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Editorial: Special Edition

by Sandra Liebenberg

This special edition of *ESR REVIEW* focuses on the papers delivered at a seminar co-hosted on 6 and 7 October 1998 by the Community Law Centre's Socio-Economic Rights Project and the Constitutional Litigation Unit of the Legal Resources Centre. The seminar gathered together members of the Constitutional Court, the Land Claims Court, the SA Human Rights Commission and Commission for Gender Equality, the bar and side-bar, representatives of government departments, legal academics and human rights NGO's at the Parktonian Hotel in Johannesburg. Entitled, *Giving Effect to Socio-Economic Rights: The Role of the Judiciary and other Institutions*, it was attended by approximately 100 persons.

Its purpose was to share information and ideas on practical ways in which the socio-economic rights entrenched in the SA Constitution can be implemented, monitored and enforced. Sessions were devoted to the respective roles of the various public institutions such as the judiciary, parliament, the executive and the independent commissions in giving effect to socio-economic rights. A related aim of the seminar was to share relevant materials and research on socio-economic rights in order to deepen participants knowledge and understanding of this group of rights. Participants received reading-packs in advance of the seminar to facilitate discussion and debate. In addition, NGO's were invited to display their publications and other materials pertaining to these rights.

At the conclusion of the seminar a networking and strategy meeting was held which was attended by about 30 representatives of human rights NGO's and academics. The aim of this meeting was to explore practical ways in which collaboration among NGO's interested in socio-economic rights advocacy or litigation could be strengthened. The outcomes of this meeting is also discussed in this edition.

One of the major themes emerging from the seminar was the complementary nature of the roles of the various public institutions in giving effect to socio-economic rights. Many speakers stressed the need to build an open, co-operative and responsive relationship between the different branches of government as well as the independent commissions. Our visiting guest speaker, Prof. Craig Scott from Canada, highlighted the need to move beyond formalistic conceptions of the doctrine of separation of powers in order to promote a "co-operative dialogue" between the different public institutions. This would pave the way for creative and

effective remedies to deal with violations of socio-economic rights without one branch of government usurping the powers and functions of another.

From the perspective of civil society a note of caution was sounded not to focus exclusively on the courts as the primary mechanism for enforcing socio-economic rights. As Judge O'Regan pointed out in her opening address all organs of State are under a duty to respect, protect, promote and fulfil the rights in the Bill of Rights. Litigation is thus only one strategy among many to advance socio-economic rights. Other strategies include lobbying and advocacy of public institutions, monitoring the realisation of the rights, and awareness campaigns. Geoff Budlender stressed the urgent need for practical legal assistance to be given to the beneficiaries of socio-economic rights which have been translated into legislative programmes, for example, the Extension of Security of Tenure Act.

Government and the legislature have the primary role to give effect to constitutional rights through concrete policies, programmes and legislation. The courts have a residual role to redress violations of these rights. However, it was not disputed that, in certain circumstances, judicial intervention to protect socio-economic rights would be necessary. The types of cases in which judiciary intervention would be appropriate include: breaches of the duty "to respect" the rights (e.g. arbitrary evictions), children's "basic" socio-economic rights, unfair discrimination in access to socio-economic rights, and unreasonable or unprocedural administrative action. In cases relating to the "progressive realisation" of socio-economic rights, the *Soobramoney* case stands for the proposition that decision-making must conform to minimum standards of rationality and good faith.

It is encouraging that the human rights community in South Africa has clearly moved beyond rhetorical affirmations of the importance of this group of rights. The focus is now on practical and creative ways of enforcing and monitoring the realisation of these rights. In his paper, Adv. Wim Trengove gives examples of remedies which are specially tailored for redressing violations of socio-economic rights. Jody Kollapan gave an account of the progress made by the SA Human Rights Commission in fulfilling its mandate under s 184(3) of the Constitution to monitor socio-economic rights. He also drew attention to some of the difficulties and challenges of this process. One of the important functions of the Human Rights Commission in conjunction with the Commission for Gender Equality and civil society is to develop the core content of the socio-economic rights. This is essential for the monitoring and enforcement of socio-economic rights. Without clear goals and benchmarks, organs of State cannot be held accountable for the fulfilment of their constitutional obligations in relation to socio-economic rights.

Socio-economic rights are important tools for advancing social justice and a better life for all in South Africa. However, their utility depends on all public institutions and organisations of civil society taking this group of historically marginalised rights seriously. The seminar highlighted the need for further conceptual work to develop the core content of the rights as well as a number of practical measures to ensure that these rights have a real impact on the lives of poor and disadvantaged communities. Finally, without knowledge of these rights, they cannot be claimed by the very people they are intended to benefit. Promoting greater awareness and knowledge of socio-economic rights among disadvantaged and vulnerable groups is thus a key challenge for government, the independent commissions and human rights NGO's.

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Opening Address

Introducing Socio-Economic Rights

by Judge Kate O'Regan

I propose to consider various arguments about the nature and enforceability of socio-economic rights. The starting point is the provisions in the Bill of Rights entrenching socio-economic rights and the Constitutional Court's judgment on the certification of the 1996 Constitution which dealt with arguments levelled against the inclusion of socio-economic rights in the Bill of Rights (*Certification of the Constitution of South Africa*, 1996 (10) BCLR 1253(CC) at paras 77-8). Objectors argued that the inclusion of socio-economic rights would result in the Courts dictating to the government how the budget should be allocated, and breach the separation of powers principle. The Court held that, although the enforcement of socio-economic rights may result in orders with budgetary implications, the enforcement of civil and political rights may also result in orders which affect the budget. The task of enforcing socio-economic rights was not so different from that ordinarily conferred upon them in interpreting a Bill of Rights that it breached the principle of separation of powers. The objectors also challenged the justiciability of socio-economic rights. Although the Court held that the relevant Constitutional Principle (CP II) did not require socio-economic rights to be included in the Constitution as justiciable rights, it was nonetheless of the view that these rights were at least to some extent justiciable. At the very minimum, they could "be negatively protected from improper invasion."

Although the interdependence of social and economic rights and civil and political rights has been repeatedly asserted, there remains a widespread view that these two groups of rights are conceptually different. In order to understand how we

can give effect to socio-economic rights it is important to consider whether these rights are different in some significant way from civil and political rights.

I will consider the following arguments which assert that there is a fundamental difference between these two groups of rights:

1. that the difference lies in the nature of the rights;
2. that there is a difference in the institutional mechanisms appropriate to their enforcement;
3. that the difference arises from an understanding of the proper role of government.

The nature of the rights

The difference between socio-economic rights and civil and political rights is often said to lie in the nature of the obligations they impose on the State. Socio-economic rights are seen to impose positive obligations upon the State while civil and political rights impose negative obligations.

In considering the merit of this argument, it is useful to refer to the analysis of human rights by the scholar, Henry Shue (*Basic Rights: Subsistence, Affluence and US Foreign Policy* , 1980). He identified three types of duties generated by human rights:

1. the primary obligation not to infringe the rights directly (the obligation "to respect");
2. the secondary obligation to prevent a right from being infringed by private actors (the obligation "to protect"); and
3. the tertiary obligation to fulfil social rights (the obligation "to fulfil").

The primary obligation placed upon a State is not to infringe the right. For example, a law prohibiting membership of a particular organisation is, on its face, an infringement of the right of freedom of association. Both civil and political rights as well as socio-economic rights can be infringed in this way. The secondary obligation imposes an obligation on the State to ensure that no private individual infringes another person's rights. It clearly overlaps with the provisions in the 1996 Constitution which govern the 'horizontal application' of the rights in the Bill of Rights. Thus section 8(2) provides that *a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.*

The third level of obligation is the obligation to fulfil the right. It can be demonstrated that this obligation was not unique to socio-economic rights. For example, the following three civil and political rights clearly impose positive duties on the State: the right to participate in elections, the right to a fair trial including the right to counsel at the State's expense, and the right to a passport.

A fourth level of obligation can also be identified: a right may place an obligation on the State to act rationally and in good faith, and require that it justify its failure to carry out its obligations. In other words, there must be a good reason for the State not to respect, protect, promote and fulfil a right. For example, in the case of *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC), the Constitutional Court held that the government is under an obligation to show that it acted *bona fide* and rationally in the circumstances. This

carries an evidentiary burden. State officials are required to place evidence before the Court of their policy regarding the rationing of scarce dialysis equipment and their budgets.

The argument that civil and political rights are inherently different from socio-economic rights assumes that civil and political rights only involve primary levels of obligation, whereas socio-economic rights only involve tertiary levels of obligation. However, this assumption is flawed. As has been illustrated, some civil and political rights do not only operate at the primary level but may also operate at the secondary and tertiary levels. Conversely, socio-economic rights do not operate only at the tertiary level, but also at the primary and secondary levels as well. For example section 26(3) of our Constitution provides:

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. The right is formulated in negative, primary obligation terms although it is contained within the clause concerning the right of access to adequate housing.

Once it is recognised that rights, whether civil, political, social or economic, can impose primary, secondary and tertiary obligations upon government, it becomes clear that the conceptual differences between the rights do not lie here.

It is also argued that, unlike civil and political rights, economic and social rights are vague and imprecise. However, this is not a basis for a conceptual distinction. Herman Schwarz has noted that "constitutional rights are usually written in general terms, and we depend on the Courts to give them specific substance." ("Economic and Social Rights" 8 *American University Journal of International Law and Policy* 551 at 562). This means that to answer the most basic questions about the Constitution, we need to read the law reports. The penumbra of uncertainty concerning the interpretation of any right can become smaller over time. Thus distinctions between socio-economic and civil and political rights are not inherent in the rights themselves. However, if we envisage a continuum of obligation with negative obligations at the one end and positive at the other, socio-economic rights will tend to cluster at the positive end of the continuum and the civil and political at the negative end.

The role of other public institutions

The distinction between the two groups of rights, if there is one, lies in the institutional manner in which they are enforced. It must be stressed that in terms of our Constitution, the responsibility for enforcing rights lies not only with the courts, but with parliament, the executive, provincial legislatures and executives, local government and all organs of state. The role of these agencies cannot be overemphasised.

The spider's web

Two main arguments are raised in relation to the institutional competence of courts to enforce socio-economic rights. The first is Lon Fuller's argument that certain types of decisions are 'polycentric' and therefore unsuitable for adjudication. ('The Forms and Limits of Adjudication' (1978-9) 92 , *Harvard Law Review* 353). He uses the metaphor of a spider's web to describe the concept of polycentricity. If you pull one strand in the web, all the others are affected. The extent to which they are affected depends upon their relationship to the strand

pulled. It is not easy to resolve polycentric decisions through reasoned argument because each step of the decision to resolve the problem generates a different set of implications. Determining a dispute with budgetary implications is a classic polycentric problem. Each decision to allocate a sum of money to a particular function implies less money for other functions. Any change in the allocation will have a major or minor impact on all the other decisions relating to the budget.

While I agree with Fuller's analysis, I would caution against the view that polycentric issues *never* arise in relation to political and civil rights and *always* arise in relation to social and economic rights. Arguments concerning polycentricity do not by themselves establish an inherent difference between the two groups of rights. Civil and political rights may give rise to polycentric problems upon enforcement just as social and economic do. Often, however, the way in which the right is formulated will render the polycentric problem more or less peripheral to the issues before the Court.

Separation of powers

The second argument in relation to institutional enforcement relates to questions of separation of powers and democracy. It is argued that because socio-economic rights often require expenditure by government in order to meet tertiary level obligations, this is a matter for parliament and should not be subject to enforcement by the courts. Furthermore, prioritising rights in a context of limited resources is more appropriately undertaken by an elected legislature than the judiciary. It must be accepted that the legislature is the arm of government primarily responsible for budgetary decisions. However, many decisions concerning first generation rights in the Bill of Rights also have budgetary implications. Courts needed to strive to establish an appropriate balance between their role as protectors of the Constitution and the legislature's role in establishing policy and determining government expenditure.

A 'Night-Watchman' State?

Finally, arguments for distinguishing socio-economic rights from civil and political rights also concern questions about the proper terrain of government. Thus some would argue that a government's primary objective is to allow market forces to predominate, not redistribution. This argument suggests that government cannot successfully meet obligations imposed upon it of a socio-economic nature. Instead it should function only as a 'night-watchman State'.

Moving beyond the abstract

Many of the arguments which suggest a rigid distinction between socio-economic rights on the one hand and civil and political rights on the other do not withstand scrutiny. While many of the arguments do not support a rigid distinction at an abstract level, this does not mean that the underlying concerns of these arguments are irrelevant to the interpretation and enforcement of both sets of rights. Debates at a high level of abstraction resolve none of the difficult and testing questions which Courts face in a particular set of circumstances.

The challenge is to move beyond these abstract arguments. Of course, these arguments may produce considerations relevant to determining specific questions. However, at the end of the day the questions themselves will need to be considered on their own terms and in their own circumstances.

* *Judge O'Regan is a member of South Africa's Constitutional Court*

Social Rights

Towards A Principled, Pragmatic Judicial Role

by Prof. Craig Scott

It is important to allow a national jurisprudence on socio-economic rights to develop with full vigour. The courts have particular qualities that they can bring to the enforcement of socio-economic rights. In particular, they have the potential to combine reflective, principled reasoning with the ability to test and enrich a legal principle in light of concrete facts in a specific context. We should think of courts as being well-suited to listen to and respond to narratives that are linked to questions of principle. The 1996 Constitution has given a meta-democratic mandate to the judiciary to interpret and enforce socio-economic rights. This places a large responsibility on our courts, especially the Constitutional Court.

Institutional dialogue

However, we should be cautious not to create the perception that rights are the domain of the courts alone. The misplaced assumption that the judiciary is the only institution responsible for giving content to rights exacerbates the fears and concerns that judges have about social rights. We need a constitutional ethos to permeate all government decision-making. Our understanding of rights will be impoverished if other state institutions adopt the view that they will only do something if the courts order them to do so. A dialogue should in fact take place between the courts and legislatures. Following Amy Gutmann, I advocate thinking of rights interpretation and enforcement in terms of a co-operative enterprise in which the judiciary and the legislatures share "a unity of moral labour" (Amy Gutmann, "The Rule of Rights or the Right to Rule?" in J. Roland Pennock and John W. Chapman, eds., *Justification: Nomos XXVIII* New York: NYU Press, 1986, 15 at 166). In South Africa, the institutional dialogue is potentially far richer because of the presence of the state institutions specifically charged with supporting constitutional democracy, particularly the South African Human Rights Commission (SAHRC) and the Commission for Gender Equality (CGE). The proposed Canadian Alternative Social Charter provides an example of how this dialogue and co-operation between various institutions in interpreting and enforcing social rights can occur. Another axis of institutional dialogue is between the domestic Courts and international human rights bodies.

Three modes of co-operation

Three modes of potential institutional co-operation can be identified:

1. *Subsidiary interaction*: This form of interaction involves one institution showing deference to one or more of another institution's functions, either on a systematic basis or on a contextually-determined basis. Deference can occur across a range of matters and can vary in degree. One notion that is central to subsidiary interaction is the notion of waiting for another institution to "speak first" on a normative issue. For example, in a case where a complete or near-complete lack of regulation is alleged to result in a constitutional violation, a court may consider it desirable and useful to adjourn proceedings in order to allow the legislature to

take the first step in enacting legislation before the court is prepared to be fully seized of the matter. Depending on the urgency of the situation and the kind of suffering at stake, such adjournment could well be accompanied with some provisional injunctive relief. It is generally desirable that the legislature should, in the first instance, give content and definition to the more far-reaching obligations attached to rights and thereby provide a baseline from which a dialogue on sufficiency can begin with the courts. The rider to this mode of co-operation is that it applies provided there is (or has been) no unreasonable delay on the part of the legislature in dealing with the particular issue. At a certain point, courts must move out of a subsidiary mode and shoulder a residual burden of responsibility to measure state inaction against constitutional principles without the benefit of an existing regulatory framework.

2. *Supererogatory interaction*: This form of interaction is premised on an understanding by institutions that there is no ceiling involved in the protection of human rights - only floors. For example, Parliament should not limit its implementation of rights to the interpretations given by the courts as it is institutionally suited to go further than the courts. A second example is the interaction between the State's domestic legal system and international human rights bodies. The standards set at an international level should not be seen as imposing a cap on how far domestic courts can (indeed, must) go. A good example is the judgment in *S v Makwanyane & another* 1995 (6) BCLR 665 (CC) in which the Constitutional Court avoided the more limited interpretation of the right to life under international law in deciding the case. Absent a specific commitment by a State to abolish the death penalty through ratification of the Second Optional Protocol of the International Covenant on Civil and Political Rights, international law does not currently appear to prohibit the death penalty absolutely. Yet, this international legal state of affairs did not prevent the Court from interpreting the South African legal system to have evolved to the point where the right to life includes such a prohibition. A third example of possible supererogatory interaction is between independent Human Rights Commissions and Parliament. A key aspect of the mandate of Human Rights Commissions should be to challenge Parliament to achieve higher levels of rights' protection, including by suggesting detailed means by which to do so.

3. *Co-ordinate interaction*: This form of interaction involves two or more institutions co-ordinating (with varying degrees of explicitness) across institutional boundaries. This can occur in relation to normative mandates that overlap not just in substance, but also in function. An example of this type of interaction is the potential relationship of co-operation between the Human Rights Commission and the courts. Thus the courts can draw on a set of standards developed and studies conducted by the Commission as aids to deciding cases. The Commission can seek to give more detailed content to general or tentative statements of principle emanating from the courts.

Creative remedies

Institutional dialogue operates with particular appropriateness at the level of remedies. When a healthy interaction exists between the courts and other institutions, there is scope for the courts to make decisions and for other institutions to formulate or propose remedies. However, there is probably a limit to how far the courts will (or should) go in this regard without feeling that their function is being undermined.

It is important to develop novel and creative remedies for dealing with violations of socio-economic rights. Through utilising declarations of non-compliance or "problematic compliance", the courts can put the State to terms to remedy the defects. In this way, the courts can deal pragmatically, yet creatively, with perceived problems of polycentric decision-making.

The following are some of the remedies which may be considered in the context of socio-economic rights:

- declaring a violation coupled with putting the legislature or executive to terms to correct the defect: in so doing, the court makes clear the normative *result* that must be achieved, but does not specify the *means* to achieve it ("putting to means");
- ordering a time-delayed provisional remedy with a duty on the State to report back with proposed measures before final argument on remedies proceeds;
- ordering a structured, participatory process to recommend final remedies (taking seriously the solutions proposed by affected groups, including by involving local communities and representative organisations in the process);
- ordering the promulgation or enactment of a regulatory regime in which measures are actually specified as being necessary to solve a defined and concrete problem; or
- ordering a government committee of inquiry to report on the situation prior to litigation, perhaps with a list of questions framed by the court as the focus of the inquiry.

The appropriateness of such remedies, alone or in combination, will depend on a range of contextual factors and on the constant exercise of judgment in relation to the most effective mode of interaction on the issue.

'Diagonality'

There is an obvious overlap between the State's duty to protect socio-economic rights and 'horizontality' (constitutional obligations placed directly on non-state actors). However, there is an important category of cases in which the most effective process would require a joinder of private and state parties in order to facilitate a legal analysis of how to allocate constitutional obligations as between private entities and the State. I have coined the phrase, 'diagonality' for the situation where human rights obligations are *prima facie* shared by both public and private actors. This conceptualisation has considerable potential for promoting a more holistic analysis of human rights violations that are located within a field of overlapping state and non-state power structures.

In South Africa, the situations that would seem ripe for `diagonality' analysis may be as numerous as the combination of 'vertical' cases (where only the state need be sued) and 'horizontal' cases (where only specific private actor need be sued). There are examples of fact situations drawn from outside South Africa which would be benefit from the 'diagonality' approach. In Britain, the government's recent Social Exclusion Report notes that there are many poor housing estates throughout the UK where "[l]ocal shops ... often charge 60 per cent more than supermarkets" in adjoining areas and, "[y]et, tenants are often trapped with no cars" (Peter Hetherington, "Blair pledges help for the jobless" *The Guardian Weekly*, Sept. 27, 1998, p. 10). One could conceive of a justified horizontal claim against shop-keepers if there is evidence of opportunistic price-gouging. Equally,

one can conceive of a claim against the State for increased social assistance for food. Yet, a case which looked at potential joint responsibility in the context as a whole might lead a court to:

a. order the State to put an efficient and adequate public transportation system in place to and from various key parts of estates; and
b. order an independent review of profit margins at similar small off-estate shops.

After this second order, the case would be reconvened to look at price levels once enough time has passed to see what effect transportation has had on freeing up market pressures to force down prices and to see how effective the combined transportation and price adjustment have been in improving access to adequate food by groups that may have a greater need to shop locally on the estate (e.g. disabled and elderly persons).

Interpretative Approaches

I conclude with a synopsis of some interpretative approaches I would advocate. Institutions such as the executive should treat the interpretations of rights by the courts as floors not ceilings. The notion of binding precedent in the context of human rights interpretation should also be adapted. Courts need to be open to new and different interpretations of rights in the future as fresh information and research comes to light, and as new understandings evolve. Overly technical and formalistic interpretations should be avoided.

* *Craig Scott is Associate Professor of Law at the University of Toronto, Canada*

A Response To Craig Scott

A South Africa Perspective

by Bongani Majola

One of the envisaged effects of our new Constitution is the transformation of South African society to a democratic society characterised by freedom and equality. The transformative nature of our Bill of Rights, which is based on human dignity, equality and freedom, is central if we are to shift ground and free ourselves from the vestiges of apartheid. Our Bill of Rights is unique in the manner in which it seeks to bring about the transformation of South African society, not only in terms of their civil and political entitlements, but also in terms of social and economic entitlements. While many constitutions place emphasis only on civil and political rights, ours goes a step further and attempts to transform the social and economic dimensions of our lives through the entrenchment of social and economic rights.

The problems of enforcement

The problem of the enforcement of socio-economic rights, which are generously spelt out in international human rights instruments and in the constitutions of some countries, is a vexed one. While there is a clear international understanding that one of the keys to the alleviation of poverty and suffering is the realisation of socio-economic rights, there is still no agreement on effective ways of bringing about the realisation of these rights. There is even less agreement regarding the

judicial enforcement of socio-economic rights. I would like to acknowledge that judicial enforcement is not the only means of bringing about the desired changes in our society. However, the role of judicial enforcement should not be downplayed. Neither should the option of judicial enforcement be abandoned because it proves to be too difficult.

Still a distant dream

One of the difficulties associated with the judicial enforcement of socio-economic rights under the constitutions of many countries is the fact that socio-economic rights are not entrenched directly as rights, thus creating the debate whether or not they are rights in the true sense. This debate does not arise in South Africa since socio-economic rights are clearly entrenched as justiciable rights in the Bill of Rights. This creates an opportunity and raises hopes for the success of judicial enforcement. The Legal Resources Centre (LRC) believes that the alleviation of poverty and the social and economic transformation of the lives of the poor and marginalised masses in South Africa hinge, to a great extent, upon the realisation of socio-economic rights. Enforcement of these rights must take place both through judicial and other means. As a human rights organisation primarily involved in litigation, the LRC sees judicial enforcement as one of the weapons in the arsenal against poverty. Its partnership in this seminar with the Community Law Centre is based on the acceptance that, notwithstanding the entrenchment of these rights in our Constitution, the enforcement thereof by judicial means is still a distant dream. It is therefore an honour for me to be invited to contribute to this very important discussion.

There are a number of factors which contribute to the difficulty in the judicial enforcement of socio-economic rights. Among those that we have encountered as legal practitioners are the following:

- Jurisprudence relating to the judicial enforcement of socio-economic rights is scarce. There are therefore few concrete examples of enforcement of socio-economic rights by municipal courts. Although such authority exists in international courts, the persuasive value thereof has not been successfully used in municipal courts.
- In interpreting sections 26 and 27 of the South African Constitution, which deal with housing, health care, food, water and social security, there is still uncertainty regarding what is meant by the right "of access to" these rights. The core content of these rights must still be developed so that the "right of access" can acquire some useful meaning. This requires bold and progressive steps by our courts. In general, there is still caution in the judiciary regarding socio-economic rights.
- It is not clear whether the qualifier or internal limitation of the socio-economic rights, namely, that the State's obligations are to be met subject to "available resources", trumps the provisions of section 7 which impose the duty on the State " ... to respect, protect, promote and fulfil" all rights entrenched in the Bill of Rights. The recent decision in *Soobramoney v Minister of Health, KwaZulu-Natal* 1997(12) BCLR 1696 (CC) creates the impression that the courts will not lightly interfere with the State's failure to protect, promote and fulfil socio-economic rights when the state pleads that the required resources are not available. There are certain decisions that courts regard as political decisions to be taken by the chosen political representatives of the vavailable state resources to the various needs of the country and government. These are the decisions that impact on the realisation of socio-economic rights.

- Efforts to bring about the judicial enforcement of socio-economic rights carry with them great expense and require skills which many human rights NGO's and legal practitioners do not have. For organisations that depend on public donations, this problem is exacerbated by the attitude of donors who express concern that the tackling of socio-economic rights amounts to involving oneself in political issues. Many are therefore not keen on letting their resources to be used in efforts to promote socio-economic rights.
- It was the understanding of the drafters of the Constitution that sometimes the courts would have to move beyond the narrow and rigid confines imposed by the doctrine of the separation of powers, and pronounce on questions which are traditionally within the realm of the other arms of government.

A collaborative process

Professor Scott has dealt with some of the difficulties mentioned above and with others which I have not touched upon. His paper presents a useful point of departure for us in our search for effective ways of enforcing socio-economic rights by judicial means. In his search for solutions he proposes that the interpretation and enforcement of socio-economic rights must occur through a collaborative and interactive process involving the legislature, the executive, the courts and the South African Human Rights Commission. I fully agree with this proposal. However, I cannot make out at what stage he proposes that there should be collaboration. If the collaboration has to be on a case by case basis, perhaps the proposal will not deliver much. Sometimes cases brought before court for the enforcement of these rights bear an element of urgency. The institutions he identified can collaborate in setting up mechanisms that will facilitate judicial enforcement if and when appropriate circumstances arise. Cases could then be dealt with in terms of these mechanisms. In this way, the proposal has much to deliver.

The impact of GEAR

I am worried about an approach to enforcement that avoids the establishment of judicial precedents. Politically crafted solutions are likely to change as political circumstances change from time to time. While change is not automatically for the worse, the danger exists that gains achieved at one particular stage may be easily lost. In the past, one has seen governments with lofty ideas about the enforcement of socio-economic rights changing and reneging on their promises. Sometimes it is economic realities which force them to take that route. Many countries in Africa and Latin America are suffering, if not economically crumbling, because of the effects of structural adjustment measures imposed by institutions such as the IMF and the World Bank. Structural adjustment measures limit the ability of governments to effect the required "progressive realisation" of socio-economic rights. South Africa has adopted the Growth, Employment And Redistribution (GEAR) strategy, a structural adjustment measure. It may therefore be placed under intense pressure to do less to fulfil its obligations towards socio-economic rights. It is for this reason that it is also necessary to use judicial enforcement as a mechanism to help the government fulfil its obligations.

A watchdog with teeth

I understand the courts' reluctance to prioritise on behalf of government. I agree that this is the primary duty of the political representatives of the people. However, courts can still play a significant role by putting the government to

terms and requiring it to account for what it has done to achieve the progressive realisation of socio-economic rights. There is a need for a watchdog, with teeth, to monitor whether the budget exhibits compliance by government with its obligations. If the judiciary takes the view that the budget is the exclusive terrain of the legislature and government, the struggle for the enforcement of socio-economic rights must hope to gain very little.

In conclusion, it cannot be denied that interdisciplinary skills and an understanding of the economics of a country are required for an organisation to litigate successfully and effectively on socio-economic rights. It is equally true that other methods of enforcing these rights cannot be ignored. Focusing only on judicial enforcement will not win the battle for the poor.

** Adv. Bongani Majola is the National Director of the Legal Resources Centre*

Judicial Remedies For Violations Of Socio-Economic Rights

by Adv. Wim Trengove

It is fortunate that the Constitution makes it so clear that constitutional rights are to be judicially protected and enforced. It is indeed a striking feature of the Constitution that the courts are given the widest possible powers to develop and forge new remedies for the protection of constitutional rights and the enforcement of constitutional duties.

The Courts' remedial powers

Our courts are empowered, whenever they decide "any issue involving the interpretation, protection or enforcement of the Constitution", to make any order that is "just and equitable" (ss 172(1)(b) and 167(7)). Justice and equity are their only lodestar in the exercise of their remedial discretion.

The same message is repeated in the Bill of Rights. Section 38 provides that, whenever a fundamental right has been violated or threatened, the Court may grant any "appropriate relief". It follows that a court's choice of remedy in any case where a fundamental right has been violated or threatened, is determined only by what is just, equitable and appropriate.

These sweeping powers of the courts to develop and build their own arsenal of remedies, are moreover supplemented and underpinned by a number of specific constitutional remedies. These include: orders of invalidity (s 172(1)(a)); the development of the common law to give effect to constitutional rights (ss 173, 8(3)); creation of procedural mechanisms necessary for the protection and enforcement of constitutional rights (s 173); and procedural remedies derived from some of the substantive rights (e.g. ss 32(1), 33(2) and 34).

Developing new and more effective remedies

Socio-economic rights are not unique and do not require unique remedies. But the litigation around those rights often presents features which call for the development and creation of new and more effective remedies. These features typically include the following:

- The litigation is undertaken in the interests of communities or classes of people and not only in the interests of specified individuals.
- The litigation is undertaken in the interests of communities or classes of people and not only in the interests of specified individuals. Those people are usually poor and politically and socially weak. They are the ones who are dependant on the State for the provision of basic socio-economic services and who lack the political and social power to get it without judicial intervention.
- They accordingly have a particular interest in the enforcement of the positive duties of the State to take action toward the provision of socio-economic services. The rich and powerful can look after themselves and usually invoke the Constitution only to prevent or strike down State action which interferes with their lives.

All our conventional remedies may serve as vehicles for development to meet these needs. I will however confine my suggestions to the development of the remedies of damages and mandamus. I will suggest the development of four remedies that I will call: preventative damages, reparation in kind, supervisory jurisdiction, and orders to enact legislation.

Preventative damages

In *Fose v Minister of Safety and Security* 1997(3) SA 786 (CC), the Constitutional Court upheld an exception to a claim for "constitutional damages" which included "an element of punitive damages." Among the reasons given by the Court was that there was that damages of this nature exacted punishment without the due process safeguards applicable to a criminal trial, there was no reason to believe that such damages would be an effective deterrent against individual or systematic repetition of police brutality, the plaintiff is given unjustified windfall denied to other victims of the same conduct, and scarce public resources could be better employed "in structural and systemic ways to eliminate or substantially reduce the causes of the infringement." (at paras 65(g), 72, 84 and 103).

These objections seem valid. But Howard Varney points out that the objections may be overcome by an award of *preventative* rather than *punitive* damages ('Forging New Tools: A Note on Fose v Minister of Safety and Security' (1998) 14 *SAJHR* 336) Such an award should be designed to prevent rather than punish. That may be achieved by making an award of preventative damages against the State in favour of an independent state or private agency, skilled in and dedicated to the prevention of the misconduct in question. An award designed to prevent police brutality may for instance be made to the Independent Complaints Directorate, the Public Protector, the Human Rights Commission or an NGO active in the combat of police brutality. Because the award is designed to prevent future violation rather than to punish violations of the past, the amount of the award should be based on the cost of prevention rather than the injury inflicted in the past. Before the award is made, the proposed recipient may be called upon to present a plan of action and may be ordered to report back to the Court on its implementation and the effectiveness of the preventative measures taken.

A remedy such as compensatory damages directed only at the discrete violations of the past does not address the threat of existing and ongoing violations posed by a delinquent State institution. Preventative damages, on the other hand, recognise and address the existing threat and seek to remove it from society to prevent tomorrow's violations rather than merely to give solace to their victims.

Reparation in kind

A conventional award of damages in delict seeks to compensate the victim in cash for the injury inflicted on his person or his property. Such an award may often be inappropriate to compensate the victims of past violations of socio-economic rights because the harm done by the violation may be too diffuse or amorphous.

How does one for instance compensate the victims of unfair race-discrimination in the provision of education, pervasive throughout a town, region or province over a long period of time? Assume that the victimised group received some education, but of a quality inferior to that given to the privileged group. How are the victims of violations of this kind to be compensated for the harm they suffered as a result of the past violations of their constitutional rights? Individualised awards of compensatory damages would be manifestly inappropriate. It would be impossible to identify all the individual victims and to determine the harm they suffered as a result of the inferior education provided to them. Any attempt at such identification and assessment would in any event be a logistical nightmare which would devour valuable resources in a hopelessly inadequate attempt to determine who should get what. One way of addressing the problem would be to order the State instead to provide appropriate remedial services for the benefit of the victimised class as a whole, rather than to resort to individualised awards of damages in cash. Orders requiring the State to provide remedial education to the victims of past race discrimination in the school system have been made by the US Supreme Court (see, e.g. *Milliken v Bradley II*(1977) 433 US 267). The purpose of the award is the same as that of a conventional award of compensatory damages in delict. It is merely the form of the award which is tailored to suit the nature of the violation and its impact. The purpose of the award is in other words the same as that of a conventional award of compensatory damages in delict. It is merely the form of the award which is tailored to suit the nature of the violation and its impact.

An award of this kind can obviously not simply be made in bald terms, leaving it to the defendant to determine the manner and form of its implementation. It would usually require the Court to involve itself in the specifics of the remedial action to be taken and often also in ongoing supervision of its implementation. The Court may do so by assuming and exercising supervisory jurisdiction of the kind discussed in the following section.

Supervisory jurisdiction

Our conventional remedies postulate that the Court makes an order once and for all, which is thereafter enforced by execution if it sounds in money, or punishment for contempt of Court if it does not. Because the order is made once and for all, it has to be sufficiently specific so that defendant is able to determine precisely what to pay, or do, or refrain from doing, to comply with the order. It must also be amenable to enforcement by execution or punishment for contempt of Court.

When a Court is asked however to put a stop to the violation of a socio-economic right and prevent its recurrence in future, it will often not be possible or appropriate to make such a specified order once and for all:

- The pattern of violation may be too widespread and diffuse to put a stop to it by a single Court order. To have any effect at all, the court order would have to be directed at the reform of the institution itself.

- It will often not be possible to put an end to the violation overnight. Unfair race-discrimination in the provision of social services can for instance not with the best will in the world, be rectified overnight.
- It will often not be appropriate to put an end to the violation overnight, even if it were possible to do so. The overcrowding of our prisons probably constitutes a violation of prisoners' rights in terms of sections 12(1)(e) and 35(2)(e) of the Constitution. It is possible to put a stop to the violation overnight by releasing as many prisoners as is necessary to avoid the overcrowding. But that would be manifestly inappropriate.
- Violations of this kind may usually be remedied by a variety of means. For example, unfair race discrimination in the provision of social services may be addressed by equalising upwards or downwards or a combination of both. The choice of means is in the first place the prerogative of the legislative and executive branches of government. It would be inappropriate for the judicial branch to usurp their prerogative if that could be avoided.

It follows that the only possible, or in any event the only appropriate, way to put a stop to widespread violations of socio-economic rights, would often be to bring about far-reaching institutional and structural reform over a period of time in a manner determined by the legislative and executive branches of government. Reform of this kind can for obvious reasons not be brought about by single Court order made once and for all. The Court however remains responsible for the ultimate protection of the victims of the violation and the enforcement of their Constitutional rights. It cannot abdicate its responsibility simply because the conventional remedies are not suited to this end.

The way in which the courts in India, the United States and Canada have addressed problems of this kind has been to issue orders directing the legislative and executive branches of government to bring about reforms defined in terms of their objective and then to retain a supervisory jurisdiction to supervise the implementation of those reforms. The main features of this remedy are broadly the following:

a. The court issues an order which identifies the violation and defines the reform that has to be brought about in terms of the objectives to be achieved by it.
b. The court calls upon the responsible state agency to present it with a plan of reform which would put an end to the violation by achieving the defined objectives. The responsible state agency is in other words given the opportunity to choose the means of compliance. Its plan would usually have to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached.
c. The defendant's plan is presented to the court for its scrutiny. The plaintiffs and all other interested parties are given an opportunity to comment on the plan and to advance alternative suggestions.
d. The court finalises the plan of reform in the light of all the submissions made to it. In doing so, it generally defers to the State's choice of means unless it is irrational, not bona fide or in some other way clearly inadequate.
e. The court issues an order directing the defendant to implement the finalised plan. Its order directs the defendant to report back to the Court on the implementation of the plan after the period allowed for implementation or, where appropriate, after each of the deadlines set for achievement of the pre-determined milestones. It may also appoint an

independent person or agency to monitor implementation of the plan and report back to it on the return day.

f. When the matter returns to court, the defendant is called to account for its implementation of the plan. The plaintiffs, the court monitor and all other interested parties are also heard. If the hearing reveals unforeseen difficulties or inadequacies in the plan, suitable adjustments are made, new orders are issued and the process repeated until the necessary reform is finally achieved.

A remedy of this kind works well if the state agency against which it is invoked, co-operates in its implementation. It may however not do so if the reform the remedy seeks to bring about is politically unpopular. When the responsible state agency does not co-operate in the preparation of the plan, the court has no option but to write its own plan, if needs be, with the aid of the other interested parties and court appointed experts. It does however mean that the judiciary then becomes increasingly involved in making policy choices ordinarily in the legislative and executive domain. But that is sometimes the only way to ensure the protection and enforcement of constitutional rights. A recalcitrant state agency may of course also drag its feet or simply refuse to comply with the court order for the implementation of the plan. The court may then:

- call upon the national government to intervene in terms of section 100 of the Constitution, if the recalcitrant state agency is in the provincial sphere of government;
- call upon the national or provincial government to intervene in terms of section 155(7) of the Constitution, if the recalcitrant state agency is in the local sphere of government;
- hold the responsible state agency in contempt of court and impose a fine on it sufficient to exact compliance; or
- as a last resort, hold the responsible state officials in contempt of court and fine or imprison them to compel their co-operation.

Orders to enact legislation

The formulation of the socio-economic rights entrenched in the constitution, is peppered with duties imposed on the state to enact legislation. In terms of item 21(1) of schedule 6, this legislation must be enacted within a reasonable time.

There can be little doubt that these constitutional obligations imposed on the legislature, are justiciable :

- In terms of the supremacy clause in section 2, all obligations imposed by the Constitution "must be fulfilled", and in terms of section 237 it must be done "diligently and without delay".
- In terms of the application clause in section 8(1), the Bill of Rights which imposes these duties, binds "the legislature".
- We have already seen that, in terms of section 172(1)(b), the court may make any order that is "just and equitable" for the protection and enforcement of the Constitution, and may in terms of section 38 grant any "appropriate relief" for a violation or threatened violation of the Bill of Rights.
- In terms of section 165(5) such an order binds "all persons to whom and organs of state to which it applies". Parliament and the provincial legislatures clearly constitute "organs of state" within in the meaning of the definition of this concept.

- Section 167(4)(e) indeed makes it clear that the constitutional court has jurisdiction to "decide that parliament ... has failed to fulfil a constitutional obligation".

However, what remedy does the court have if the responsible legislature refuses to enact the legislation required of it under the Constitution? Can a court compel an elected legislature to enact legislation against its will? The following possibilities come to mind:

- It ought ordinarily to be enough simply to declare that the legislature in question is obliged under the constitution to enact the legislation and that its failure to do so is in violation of the Constitution. This should be the first step. A responsible legislature would ordinarily comply.
- If it does not, the court may issue a mandatory order against the legislature directing it to enact the legislation on pain of being held in contempt of court for which it may be fined.
- If the legislature still resists, the court may issue a mandatory order against the members of the legislature personally, directing them to enact the required legislation on pain of being held in contempt of court for which they may be fined or imprisoned.
- As a last resort, the Court may issue a *legislative order* which prescribes the rules meant to have been enacted by the legislation required under the Constitution.

New tools

It is clear that the protection and enforcement of the Bill of Rights and particularly those of its provisions which impose positive duties on the State, will require the courts to develop and create novel remedies. Justice Ackermann made it clear in *Fose v Minister of Safety and Security* 1997(3) SA 786 (CC) that the Constitutional Court is alive to this need:

In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to forge new tools and shape innovative remedies, if needs be, to achieve this goal.

In doing so, the courts may on occasion have to act in a more proactive and inquisitorial fashion and intrude further into the legislative and executive domain than they have done in the past.

** Adv. Wim Trengove is Director of the Constitutional Litigation Unit of the Legal Resources Centre*

Giving Effect To Socio-Economic Rights

The Role Of The Judiciary

by Nicolas Haysom

The subject of this seminar has prompted me to recall an academic debate conducted prior to the adoption of our Bill of Rights on the role of the judiciary in enforcing socio-economic rights. That debate conducted by Dennis Davis, Etienne Mureinik and myself concerned the proper place of socio-economic rights in a democracy. The full thrust of the debate can be found in articles published in the 1992 issue of the South African Journal on Human Rights.

Judicialising Politics

Dennis Davis, in his own inimitable way, was concerned to establish the perspective that in a democracy judges are singularly inappropriate functionaries to determine the extent of socio-economic entitlements, the manner in which those entitlements should be met, and, much more fundamentally, to rank and prioritise claims on the public purse. He pointed out that in South Africa, the poor and disadvantaged majority have Parliament as their instrument to achieve the satisfaction of their needs. It would be inappropriate to judicialise politics which is the proper arena for determining the policies and programmes of government. It would also have the converse effect of politicising justice. Davis pointed out that if, on the other hand, the rights were framed so as to have only an aspirational dimension, then they might tarnish a commitment to the enforceability of all civil rights - many of which underwrite the democratic political process.

Rational, accountable politics

Etienne Mureinik, on the other hand, was a robust advocate of the judicial process as a means of imposing rationality on decision-making and accountability in politics. In his argument it would be a major advance if socio-economic rights were rendered justiciable. Even if remedies were not immediately apparent, the need to account for decisions taken and to justify the priorities in public expenditure would significantly improve the quality of public administration. Etienne, in perhaps one of his most creative pieces, was anxious to examine the way in which the courts could, by enforcing socio-economic rights, enrich political life, promote democracy and ensure a concerted and rational attempt to meet the basic needs of all citizens.

Equal Citizenship

The thrust of my own contribution was to point out the porous nature of the barrier between civil and political (first generation) rights and socio-economic (second generation) rights. It was quite incorrect to regard the first as having only a negative "shield-like" quality and to categorise the second as having a positive, resource dependent, or spear-like character. Enforcing some civil and political rights can be more costly than, for example, guaranteeing basic nutrition for all children. A current nutritional scheme which does precisely that is no more of a drain on the public purse than legal aid, or guaranteeing a right to a fair trial or providing for the right to vote. Nor can it be confidently asserted that some rights are more essential for the proper functioning of democracy than others. I was then concerned to argue that the pre-eminent project with which we were concerned was the construction of a democracy. The fundamental element in a democracy was the notion of equality of citizenship. The minimum content of that citizenship must involve an absolute entitlement to certain core material rights which rights should be as enforceable as any first generation rights. If this were not so, the ability to be a citizen - and to exercise democratic rights - would be the pleasure of a few. The historian, Annatole France had commented that education has always been considered a core right in France. There is no reason

why it could not, for example, be considered a core or fundamental right in South Africa.

Rights-apartheid

This argument should, however, be confined to certain core rights. We must, as Davis suggested, leave room for politics to influence the content of other socio-economic rights. In regard to the more aspirational socio-economic rights, I had nonetheless argued that it was inappropriate to cast them as directives of state policy thereby introducing a "rights-apartheid" - a rigid distinction between *enforceable* civil rights and *unenforceable* socio-economic rights. Rather indicate in the text itself the manner and extent of the enforceability.

Overcoming the divisions

I would want to argue that in fact our constitutional text follows that distinction. It is apparent from the text that some rights (for example, sections 26(3), 27(3), 28(1)(c) and 29(1)(a) relating to arbitrary evictions, emergency health care, certain children's rights and 'basic' education) are cast as directly enforceable rights. In contrast, those relating to housing, health care services, food, water, and social security are cast as a right 'of access' hedged by certain qualifications (see sections 26(1) and 27(1)). In this sense the Constitution does not purport to lie and its text indicates the precise instances in which socio-economic rights are to be given direct effect by the courts and those which are to be given effect in a less direct manner or with due deference to the political process of allocating and collecting public resources.

Taking the constitutional text as a cue, I can see no reason why the courts can't directly enforce those socio-economic fundamental rights set out in the Constitution as directly enforceable rights. This view has been affirmed by the Constitutional Court in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 at paragraph 36. Thus, for example, the courts can directly order the State to provide either transport or the establishment of educational facilities in an otherwise neglected area in which children have no access to education. The same would apply to a feeding scheme or to any State institution which refuses to treat an emergency patient.

Fourth-generation rights

In regard to the other rights which are more clearly qualified, there are many ways of giving effect to such rights extra-curialy. However, even these rights are not irrelevant to the judicial process. Those rights should find recognition in our jurisprudence in a number of ways. They can ride on the back of certain due process rights. Due process and equality rights have often served as the entry point in asserting entitlements to State resources. Indeed certain "fourth generation rights" introduced into our Constitution are included precisely to provide a basis for ensuring equity in access to resources e.g. the right to administrative justice and the right to information. The concept of "fourth" generation rights is my attempt to signify a new generation of rights which strengthen participatory democracy by empowering civil society (see Haysom, Cachalia & Molahleli in *Civil Society & Fundamental Freedoms*, Development Resources Center, 1998).

Defending socio-economic programmes

Secondly the courts will be required to consider the socio-economic rights when considering the limitations clause and in balancing one right against another. A discussion on the enforceability of socio-economic rights usually assumes that the only way in which this matter can be considered is in the context of an action against the State to allocate resources. This is not so. In many cases it may well be that it is the State itself, which would wish to rely on socio-economic rights to justify its actions or to pit them against other rights which stand in the way of realising these socio-economic rights through its programmes. As such, the package of socio-economic rights serves to strengthen the claim that citizens are entitled - in limited but constitutionally designated ways - to material, not merely formal, equality.

* *Prof. Nicolas Haysom is Chief Legal Advisor in the Office of the President*

Panel Discussion: Enforcing Socio-Economic Rights:

The Potential And Limits Of The Judiciary?

Judge Zac Yacoob reminded the seminar that the debate about whether socio-economic rights should be included in the Constitution is now over as these rights are now entrenched in the Constitution. The Bill of Rights should be seen as a whole, as interrelated and interdependent. There is no point in making rigid distinctions between the different categories of rights. The only tenable approach is to see the Bill of Rights as a living organism, to be developed holistically and not in a piecemeal fashion. The Constitution obliges the Courts to ensure that the socio-economic rights provisions in the Bill of Rights are properly enforced and protected.

A crucial debate is concerned with the circumstances in, and the extent to which a court should intervene and replace its own decision for that of the executive and legislature in matters concerning socio-economic rights. There is an area of policy-making that is clearly within the power of elected political representatives, and which cannot be interfered with. On the other hand, when policy-makers cross the line and infringe a right the courts must act. We need to determine where that line is. The judiciary has been authorised to intervene in the legal terrain. The sections containing socio-economic rights were drafted to take account of the debates concerning enforcement. For example, the inclusion of "reasonable legislative and other measures" in sections 26 and 27, and "basic" in section 29 are indicators of this.

This is a challenge posed to the courts. However, courts do not intervene by themselves. What courts will do depends on various factors, including the development of civil society and the cases which come before the Court. It is therefore essential that organisations that wish to deepen socio-economic rights in society are sufficiently developed and active to do two things. In the first instance, they must engage with the political arm and, if necessary, bring cases to court. They must also oppose efforts by others to diminish these rights.

Every challenge involving administrative action potentially entails concerns about redistribution and legislative or executive action. It is difficult to conceive of any constitutional challenge that is wholly unrelated to socio-economic rights.

Judge Yacoob cautioned that when legislation is passed pursuant to sections 26 to 29, those who rely on individual rights are likely to challenge the legislation. It can be predicted that the most likely challenges to social and economic rights will

occur when government attempts to fulfil these rights and powerful vested interest groups oppose their implementation

Advocate Nona Goso highlighted the need to identify effective approaches to the systematic implementation of socio-economic rights. As we progress towards a rights culture, we need to identify effective approaches to the systematic implementation of socio-economic rights. We also need to recognise that legal discourse informs social and economic policy making and *vice versa*. Courts need to begin to simplify litigation procedures and to revisit questions of burden of proof to facilitate litigating the rights in question. The limitations clause must be interpreted in a way that does not negate the essential content of the rights, taking into account that these rights already contain a set of internal limitations considered appropriate by the constitutional drafters. The person in the street must also begin to perceive that a unifying jurisprudence flows from the courts. The challenge is delivery of effective equality and social justice to the poor. Finally, the fact that rights have public expenditure implications ought not to deter the courts from intervening in appropriate cases. Courts should, through their reasoned judgments, encourage those that allocate budgetary resources to prioritise the meeting of constitutional obligations in relation to these rights.

Vincent Saldanha suggested that we need to consider the role of the judiciary within our present context. We have a strong executive arm which marginalises the role of the legislature and a weak South African Human Rights Commission, Commission for Gender Equality and Public Protector, which are all under-budgeted. This calls into question the commitment of the State to socio economic rights. The broader imperatives in the socio-economic context are being pre-determined elsewhere - in our macro economic context.

The transformation of the judiciary that is currently taking place is to be welcomed. A transformed judiciary provides new promise and the potential to develop a substantive jurisprudence on socio-economic rights. Vincent concluded that socio- economic rights pose a challenge for everyone. Unless these rights are located in the realities of South African social and political discourse, they will become meaningless and many South Africans will remain marginalised and impoverished.

- *Judge Zac Yacoob is a member of the Constitutional Court*
- *Advocate Nona Goso is a member of the Cape Bar, and Deputy President of the Black Lawyers Association*
- *Vincent Saldanha is from the Cape Town Office of the Legal Resources Centre, and is National General Secretary as well as Western Cape Chairperson of NADEL*

Reflections On Emerging Themes

by Judge Albie Sachs

One of the emerging themes of the seminar is the importance of building a co-operative relationship between the judiciary, the executive and the legislature. The history of the constitution-making process in South Africa reveals that a Bill of Rights and parliamentary democracy were achieved simultaneously. Majority rule and equal citizenship were the foundation of the Bill of Rights while guarantees of fundamental rights led minorities to accept majority rule. The special role that courts have is a responsibility placed upon them by the

Constitution, the Parliament that drafted the Constitution, and the citizens of South Africa who elected that Parliament.

The concept of dialogue

Dialogue as a mode of legal thinking: traditionally, there is not much scope for dialogue in rights-determinations, either a right exists or it doesn't. However, dialogue should be built into our conception of rights and the way that they are balanced with other rights and the interests of the broader society. The interpretation of rights should be an on-going process, based on proportionality and balance, rather than on either/or limits.

Dialogue on remedies between the courts and Parliament: The Court may declare legislation invalid only to the extent that it infringes a fundamental right, or suspend the declaration of invalidity in order to give Parliament a fixed time within which to remedy the defect. Other potential orders include severing invalid legislative provisions, reading-down legislation and even reading certain things into legislation. The idea is to create a constitutionally appropriate relationship between the judiciary and the legislature, neither overly robust nor unduly deferential.

Dialogue (interaction) between rights: Social and economic rights pervade the whole Constitution and are integral to the way in which the Bill of Rights has to be interpreted. The balancing and harmonising of rights is necessary to ensure that some rights are not used to override and suppress other rights. There is a close correlation between socio-economic rights and the rights to dignity, equality and freedom. They support rather than contradict each other.

When may the courts intervene?

The Constitution requires that organs of State "respect, protect, promote and fulfil" the rights in the Bill of Rights. This is a useful analytical structure. However, not enough attention is given to the primary obligation "to respect" rights in the context of socio-economic rights.

In terms of this duty, the more flagrant the invasion of socio-economic rights, the more likely the Court is to intervene to protect the right. The Court may also intervene to prevent the State from destroying or diminishing rights already enjoyed.

The biggest difficulties relate to direct enforceability of socio-economic rights, that is, their promotion or fulfilment. The drafting of the relevant sections in the Bill of Rights indicates that the fulfilment of socio-economic rights was intended primarily to occur through legislation. It is in the context of the legislative process that the availability and fair distribution of resources can best be considered.

However, there are circumstances where Parliament may unduly infringe on rights to achieve certain legitimate socio-economic goals. This is something that the courts will not sanction.

State action affecting certain socio-economic rights may also require a higher degree of judicial scrutiny. These include, for example, the right to be protected from arbitrary evictions, the right not to be refused emergency medical treatment and a child's right to basic education. The closer the connection between the infringed socio-economic right and first generation rights, the more one can

envisage some form of judicial intervention. The Indian Supreme Court's judgment in the 'pavement dwellers' case (*Tellis & others v Bombay Municipal Corp. & others* (1987) LRC (Const) 351) can be cited as an example in this context. The intervention of the Court was possible in that case because the unprocedural eviction of the pavement-dwellers had serious implications for their enjoyment of the right to life.

Reconciling and harmonising rights

Socio-economic rights are not inherently competitive with each other or with other rights. Neither should there be an inevitable tension between the State and the individual in the enjoyment of these rights. We can use the example of a group of people all claiming access to health services. The question that needs to be answered is: what is the best way in which all can exercise our rights together? The concept of rationing and a queue is therefore built into the very nature of access to social and economic rights. The rationing of socio-economic rights does not therefore constitute a limitation of the rights that has to be justified. In the course of rationing, everyone's right to be considered as an individual may not be disregarded. The right to dignity includes ensuring that an individual's access to limited resources is determined through a fair and transparent process and according to fair and rational criteria. The Court will intervene appropriately to protect these dimensions of the rights. If the system worked otherwise, it would degenerate into judicial populism - and those who shouted the loudest (usually the most advantaged among the disadvantaged) would gain the most. Rights are not about money but about dignity and having meaningful control over one's life.

Who should decide?

Ultimately, the question to be asked is: Who is best able to decide who should have access to scarce kidney dialysis machines in the public health sector - judges or the people working in state health care services? This question had to be confronted directly by the Constitutional Court in the case of *Soobramoney v Minister of Health, KwaZulu-Natal* 1998(12) BCLR 1696 (CC). It seems obvious that the health professionals working in the Department of Health are best qualified to make these decisions. The courts' role is to ensure that the process and criteria used are fair and rational.

** Judge Sachs is a member of South Africa's Constitutional Court*

Socio-Economic Rights In The New Millennium

The Challenges Of Implementation In SA

by Geoff Budlender

A shift in thinking

I have prepared my presentation on the assumption that we are talking about South Africa as we enter the 21st century, and that we are talking in practical terms. I am proceeding on the assumption that we are concerned to find out how social and economic rights can be used to benefit *real people* in South Africa, who have a need for land, housing, medical care and so on.

If my assumptions are correct, then we need to start with a shift in thinking about this issue. The traditional approach is to ask how lawyers, courts and others can force an antagonistic or passive State to do what the Constitution and international law require. Most of the writing on this subject still seems to start, at least implicitly, from this premise.

My experience of two years in government is that this premise is false in South Africa at the end of the 20th century. The land officials in government really do want to redistribute land, and to do it more quickly and effectively - in the words of s 25(5) of the Constitution, to take reasonable legislative and other measures which enable citizens to gain access to land on an equitable basis. The same applies to the housing and health officials who really want to give effect to the rights of access to housing and health care services enshrined in sections 26 and 27 of the Constitution. The Reconstruction and Development Programme is, at its core, an ambitious programme for the realisation of socio-economic rights. It remains the animating theme behind government activities in the social sector. If we do not recognise this, we have little chance of dealing effectively with the issue.

Doing too much at the same time

But if government is really so committed to these issues, why does it so often fail? The reason is not a lack of commitment to socio-economic rights - rather, it is a lack of skill, experience and focus in government's work, coupled with limited resources in an economy which is not growing. The problem is also that government is trying to do too much at the same time. In the typical department dealing with social and economic issues we have more major new programmes than a stable, well-organised and well-resourced government would attempt in two decades. Our government system is not yet stable, or well-organised, or well-resourced - yet we are trying to introduce all of these ambitious new programmes simultaneously.

The example of land reform

These points and their implications for the enforcement of socio-economic rights can be illustrated through the land reform programmes of government.

Section 25 of the Constitution requires the State to institute three programmes of land reform: *restitution* for those who lost land through racial discrimination; *redistribution* (equitable access to land) for those who need land as a place to live or to produce for their needs; and *tenure reform* for those whose tenure is insecure as a result of our racial history.

The land programme of government started on the premise that, wherever possible, it should be rights-based. The intention was to create a platform of land rights. By anyone's standards, a pretty full suite of programmes and laws has been instituted with legally enforceable rights as the foundation and bedrock. These include: the Restitution of Land Rights Act, the Land Reform (Labour Tenants) Act, the Interim Protection of Informal Land Rights Act, the Communal Property Associations Act, and the Extension of Security of Tenure Act.

Why are the rights not translated into reality?

The land reform programme has achieved a great deal, but not as much as many would like. There are three main reasons for this:

1. It is over-ambitious, as it cannot be implemented in the short-term by a total staff of 600, or 0.05% of the public service;
2. The new enforceable rights have not been consistently exercised because the new rights-holders have not been adequately supported by information on their new rights, and by lawyers willing to represent them. The underlying assumption behind this rights-based programme was that the small army of lawyers and NGO's which had assisted people to fight apartheid, would now turn to enforcing the new rights which had been won. This has turned out to be a false assumption. There is less money available for this than was previously the case, many of the lawyers have moved on to other areas of work, and a great deal of energy has gone into debate, writing and lobbying about matters which are interesting, but produce no practical assistance to the beneficiaries of socio-economic rights.
3. Some of the rights are mediated through government institutions which are overloaded and cumbersome. An example is the restitution programme, where the interim Constitution stipulated that no award could be made by the Land Claims Court until it had been processed by the Commission on Restitution of Land Rights. The final Constitution does not contain this provision, and a year ago the Act was amended to permit direct access to the Court - yet not a single restitution case has yet been brought to the Land Claims Court on the direct access route - an illustration of my second point.

What are important tasks?

What does this tell us about the role of Parliament, the Executive and others? To me, it suggests the following tasks of importance:

1. We need to continue to create legal rights which are directly enforceable. This is still the best protection against government muddle, incompetence, lack of care or outright hostility. Socio-economic rights do not exist only in the Constitution. Many of them can be readily translated into statutory rights - for example, the right to land restitution, or the right to a social pension. Once the constitutional rights are translated into statutory rights, many of the difficult legal problems about enforcement of constitutional socio-economic rights fall away, as the statute invariably deals with the detailed content of the right, the means of enforcement, and with the ambit of any justifiable limitations to the right.
2. We need to set specific, quantifiable and achievable targets, by agreement or negotiation. The parliamentary Portfolio Committees could play a very important role here. This would make them more than simply processors of legislation proposed by the executive.
3. The achievement of these measurable goals must then be monitored. Here the Human Rights Commission could play a valuable role, reporting to Parliament and the public. The need is for systematic monitoring of outputs and outcomes - not of whether, in general, the rights are being promoted. We need to monitor the mainstreaming of social and economic rights in policy and legislation, and not simply focus on the exceptions (i.e. looking for instances of abuse).
4. We need a legal aid system that works for the poor with a deliberate and conscious focus on the most marginalised and their socio-economic rights. There are limited resources for legal aid. At the moment, the rights of the accused to legal aid trump all others who seek legal aid, because these are constitutional rights. On a similar basis, the holders of socio-economic

rights should have a prior claim to legal aid when they seek to enforce those rights.
5. Law schools must be brought on board, and legal aid clinics must be brought to the centre of the law schools. This will serve the dual purpose of educating students, and of bringing benefits to those who need help in enforcing their rights.
6. Finally, we need a renewed commitment from the large number of lawyers who undoubtedly do care about these issues. Under apartheid, the Group Areas Act was brought to a standstill in Johannesburg by the efforts of literally hundreds of lawyers, attorneys, advocates and academics - each of whom took on just a few cases. Now let's challenge and organise lawyers to make a contribution to meeting the country's greatest challenge - poverty. There are too few lawyers doing this work.

What about the courts' role?

I have not yet mentioned the role of the courts. This is because I believe that the debates about what the courts can do are excessive. We all *know* what the courts can do. If the statutes are drafted correctly, and the cases are properly litigated, the courts will have no difficulty in enforcing the rights in the overwhelming majority of cases which come before them. They won't need to know a great deal, if anything at all, about the jurisprudence of the Supreme Court of India.

Where officials are lazy, obstructive or incompetent, administrative justice is the key. We are firmly on the road to a more rational system of administrative law that can be used to hold administrators accountable. The final Constitution has made it clear: administrative action must be lawful, reasonable and procedurally fair, and people are entitled to reasons for administrative decisions that affect their rights. Here the social and economic rights in the Constitution become very powerful. The justifiability of administrative action has to be tested against a constitutional framework that places a duty on government to take active steps to promote economic and social rights.

These are enormously powerful weapons for dealing with arbitrariness, unfairness, incompetence or sloth. Speaking as an administrator, I believe that to the extent that they are used, they will greatly improve the quality of public administration and the enforcement of social and economic rights.

Grasping the new weapons

In short, what we need is less debate about whether socio-economic rights can be enforced, and more actual enforcement. To me, one of the greatest disappointments of the past four years has been the failure of lawyers to grasp the new weapons that have been created. In many areas, there is now a platform of rights of which anti-apartheid lawyers could only dream. The Constitution creates a framework for the exercise of those rights - by creating a legal environment that 'leans' towards supporting the needs of the poor, by creating wider *locus standi*, and by placing government under proper administrative and judicial controls. Yet the truth is that in the past four years there has almost certainly been significantly less litigation on poverty issues than in the previous period. It is almost as if some people have said: "Now it's the government's problem."

Anyone who thinks the government alone can or will deal with these issues is simply foolish. It is a national problem which requires a national effort - including by lawyers.

An optimistic conclusion

As long as there is a government committed to social and economic programmes consistent with the requirements of the Constitution, there may be only limited importance in litigation aimed at converting the constitutional rights into subjective rights for the poor. This is not a pessimistic statement, except for those who relish finely-tuned debate over whether, and if so when, the courts will intervene on budgetary allocations. As the judgment of the Constitutional Court in *Soobramoney v Minister of Health KwaZulu-Natal* 1997(12) BCLR 1696 (CC) has shown, they will seldom do this. It is in fact an optimistic statement. Better a government committed to social and economic rights and struggling to carry them into effect, than a government hostile to those rights and a few famous victories for the lawyers.

To say this is not to deny the importance of social and economic rights in the Constitution. They are not only a sword for the intrepid promoter of the interests of the poor. They are also a shield for a government committed to carrying them into effect. Social and economic rights are inherently redistributive in nature. In the words of Michael MacNeil: *There is an inherent tension between the rights of property and the rights of individuals to a fair share of the resources which guarantee the necessities of life... it is not only the rights of persons to exclude others from the use or benefit of a thing which should be protected. Equally, there should be a right not to be excluded by others from the use or benefit of some things.* (Property in the Welfare State (1983) *Dalhousie Law Journal* 343).

Socio-economic rights provide the constitutional justification for, and protection of, redistribution. They are the counterbalance to the inherent role of the courts to protect existing rights, whether constitutional or otherwise. They are the most important defence to the constitutional challenges that are being, and will be, mounted against redistributive challenges. They will enable government to do its job.

Less talk, more action

This must be the most civil society-friendly Constitution in the world: we have broad social and economic rights, many institutions (perhaps too many) created to address their concerns, and wide rules of *locus standi*. Now we need to see some action, rather than complaints about government's lack of action.

We repeatedly read that the socio-economic rights in the Constitution are not merely pious wishes, and are in fact enforceable. I agree. Now let's put that debate behind us, and let's see some enforcement. Then we will be able to talk of real socio-economic rights in South Africa, and the Constitution will have real meaning as an instrument of transformation of our country in the new millennium.

** Geoff Budlender was formerly National Director of the Legal Resources Centre and is presently Director-General of the Department of Land Affairs.*

Socio-Economic Rights, Macro-Economic Policy And The Budget

by Leslie Maasdorp

An "economic definition"

The key challenge in my view is to develop an appropriate "economic definition" of socio-economic rights. A broad definition of socio-economic rights is necessary to appreciate the role of fiscal policy in giving effect to these rights. According to Craig Scott and Patrick Macklem, 'social rights' refer to those rights that protect the necessities of life or provide the foundations of an adequate quality of life. Does this exclude traditional 'economic rights' such as freedom of contract or private property rights?

Socio-economic rights, in a fiscal sense, can only be conceptualised in the context of an integrated economic strategy. Several inter-related economic strategies are required for us to confront the challenges of meeting basic needs, developing human resources, increasing participation in the democratic institutions of civil society and implementing the objectives of reconstruction and development.

A clash between law and economics?

A clash of legal and economic interpretations of the concept of "available resources" should be avoided. South Africa has a finite budget that will not increase unless our economy grows substantially. The courts should not be in a position to overrule the decisions of the executive relating to the management of the economy and the allocation of budgetary resources. In essence, macro-economic policy should not be subject to the jurisdiction of the courts.

Central themes

The central themes of the government's macro-economic policy include:

- A competitive, fast-growing economy that creates sufficient jobs for all work-seekers;
- A redistribution of income and opportunities in favour of the poor;
- A society in which sound health, education and other services are available to all; and
- An environment in which homes are secure and places of work productive.

Within this macro-economic framework, the role of fiscal policy includes a renewed focus on budget reform to strengthen the redistributive thrust of expenditure and a faster fiscal deficit reduction programme to contain debt service obligations, counter inflation and free resources for investment.

Disaggregation of the Budget

A disaggregation of the budget is needed to analyse expenditure on those social services that contribute most directly to the promotion of socio-economic rights. However, it is not a straightforward calculation to determine which aspects of expenditure contribute to the promotion of socio-economic rights. Protection services such as the SAPS and the SANDF safeguard the income and assets of people and thus protect and promote people's ability to attain their socio-economic rights. Similarly, expenditure on economic services such as infrastructure, promotion of South Africa as an investment destination, enhancing external trade, preserving jobs, the environment or promoting work-place

productivity - all contribute to the promotion of these rights within a sustainable fiscal policy.

Despite these caveats, the figures will indicate that expenditure on social services constitutes almost two-thirds of non-interest expenditure. Education, health and welfare amount to 50% of the total budget. In the Provinces, 90% of the budget is spent on social services.

In conclusion, it is my view that considerable research is still needed to develop an analytical framework and understanding of the obligations imposed by the Constitution on relevant organs of State. We need to ensure that the economic fundamentals are in place and that sustainable implementation of socio-economic rights happens over time. This involves ensuring that the economy is poised for growth in the medium- to long-term. We also need to eliminate efficiencies in the public service to promote greater delivery of socio-economic rights.

* *Leslie Maasdorp is Senior Manager in the Budget Office of the Department of Finance*

Monitoring Socio-Economic Rights

What Has The SA Human Rights Commission Done?

by Jody Kollapen

The perspective of rights-bearers

The inclusion of social, economic and cultural rights in our 1996 Constitution was seen nationally and internationally as a progressive mover of radical width, bringing our country in line with, if not exceeding, current international practice. While the sense of pride amongst South Africans at the inclusion of these rights in the Constitution was justified and remains warranted, at the end of the day the actual enforcement and implementation of the rights are the acid test of our commitment to them. It is precisely the nature and extent of that commitment that will determine how our society and our country unfolds.

There has been much debate amongst lawyers about the concepts of the interdependence and indivisibility of rights. However, it is important to approach these debates from the perspective of the bearers of these rights.

If the provisions of the Bill of Rights can be successfully invoked to stop the State from executing convicted criminals, or stop the torture of political opponents and criminal suspects, the very same Constitution must be able to come to the assistance of someone dying from hunger, disease or exposure to the elements. If not, then the bearer of rights is entitled to question whether the concept of indivisibility has any force. This has been the experience of the South African Human Rights Commission (SAHRC) in conducting educational workshops around the country. In our debates and discussions we should not lose sight of this simple but powerful observation.

Not just a conduit of information

The Constitution has given the SAHRC a special role in monitoring the implementation of socio-economic rights. Section184(3) of the Constitution

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

This monitoring function of the Commission must be seen in conjunction with its other powers and functions set out in s 184 of the Constitution and in the Human Rights Commission Act. In approaching its novel (and, I may add, somewhat intimidating) mandate, the Commission saw its task as extending beyond simply requesting information from relevant organs of State and then passing this information on to Parliament. Rather the Commission sees its task in the context of its broader mandate of monitor and assess the observance of human rights in the Republic (s 184(3)). Thus the role of the Commission is not simply to be a conduit of information. It must also analyse and evaluate whether the measures adopted by relevant organs of State to realise socio-economic rights are effective.

The reporting mechanism

The primary mechanism used to obtain information from relevant organs of State was the sending out of 'protocols' (or questionnaires). A number of NGO-partners were involved in assisting the Commission to develop these protocols - the Centre for Human Rights, the Community Law Centre, and the Community Agency for Social Enquiry (CASE). The questionnaires solicited information on the impact of past policies and legislation, the understanding by relevant organs of State of their constitutional obligations, information-gathering systems, particularly vulnerable and disadvantaged groups, the measures adopted to improve access to the rights, future plans and general information.

The questionnaire was forwarded to various national and provincial government departments and to the South African Local Government Association (SALGA). The rate of the responses as well as the quality thereof varied considerably. In some cases there appeared to be a sophisticated understanding of what the Constitution requires of the relevant department, while in others, the understanding was basic or very limited. This is understandable as the process is new for all involved - the SAHRC, government departments and NGO's. I believe that much can be done to ensure that the quality and consistency of reporting is improved.

Assessing the responses

In analysing and assessing the responses received, the Commission had reference to the relevant constitutional provisions as well as international standards. The latter included the African Charter on Human and Peoples' Rights, the International Covenant on Economic, Social and Cultural Rights, the General Comments of the Committee on Economic, Social and Cultural Rights, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.

Other intiatives

There were two other initiatives that were relevant to the monitoring process. The first was a survey conducted by CASE on public perceptions relating to the realisation of socio-economic rights. This survey was not an evaluation of government's performance as such, but rather a study of public perceptions. The

Commission believed that it was important, in the words of the study, "to gather pertinent information that would shed light on the nature and reach of the government policies, seen from the viewpoint of the intended beneficiaries."

A second initiative was the National *Speak out on Poverty* Hearings jointly organised by the SAHRC, the Commission for Gender Equality (CGE), and the South African National NGO Coalition (SANGOCO). Through these hearings, the testimony of ordinary people was obtained on their experiences of poverty and the barriers and obstacles they encounter in gaining access to socio-economic rights.

Both the CASE report as well as the reports of the *Speak out on Poverty* hearings will be attached to the monitoring report of the SAHRC

The Report of the SAHRC

The report of the SAHRC on the monitoring process in terms of s 183(3) will be tabled in Parliament during the first session of 1999. It is important that the report be widely circulated and that a proper forum within Parliament is created in order to discuss and debate the report. Public participation in this process is critical. The Commission will initiate discussions with the Speaker of Parliament on how best these objectives can be achieved. There must be and we accept criticisms from certain quarters about the process, methodology etc. that was followed. Like government, we see the process as an opportunity to progressively improve our abilities and capacities. There is obviously much that can be done to improve the process.

Outcomes of the monitoring process

What are the main outcomes that the Commission aims to achieve from this process, and what is the unique contribution that the Commission can make to promoting the fulfilment of socio-economic rights in South Africa? I suggest that the following are the main outcomes that the Commission should strive to achieve:

a. An understanding by government that the constitutional obligations to respect and give effect to socio-economic rights must be reflected in policy, legislation, programmes and budgetary processes. The SAHRC has a useful and supportive role to play in developing this understanding, particularly through greater interaction with State organs.
b. The development of consensus around the core normative content of these rights as well as clear standards (benchmarks) for measuring the progressive realisation of the rights. This is essential to ensuring proper accountability. The Department of Water and Forestry's definition of a basic water supply consisting of 25 litres of water per person per day within a distance of 200 metres from the dwelling is an example of how such core standards begin to provide greater certainty to beneficiaries. The SAHRC does not see its role as developing policy and legislation. At the end of the day, that responsibility rests with government. However, there should be dialogue and co-ordination between government and the Commission with a view to progressively and systematically improving access to socio-economic rights in South Africa.
c. Active participation by NGO's in the process. From the start of the monitoring process, we have enjoyed the active support of NGO's. Their assistance to the Commission in developing the monitoring mandate has

been considerable. The Poverty Hearings were also driven by NGO's. We envisage that NGO's will continue to interact with the Commission during future monitoring cycles. NGO's can monitor the impact of government's policies and report their findings to the Commission. They can also critique or support aspects of the Commission's report. However, at the end of the day, the report submitted must be that of the Commission's. We must be in a position to own and take full responsibility for it.

A better life for all

The human rights discourse has created the expectation, certainly in our country, of a better life for all. This depends on the realisation of the rights in our Constitution that for millions of people in South Africa represent the basis of survival. The SAHRC has an important role to play in contributing to the improvement of the quality of life of all in South Africa. We cannot therefore afford to take the challenge of monitoring the implementation of socio-economic rights lightly.

** Jody Kollapen is a Commissioner on the SA Human Rights Commission*

Panel Discussion:

The Role Of The Independent Commissions And Civil Society

Ms Phumelele Ntombela-Nzimande suggested that we need to go beyond our narrowly defined boundaries as individuals and institutions to create a culture of delivery of socio-economic rights. This requires collaboration between government and the private sector and well as between the Commissions and civil society.

From the Commission for Gender Equality's point of view the challenge and difficulty that our society faces is to ensure that women have equal access to resources. An understanding of women's right of equal access to resources and opportunities needs to be built in society as a whole.

In terms of section 187(1) of the Constitution, the Commission for Gender Equality's obligations are to promote respect for gender equality and the protection, development and attainment of gender equality. The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.

We need to turn rights on paper into meaningful, legally enforceable rights, especially for the marginalised and illiterate members of our society who often do not have the power to challenge the practices of local officials - let alone departmental decisions.

Ms Ntombela-Nzimande concluded by suggesting that we need to consider partnership projects between the independent commissions and NGO's. In this way the commissions and civil society can play a mutually supportive role instead of competing with each other. One example of an area that both the CGE and civil society can monitor is the implementation of reproductive health legislation. Another major joint challenge is dealing with violence against women. We need to ensure that the police, judiciary, commissions and civil society do not fail women

by allowing domestic violence to continue unchallenged. Women who are suffering abuse at the hands of their partners will seldom be able to access their socio-economic rights.

Advocate Pansy Tlakula supported the view that we need to build a collaborative and co-operative relationship between the independent commissions and civil society in order to monitor socio-economic rights effectively. Government departments should not react defensively to the efforts of the commissions and civil society to monitoring these rights.

Section 181(2) of the Constitution requires that the commissions be independent and impartial. An issue that must be resolved is what this impartiality means in the context of collaboration with NGO's. While the Commission values a co-operative and supportive relationship with NGO's, at the end of the day, the Human Rights Commission must produce an independent assessment of the measures adopted by government towards the realisation of socio-economic rights.

Michael Blake began by contextualising socio-economic rights. The truth is that the poor want and need enough food and water, decent housing, good health care and education, not the right to these things or the right of access to them. Blake challenged the workshop to question the assumption that all the socio-economic rights cannot be immediately met. What are the parameters of this assumption and who sets the parameters? Is it really the case that we just do not have the means to widely realise the basic needs that are presently denied to tens of millions? The RDP says otherwise. After all, we are one of the most unequal societies in the world, second only to Brazil. We would see the problem of poverty in South Africa in a proper perspective if we held 'wealth hearings' in which the richest 10% of the population could publicly tell their stories of wealth and privilege.

The poverty hearings indicated how desperate people are. It seems to me that many will not be content with a plea to be patient. Paper rights are no comfort nor is expectant talk of an economic miracle. 'Progressive realisation' could be very piecemeal and a long way off. Furthermore, there are no guarantees that existing backlogs will not mount and poverty and inequality increase.

The present international and national context is hardly encouraging. One UNDP report after another testifies to the devastating impact of structural adjustment programmes in most parts of the world. The latest Human Development Report reveals that in 1997 Europeans and Americans spend more money on pet food than the combined budget for health care and nutrition of all so-called 'developing countries.'

In the case of Africa, judicial enforcement of socio-economic rights is virtually non-existent. Our home-grown structural adjustment programme threatens to impact severely on the historically disadvantaged. It has failed miserably to achieve its own growth and employment creation targets.

Faced with these realities, civil society has no option but to raise its voice and become more organised and mobilised. This must include a struggle to realise the socio-economic rights that have been won through the efforts of millions of South Africans. A rights-based approach to socio-economic issues must be developed and used as an important supplementary means of striving to secure unmet needs. This approach needs to be incorporated in the work of development

organisations, civics, CBO's, human rights organisations and the trade unions. Innovative efforts on the part of civil society organisations are necessary to facilitate the involvement of local communities in rights-based work. For example, the idea of developing a programme of action against poverty as a follow up to the poverty hearings is an excellent one. A rights-based approach should be included in such a programme. Organisations on the ground are weak, much weaker than they were in the 1980's. Active and creative work around socio-economic rights could facilitate the building up of organisations and strengthen the confidence of local people. As civil society organisations, we must define the different roles we can play and devise plans to complement each others work.

Some practical suggestions for projects that NGO's can take up include:

- under the right to education, monitoring attendance at schools (e.g. farm schools), and the effect of schools fees on access to basic education (e.g. there is a high incidence of children being turned away from school despite assurances that this will not happen);
- under the right to social security, organising a campaign to ensure that the 20-40% of pensioners who are not drawing the pension that they are entitled to, receive their pension;
- developing codes of good practice for government around a number of socio- economic rights with active grassroots involvement;
- lobbying for funding of community-based advice offices throughout the country to promote a range of rights-based activities.

I conclude with a quote from Craig Scott and Patrick Macklem:

Courts do not simply discover the inherent meaning of a right that has somehow been settled by the mere inclusion of words in a constitutional document. Rather, they respond to arguments over the kind of worlds in which we want to live and the types of social beings we want to become. ('Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' vol. 141, no. 1 *University of Pennsylvania Law Review*).
It is the duty of civil society organisations to argue about and give expression to "the kinds of world we want to live in" and set out what is required for all to lead decent, dignified lives. The tree of freedom is rooted in the efforts of the historically disadvantaged. Today they will need to shake the tree to acquire a fair share of the fruits.

Jacqui Boulle stressed the need for organisation among poor people in order to access legal processes and systems that make these work. It emerged clearly from the poverty hearings that there is a limited understanding among communities that socio-economic rights exist and what they mean in practice. By including socio-economic rights in the Constitution, the State has made a choice to prioritise these rights. It must also assume responsibility for fulfilling these rights.

I see the following as the key challenges for civil society in relation to socio-economic rights -

- Organising jointly as NGO's by developing systematic programmes and working collaboratively;
- Working with communities on these issues. Communities often need information and education to start organising around these issues;

- Advocating and negotiating with the State regarding policy and legislation that will advance and improve access to socio-economic rights;
- Lobbying private institutions and individuals to ensure that socio-economic rights are protected and promoted;
- Assisting with creating an enabling environment: for example, improving the Legal Aid system so that legal aid funding can be accessed for socio-economic rights cases;
- Working collaboratively with the independent commissions that have a clear mandate to monitor the implementation of socio-economic rights.

- *Phumelele Ntombela-Nzimande is the Acting Chairperson of the Commission for Gender Equality*
- *Adv. Pansy Tlakula is a Commissioner on the SA Human Rights Commission;*
- *Michael Blake is from NADEL's Human Rights Research and Advocacy Project;*
- *Jacqui Boulle was former Programmes Director of SANGOCO and organiser of the national Speak Out on Poverty hearings.*

NGO Networking And Strategy Meeting

by Sandra Liebenberg

At the conclusion of the seminar, NGO's that attended the seminar participated in a networking and strategy meeting. It was attended by about 30 representatives of human rights NGO's. The main purpose of this meeting was to explore how to facilitate the sharing of information and to build greater collaboration among NGO's involved in socio-economic rights litigation and advocacy.

Jacqui Boulle, the then Programmes Director of SANGOCO, highlighted the need for a sector to take forward the recommendations in the *Poverty and Human Rights* report on the national *Speak Out on Poverty* hearings. In order to do this effectively, she suggested that there was a need to build a strong human rights sector within SANGOCO.

Vincent Saldanha of the LRC (Cape Town) described some of the main problems experienced in conducting litigation on socio-economic rights and the role that NGO's could play in supporting and engaging in such litigation. He also reported on the NADEL, Human Rights Research and Advocacy Project's "Networking for Change" workshop held on the 3rd and 4th October 1998.

Danie Brand from the Centre for Human Rights (Univ. of Pretoria) provided an overview of process of the first monitoring cycle completed by the Human Rights Commission on socio-economic rights. A point of concern was the limited opportunities for NGO-participation in the process. One of the ways in which NGO's could play a more active role was through the compilation of an NGO 'Shadow Report'.

The meeting then broke up into 2 focus groups: one focusing on advocacy and the other on litigation. Each of these groups explored concrete ways for NGOs to collaborate in these respective areas.

Focus Group on Litigation

The Litigation Group stressed the need for a carefully strategised socio-economic rights litigation strategy with the aim of incrementally establishing positive precedents.

The litigation group also recognised the need for a co-ordinated group of progressive lawyers who would assist communities to enforce their socio-economic rights. The possibility of NGOs encouraging law firms to take up such work was also discussed. Sector specialists/NGOs should be mobilised to identify and take up cases, including the preparation of *amicus* briefs in appropriate cases.

The Legal Aid System should also be improved with a view to ensuring that it extends to the enforcement of the socio-economic rights of disadvantaged groups.

Focus Group on Advocacy

The Advocacy Group recognised that socio-economic rights advocacy includes a broad range of activities such as social mobilisation; policy research and formulation; monitoring implementation; lobbying individuals, legislatures, statutory bodies and international agencies; litigation; and communication and information-sharing between organisations.

Co-ordinated advocacy between organisations can produce greater impact and results - the Poverty Hearings and the Employment Equity Alliance were cited as examples.

The focus group on advocacy identified eight socio-economic rights issues for co-ordinated advocacy action in the human rights sector. Organisations could strengthen each other and gain more if co-operation in these areas could be sustained.

Key advocacy issues are:

a) Monitoring the Implementation of Socio-Economic Rights

There was a critical need for NGO's to engage with the SAHRC and make it aware of the extent to which they believed socio-economic rights were being respected, protected, promoted and fulfilled. NGO's could learn from international human rights treaty-monitoring bodies where 'shadow reports' provide a balance to information provided by governments. The compilation of a shadow report would also require that NGO's have access to the information provided by government departments to the SAHRC. This is an important advocacy and lobbying point. The 'shadow report' could cover both the process of giving effect to socio-economic rights, and the substantive impact of government programmes on the socio-economic rights of communities with whom NGO's work. SANGOCO could provide reports, information and monitoring on a sector by sector basis.

b)Legal Aid Transformation

Access to information and knowledge of legal rights and remedies by poor people were constant concerns throughout the seminar. The participants of the Advocacy Focus Group agreed that advice offices could play an important role in providing information and acting as advocates for socio-economic rights.

The restructuring of the Legal Aid System must include the right of poor people to information and advice on their constitutional rights, particularly their socio-economic rights. NGOs could lobby for a portion of the State's Legal Aid budget to be allocated to local citizen's advice offices for the purpose of access to information and advice on all human rights, including socio-economic rights.

c) The Inclusion of "Socio-Economic Status" in Equality Legislation

The SAHRC and the Justice Department's proposed Equality Legislation will include anti-discrimination and positive measures to eliminate inequalities. The focus group agreed that the inclusion of "socio-economic status" as a ground for non-discrimination and positive measures was crucial to the realisation of socio-economic rights. However, a broad campaign was needed to ensure that "socio-economic status" was included. A link up between the War on Poverty Campaign and Human Rights NGO's was the first step secure this.

d) Promoting Administrative Justice Awareness

Throughout the seminar participants stressed the importance of administrative law for the enforcement of socio-economic rights. Both the rights to just administrative action and access to information provide poor people and their organisations with powerful mechanisms to enforce socio-economic rights. In this regard, legal literacy and rights-awareness were identified as important areas of work. Both the broader public and NGO's need to be made aware of administrative justice remedies.

It is essential that the Departments of Welfare and Home Affairs ensure just administrative action in respect of social assistance grants, refugee rights and fair procedures for non-nationals.

NGO's should also monitor and, if necessary, conduct lobbying and advocacy around the new administrative justice legislation which is currently in the process of being drafted to give effect to s 33 of the Constitution.

e) Socio-Economic Rights of Refugees and Immigrants

For all the participants, the socio-economic rights of refugees and non-nationals were regarded as a crucial area of concern. Even though many of our organisations are confused on the issues, NGOs working in the human rights arena needed to take a principled stand on these issues. The Draft Refugee Bill and the White Paper on Immigration provided the background for joint advocacy.

f) HIV/AIDS

The socio-economic rights of people with HIV/AIDS and in particular, their access to employment, social benefits and the right to affordable treatment and care was identified as a cross-sectoral area of advocacy.

g) Legal Training

Participants agreed that Law Schools should be approached to include socio-economic rights into their curricula. This could contribute to the emergence of a new generation of human rights lawyers and activists. Advocacy in the para-legal field on socio-economic rights should also be undertaken.

h) Internal Advocacy and Education

Participants agreed that internal education on common work and campaigns was essential for effective advocacy. Joint workshops, briefing sessions and participation in public events would assist in internal human rights education. The involvement of other NGO's working in the area of socio-economic rights, particularly those working in relevant sectors (e.g. housing) was also considered vital.

Following the meeting, an informal *information-sharing network* on socio-economic rights litigation and advocacy has been established. Those organisations and individuals who wish to be added to the e-mail distribution list, please contact Sandy.

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