ESR REVIEW

Vol 1, No. 1 March 1998

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Advancing Social Justice In South Africa Through Economic And Social Rights

From the Margins to the Mainstream

by Christof Heyns

One of the main themes of the 50th anniversary of the Universal Declaration of Human Rights is the need to bring the neglected half of the rights recognised in this historical document, namely economic and social rights, into the mainstream.

In contrast to civil and political rights, economic and social rights have widely and for a long time been regarded as non-justiciable. As a result, whatever recognition they have received, has often amounted to little more than lip service. In the words of the 1993 Vienna Declaration, the challenge facing the world community is "to treat human rights globally in a fair and equitable manner on the same footing, and with the same emphasis".

The Constitutional Assembly has responded to this challenge by including a comprehensive set of economic and social rights in the Bill of Rights of the 1996 Constitution. These include the rights of access to housing, food and water, health care, social security, education and a healthy environment. The state is required to "respect, protect, promote and fulfil" all the rights recognised in the Bill of Rights, including the economic and social rights. The possibility also exists that these rights could have some application against private institutions, such as private hospitals.

The Constitution has used a combination of two mechanisms to give teeth to these provisions. In the first place, the framers of the Constitution have taken the bold step of providing that socio-economic rights, like civil and political rights, are subject to judicial enforcement. If these rights are violated, the courts can be approached for appropriate relief.

The recognition of economic and social rights in the Bill of Rights is also certain to influence the balancing of interests protected by the various groups of rights in Bill of Rights. The state is under a constitutional duty to realise certain economic and social rights. This duty provides the state with powerful arguments to limit civil and political rights in appropriate circumstances to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The National Water Bill which is reviewed in this edition provides an example of the delicate balance between

property rights on the one hand, and the constitutional injunction to achieve equitable access to sufficient water by all.

The "hard" or judicial protection of economic and social rights is limited by the fact that many of these rights do not create an entitlement to immediate implementation, free of charge. Rather one is entitled to have "access to" the relevant rights which the state must realise through reasonable legislative and other measures. The state is expressly allowed the latitude to implement these rights progressively and "within available resources". Other economic and social rights are less qualified and must be implemented without delay: for example, children's socio-economic rights, the right to basic education, and the right against arbitrary evictions.

In order to reinforce the protection of economic and social rights, the new Constitution introduces a mechanism that is unique in world jurisprudence. Each year the South African Human Rights Commission must request relevant organs of state to provide it with information on the steps they have towards the realisation of a number of economic and social rights. This gives the Commission the opportunity to monitor the implementation of these rights and to keep the issue on the national agenda.

In short, the inclusion of economic and social rights has dramatically changed the centre of gravity of the Bill of Rights. The South African Constitution is a document with great potential to contribute towards greater economic and social justice in a country once known for its violation of almost every internationally recognised human right.

Human rights provisions almost always have a "never, never again" quality - they are written when people look back at what went wrong, and they reflect a commitment that these mistakes will not be repeated in future. Given the fact that inequality in all spheres was at the root of the wrongs of the past in South Africa, it is not surprising that the new Constitution strives to achieve political, civil as well as socio-economic equality. The inclusion of economic and social rights in the Constitution represents a commitment to achieving substantive equality in South Africa. The Constitution promises us a future in which equality will not merely be an empty and formalistic shell, but a living reality.

However, it is widely recognised that constitutional provisions mean little if they are not integrated into the lives of the people they are meant to govern. The ultimate custodians of constitutional promises are the people themselves. It is therefore essential that civil society play an active role in monitoring and, where necessary, pressurising responsible institutions to fulfil their obligations. As citizens we need to keep questions about the present state of the delivery and accessibility of housing, health services, social security, food and water and education on our personal and on the public agenda. We have to ensure that the different institutions responsible for the implementation and monitoring of economic and social rights reach their full potential.

It is in this context that the present publication seeks to make a contribution. This is the first edition of our quarterly publication, ESR Review (Economic and Social Rights Review) which is aimed at NGO's, members of parliament, government, the state institutions supporting constitutional democracy, policy-makers, the judiciary, the academic and legal community. ESR Review will provide an update on key developments relating to economic and social rights, and a platform for the evolving and necessary debate on the many issues arising in this area.

The publication includes -

- a review of legislation, policy documents, court decisions, and international developments relating to economic and social rights;
- features articles on topical issues;
- reviews of relevant publications, research papers and events such as conferences and workshops.

ESR Review is published as part of a joint project on economic and social rights undertaken in 1997 by the Community Law Centre (University of the Western Cape) and the Centre for Human Rights (University of Pretoria). The project and this publication is funded by the European Union Foundation for Human Rights in South Africa.

The project has various components, including: research, assisting the SA Human Rights Commission to fulfil its mandate in respect of economic and social rights (see the focus on the Commission in this edition), conducting advocacy and lobbying, organising workshops, monitoring state institutions responsible for economic and social rights, and limited litigation.

There can be little doubt about the relevance of economic and social rights in South Africa today. The transformation of our society and improving the quality of life of all are high on the political agenda. It is hoped that ESR Review will contribute and add momentum to this process.

Completed research reports and papers:

Karrisha Pillay, 'Defining "Relevant Organs of State" in Section 183(3) of the Constitution' September 1997
Karrisha Pillay, 'The Role of Local Government in Implementing the Right of Access to Adequate Housing' January 1998.
Sandy Liebenberg, 'Identifying Violations of Socio-Economic Rights - The Role of the South African Human Rights Commission' May 1997
Sandy Liebenberg, 'Gender Equality in the Enjoyment of Socio-Economic Rights: A Case Study of the South African Constitution' November 1997;
Sandy Liebenberg 'Developing the Core-Elements of Socio-Economic Rights' Briefing document prepared for the South African National NGO Coalition (SANGOCO) and the SA Human Rights Commission: Joint Hearings on Poverty and Inequality.
Nadira Bayat, Gina Bekker, Christof Heyns, 'A Comparative Overview of Reporting on Socio-Economic Rights under International Human Rights Law' June 1997.

Copies of the above documents are available from the relevant centres at a reasonable fee to cover copying and postage charges.

The National Water Bill - Breathing Life into the Right to Water

The current social and legal context

by Sandy Liebenberg

Between 12 and 14 million people in South Africa are without access to safe water and over 20 million without adequate sanitation (White Paper: para. 2.2.3) Women and children are disproportionately affected by a lack of access to basic water services. Rural women in South Africa spend more than four hours a day collecting water and wood. Thousands of children die annually of avoidable diseases related to poor sanitation and the lack of clean water.

The current water law (the Water Act No. 54 of 1956) gives private land owners extensive rights in relation to water resources. These include the exclusive right to use so-called 'private water', for example, rain water falling on the land, a stream which rises on the land or any groundwater pumped from boreholes on the land. In addition, land owners with land adjacent to a public stream (riparian owners) have the right to divert and use a reasonable portion of the normal flow of this stream and to as much of the surplus water from such a stream as the landowner is able to use beneficially (these 'riparian rights' are, however, subject to a number of exceptions and qualifications).

Water rights are therefore directly tied to land ownership. It has been estimated that more that 65% of all water currently used in South Africa is either privately owned or used under historically obtained riparian rights. Given the historical fact that Black people in South Africa were systematically stripped of their land rights, these principles of South African water law have ensured that white landowners enjoy privileged access to, and use of the country's water resources.

The parcelling out of water rights on the basis of an artificial division of water resources into different categories is also environmentally unsustainable. The state has little control over how private and riparian water rights are used. Large scale irrigation on commercial farms accounts for over half of the nation's water resources (Eddie Koch, 'Parting the farmers and their water' Mail & Guardian, 29 November to 5 December 1996). The current law does not acknowledge the indivisibility of the water cycle and that water is a common asset to be managed for the benefit of present and future generations.

The Constitution

The South African Constitution gives everyone the right to have access to sufficient water (s 27(1)(b)). The state is under a positive duty to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right (s 27(2)). Furthermore, everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution, promote conservation, and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development (s 24(b)). The legislature and executive are given the primary responsibility to adopt policy and legislation that demonstrably promote and advance the full realisation of these rights. As in the case of all human rights, the role of the courts is secondary and becomes relevant only when these organs of state fail in their duty to respect, protect and fulfil the rights (s 7(2)).

Are these rights meaningful, and can they make a real contribution to ensuring access by all to sufficient water to meet their basic human needs?

The National Water Bill

The National Water Bill is due to be tabled in Parliament in the current session. It is based on the 28 Fundamental Principles on Water Policy adopted by Cabinet in November 1996, and seeks to execute the constitutional mandate to ensure the right of all South Africans to water. Does the Bill achieve this fundamental objective?

The following criteria are used to evaluate the extent to which the Bill gives effect to the right of access to water and the environmental rights in the Bill of Rights:

- the provision of an enabling framework to facilitate equitable and sustainable access to water;
- fulfilment of the minimum core obligation to ensure essential levels of water sufficient to meet basic human needs;
- prioritising the needs of groups in disadvantaged and vulnerable circumstances;
- consultation and community participation in the institutions and processes of water management;
- the establishment of monitoring and review mechanisms.

These criteria are derived primarily from the interpretation of economic and social rights under international human rights law, particularly by the UN Committee on Economic, Social and Cultural Rights which is responsible for supervising states parties' obligations under the International Covenant on Economic, Social and Cultural Rights. Although South Africa has not yet ratified this Covenant (it was signed on 3 October 1994), it constitutes an important source for interpreting these rights under the Constitution (section 39(1)(b)).

Provision of an enabling framework

The national government is given the clear role of "public trustee" of the nation's water resources. All water in the water cycle is treated in a consistent way regardless of the nature of the water or usage, or the location of the water resource in relation to land. Private ownership of water and the riparian principle will no longer apply. Instead water use will be subject to authorisation through a system of licensing which excludes allocations made in perpetuity. Licenses may be issued either for a fixed period not exceeding 40 years, or for an indefinite period subject to termination by notice which may not exceed 40 years. These provisions allow the state to exercise effective control over the nation's water resources for the purpose of ensuring that water is used, protected and conserved in a sustainable and equitable manner for the benefit of all and in accordance with its constitutional mandate.

Secondly, the Bill requires the Minister to develop a national water resource strategy, providing a binding framework for the protection, use, development, conservation, management and control of water resources for the country as a whole. In addition, every catchment management agency must develop a catchment management strategy which harmonises with the national water resource strategy. A framework is also provided for the protection of water resources through a system of classifying different classes of water resources and determining resource quality objectives for each class. The purpose of the resource quality objectives is to establish clear goals relation to the quality of the relevant water resources.

The Bill also introduces more effective mechanisms of pollution prevention and control. These include the power of water management institutions to issue

directions and take the measures they considers necessary for pollution prevention, as well as the power of the Minister to declare and regulate certain activities which have the potential to pollute water resources ("controlled activities").

Meeting basic human needs and protecting aquatic ecosystems

Through the innovative concept of the 'Reserve', water required to satisfy basic human needs and to preserve the aquatic ecosystem is accorded a priority status. The quantity and quality of water required for these purposes is guaranteed, and is not subject to competition with other water demands. These are the only water allocations that are not subject to authorisation under the licensing system. Through this mechanism the Bill aims to ensure that sufficient water will be available to support human life and health and to secure ecologically sustainable development and use of water resources. Although there is as yet no clear definition of sufficient water, the amount of water required for the Reserve will be estimated on the basis of the minimum standard of water supply and sanitation services prescribed in terms of the Water Services Act No.108 of 1997 (see the note on this legislation below).

Prioritising disadvantaged groups

The UN Committee on Economic, Social and Cultural Rights requires that states parties give "due priority to those groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others." (General Comment No. 4, para. 11). The equality clause of the South African Bill of Rights expressly mandates legislative and other measures designed to protect or advance disadvantaged groups in order to promote the achievement of substantive equality (s 9(2)).

The Bill gives effect to these principles by requiring a relevant authority to take into account a number of factors before issuing a general authorisation or license, including "the need to redress the results of past racial and gender discrimination." In this way the Bill prioritises those who were previously disadvantaged in the allocation process.

Provision is made for the continuation of existing lawful water uses derived from repealed laws. No license is required until a responsible authority requires a person claiming this entitlement to apply for a license. When a responsible authority considers that it is necessary to review prevailing water use because particular resources are under "water stress" (e.g. where the demands for water threaten to exceed the available supply) or in order to achieve equity in allocations, it may require licensing in respect of those resources. An allocation schedule must be prepared which (amongst other categories) reflects allocations made with a view to redressing the results of past racial and gender discrimination in accordance with the constitutional mandate for water reform.

The Minister has the power to establish a pricing policy for water use charges. These charges are to be used to fund the costs of water resource management, and may also be used to achieve the equitable and efficient allocation of water. This policy may differentiate between different water users on the basis (amongst others) of their economic circumstances. This represents a significant mechanism for facilitating access to water by poor communities. Provision is also made for financial assistance by the Director General in the form of grants, loans or

subsidies. This assistance must be granted on the basis of a number of considerations, including the need for equity, transparency and redressing the results of past racial and gender discrimination.

Consultation, administrative justice and community participation

The Bill has extensive provisions for public comment and consultation on a number of key aspects, for example, the development of the national water resource strategy and the catchment management strategy, the classification system for water resources, and the pricing policy established by the Minister. The right to just administrative action in the Constitution (s 33) is also protected in the Bill through the inclusion of a number of safeguards against arbitrary administrative action. These include the obligation of responsible authorities to notify and provide reasons for decisions concerning license applications, as well as the right of appeal to an independent Water Appeal Board against decisions adversely affecting a person's rights.

COSATU's full submission can be located at the following Internet site: www.cosatu.org.za/docs/waterser.htm

There is also a decisive shift away from the exercise of centralised power embodied in the current Water Act. The Bill devolves many functions to local levels through the establishment of Catchment Management Agencies and Water User Associations. These institutions are designed to enable local water users to play a central role in local water resource management within the framework of a systematic, coherent national water resource strategy. In this way the Bill promotes broader participation in water management and conservation.

Monitoring and review mechanisms

The Bill recognises that monitoring, recording, assessing and disseminating information about water resources are critically important for achieving the objectives of the Act. The Director-General is placed under a duty as soon as it is practicable to establish national monitoring networks and information systems. Water users and the general public may gain access to the information in the national systems subject to any limitations imposed by law and the payment of a reasonable charge. Provision is also made for the review of the national water resource strategy and the catchment management strategy at intervals of not more than five years.

The right of access to water and the property clause

Section 25 of the Bill of Rights prohibits the arbitrary deprivation of property, and stipulates that property may only be expropriated for a public purpose or in the public interest and subject to compensation. Existing rights to use water may be regarded as an incident of land ownership. Accordingly, the regulation and control of these rights must be through law of general application, and may not be arbitrary. In terms of section 25(8) of the property clause "no provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of the section is in accordance with the provisions of section 36(1)" (the general limitations clause). In other words, the measures must be reasonable and

justifiable in an open and democratic society based on human dignity, equality and freedom (s 36(1)).

As has been mentioned, the Water Bill provides for the continuation of existing entitlements to use water until a person is required to apply for a license. The Bill makes provision for compensation to be claimed when the refusal of a licence application or the granting of a licence for a lesser use than the existing entitlement "constitutes the destruction of or severe prejudice to the economic viability of the undertaking." A reasonable and justifiable balance has been struck between the protection of existing water rights and the constitutional imperative to achieve the water reforms necessary to ensure equitable and sustainable access to water by all.

Conclusion

The National Water Bill constitutes a solid foundation for recasting the present legal edifice which supports inequitable and unsustainable patterns of water usage. By producing well-crafted legislation designed to give effect to constitutional rights and values, the Minister of Water Affairs and Forestry, Kader Asmal has breathed life into these rights which currently exist only on paper. The legislation illuminates and clarifies the core content of the socio-economic right to water. Its provisions are also a vivid illustration of the interdependence and indivisibility of all human rights - the socio-economic rights to water and environmental protection, property rights, and the rights to equality and just administrative action.

Once the Bill has passed through the parliamentary process, the real challenge will be ensuring that its provisions are effectively implemented. This will in turn depend on an efficient administration with the capacity and commitment to achieve the Bill's objectives.

It is through legislation of this nature that the constitutional promises of social justice and an improved quality of life for all stand the best chance of fulfilment.

Note on the Water Services Act No. 108 of 1997

This article has focused on the provisions of the National Water Bill. However, the Bill is integrally related to the above legislation which was passed in the final parliamentary session of 1997.

The Water Services Act was adopted to provide for "the right of access to basic water supply and basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being" (s 2). These rights are expressly recognised in the legislation, and every water services authority must provide for measures to realise these rights in its water services development plan. A "basic water supply" is defined as "the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene." (s 1). This minimum standard will thus be defined in regulations. The White Paper on Water Policy (30 April 1997) states that the present RDP provision of 25 litres per person per day constitutes a short term target, allowing for the progressive increase in the standards of basic service to be assured by local government (para. 5.2.1). In its submission on the Water Services Bill to the Portfolio Committee on Agriculture, Water Affairs and Forestry (dated 10 September 1997), COSATU called for the definition of "basic water

supply" in the Act to include a prescribed minimum "of at least 50 litres free potable water per person per day."

The Act provides for the setting of compulsory national standards relating to the provision of water services. In prescribing these standards the Minister must consider a range of factors, including "the need for everyone to have a reasonable quality of life and "the need for equitable access to water services." (s 9(3)). Norms and standards in respect of tariffs for water services may also be prescribed by the Minister with the concurrence of the Minister of Finance. Amongst other factors, the Minister must consider social equity. Procedures for the limitation or discontinuation of water services must be fair and equitable, contain reasonable notice provisions, and an opportunity to make representations. They may "not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services." (s 4(3)).

The Act establishes a regulatory framework for water services institutions and water services intermediaries, and for the establishment of water boards and water services committees. In their submission, COSATU criticised the Bill for over-reliance on private sector partnerships for the extension of water and sanitation services. They argue that South Africa faces the challenge to extend water and sanitation services to millions of people: "If provision is private sector driven such extension will not occur as there is little profit to be made in the delivery of water to impoverished areas." They also call for the allocation of sufficient public resources for the purpose of building capacity for public sector delivery of water services and sanitation, particularly at local government level.

Hard Cases:

A Review Of Important Cases And International Developments Relating To Economic And Social Rights

by Danie Brand

A fledgling jurisprudence on economic and social rights is at last starting to develop in South African law. A number of cases dealing with these rights have been decided in the lower and High Courts. The Constitutional Court recently delivered judgment in its first high profile case dealing with a socio-economic right. In addition, a number of cases are pending before the courts.

This section (a regular feature of this publication) focuses on this developing jurisprudence. It will consist of two parts: an overview of the most important recent court cases dealing with socio-economic rights and of significant developments in international law relating to economic and social rights.

The case review will focus on cases in which direct reliance was placed on one of the socio-economic rights in the South African Constitution. For the purposes of this review, these are: the rights of access to housing, health care, food, water, and social security, the right to a healthy environment and education, and the socio-economic rights of children and detained persons.

The review of international law will provide an overview of South Africa's international obligations under treaties protecting economic and social rights as

well as the government's participation in other relevant international declarations and resolutions.

This first edition of the review will cover the period from the coming into force of the interim Constitution until the end of January 1998. As this is a lot of ground to cover, the review will not be exhaustive, and will focus on reported cases.

A. Case Review

The development of case law dealing with socio-economic rights in South Africa has recently started to gain momentum. The economic and social rights in the interim Constitution were not as extensive as those contained in the 1996 Constitution. They mainly consisted of rights relating to the environment and education, and children's economic and social rights.

Certain cases decided under the interim Constitution provide guidance on possible approaches to the interpretation of the socio-economic rights in the 1996 Constitution. A number of these cases dealt with the educational rights entrenched in section 32.

Amongst other issues the Court was called on to decide in the case of Motala and Another v University of Natal 1995 (3) BCLR 374 (D), it dealt with the interpretation of the phrase, "basic education". Applicants in the case brought an urgent application requesting an order, directing the respondent University to admit their daughter to medical school, inter alia, on the grounds of the guarantee of equal access to educational institutions in section 32(a) of the interim Constitution. The Court had to decide whether the phrase, "educational institutions" included institutions of higher learning. It held that it did not, and that the phrase had to be interpreted in the context of the right to basic education also guaranteed in section 32(a). This did not include a right to tertiary and other forms of higher education.

The case of SW v F 1997 (1) SA 796, on the other hand, casts some light on the interpretation of the right of children to adequate parental care, guaranteed in section 30(1)(b) of the interim Constitution and echoed in section 28(1)(b) of the 1996 Constitution. Applicant in this case appealed against an adoption order placing her child with respondents. She based her appeal partly on the right to parental care, arguing that parental care referred only to care by natural parents and not adoptive parents. The court rejected her argument, declaring that the right to parental care has as its aim the provision of adequate care to needy children. Such care does not necessarily have to be provided by natural parents in all circumstances. Section 28(1)(b) of the 1996 Constitution, gives every child the right "to family care or parental care, or to appropriate alternative care when removed from the family environment."

In the case of In Re The School Education Bill of 1995 (Gauteng) 1996(4) BCLR 537(CC), the Constitutional Court considered the constitutionality of a provincial Bill dealing with the provision and control of education in schools. The crucial question for determination was whether section 32(c) of the interim Constitution created a positive obligation on the state to to have established, where practicable, schools based on a common culture, language or religion subject only to the qualification that there be no discrimination on the grounds of race. The Court held that this right was a defensive right which protected the freedom of persons to establish institutions of this nature without undue interference by the state. However, it did not create a positive duty on the state to establish and fund

these institutions. In contrast, the right to basic education in section 32(a) of the interim Constitution "creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education." (para. 9. Per Mahomed J). This suggests that a judicial remedy may be granted at least in relation to socio-economic rights such as the right to basic education

A number of other cases dealing with subjects related to socio-economic rights where also decided under the interim Constitution: see for instance Rikhotso v Northcliff Ceramics (Pty) Ltd and Others 1997 (1) SA 526 (W) (housing); S v Mumbe 1997 (7) BCLR 966 (W) (environment); OVS Vereniging vir Staatsondersteunde Skole en 'n Ander v Premier Prov. Vrystaat en Andere 1996 (2) BCLR 248 (O) (education). However, these will not be discussed as no direct reliance was placed in the judgments on a socio-economic right.

The first direct consideration of the socio-economic rights in the 1996 Constitution is found in In re: Certification of the Constitution of the Republic of South Africa, 1996 1996 (10) BCLR 1253 (CC). The Constitutional Court was required to certify that the 1996 Constitution complied with the 34 Constitutional Principles annexed to the interim Constitution before it could come into force. In the course of the judgment, the Court rejected a challenge to the inclusion of socio-economic rights as justiciable rights in the Constitution. The opponents argued that socio-economic rights breached the doctrine of separation of powers between the judiciary, legislature and executive, and were incapable of enforcement by a court. The Court pointed to the fact that many civil and political rights (including the right to equality) may also have budgetary implications and require the courts to interfere with the policy choices of the legislature and executive. The fact that socio-economic rights had budgetary implications were not a bar to their justiciability. The Court held that these rights are, "at least to some extent, justiciable" and can, "at the very minimum," be "negatively protected from improper invasion." (paras. 76 - 78). Through the Certification judgment the Court has signalled its willingness to enforce at least the duty of the state to respect and protect the socio-economic rights.

After the coming into force of the 1996 Constitution in February 1997, it did not take much time for the first cases dealing with socio-economic rights to reach the courts. Certain cases dealing with social security in various magistrates courts were decided on the basis of administrative fairness, and not on the basis of the right to social security. There are approximately five reported cases dealing directly with the socio-economic rights in the 1996 Constitution.

Two cases dealing with the right of access to housing (section 26) were decided in the South-Eastern Cape Local Division of the High Court. In the case of Despatch Municipality v Sunridge Estate and Development Corporation (Pty) Ltd 1997 (8) BCLR 1023 (SE) the Court held that section 3B of the Prevention of Illegal Squatting Act 52 of 1951, which permitted the summary demolition of unauthorised buildings or structures without a court order, were in conflict with section 26(3) of the Constitution, and could accordingly no longer be applied. Section 26(3) provides that "no-one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

In Uitenhage Local Transitional Council v Zenza and Others 1997 (8) BCLR 1115 (SE), the Applicant applied for an eviction order against illegal occupiers of land owned by it. The Court decided the matter on the basis of section 26(3), and

discussed the "relevant circumstances" that it was required to consider in terms of the section. The Court took account of the necessity that forced the respondents to occupy the land (their homes had been destroyed by floods), and of the fact that no alternative housing or shelter was available to them. However, it held that these considerations were outweighed by the recalcitrant attitude of the respondents and the fact that the land in question had been earmarked for a housing project that would provide housing to 8 000 people who were in the same predicament as the respondents. The order was accordingly granted.

Three reported cases dealing with the right of access to health care have also been decided.

In the case of B and Others v The Minister of Correctional Services and Others 1997 (6) BCLR 789 (C) the applicants, diagnosed HIV positive, were convicted prisoners incarcerated in prisons run by the respondents. They applied for a declaratory order that the right to "adequate medical treatment" of prisoners (s 35(2)(e) of the Constitution) entitled them to the provision, at state expense, of specific anti-viral medication (a combination of AZT and ddl). The respondents opposed the application, arguing that the medication was too expensive, and that it was only obliged to provide the applicants with the same standard of care as was provided in state hospitals outside prison. Evidence was given to the effect that the use of the relevant anti-viral drugs in state hospitals in the region was limited, and that the applicants would not qualify for the prescription of this medication according to the policy applied in these hospitals.

The Court granted the order on the basis that it was common cause between medical experts that the drugs requested were the most effective treatment for HIV. It held that "once it is established that anything less than a particular form of medical treatment would not be adequate, the prisoner has a constitutional right to that form of medical treatment and it would be no defence for the prison authorities that they cannot afford to provide that form of medical treatment." However, in determining what is "adequate medical treatment", regard must be had, inter alia, to what the State can afford. The Constitution did not provide for "optimal medical treatment", but only for "adequate medical treatment" (at para. 49). In the present case the respondents had not made out a case that, as a result of budgetary constraints, they could not afford the anti-viral treatment to HIV-positive prisoners who were eligible for such treatment.

The Court rejected the argument that the state owed no higher duty to prisoners than to citizens in general, and that the standard of "adequate medical treatment" as envisaged in the Constitution should be determined by what the State can provide for poor patients outside prisons.

The first case decided by the Constitutional Court based directly on a socio-economic right in the 1996 Constitution is the case of Soobramoney v Minister of Health, KwaZulu-Natal (Case CCT 32/97).

The applicant in this case, Mr Soobramoney, suffered from chronic renal failure which required, for his survival, regular kidney dialysis treatment. He did not have the resources to obtain treatment from private sources and approached a state hospital for the provision of the treatment, but was refused.

Dialysis treatment in this hospital is only available to a limited number of patients, because it is very expensive and the resources of the hospital are limited. The hospital has an established policy according to which it decides which

patients suffering from irreversible chronic renal failure will qualify for dialysis treatment. The primary criteria for admission to dialysis treatment is that a patient has to be eligible for a kidney transplant. The guidelines provide that an applicant is not eligible for a transplant unless he or she is free from other significant disease. Mr Soobramoney did not meet these criteria for selection as he suffered from other significant diseases that precluded his chances of recovery.

Mr Soobramoney brought an urgent application to the Durban and Coast Local Division of the High Court for an order directing the hospital to provide dialysis treatment to him. Arguing that he would die if he did not receive the treatment, he based his application primarily on the right in section 27(3) of the Constitution which prohibits the refusal of "emergency medical treatment". The Court refused the application, and he successfully obtained leave to appeal against the judgment to the Constitutional Court.

The Constitutional Court dismissed the appeal. In doing so it held that regular, on-going treatment for chronic disease, even if that treatment forestalled death, did not constitute emergency medical treatment as envisaged in section 27(3). The right is restricted to cases of "sudden catastophe" which called for immediate medical attention in order to avert harm. According to the Court the purpose of the right "seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities." (para. 20. Per Chaskalson P). An application in terms of section 27(1)(a) (the right of access to health care services) would also not have succeeded. As will be recalled, this right expressly allows the state to achieve the full realisation of this right progressively and within available resources (s 27(2)). Given the lack of resources and the extensive demands on hospital administrations, "an unqualified obligation to meet these needs would not presently be capable of being fulfiled." (para.11).

The Court found that the hospital had clearly and convincingly demonstrated that its resources only allowed it to provide dialysis treatment to a limited number of patients. The hospital authorities had exercised their discretion to decide who should be treated and who not according to a set of rational and objectively fair criteria: "A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters." (para. 29)

The Court accordingly declined to overturn the decision to refuse Mr Soobramoney dialysis treatment.

The Soobramoney case is important for a number of different reasons.

It is clear from the judgment that the Court in its application of the right to health care, but probably of socio-economic rights in general, will be slow to interfere with the reasonable decisions of the political organs and the particular service providers involved. The court was at pains to point out that it did not regard itself as being qualified to make the kind of detailed decisions regarding resource allocation that are required to spread limited resources equitably.

The Court also emphasised that, particularly in the context of the application of socio-economic rights, the issue would very often be the equitable distribution of limited resources. In this context, the rights of individuals would have to be balanced against the needs of the broader community.

In reaching its decision, the Court referred to certain decisions of the Supreme Court of India, to the jurisprudence of British and American courts, as well as its own previous decisions. However, the judgment can be criticised for failing to consider the protection of health rights under international human rights law.

In conclusion, a number of cases dealing with the rights of access to social security and water are currently pending before the courts.

B. International obligations and commitments

- South Africa has ratified the following treaties or conventions which directly or indirectly protect socio-economic rights:
- International Labour Organisation Conventions No. 2, 19, 26, 42, 45, 63, 89, 87 and 98
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979) (ratified December 1995)
- Convention on the Rights of the Child (1993) (CRC) (ratified June 1995)
- African Charter on Human and Peoples' Rights (1981) (ratified on 9 July 1996)

On 3 October 1994, South Africa signed, but has not yet ratified, the International Covenant on Economic, Social and Cultural Rights (1966). This is the principal international instrument protecting economic and social rights. Together with the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966), it constitutes the 'International Bill of Rights'.
Under CEDAW and the CRC, South Africa is obliged to submit an initial and thereafter periodic reports to the Committee on the Elimination of Discrimination Against Women and the Committee on the Rights of the Child respectively. These reports must set out the legislative, judicial, administrative and other measures that have been adopted to give effect to the provisions of the conventions, and must record the progress made as well as obstacles encountered in implementing the rights.

The initial reports required in terms of both these Conventions were submitted by the government during 1997, and are available from the Department of Foreign Affairs. The Committees will review these reports, and make observations and comments on South Africa's compliance with its obligations under these conventions.

For more detail on the protection of economic and social rights under these and other international human rights treaties, a copy of a research paper entitled 'A Comparative Overview of Reporting on Socio-Economic Rights under International Human Rights Law' (June 1997) is available from the Centre for Human Rights.

The SA Human Rights Commission

by Sandy Liebenberg

The 1996 Constitution accords the SA Human Rights Commission a unique role in the monitoring of economic and social rights in South Africa.

Section 184(3) of the Constitution reads as follows:

"Every year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken toward the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment."

The process followed

During the past year the Commission has been working together with a number of partners on developing a methodology for implementing this constitutional mandate. These partners are: the Community Law Centre (UWC), the Centre for Human Rights (University of Pretoria), the Community Agency for Social Enquiry (C A S E) and the Human Sciences Research Council (HSRC). Key issues which the Commission has grappled with include:

- the 'relevant organs of state' which should be targeted for information;
- the nature of the information which should be included in the questionnaires (the 'Protocols').
- the criteria for evaluating or assessing the information received;
- civil society's involvement in the process;
- reporting on economic and social rights to Parliament.

A number of preparatory workshops and meetings have been held. On 18 September 1997, the Commission and its partners hosted a consultative workshop with representatives of government departments and civil society to review the process and the draft protocols which had been prepared. Presentations were made by the two international experts invited to participate in the workshop: Dr. Audrey Chapman (Director of the Human Rights Programme of the American Association for the Advancement of Science) and Prof. Michelo Hasungule of Zambia.

Following this workshop, the protocols were refined and streamlined. A separate protocol was prepared for each economic and social right in the Bill of Rights. The information requested was structured within the framework of the four primary duties imposed on the state by the Constitution: the duty to "respect, protect, promote and fulfil the rights in the Bill of Rights." (s 7(2)). This will facilitate the duty of the Commission to monitor and assess compliance by relevant organs of state with their obligations.

The relevant protocols accompanied by an explanatory memorandum were delivered on 23 December 1997 to the Director Generals of the following government departments:

- Department of Housing;
- Department of Health;
- Water Affairs and Forestry;
- Department of Agriculture/Land Affairs
- Department of Welfare
- Education;
- Environmental Affairs and Tourism;
- Correctional Services;
- Finance.

In addition, protocols were sent to the Director Generals of each provincial government, and to a representative of the South African Local Government Association (SALGA).

Relevant organs of state were given until 15 February 1998 to provide the Commission with the information requested in the protocols. In terms of section 7(2) of the Human Rights Commission Act (No. 54 of 1994), all organs of state are obliged to provide the Commission with the assistance it requires to

effectively exercise its powers and perform its duties and functions. It is essential that the Commission develop effective strategies for dealing with organs of state who delay or fail to deliver their responses to the protocols. This aspect has plagued reporting systems under international human rights treaties although treaty-monitoring bodies are developing innovative methods of exerting pressure on states parties to submit over-due reports.

Analysis of information and report to Parliament

The Commission plans to engage a team of researchers to assist it in analysing the information received from the relevant organs of state. Thereafter it will prepare a special report on economic and social rights which will be sent to the President, and to the Speaker of the National Assembly for tabling in Parliament. The possibility exists that Parliament may wish to convene a public hearing and debate on the Commission's report. At present there is no special portfolio committee dealing with human rights, and the portfolio committee on Justice has responsibility over matters relating to the implementation of the Bill of Rights.

Civil society involvement

The experience of international reporting systems relating to human rights has demonstrated that civil society input is vital to the success of the process of monitoring human rights. For example, the UN Committee on Economic, Social and Cultural Rights which is responsible for supervising states parties obligations under the International Covenant on Economic, Social and Cultural Rights (1996) has developed innovative ways of involving NGO's in the reporting system under the Covenant. These include inviting the submission of "shadow" or "alternative reports" as well as opportunities for oral representations. Governments tend to portray the situation in their country in the most favourable light whereas NGO's are inclined to be more critical. It is only by being exposed to both perspectives that a balanced and credible assessment of compliance with human rights obligations can be made by the monitoring institution.

These lessons are also applicable to the monitoring of economic and social rights under the South African Constitution. NGO's, CBO's and trade unions should have a meaningful opportunity to submit independent information to the Commission and to comment on the information provided by government departments. Those NGO's and CBO's with grassroots experience on the obstacles experienced by disadvantaged communities in gaining access to economic and social rights have a particularly valuable role to play. The Commission should also ensure that these submissions are taken into account and reflected in its report to Parliament.

For further information on the 'Poverty and Inequality Hearings' contact Jacqui Boulle from SANGOCO at tel. no: (011) - 403 7746.

The hearings on "Poverty and Inequality" being organised by the South African National NGO Coalition (SANGOCO), the SA Human Rights Commission and the Commission for Gender Equality provide a valuable opportunity for civil society to share its perspectives on the implementation of economic and social rights in South Africa. These hearings were launched on 24 February 1998, and will run from March to June 1998. At the conclusion of the hearing SANGOCO will prepare a comprehensive report on the hearings. It is recommended that the Commission integrate the contents of this 'NGO-Report' in its special report to Parliament on economic and social rights. By doing so, this exciting NGO-initiative will dovetail with the monitoring process under section 184(3) of the Constitution.

The Commission has indicated that it will convene a consultative meeting on its draft report to Parliament on economic and social rights at which civil society input and comment will be sought. It has also undertaken to make a report of the analysis of government responses available to the NGO-community. However, we believe that NGO's should also be entitled to gain access to the actual information supplied by organs of state in response to the protocols. This will facilitate more meaningful comment and involvement by civil society in the monitoring process.

For further information on the monitoring of economic and social rights by the SA Human Rights Commission, contact:
Ms Louisa Zondo, Chief Executive Officer, SAHRC
Tel: (011) 484-8300
Telefax: (011) 484-1360

Conclusion

We conclude with a quote by the Chairperson of the SA Human Rights Commission, Dr. Barney Pityana, on the Commission's important role in monitoring the implementation of economic and social rights in South Africa:

"The Constitution makers decided in their wisdom to provide a mechanism whereby economic and social rights (considered by some to be of dubious justiciability and enforceability) could go beyond mere aspirations and unenforceable directives. The Constitution makers intended to make these rights substantial and effective.

In order to take up this challenge we must hold government accountable through requiring them to justify their laws and policies, the setting of priorities and the way in which the resources of our country are being spent. We will assess whether decisions taken by government are reasonably targeted at the realisation of the economic and social rights enshrined in the Bill of Rights.

As we seek to do this work, we recognise that we have enormous resources in our country. The NGO's and other organisations have been working on these issues in other ways. We need to consult with them."

A discussion of the key issues pertaining to the monitoring process in terms of section 184(3) of the Constitution is contained in the published workshop report (jointly produced by the Community Law Centre and the Centre for Human Rights) entitled 'Monitoring Socio-economic Rights in South Africa - the Role of the SA Human Commission.' All published copies have been distributed. However, photocopied reports can be requested from our project administrator, Sonya Le Grange (tel: (021) - 959 3708) subject to a reasonable fee to cover copying and postage charges.

The Role Of Local Government In Implementing The Right Of Access To Adequate Housing

by Karrisha Pillay

Introduction

Whilst the inclusion of socio-economic rights in the 1996 Constitution is welcomed, their actual implementation is often viewed with much scepticism. As the protection of socio-economic rights is a fairly novel concept in South African constitutional jurisprudence, problems regarding their implementation is understandably exacerbated. The issue is further complicated by the tripartite structure of government that South Africa has opted for. The functions, powers and duties accorded to each tier in relation to the implementation of socio-economic rights have proven to be of particular concern. This article focuses

specifically on the right of access to adequate housing and the role of local government in its implementation.

Section 7 (2) of the Constitution obliges the state to respect, protect, promote and fulfill the rights in the Bill of Rights. Section 8 concerning the application of the Bill of Rights states that it applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. In defining the term, 'organ of state', the Constitution unequivocally includes the national, provincial and local spheres of government (s 239). This translates into a duty on the part of local government to respect and give effect to the rights in the Bill of Rights, including the right of access to adequate housing.

Up until the 1996 Constitution, local government was considered the lowest level of government and at the base of the pyramid structure of government. It acquired its powers and functions from its superiors: national and provincial government. However, in terms of Chapter 3 of the Constitution, the present system is described as follows: "[G]overnment is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated." The image of three concentric circles which intersect one another replace the traditional hierarchical pyramid model with local government at its base. However, whilst a new legal space has been created for local government, the Constitution has sought to ensure that local government, as with the other spheres of government and organs of state, exercises its powers and duties in accordance with the principles of co-operative government.

Both the Constitution as well as the Housing Act make provision for national and provincial governments to support and strengthen the capacity of local government to perform its functions and exercise its duties. In addition, the provincial executive has the power to intervene and perform the functions of a municipality when it does not or cannot do so itself. It is important that both the 'supportive' role of national and provincial governments as well as the 'intervention' that may take place are kept in mind when considering the functions and powers of local government in relation to housing.

The right to housing in the Constitution and the role of local government

In terms of Section 26 of the Constitution, everyone has a right of access to adequate housing. Section 26(2) obliges the state to take reasonable legislative or other measures within its available resources to ensure the progressive realization of this right. As the term 'state' refers to national, provincial and local spheres of government, local government clearly shares the duty to take reasonable measures to promote and advance access to adequate housing.

However, the fact that housing is listed as a functional area within the concurrent legislative competence of national and provincial government in terms of Schedule 4 of the Constitution can give rise to a misconception that local government has either no role, or an extremely limited role to play in implementing section 26. Contrary to this misconception, it will be shown that it in fact has a vital role in fulfilling the right of access to adequate housing in South Africa.

The objects of local government under the Constitution include ensuring the provision of services to communities in a sustainable manner, promoting social and economic development and promoting a safe and healthy environment. Adequate housing is clearly critical to social and economic development.

Local government also has a number of developmental duties under the Constitution. It has been argued that the term, 'development' in this context refers to 'the satisfaction of people's material and strategic needs' (Mastenbroek and Steytler, 'Local Government and Development: The New Constitutional Enterprise' forthcoming in Law, Development and Democracy, 1998). This definition suggests an improvement in people's standard of living and a reduction of poverty. Access to adequate housing is a critical component of meeting these objectives.

The Constitution further obliges local government to give priority to "the basic needs of the community". In meeting these basic needs, conditions conducive to the general health and well being of people should be created. The Universal Declaration of Human Rights recognises housing as a human right integrally related to the health and well-being of people. The preamble of the Housing Act offers further support for the contention by recognising that housing as adequate shelter fulfills "a basic human need."

Finally, the Constitution provides that local government has executive authority in respect of, and has the right to administer, local government matters listed in Part B of Schedule 4 and Part B of Schedule 5. Although housing is not per se included in either of these Schedules, many of the functional areas listed therein relate to the adequacy of housing. These areas relate to certain of the core elements of the right to adequate housing identified by the UN Committee on Economic and Social Rights [General Comment No. 4 on the right to adequate housing (article 11 of the International Covenant on Economic, Social and Cultural Rights), para. 8]. These factors include: legal security of tenure; the availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy. What follows serves to illustrate the relationship between certain functional areas of local government and these core elements identified by the UN Committee. For instance, municipal health services, water and sanitation services, child care facilities, refuse removal and stormwater management systems relate to the availability of services. These fall within the competence of local government, as does municipal public transport which is central to the creation of infrastructure. Building regulations and electricity and gas reticulation are also within the competence of local government. These relate to the habitability and location of housing.

It is clear that even in terms of the Constitution, local government has a vital role to play with regard to housing. The objects of local government, the developmental duties of local government as well as the functional competencies of local government lend support to this contention. This role is reinforced and further elaborated in terms of the Housing Act.

The role of local government in housing development under the Housing Act

The Housing Act No. 107 of 1997 is the primary legislative framework giving effect to Section 26 of the Constitution. The Act defines the role of national, provincial as well as local government in relation to housing development. The Act makes it clear that its reference to a municipality includes a local council, a metropolitan council, a metropolitan local council, a rural council and a district council. The extensive reference to the duties and functions of municipalities in the Housing Act accordingly refers to all of these different types of municipalities in spite of the vast disparities in their resources, capacity and general skills and knowledge regarding housing development. Section 9 of the Act deals in

particular with the functions of municipalities. It obliges every municipality, as part of its process of integrated development planning, to take all reasonable and necessary steps within the framework of national and provincial housing legislation to fulfill a number of specific duties. Municipalities are obliged under the Local Government Transition Act No. 209 of 1993 to prepare integrated development plans and financial plans in respect of their powers, duties, functions and priorities.

The Housing Act confers vast and specific powers, functions and duties to municipalities. As local government interfaces most with local communities, it is clearly the level of government that is best suited to making an assessment regarding certain fundamental issues concerning housing development. The Act accordingly obliges municipalities to ensure that inhabitants within its area of jurisdiction have access to adequate housing on a progressive basis. In order to ensure access to housing, the Act obliges them to identify and designate land for housing and associated purposes, to initiate, plan and execute any appropriate housing development, to facilitate and coordinate housing development in its area of its jurisdiction as well as to regulate health and safety standards regarding housing development. These duties clearly illustrate an overall responsibility on local government for the management and co-ordination of housing development within its area of jurisdiction.

Municipalities are further obliged to set housing delivery goals as well as to create and maintain a public environment conducive to viable housing development. Again, their knowledge and interaction with members of their communities would make them best suited to assessing the needs, opportunities, capacity and resources available within their particular jurisdiction so as to set appropriate housing delivery goals.

In accordance with the objects of municipalities under the Constitution to ensure the provision of services to communities in a sustainable manner and the duty to give priority to the basic needs of the community, the Act obliges them to ensure the provision, operation and maintenance of water, sanitation, electricity, roads, stormwater drainage and transport. Municipalities are further responsible for the provision of bulk engineering services, and revenue generating services in so far as these services are not provided by specialist utility suppliers.

Municipalities also have the duty to promote the resolution of conflict arising in the housing development process, and to participate in national and provincial development programmes. The Act further allows a municipality to apply in writing to the MEC to be accredited for the purposes of administering one or more of the national housing programmes. Should such accreditation take place, the role of a particular municipality in housing delivery will be even greater.

These duties underscore the enormous responsibilities of local government for a number of functions which are vital to the realisation of the right of access to adequate housing.

The devolution of these powers and functions to a sphere of government which has the greatest level of interaction with civil society is laudable. However, this devolution of functions must be viewed in the light of two fundamental issues: the stark divisions and differences between urban local government and rural local government, and the resources, infrastructure and institutional capacity of local government as a whole.

Challenges facing local government

As has been mentioned, the reference to a municipality in the Act, includes a local council, a metropolitan council, a metropolitan local council, a rural council and a district council. The Act accordingly imposes the same obligations and duties on all of these different types of municipalities. For instance, Transitional Representative Councils have only a representative function with no executive powers and as such are not fully fledged councils. Yet, they bear the same obligations as a fully fledged metropolitan local councils. The underlying assumption of the Housing Act is that municipalities are similarly placed in terms of resources and infrastructure so as to enable them to perform their duties and functions in an equally diligent and capable manner.

Furthermore, the budget of a municipality is obviously key in ensuring that it can perform these extensive duties in terms of the Act. The issue of the budget is particularly critical in the context of the limit of "available resources" in terms of Section 26(2) of the Constitution. The Constitution provides that an Act of Parliament must provide for the equitable division of revenue raised nationally among the national, provincial and local spheres of government. In making an assessment as to what constitutes an equitable share of the revenue, it is critical that the extensive duties of local government as regards housing (and other functions) are taken into account.

As has been noted, the Housing Act places an extremely onerous burden on local government as regards housing development. Yet, this important role of local government in housing delivery is not linked to any specific financing provisions in the Housing Act. The devolution of the housing function to provincial and local spheres where implementation and delivery is expected to happen is a positive feature of the Act. However, a number of concerns have been raised regarding the financing as well as the institutional arrangements for local government to be able to perform these functions effectively. The problem is exacerbated by the stark reality that many municipalities lack the necessary infrastructure for even the most basic planning functions to occur.

Aside from the need for an increase in the overall budget for housing, it is equally important to provide adequate financing for the devolution of powers and functions relating to housing development. More specifically, if critical functions and duties as regards housing development are devolved to local government, finances need to follow where duties and functions rest.

Conclusion

One of the greatest challenges facing South Africa is the realisation of everyone's right of access to adequate housing against a background of huge backlogs and limited resources. This requires that finances are structured and utilised efficiently and equitably. As housing delivery clearly requires an intimate knowledge of the circumstances within a particular jurisdiction, the devolution of powers and functions to local government is vital and accordingly welcomed. However, it is critical that the necessary resources are devolved in accordance with the devolution of powers and functions. Finally, fundamental disparities between certain municipalities must be borne in mind and reflected in both the financial assistance and support given to certain municipalities.

The Maastricht Guidelines On Violations Of Economic, Social And Cultural Rights

ESR REVIEW

by Danie Brand

Despite the fact that socio-economic rights have been on the South African legal landscape since 1993, there is still a great deal of uncertainty in the general discourse surrounding these rights. Lawyers still feel uncomfortable dealing with issues that were previously regarded to be within the exclusive domain of the legislature and executive alone. Academics still struggle to ascertain the nature and content of the rights. Government officials and policy makers are still wondering what impact these rights will have on their activities. The public are still waiting for the rights to have a real influence on their day to day lives. Some of the most basic questions continue to be asked: what obligations do these rights impose, when are they violated, and how are they to be enforced?

These concerns are at least partly attributable to the fact that the extensive inclusion of socio-economic rights in the South African Constitution is unique: nowhere else in the world are socio-economic rights given the kind of direct judicial protection backed up by "softer" non-judicial protection (via the SA Human Rights Commission) that they enjoy in South Africa. Exciting as this undoubtedly is, it also means that there are very few examples in the world that we can turn to for guidance in our efforts to give content to our socio-economic rights. In lawyer's language: there are very few "comparative sources" for the interpretation of these rights.

One substantial source that is available is the international jurisprudence that has developed around the International Covenant on Economic, Social and Cultural Rights (1966) ('the ICESCR') and other international instruments protecting socio-economic rights. The activities of the UN Committee on Economic, Social and Cultural Rights (the body charged with supervising the ICESCR) and other treaty monitoring bodies as well as academic writing and research around the topic have resulted in the development of a number of principles for the interpretation of economic and social rights. Despite the seeming reluctance of our courts to make use of this source (see for instance the recent case of Soobramoney v Minister of Health, KwaZulu-Natal 1997 (12) BCLR 1096 (CC)), the developing international law relating to socio-economic rights will provide rich pickings for lawyers and academics alike in their efforts to give flesh to socio-economic rights.

An important recent addition to this international jurisprudence is "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" ('the Maastricht Guidelines'). The Maastricht Guidelines were drafted by a group of experts, including legal academics, lawyers and members of the UN Committee on Economic, Social and Cultural Rights, in Maastricht (Netherlands) during January 1997. The guidelines are an elaboration and updating of the so-called "Limburg Principles" (The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights) drafted by a similar group of experts at Limburg University in 1986. They do not have any legal force, but are an authoritative summary of the state of international human rights law on the subject of economic, social and cultural rights, drawing together the ideas and opinions of the leading experts in the field.

The Maastricht Guidelines, like the Limburg Principles, provide a conceptual guide to the interpretation of the rights protected in the ICESCR. They are particularly relevant to the interpretation of the socio-economic rights in the South African Constitution. In many respects the socio-economic rights in the Constitution are similar in their formulation and structure to the rights in the ICESCR. The

Guidelines can therefore be fruitfully applied to the interpretation of some of the more difficult phrases and concepts related to these rights that are echoed in the South African Constitution.

The Maastricht Guidelines deal with a variety of issues relating to socio-economic rights: they contain a sections on: the significance of economic, social and cultural rights (part I); the meaning of violations of these rights, including minimum core obligations (part II); responsibility for violations (part III); victims of violations (part IV); remedies and other responses to violations (part V).

The Maastricht Guidelines go a long way towards answering some of the questions regarding the scope and content of the economic and social rights in the South African Constitution.

A few examples:

In the first place the Maastricht Guidelines provide a cogent explanation of the possible meaning of the injunction placed on the Sate to "respect, protect, promote and fulfil" the rights in our Bill of Rights found in section 7(2) of the South African Constitution. In terms almost identical to section 7(2), the Guidelines declare that all human rights, including economic, social and cultural rights, impose three "layers" of obligations: obligations to respect, to protect and to fulfil.

The obligation 'to respect' is described as requiring states to "refrain from interfering with the enjoyment of economic, social and cultural rights" - an example of a violation of this obligation in relation to the right to housing would be an arbitrary eviction from a dwelling. This is specifically prohibited by section 26(3) of the South African Constitution.

The obligation 'to protect' requires states to "prevent violations of such rights by third parties"- an example of a violation would be the failure of the state to protect persons against practices of unscrupulous landlords that effectively deny their right to access to housing (a possible violation of section 26(1) and (2)).

The obligation 'to fulfil' requires states "to take appropriate legislative, administrative, budgetary, judicial and other measures toward the full realisation of such rights". An example of a violation would be the failure of a state to develop and implement a reasonable plan of action for achieving access to essential primary health care, basic nutrition, or basic social assistance.

The Maastricht Guidelines also point out that socio-economic rights involve both "obligations of conduct" and "obligations of result". An obligation of conduct requires "action reasonably calculated to realise the enjoyment of a particular right" - a plan of action to realise the particular right with a reasonable chance of success. An obligation of result requires the state to "achieve specific targets to satisfy a detailed substantive standard". Applied to the right to food for example, the obligation of conduct will require the development and implementation of a plan aimed at eliminating malnutrition. The obligation of result will require malnutrition levels to be reduced to a predetermined level.

At the very least, even if a particular socio-economic right does not impose an obligation of result, it will require relevant organs of state to undertake specific conduct. In the case of the rights in sections 26 and 27 of the Constitution this conduct involves the adoption of measures (including a plan of action) reasonably

calculated to achieve the result of full access to the relevant rights in the shortest possible period of time.

The Maastricht Guidelines divide violations of economic and social rights into those occurring through "acts of commission", and those through "acts of omission". Examples of violations of both types are provided.

Many of the terms found in the clauses protecting economic and social rights are also defined with greater precision in the Maastricht Guidelines.For example, they state that the requirement of "progressive realisation" of socio-economic rights found both in the South African Constitution and the ICESCR cannot be used by states as a pretext for non-compliance with their obligations. This requirement mandates the state to take at least some steps toward the realisation of the right immediately, followed by others as soon as objectively possible. The burden is always on the state to show that measurable progress towards the full realisation of rights is being made. Retrogressive measures require particular justification.

With regard to the question of resource contingency (according to which the state is only obliged to pursue the realisation of socio-economic rights within the limits of its available resources), the Maastricht Guidelines confirm the Limburg Principles in this regard:

- regardless of the availability of resources, a state must ensure that everyone at least enjoys basic subsistence rights.
- "available resources" refers both to resources within a state and resources available in the international community.
- available resources must be used equitably and effectively.
- in the use of available resources, priority must be given to groups in vulnerable and disadvantaged circumstances.

Another interesting issue discussed in the Maastricht Guidelines is the "minimum core content" of socio-economic rights. According to the Guidelines, irrespective of the availability of resources, and without allowing for the luxury of progressive realisation, there are certain "minimum core obligations" imposed by socio-economic rights. States are under a duty to fulfil these obligations as a matter of priority. These would include, for example, the provision of basic foodstuffs to those who cannot provide for themselves, basic shelter during times of emergency, primary health care services and basic education.

As this brief overview reveals, the Maastricht Guidelines are a valuable source of international law principles for the interpretation of the socio-economic rights in the South African Constitution. Section 39(1)(b) directs the courts to consider international law when interpreting the Bill of Rights. Apart from the courts, government officials, parliamentarians, the SA Human Rights Commission, the Commission for Gender Equality and NGO's will find the Maastricht Guidelines an invaluable aid in making sense of socio-economic rights and the obligations they impose.

Review Of Events And Publications

by Danie Brand

Events

The following events relating to socio-economic rights took place in the period preceding this edition:

- The South African Human Rights Commission, in co-operation with the Centre for Human Rights (Pretoria) and the Community Law Centre (Cape Town) organised a workshop on 18 September 1997 in Midrand with a view to publicising its monitoring function regarding socio-economic rights and to consult with interested parties regarding the process. Participants were representatives of state departments (who have to provide information to the Commission regarding the steps they have take to implement socio-economic rights) and NGO's. The workshop was addressed by Dr Audrey Chapman of the American Association for the Advancement of Science and Prof Michelo Hansungule of the University of Zambia and the Raoul Wallenberg Institute of the University of Lund, Sweden.
- The Faculties of Law of the University of the Western Cape and the Universite d' Aix-Marseille III and the French Embassy, South Africa jointly presented a symposium entitled: "The Horizontal Application of Socio-Economic Rights: South African and French Perspectives" on 5 November 1997 in Cape Town.
- The United Nations Committee on Economic, Social and Cultural Rights and the American Association for the Advancement of Science jointly presented a conference entitled: "The nature of Violations of Economic, Social and Cultural Rights" during December 1997 in Geneva Switzerland. At this meeting the results of a joint research project into the nature of violations of socio-economic rights were presented.
- The United Nations Division for the Advancement of Women presented an Expert Group Meeting on "Promoting Women's Enjoyment of their Social and Economic Rights" in Finland from 1-4 December 1997. Sandy Liebenberg from South Africa participated as an expert and was elected as Rapporteur of the meeting.
- The Portfolio Committee on Welfare and Population Development in the National Assembly, the Community Law Centre (Cape Town) and the Centre for Human Rights (Pretoria) jointly presented a workshop entitled: "From Rights to Real Change: The Implementation and Monitoring of Economic and Social Rights in South Africa" on 23 February 1998 in Cape Town. The workshop was addressed by Prof Philip Alston, Chair of the United Nations Committee on Economic, Social and Cultural Rights, Prof Kader Asmal, Minister of Water Affairs and Forestry and others involved in the implementation of economic and social rights in South Africa.

Publications

Matthew CR Craven The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development 1995 Oxford: Clarendon Press

This book provides a comprehensive overview of the International Covenant on Economic, Social and Cultural Rights (ICESCR), its history, structure, interpretation and enforcement.

The book contains a discussion of the background to the Covenant, its supervision structures, the obligations imposed by the Covenant, and chapters dealing with specific rights (labour related rights and the right to an adequate standard of living).

The chapter dealing with the obligations imposed by the Covenant will be particularly valuable for South African readers, as it provides a comprehensive discussion of the jurisprudence developed by the United Nations Committee on Economic, Social and Cultural Rights around elusive concepts such as "progressive realisation" and resource contingency that are also found in our Constitution.

The most impressive aspect of this book is its extremely comprehensive and detailed references to a variety of materials related to the development and interpretation of the ICESCR. It is an invaluable source of information and a starting point for research on virtually any topic related to economic and social rights in general, and the Covenant on Economic, Social and Cultural Rights in particular.

The report of the expert seminar hosted by the UN Division for the Advancement of Women entitled "Promoting women's enjoyment of their economic and social rights" is available from Sonya Le Grange of the Community Law Centre (tel: 021 - 959 3708) at a reasonable charge to cover postage and photocopying expenses.
It can also be located at the following Web location: www.un.org/dpcsd/daw.

All readers are invited to advertise forthcoming events or publications relating to economic and social rights in ESR Review. Please contact Sonya Le Grange with the relevant information (tel: 021 - 959 3708).