the HIV and AIDS epidemic and its management in South Africa.

It revealed that the epidemic has stabilised at high levels, highlighting the fact that the practice of multiple sexual partnerships has normalised. It also revealed that there is a reduction in HIV prevalence among children, suggesting that the programme for the prevention of mother-to-child transmission of HIV is making a difference. It also showed that there is a slight reduction of HIV among the youth, increased awareness of HIV serostatus, especially among women, a decrease in HIV prevalence among adults in the Western Cape and Gauteng Province, a substantial increase in condom use among young people and all other age groups including women, and rising HIV prevalence among adults in KwaZulu-Natal and the Eastern Cape.

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The presentations can be accessed at:
www.communitylawcentre.org.za/Socio-Economic-Rights/conferences