ESR REVIEW

Economic and Social Rights in South Africa

Volume 11
No. 2 2010

Ensuring rights make real change

Contents

20 Years of Excellence promoting human rights and democracy
COMMUNITY LAW CENTRE
1990-2010

A publication of the Community Law Centre at the University of the Western Cape

ESR REVIEW

Editorial

ISSN: 1684-260X
A publication of the Community Law Centre
(University of the Western Cape)

Editor-in-Chief: Lilian Chenwi
External editor: Siyambonga Heleba

Contact the Socio-Economic Rights Project
Community Law Centre
University of the Western Cape
New Social Sciences Building
Private Bag X17, Bellville, 7535
Tel: (021) 959 2950
Fax: (021) 959 2411
Email: serp@uwc.ac.za
Website:
www.communitylawcentre.org.za
ESR Review online
www.communitylawcentre.org.za/clc-projects/socio-economic-rights/esr-review-1

ESR Review
The ESR Review is produced by the Socio-Economic Rights Project of the Community Law Centre, with the financial assistance of the European Union and with supplementary funding from the Ford Foundation. The contents of the ESR Review are the sole responsibility of the Socio-Economic Rights Project and can under no circumstances be regarded as reflecting the position of the European Union or the Ford Foundation.

Production: Page Arts cc
Printing: Tandym Print

Meeting human rights commitments and ratifying international human rights treaties have been topical issues in September this year. Against the backdrop of the Millennium Development Goals (MDGs) Review Summit and the United Nations' annual treaty signing event, civil society organisations (CSOs) have called on the South African government to meet its human rights commitments and ratify key human rights treaties.

The South African government prepared its 2010 MDG country report, which CSOs believe presents an incomplete picture of poverty and inequality in South Africa. Many have voiced the need for South Africa to strengthen its efforts to meet the MDGs. A seminar held on 15 September 2010 expressed this concern and called for a streamlined and efficient MDG monitoring process to be established. The seminar was organised by the Community Law Centre, the Black Sash, the People's Health Movement South Africa, the National Welfare, Social Service and Development Forum and Global Call to Action against Poverty South Africa. The seminar also stressed the importance of improving communication and engagement between civil society and government. The government's support is also needed in bringing about localised awareness of human rights and the MDGs at district and community levels.

Parliaments also have a crucial role and responsibility in meeting the MDGs, something that the 2010 MDG Review Summit Outcome Document emphasised.

Furthermore, the ratification of relevant human rights treaties would contribute to achieving the MDGs. This is because treaties impose a legal obligation for compliance with development goals. Ratification would thus provide such a legal obligation and accountability framework for ensuring that development needs are fully realised. In this regard, South Africa's prolonged delay in ratifying the International Covenant on Economic, Social and Cultural Rights (ICESCR) was raised as an issue of concern at the seminar. The ICESCR is a human rights treaty that is right at the nexus of development and human rights, because it seeks to secure important rights necessary for sustainable human development. It is a guiding tool for the adoption and implementation of socio-economic policies and legislation, especially those called for in the MDGs. There is reason to hope that South Africa will ratify this treaty soon, since President Jacob Zuma indicated on 4 May 2010 that issues surrounding ratification have been placed on the agenda of key government departments.

The articles in this issue illustrate the importance of implementing socio-economic rights effectively, especially for vulnerable groups. Achieving this in South Africa requires the government to meet its human rights commitments, including the MDGs, and also to ratify key treaties, such as the ICESCR, that protect the poor and vulnerable.

Lilian Chenwi, editor-in-chief

Advancing adolescents' sexual health rights in Africa

Ebenezer Durojaye and Rebecca Amollo

In many parts of Africa, issues relating to the sexuality of young people are shrouded in secrecy and taboos. The result is that many adolescents are ignorant about their sexuality and unable to avoid sexual ill health. This can have grave sexual and reproductive consequences.

For instance, it is estimated that about 15 million adolescent women aged 15 to 19 give birth annually (De Bruyn and Parker, 2004). Many of these births occur in developing countries, where high fertility rates can prejudice the health of young women. The average rate for births per 1000 young women in sub-Saharan Africa is put at about 143, compared to 25 and 59 in Europe and Central Asia respectively (WHO, 2004). In addition, sexually transmitted infections (STIs), excluding HIV and AIDS, are the second most important cause of loss of health in women, especially young women, and it is estimated that adolescents in the age group 15–19 constitute about 70% of the 23 million people living with HIV in the region (UNAIDS, 2009). The infection rate among young women is almost three times that of young men in the region.

Access to sexual health services and advice for adolescents remains difficult for a number of reasons. These include negative attitudes on the part of health care providers, lack of youth-friendly health care services, the need for parental consent, a lack of information on sexuality and sociocultural practices. Consequently, many young adolescents in the region continue to bear the burden of sexual and reproductive ill health and preventable loss of life.

Against this backdrop, we examine how adolescence and childhood have been construed in many societies and the implications of this for the enjoyment of sexual health rights in those age groups. We argue that adolescents have been unfairly treated as people incapable of expressing their sexuality and denied information and knowledge necessary for preventing sexual ill health, and we propose that parents, guardians and policymakers adopt a more realistic and holistic approach to adolescent sexuality in Africa. The approach must be grounded in respect for the human rights and dignity of adolescents.

How childhood and adolescence are construed in different societies

According to the World Health Organization (WHO), adolescents are people in the 10–19 age group, while young persons are those aged 15 to 24 (UNDP et al., 2002). Adolescents, by this definition, fall within the definition of children contained in the Convention on the Rights of the Child, 1989 (CRC), and the African Charter on the Rights and Welfare of the Child, 1990 (African Children's Charter).

Development varies depending on the stage of adolescence. The early years of adolescence (10–14) usually see the beginning of sexual maturation and abstract thinking (Jenkins, 1999). Despite this developing maturity, most societies equate adolescence with childhood. This implies that adolescents, like children, are vulnerable, dependent, weak and innocent (Piper, 2000). It is a view of adolescents that sees them as always needing protection and that justifies steps being taken to afford them that protection in society. This attitude is paternalistic. It sees adolescents – erroneously – as asexual and incapable of anything good or of discerning wrong from right. Premarital sex for adolescent girls, in particular, is more or less regarded as forbidden fruit. This leads Gagnon and Simon (1973) to conclude that 'learning about sex in our society is learning about guilt; conversely learning about how to manage sexuality constitutes learning how to manage guilt'.

The human rights of adolescents to express themselves have not been accorded the respect they deserve. Often, society tries to live the lives of adolescents for them – and this is where the challenge lies. At what point should control of the affairs of adolescents give way to respect for their fundamental rights and freedoms? How do we ensure that society's efforts to protect children and maintain public morality do not, in fact, interfere with their sexual well-being and expose them to harm? Steps taken to protect adolescents must be balanced with standards relating to children and adolescents recognised in international and regional human rights instruments.

Sexuality: A contested subject

Issues relating to sexuality are widely perceived as contentious. Students of sexuality often appear to share the prevailing cultural view that sexuality is not an entirely legitimate study. Perhaps human sexuality is so often misconceived because it is equated with sex, whereas, in fact, it is much more. Unlike the physiological act of sex, human sexuality connotes the totality of human being. It includes the biological, physiological, sociocultural and ethical components of sexual behaviour.

The WHO (2006) has provided a working definition of sexual rights that includes the rights

- to access to sexual and reproductive healthcare services;
- to seek, receive and impart information related to sexuality;
- to sexuality education;
- to respect for bodily integrity;
- to choose one's partners;

- to decide to be sexually active or not;
- to consensual sexual relations; and
- to pursue a satisfying, safe and pleasurable sex life.

The definition also explains that sexual rights 'embrace human rights that are already recognized in national laws, international human rights documents and other consensus statements'. It is clear from this explanation that certain human rights such as the rights to dignity, privacy, non-discrimination, information and life, are all relevant to adolescents' sexuality.

While human sexuality generally has been a subject of controversy, adolescents' sexuality has been the most contested. There is often heated disagreement on whether sexual health services or advice should be available to adolescents without the consent of their parents or guardians. This obsolete debate is usually premised on the presumption that adolescents are incapable of making competent decisions affecting their lives. However, the House of Lords (United Kingdom), in *Gillick v West Norfolk and Wisbech Area Health Authority and Another* [1985] 3 All E.R. 403, affirmed that a girl under 16 could seek contraceptive treatment and advice without the need for parental consent, provided she understood the nature of the treatment and its implications.

Protection of adolescents' sexual health in international law

Notwithstanding the negative perceptions about adolescent sexuality in many parts of Africa, there are international and regional human rights instruments that can be invoked to advance the sexual health and rights of adolescents in Africa. These include the CRC, the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW), the African Children's Charter and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 (African Women's Protocol). These instruments guarantee a number of fundamental rights which can be invoked to advance the sexual health and rights of adolescents. This paper focuses on the rights to autonomy and non-discrimination.

The right to autonomy

With regard to sexual health, the right to autonomy or self-determination implies the right of an individual to take decisions freely and independently of others, free of discrimination or coercion, on matters regarding his or her sexuality. An important element of this right is choice. Although the right to autonomy is not specifically guaranteed in any human rights instrument, it is nonetheless intrinsically linked to other rights, such as those to privacy, security, liberty and dignity. These combinations of rights form the basis of an individual's right to make choices with regard to his or her sexuality. They support the entitlement of adolescents to seek confidential information and services with regard to their sexual health without parental consent (Center for Reproductive Law and Policy and the Child and Law Foundation, 2002).

The CRC strives to balance parental responsibility with children's rights to exercise free choice in matters concerning themselves. However, article 12 of the CRC, which enjoins states to assure children of the right to form and express their views in all matters affecting them, can be invoked to support the right to autonomous decision-making for adolescents in the context of sexual health services. Furthermore, article 16 recognises adolescents' right to privacy. In some of its concluding observations to states parties to the CRC, the United Nations (UN) Committee on the Rights of the Child (CRC Committee) has affirmed the need to guarantee adolescents' right to privacy when seeking sexual health information and services (see CRC Committee Concluding Observation: Djibouti, UN doc. CRC/CI5/Add.131 para 46). In its General Comment 3 on HIV and AIDS and the rights of the child (UN doc. CRC/GC/2003/3) and General Comment 4 on adolescent health and development in the context of the CRC (UN doc. CRC/GC/2003/4), the Committee specifically urged states parties to promote adolescents' sexual health and to respect their right to privacy and confidentiality in relation to sexual health services. This interpretation would seem to require African governments to take steps to remove barriers to confidential access to sexual health services for adolescents in the region. It also implies that African governments must accord due respect to children and adolescents expressing their sexual autonomy.

The right to non-discrimination

With regard to adolescents, discrimination may arise where laws and policies debar them, solely on the basis of their age, from access to information and services in relation to their sexuality. More specifically, if access to information and services on sexual health is deliberately denied to female adolescents or adolescents in rural areas for religious or cultural reasons, that could amount to discrimination. Both the International Covenant on Civil and Political Rights (ICCPR) (article 2) and the ICESCR (article 2) provide that everyone is equal before the law and that no one should be subjected to discrimination based on sex, race, religion, political belief or other status. The UN Human Rights Committee (HRC) has noted: 'Non-discrimination, together with equality before the law and equal protection of the law without discrimination, constitutes a basic and general principle relating to the protection of human rights' (HRC General Comment 18 on non-discrimination, UN doc. A/45/40 Vol 1, para 1).

Article 2 of CEDAW urges states to take measures to eliminate all forms of discrimination against women. Article 12 specifically provides for access to health care services to women on an equal basis with men. This provision can, no doubt, be invoked to ensure access to sexual health services for female adolescents. The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has interpreted it to apply to the needs of girls, and has urged states to eliminate discrimination in health care services to women and girls in their countries (CEDAW Committee General Recommendation 24 on women and

health, UN doc. A/54/38 Rev. 1 para 12). These clarifications would seem to cover the elimination of discrimination against female adolescents seeking sexual health services.

One of the CRC's core principles is non-discrimination. It is guaranteed under article 2 of the CRC, which prohibits discrimination against children. A purposive interpretation of the CRC would suggest a proscription of practices that discriminate against adolescent girls by restricting their access to sexual health services. The CRC Committee has explained that discrimination against girl children often leads to their being denied access to sexuality information and services, and has expressed concerns about the negative implications of gender-based discrimination combined with taboos on or judgemental attitudes to sexual activity by girls (CRC Committee General Comment 3 on HIV/AIDS and the rights of the child, UN doc. CRC/GC/2003/3, paras 7 and 8). States are thus urged to take adequate measures to eliminate gender-based discrimination, which makes the girl child more vulnerable to STIs and HIV infection.

Article 3 of the African Children's Charter proscribes discrimination against every child, irrespective of the child's or his/her parents' race, religion, sex, ethnic group, language, birth and other status. Equally, article 2 of the African Women's Protocol specifically calls for states to eliminate all forms of discrimination against women in the region. Article 1 of this Protocol broadly defines discrimination against women and girls to include 'any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their mental status, of human rights and fundamental freedoms in all spheres of life'.

Furthermore, article 5 of the African Women's Protocol urges states to take adequate steps and measures to eliminate harmful traditional practices which entrench discrimination against women and girls in the region. Also, the Protocol contains broad and radical provisions relating to the sexual and reproductive health needs of women and girls in Africa. For instance, in article 14, the Protocol explicitly guarantees women's and girls' sexual and reproductive rights.

Conclusion

Despite the negative perceptions and construction of adolescent sexuality in many societies, there are provisions under international human rights law to advance the sexual health needs of adolescents. African governments cannot continue to treat adolescents' sexuality with pretence and moralisation. This will merely drive their sexual activities underground, which may, in the long run, be harmful to them. A better approach is to face the reality that more and more adolescents are engaging in sexual activity at an early stage. They need a safe and supportive environment where their rights are upheld and their sexual health needs met.

Ebenezer Durojaye is a doctoral candidate in the Department of Constitutional Law at the University of the Free State. Rebecca Amollo is a lecturer and doctoral candidate in the Faculty of Law at the University of the Western Cape.

References

Barker, G and Rich, S 1992. Influences on adolescent sexuality in Nigeria and Kenya: Findings from recent focus-group discussions. 23 *Studies in Family Planning*: 199.

Center for Reproductive Law and Policy and the Child and Law Foundation 2002. *State of denial: Adolescent reproductive rights in Zimbabwe*. Available at http://reproductiverights.org/sites/default/files/documents/zimbabwe_report.pdf [accessed: 26 July 2010].

De Bruyn, M and Parker, S 2004. *Adolescents, unwanted pregnancy and abortion: Polices, counseling and clinical care*. Ipas. Available at www.ipas.org/Publications/asset_upload_file38_2419.pdf [accessed: 26 July 2010].

Gagnon, J H and Simon, W 1973. *Sexual conduct: The social sources of human sexuality*. Aldine Publishing Company.

Jenkins, W 1999. Overcoming barriers to health services for adolescents. 19(2) *Pace Law Review*: 235.

Piper, C 2000. Historical conceptions of childhood innocence: Removing sexuality. In E Heinze (ed.) *Of innocence and autonomy: Children, sex and human rights.* Ashgate (Dartmouth) Publishing.

Renne, E 1993. Changes in adolescent sexuality and perception of virginity in a Southwestern Nigerian village. 3 *Health Transition Review*: 121.

Tolman, D and Higgins, T 1996. How being a good girl can be bad for girls. In N Maglin and D Perry (eds.) *'Bad girls/good girls': Women, sex and power in the nineties*. Rutgers University Press.

UNAIDS, 2009. *AIDS epidemic update 2009*. Geneva, United Nations Joint Programme on HIV/AIDS. Available at http://data.unaids.org/pub/Report/2009/JC1700_Epi_Update_2009_en.pdf [accessed: 29 September 2010].

UNDP, UNFPA, WHO and World Bank Special Programme of Research, Development and Research Training in Human Reproduction 2002. *Research on reproductive health at WHO: Pushing the frontiers of knowledge*. Geneva, World Health Organization. Available at http://www.bvsde.paho.org/texcom/cd045364/00706.pdf [accessed: 9 August 2010].

WHO 2004. *Contraception: Issues in adolescents' health and development*. Geneva, World Health Organization. Available at http://whqlibdoc.who.int/publications/2004/9241591447_eng.pdf [accessed: 9 August 2010].

WHO 2006. *Defining sexual health: Report of a technical consultation on sexual health, 28–31 January 2002, Geneva*. Geneva, World Health Organization. Available at http://www.who.int/reproductivehealth/topics/gender_rights/defining_sexual_health.pdf [accessed: 26 July 2010].

Regulating private power in health

Jonathan Berger and Adila Hassim

Hospital Association of South Africa v Minister of Health and Another **[2010] ZAGPPHC 69 (*HASA* case)**

On 28 July 2010, Ebersohn AJ of the North Gauteng High Court reviewed and set aside regulations purportedly made in terms of section 90(1)(u) and (v) of the National Health Act 61 of 2003 (NHA). As a result of this judgment, the Regulations Relating to the Obtainment of Information and the Process of Determination and Publication of the Reference Price List (the Regulations) and all related acts – including the determination and publication of the annual national health reference price list (NHRPL) – are now invalid.

In this case review, we consider the implications of the *HASA* judgment for the regulation of private health service pricing. This, in our view, is an integral part of the state's positive obligations that flow from the right to have access to health care services as contemplated by section 27 of the Constitution of South Africa (the Constitution). After considering a brief history of the NHRPL, we analyse the key findings of law and their implications.

We come to the conclusion that, as it stands, the *HASA* judgment makes it very difficult for the Department of Health (DoH) to persist with an NHRPL mechanism by way of amendments to the Regulations. In our view, Ebersohn AJ's interpretation of the legal framework undermines the ability of the state to comply with its positive obligations in relation to the right to have access to health care services. Mindful of the fact that none of the respondents has sought leave to appeal, and recognising that an NHRPL may indeed be an ineffective tool for ensuring reasonable pricing of private health care services, we propose an alternative process below.

The relevant provision in the NHA

Section 90(1) of the NHA empowers the Minister of Health (the Minister), 'after consultation with the National Health Council', to make regulations on a range of topics. The relevant subsections deal with the following:

> (u) the processes and procedures to be implemented by the Director-General in order to obtain prescribed information from stakeholders relating to health financing, the pricing of health services, business practices within or involving health establishments, health agencies, health workers and health care providers, and the formats and extent of publication of various types of information in the public interest and for the purpose of improving access to and the effective and efficient utilisation of health services;
>
> (v) the processes of determination and publication by the Director-General of one or more reference price lists for services rendered, procedures performed and consumable and disposable items utilised by categories of health establishments, health care providers or health workers in the private health sector which may be used—
>
> (i) by a medical scheme as a reference to determine its own benefits; and
>
> (ii) by health establishments, health care providers or health workers in the private health sector as a reference to determine their own fees,
>
> but which are not mandatory ...

History of the NHRPL

The National Health Bill [B32—2003] that was introduced in the National Assembly dealt with the Minister's powers to make regulations (clause 95). That provision did not include any powers like those eventually contained in sections 90(1)(u) and (v) of the NHA. The need for such provisions arose some time between 8 August 2002 and the adoption of the NHA on 26 November 2003 following the findings of the Competition Commission (the Commission) in complaints against the South African Medical Association (SAMA) and the Board of Healthcare Funders of Southern Africa (BHF) respectively. The NHA was only assented to on 18 July 2004 and published in *Government Gazette* No 26595 on 23 July 2004.

The first complaint considered SAMA's annual publication of 'tariffs for the pricing of the provision of medical services'. The second complaint considered the BHF's annual publication of 'benchmark tariffs for healthcare services' (see *Competition Commission v Board of Healthcare Funders of Southern Africa*, Case No 07/CR/Feb05, 3 March 2005; *Competition Commission v South African Medical Association*, Case No 23/CR/Apr04, 26 April 2004). After the conclusion of the Commission's investigation, the Competition Tribunal – by consent between the BHF and SAMA on the one hand and the Commission on the other – ordered that the collectively determined price lists of industry players violated section 4(1)(b)(i) of the Competition Act 89 of 1998 and that the BHF and SAMA would cease such conduct. This section prohibits agreements or concerted practices by firms in a horizontal relationship that result either directly or indirectly in the fixing of a purchasing or selling price.

The DoH and the Council for Medical Schemes (CMS) recognised that some sort of reference price list was necessary in order to ensure stability in the health financing infrastructure – for example, in order to have a standardised method by which providers billed and by which funders paid. It was thus to fill the void created by the consent orders that the NHRPL process was to be brought in by regulations issued in terms of section 90(1) of the NHA.

It was further agreed that the CMS, as a party acting in the public interest as opposed to commercial interest, would develop a 'reference' price list. This would be based as closely as possible on the actual cost of health services (CMS, 2005: 43). However, as the CMS itself acknowledged, establishing a methodology is extremely complex and a number of revisions to the methodology have been necessary. Indeed, as the court dispute regarding the Regulations demonstrated, even in 2009 the methodology remained a serious challenge.

The extent to which the NHRPL has been useful as anything other than a billing and coding structure is questionable. The Hospital Association of South Africa (HASA) and concentrated parts of the market have not relied on the NHRPL and instead determine their own fee levels. Also, many providers have instituted a system of balance billing so that it is the patients who pay out of their own pockets for a part of the fee. Medical schemes may use the NHRPL as a benchmark, but it is used in different benefit options merely to describe the level of reimbursement.

Finally, the NHRPL has not been successful at ensuring transparency in the manner in which private health services and goods are priced. Indeed, an unintended consequence of the NHRPL is that it can cause inflation in prices where some providers use it as a justification for increasing the price of a service even when there has not been an increase in the cost of that particular service. As a result, the NHRPL has been unable to contain cost escalation in the private sector – especially in the hospital and specialist markets.

In any event, the NHRPL was meant to be an interim measure until a more appropriate mechanism for price determination could be established. In our understanding, this was the rationale behind the National Health Amendment Bill [B65—2008] that was published in the *Government Gazette* on 2 June 2008. Despite the flaws in that Bill, which has since lapsed, it was the first step towards a system of levelling the playing field among funders and providers in the private health sector and ensuring transparency in the pricing of health services (ALP and TAC, 2008).

Analysis of the *HASA* judgment

In our view, the *HASA* judgment provides a mixed bag of findings of law: some sound and others with a weak legal basis or none whatsoever. In terms of his two key sound findings, each of which would have been sufficient to strike the regulations down, Ebersohn AJ held as follows:

- There was no evidence in the record to show that the requirement of consultation – as set out in section 90(1) of the NHA – had been met. Not only had the National Health Council (NHC) not been consulted, but there was no evidence to show that the Regulations had ever been discussed at any meeting of the NHC (paras 21–28).
- Section 90(1)(v) of the NHA did not permit the Minister to make regulations that delegated to the Director-General (DG) the power to develop a methodology for determining an NHRPL. Instead, the section empowered the Minister to prescribe the processes and procedures in terms of which the DG might thereafter determine an NHRPL (para 66).

Ebersohn AJ also held that an NHRPL had to be an effective guideline with reasonable rates that were grounded in the reality of operating costs. We agree. But that is where our agreement ends. In our view, the following key findings of law – were they to be part of any appeal – would be vulnerable to attack:

The regulations impermissibly conflated subsections (1)(u) and (1)(v), the first of which related to calls for information from stakeholders and the second to the determination of an NHRPL (para 42).

Any NHRPL issued in terms of subsection (1)(v) should reflect the actual prices charged for services rendered, procedures performed and items utilised, with it therefore being impermissible to take into account considerations other than these prices (paras 42 and 48).

The purpose of section 90(1)(v) was not to regulate the private health care industry (as stated by the DoH); hence the Regulations constituted administrative action taken for an ulterior purpose and were therefore invalid (paras 54 and 164).

Whether these findings are sound or not, in the absence of an appeal they stand and are binding on the DoH. They will therefore have an impact on the way forward for the DoH. These findings of law are now discussed in more detail.

It should be noted that there were other findings of law in the *HASA* case that, in our view, would also be vulnerable to attack. For example, Ebersohn AJ was incorrect in stating that the Constitutional Court, in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* 2006 (8) BCLR 872 (CC) (*New Clicks*), had held that the making of regulations constituted administrative action. There were different views on this issue among the judges and no majority prevailed.

Conflation of subsections (1)(u) and (1)(v)

At the heart of Ebersohn AJ's judgment is a finding that it was impermissible to compile an NHRPL under subsection (1)(v) on the basis of the information contemplated in subsection (1)(u) – that in doing so, the regulations impermissibly conflated the two subsections. While subsection (1)(v) is indeed the only provision of the NHA that deals expressly with NHRPLs, there is nothing in the legislation that prohibits the making of regulations that rely on more than one of the empowering provisions in section 90(1). There is simply no statutory basis to conclude, as Ebersohn AJ does, that '[t]he only provisions in the NHA that are concerned with a reference price list are to be found in sub-section 90(1)(v) of the NHA' (para 44).

In support of his position, Ebersohn AJ refers to sections 12, 13, 14, 74, 75 and 76 of the NHA, all of which deal with 'the provision of and access to information' in respect of health care services, patient health records and health systems. He then correctly argues that sections 90(1)(u) and (v) 'are designed and are intended to achieve different and discrete purposes under the NHA' (para 47). After doing so,

> Neither the SAMA nor the BHF tariffs were designed or published to be a reflection of actual prices charged

however, he suddenly jumps to a conclusion without making any cogent argument as to why subsections (1)(u) and (v) must be read as being independent of each other. He makes no argument as to why the two subsections cannot be read as supportive of each other.

By Ebersohn AJ's logic, it would also be impermissible, for example, to make regulations that deal generally with communicable diseases (subsection (1)(j)) and particularly with notifiable medical conditions (subsection (1)(k)), with the latter being a subset of the former. Similarly, subsection (1)(e) deals with human resource development and subsection (1)(f) focuses on 'co-operation and interaction between private health care providers and private health establishments on the one hand and public health care providers and public health establishments on the other'. Again, the latter includes a key aspect of the former.

It is indeed possible – and indeed appropriate, as the legislative history of section 90(1) of the NHA shows – for subsection (1)(v) to be read as working in tandem with that part of subsection (1)(u) concerned with 'improving access to … health services'. The fact that subsection (1)(u) is also aimed at 'improving … the effective and efficient utilisation of health services' simply makes it plain that the information to which the subsection refers may be read to include – but not be limited to – the NHRPL processes contemplated by subsection (1)(v).

Reflecting actual prices charged

The finding that subsection (1)(v) of the NHA speaks to NHRPLs that reflect 'actual prices for services rendered, procedures performed and items utilised' (para 47) appears to result directly from Ebersohn AJ's finding that the regulations impermissibly conflated subsections (1)(u) and (1)(v). It also results from an apparent failure to consider the reason why the relevant subsections were included in the NHA. But when considered in their historical context, the NHRPLs contemplated by the NHA cannot be seen as lists that reflect 'actual prices for services rendered, procedures performed and items utilised'.

Neither the SAMA nor the BHF tariffs were designed or published to be a reflection of actual prices charged; they were intended rather as tariffs that, in the case of SAMA, its members were recommended to charge, and, in the case of the BHF, its members were recommended to reimburse. In respect of both sets of tariffs, the type of information identified in section 90(1)(u) of the NHA would have been necessary for their development and publication.

Ebersohn AJ's finding that it was impermissible for the NHRPLs to take into account considerations other than the actual prices charged for services rendered, procedures performed and items utilised appears to be based on

- a decontextualised and ahistorical understanding of the text of section 90(1)(u) and (v) of the NHA;
- his flawed argument that it was impermissible to 'conflate' the sections; and
- an impoverished understanding of the meaning of access to health care services, which, as *New Clicks* makes plain, includes both availability and affordability.

Further, nowhere in his judgment is there any acknowledgement of the state's need and constitutional duty to take steps to reduce health service costs, as expressly recognised in *New Clicks*. Nor is there an interpretation of the subsections in terms of the stated objects of the NHA. Section 2 of the NHA makes it clear that important objects of the NHA include: to regulate national health, to provide uniformity in respect of health services and to establish a national health system that encompasses public and private providers and that sets out the rights and responsibilities of various role-players, including private health providers and establishments. It is therefore unsurprising that he comes to his problematic and flawed conclusion in respect of relevant considerations. What the purpose would be of publishing a list of actual charges for goods and services is also not explained in the judgment.

Purpose of the NHRPL

What is clear from the *HASA* judgment is that the purpose of the NHRPL cannot be to regulate the health care industry. According to Ebersohn AJ's interpretation of the NHA, such a purpose 'for the promulgations [sic] of the regulations [was] contrary to the provisions of section 90(1)(v) of the NHA' (para 53). The Regulations were therefore promulgated 'substantially for an ulterior purpose' and are accordingly invalid.

But the NHRPL was designed to provide legislative guidance in determining private health service prices. As the CMS put it in 2005, 'the challenge in the NHRPL will be to publish a set of reference prices which reflect fair reimbursement for health services rendered, based upon sound and defensible research on actual costs of services rendered and reasonable income expectations of health service providers' (CMS, 2005: 46). Further, the scheme of the Act clearly contemplates a degree of regulation of the private sector in the public interest. This is evident from the definition of a 'health establishment', which includes the private sector, the objects of the Act in section 2 and various provisions that govern the private health sector and the public.

An alternative process

While many of Ebersohn AJ's findings may indeed be vulnerable to challenge on appeal, the state's decision not to seek leave to appeal means that there is very little room to develop, publish and promulgate NHRPLs capable of having any impact on cost containment in the private health

industry. The only option now available to the state to address the issue is legislative – by the enactment of a new statutory health pricing framework. The relevant legislation would make it clear that a transparent health pricing mechanism is not anti-competitive in the way that the conduct of the BHF and SAMA was deemed to be.

The competition law framework is not antagonistic to the reasonable regulation of any sector. Indeed, competition regulation is aimed at ensuring a fair balance in the marketplace and is premised on a recognition that a completely free market will not function in a manner that is completely fair to consumers of goods and services. The preamble to the Competition Act proclaims that South Africans will benefit from 'an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development'. Further, section 2 provides that one of the Act's purposes is to 'advance ... social and economic welfare'.

The objectionable conduct in the BHF and SAMA cases was that parties that were meant to be in competition with one another were agreeing on prices for the health services that they provided or funded. It would therefore be inappropriate to consider amending the Act in a manner that exempted such objectionable conduct. Were there to be a form of regulation that included representatives of the public interest and operated within the confines of a narrowly defined statutory framework, this would most likely not fall foul of the Competition Act.

Given our concerns relating to the value of an NHRPL, we are of the view that time and effort may be better spent in developing, with expert advice and consultation, a statutory pricing mechanism that is more likely to apply downward pressure on price escalation in the private health sector. Developed in or after consultation with the Minister of Trade and Industry, such a mechanism – which in effect would constitute an exemption to the Competition Act for the purposes of regulating private health service prices in the public interest – would be given legal force either in the form of an amendment to the NHA or, perhaps preferably, within a separate statute dealing with health pricing alone.

"The only option now available to the state to address the issue is legislative – by the enactment of a new statutory health pricing framework."

Jonathan Berger is a senior researcher and head of policy and research, and Adila Hassim is an advocate and head of litigation and legal services, both at SECTION27, incorporating the AIDS Law Project.

The *HASA* judgment is available at www.saflii.org/za/cases/ZAGPPHC/2010/69.pdf.
The National Health Act is available at www.info.gov.za/view/DownloadFileAction?id=68039.
The National Health Amendment Bill [B65 – 2008] is available at www.pub.ac.za/resources/docs/national_health_bill.pdf.

References

ALP and TAC 2008. *Joint submission on the draft National Health Amendment Bill, 2008*. 16 May. AIDS Law Project and Treatment Action Campaign. Available at www.section27.org /wp-content/uploads/2010/04/Draft-NHA-AB-Submission.pdf [accessed: 30 September 2010).

CMS 2005. *Regulating in the public interest: Taking stock and looking to the future*. A five-year review of the Council for Medical Schemes. Available at www.medicalschemes.com/publications/ZipPublications/Presentations%20And%20Reports/CMS_Five_Year_Review_Document.pdf [accessed: 18 September 2010].

African Commission reaffirms protection of socio-economic rights in the African Charter

Lilian Chenwi

Communication 279/03, *Sudan Human Rights Organisation v The Sudan*, and Communication 296/05, *Centre on Housing Rights and Evictions v The Sudan*

In July 2010, the ruling of the African Commission on Human and Peoples' Rights (African Commission) in relation to communications 279/03 and 296/05 was made public, the decision having been adopted in May 2009. The communications were submitted by the Sudan Human Rights Organisation (SHRO) and the Centre on Housing Rights and Evictions (COHRE), respectively, against the Sudan government. However, because the applicants in the SHRO case did not appear before the African Commission on the merits, the Commission considered and decided only the COHRE case on the merits.

The decision is viewed as another landmark decision, as it speaks to the indivisibility of human rights and advances socio-economic rights, such as the rights to housing, food, water and health, as well as the need for effective domestic remedies.

The facts and admissibility

The complaints concerned allegations of 'gross, massive and systematic' violations of human rights in the Darfur region of Sudan, including forced evictions, the destruction of public facilities and properties, the looting and destruction of foodstuffs, crops and livestock, the poisoning of wells and the denial of access to water (paras 1–14 and 207). It was alleged that these acts had been committed in a discriminatory manner against people of black African origin in the Darfur region (para 63). The civil and political and socio-economic rights at stake included the rights to life and dignity, the right to be heard, the right to property, the right to health, the right to protection of the family and the rights to food and water.

The situation was compounded by the unavailability of local remedies. It was impossible to bring issues of human rights violations before independent and impartial courts since the state was under a military regime, resulting in intimidation, threats and harassment where a case was brought (para 64). Moreover, it was argued that the Sudan government had taken few or no steps to remedy the violations. Displacements into remote regions also made it impossible for people to avail themselves of any remedies (para 67).

The Sudan government disputed the allegations. It also challenged the complaints on admissibility grounds under article 56(5) of the African Charter on Human and Peoples' Rights of 1981 (African Charter) (paras 69–80). One of such grounds referred to by the government was the non-exhaustion of local remedies. Article 56(5) of the Charter requires, among other grounds, that local remedies be exhausted before a complaint is brought to the African Commission, except if such remedies are unduly prolonged.

The African Commission, while finding the case to be admissible, stated in relation to local remedies that 'the scale and nature of the alleged abuses, [and] the number of persons involved *ipso facto* make local remedies unavailable, ineffective and insufficient' (para 100). Local remedies are 'available' if they can be utilised without impediment, 'effective' if they offer a prospect of success, and 'adequate' or 'sufficient' if they are capable of redressing the wrong complained against (Viljoen, 2007: 336).

Decision of the Commission

Forced evictions, the rights to life and dignity, and the right to be heard

With regard to the rights to life and dignity, the African Commission pointed out that international courts have interpreted the right to life broadly to include the right to dignity and the right to a livelihood (para 146). It found a violation of the right to life provided under article 4 of the African Charter based on the lack of effective investigations into cases of arbitrary killings and extra-judicial executions (para 153).

The Commission also found a violation of the right to dignity in the fact that the government of Sudan and its agents had actively participated in the forced eviction of the civilian population and failed to protect the victims against this violation, and that the state had targeted the civilian population when fighting the armed groups. The Commission found this to be cruel and inhuman, and thus to have 'threatened the very essence of human dignity' (para 164).

A violation of the rights to life and dignity was also found in the fact that the forced eviction of the Darfur civilian population could not be justified under article 27(2) of the African Charter (para 166). This article provides that '[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'. The reasons for the finding were that the government of Darfur had not acted

diligently to protect the civilian population against violations by its forces or third parties and had failed to provide immediate remedies to victims (para 168).

The failure of the state to investigate and prosecute its agents and third parties also resulted in the Commission finding a violation of the right to be heard under article 7 of the African Charter. The Commission considered it an affront to common sense and justice to expect victims who suffered fear due to constant bombing, violence, burning of their houses and evictions to bring their plights to the courts in Sudan (para 182). Access to competent national organs to have their case heard was thus seen to be impractical and illusory (para 185).

Forced evictions, liberty and security, freedom of movement and protection of the family

The African Commission further derived the right not to be forcibly evicted or displaced from the right to freedom of movement and residence provided for in article 12(1) of the African Charter (paras 186 and 189). States have a duty to ensure that the right to freedom of movement and residence is not restricted. Any restrictions 'should be proportionate and necessary to respond to a specific public need or pursue a legitimate aim' (para 188).

The Commission did not find the restrictions set out in these communications to be justifiable (para 189). It thus found a violation of article 12(1) of the African Charter, because the government of Sudan had failed to prevent forced evictions or to take urgent steps to ensure that displaced persons returned to their homes (para 190). In arriving at this conclusion, the Commission considered the UN Guiding Principles on Internal Displacement, adopted by the UN General Assembly in 1998, requiring states and international actors 'to prevent and avoid conditions that might lead to displacement of persons' (principle 5).

The African Commission also observed that the right to liberty and security protected in article 6 of the African Charter complemented the right to freedom of movement. It held that if internally displaced persons were not able to move freely to their homes because of insecurity or because their homes had been destroyed, then their liberty and freedom were proscribed (para 177). The failure of the government of Sudan to take steps to protect the victims thus amounted to a violation of article 6 of the African Charter. The Commission drew attention to women and girls, whose rights to liberty and security had remained an illusion as a result of several factors including sexual and gender-based violence against them (para 178).

The African Commission also found a violation of article 18(1) of the African Charter, which states: 'The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.' The Commission held that the forced eviction of people from their homes and the killing of family members threatened the very foundation of the family and rendered the enjoyment of the right to family life difficult. This was compounded by the fact that the government had done nothing to prevent the violations of this right (para 216).

> The Commission considered it an affront to common sense and justice to expect victims to bring their plights to the courts in Sudan.

Right to property

Article 14 of the African Charter guarantees the right to property. The right 'may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'. The Commission observed that there were two principles in respect of the right to property: the first related to its general nature, providing for the principle of ownership and peaceful enjoyment of property, and the second provided for the possibility and conditions of limitation of the right (para 193). The state had a duty to 'respect' and 'protect' this right. It was required to establish conditions and provide means to ensure the protection of life and property in times of both peace and war. The state was also required to ensure that displaced persons were resettled in safety and with dignity (para 201).

Drawing from international jurisprudence (such as the European Court of Human Rights decisions in *Dogan and Others v Turkey* of 19 June 2004 and in *Akdivar and Others v Turkey* of 30 August 1996, both concerning the destruction of homes and property), the Commission held that the victims had been deprived of their property, even though the state had not taken possession of the victims' property and the property was destroyed by military and armed forces acting on their own or alleged to be supported by the state (para 194).

The African Commission also considered the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (the Pinheiro Principles), which were endorsed by the UN Sub-Commission on the Promotion and Protection of Human Rights on 11 August 2005. The African Commission stated that, though these principles were not binding, they reflected emerging principles in international human rights law jurisprudence and, when read together with other decisions, had persuasive value as a guide to the interpretation of the right to property in the African Charter (para 204). Principle 5 deals with the right to be protected from displacement and sets out the following obligations of states:

> 5.2 States should incorporate protections against displacement into domestic legislation, consistent with international human rights and humanitarian law and related standards, and should extend these protections to everyone within their legal jurisdiction or effective control.
>
> 5.3 States shall prohibit forced eviction, demolition of houses and destruction of agricultural areas and the arbitrary confiscation or expropriation of land as a punitive measure or as a means or method of war.

> 5.4 States shall take steps to ensure that no one is subjected to displacement by either State or non-State actors. States shall also ensure that individuals, corporations, and other entities within their legal jurisdiction or effective control refrain from carrying out or otherwise participating in displacement.

Following its consideration of the relevant jurisprudence and principles 5.3 and 5.4, the African Commission found a violation of article 14, on the basis that the government of Sudan had failed to refrain from evicting the victims or demolishing their houses and property, and had not taken steps to protect the victims from constant attacks and bombings. Whether or not the victims had title to the land was immaterial. The Commission held that

> the fact that the victims cannot derive their livelihood from what they possessed for generations means they have been deprived of the use of their property under conditions which are not permitted by Article 14 (para 205).

Right to health

The African Commission also found a violation of article 16 of the African Charter, which guarantees the right to the best attainable state of physical and mental health. The provision also requires states to take necessary measures to protect the health of their people and ensure that they receive medical attention when sick.

The Commission noted the developments in international law relating to the normative content of the right to health, which includes health care and health conditions (para 208). Specifically, the Commission considered General Comment 14 of the UN Committee on Economic, Social and Cultural Rights, on the right to the highest attainable standard of health (UN doc. E/C.12/2000/4) and the duties on states contained in it. These include the obligations to ensure that third parties do not encroach on the enjoyment of the right, to refrain from unlawfully polluting water and soil during armed conflicts, to ensure that third parties do not limit people's access to health-related information and services, and to enact or enforce laws to prevent the pollution of water (paras 209 and 210).

The Commission also recalled its decision in *Free Legal Assistance Group and Others v Zaire* (Communications 25/89, 47/90, 56/91 and 100/93 (2000) *AHRLR* 74). In that case, the Commission had found the failure of a state to provide basic services such as safe drinking water and electricity and the shortage of medicine to constitute a violation of the right to health (para 211).

The Commission thus found that the destruction of homes, livestock and farms, and the poisoning of water sources, exposed the victims to serious health risks and therefore constitute a violation by the government of Sudan.

Right to economic, social and cultural development

The Commission also considered whether the government of Sudan had violated article 22 of the African Charter, which guarantees the right to economic, social and cultural development. Because this right is a collective right, the Commission first had to determine whether the victims constituted a 'people' within the context of the African Charter (para 218). Considering the characteristics used to define people – such as language, religion, culture, territory, history and ethno-anthropological factors – the Commission found the population of the Darfur region to constitute 'people' (paras 220–223). It then held that '[t]he attacks and forced displacement of Darfurian people denied them the opportunity to engage in economic, social and cultural activities' and also impeded the right to education for their children as well as other individual rights. The Commission thus found a violation of article 22 of the African Charter (para 224). The Commission also considered the right to equality in arriving at its decision, specifically section 19 of the African Charter, which recognises the right of all people to enjoy the same respect and rights and prohibits the domination of one people by another (para 221).

The remedy

In addition to the violations above, the Commission also, based on the fact that article 1 of the African Charter places a general obligation on states to recognise the rights contained in it and adopt measures to give effect to the rights, found a violation of that provision (paras 227 and 228).

Following the finding of violations, the African Commission recommended that the government of Sudan should, among other things,

- investigate the abuses and reform its legislative and judicial framework in order to handle cases of serious and massive human rights violations;
- take measures to ensure that there were effective domestic remedies, including restitution and compensation;
- rehabilitate economic and social infrastructure, such as education, health, water, and agricultural services, in the Darfur provinces in order to facilitate the return of those that had been displaced; and
- establish a national reconciliation forum to resolve, *inter alia*, issues of land, grazing and water rights, including the destocking of livestock.

Conclusion

The decision of the African Commission reinforces the protection of socio-economic rights in the African Charter and the need for effective domestic remedies. It reaffirms that where there are serious and widespread violations that make it impossible to access remedies, domestic remedies can be considered to have been exhausted. It elaborates on the right to property, the prohibition on forced eviction and the right of peoples to their economic, social and cultural development. It speaks to the right to water, which is not explicitly provided for in the African Charter. It accentuates the fact that forced evictions and displacements impact on a range of rights: civil, political, economic, social and cultural. This decision is therefore relevant to many countries, including states parties to the African Charter such as South Africa, where evictions are a regular occurrence.

Lilian Chenwi is the coordinator of, and senior researcher in, the Socio-Economic Rights Project.

References

COHRE 2010. *Sudan: African Commission issues scathing decision against the government for Darfur atrocities*. 29 July. Centre on Housing Rights and Evictions. Available at http://www.cohre.org/view_page.php?page_id=437 [accessed: 1 October 2010].

Viljoen, F 2007. *International human rights law in Africa*. Oxford University Press.

The decision of the African Commission and other relevant documents are available at http://www.cohre.org/Sudan. The UN Guiding Principles on Internal Displacement can be accessed at http://www.internal-displacement.org/guidingprinciples and the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles) at http://www.cohre.org/store/attachments/Pinheiro%20Principles.pdf.

Parliaments and the MDGs

During the Millennium Development Goals (MDGs) summit that took place in New York from 20 to 22 September 2010, the Inter-Parliamentary Union (IPU) and the United Nations (UN) Millennium Campaign organised a meeting aimed at mobilising parliamentary support for MDG policies and plans. The meeting, held on 21 September, served to highlight in very concrete terms what parliaments and parliamentarians can do to help advance the MDGs.

The IPU has frequently emphasised the role of parliaments in meeting the MDGs. For instance, it has stated the following:

> Parliaments have a role to play in fostering awareness and guaranteeing efficient oversight of government programmes, furthering the adoption of the right policies and budgets and promoting legislative reform for the implementation of the MDGs. Ensuring public participation and exercising and displaying political will are key to achieving the MDGs (IPU Progress Report 2000–2010).

The MDG Summit Outcome Document that was adopted on 22 September acknowledges the particular role of parliaments in meeting the MDGs by 2015.

For further information, visit the IPU website at http://www.ipu.org/news-e/latest.htm or http://www.ipu.org/splz-e/mdg10.htm. The IPU Progress Report 2000–2010 is available at http://www.ipu.org/splz-e/speakers10/3a.pdf. South Africa's MDG country report 2010 can be accessed at http://www.pmg.org.za/files/docs/100921mdg.pdf.

Parliamentarians discuss issues around HIV and AIDS

During the XVIII International AIDS Conference held in Vienna, Austria, from 18–23 July 2010, members and staff of parliament from 47 countries met on 20 July to discuss legislative aspects of HIV relating to key affected populations. The meeting was organised by the Inter-Parliamentary Union (IPU) and the Parliament of Austria. The discussion focused on how to strike a balance between criminal law and public health in the field of HIV and AIDS so that both could function as effectively as possible. Specific emphasis was on testing and HIV virus transmission modes (sexual, intravenous and vertical, ie from parent to child). The meeting further discussed human rights concerns associated with interventions to prevent mother-to-child transmission of HIV. The following agreements were reached:

> Members of parliament agreed that laws exclusively criminalizing the transmission of HIV constitute a violation of the right not to be discriminated against, further stigmatize persons living with HIV and create a false sense of security. Instead of criminalizing HIV transmission, parliaments should examine and audit the laws that already exist and that are or can be applied in the context of HIV. Members of parliament agreed that interventions to prevent transmission from mother to child are the most cost-effective way to remove one mode of HIV transmission. They endorsed the international community call to eliminate vertical transmission of the HIV virus by 2015 and pledged to support this as a goal in their countries (IPU website).

For further information, visit the IPU website at http://www.ipu.org/news-e/latest.htm or http://www.ipu.org/splz-e/aids10.htm.

Sandra Liebenberg, 2010. *Socio-economic rights: Adjudication under a transformative constitution*. Juta

Geoff Budlender *spoke at the launch in July.*

It is a great privilege to be invited to participate in launching Sandra Liebenberg's book. This book is a monumental piece of work. It combines an account of the struggle for the constitutional recognition of social and economic rights in South Africa, a jurisprudential analysis of the basis for this recognition, a comprehensive and detailed account of the way in which our courts have dealt with social and economic rights in this phase of the development of this area of our law, and a scholarly critique of the judgments and the literature which have now emerged.

We have now more or less completed the first phase of the development of this area of our law. I say this because it is only now that one can begin to say that our practitioners and our courts have fully accepted that these are rights, they are legal rights, and they have to be given effect. We are, however, only at the early stages of the second phase, which is establishing clearly the content of the rights, and we are on the threshold – perhaps just past the threshold – of the third phase, which is developing appropriate remedies for breaches.

Sandy titles the 'remedies' chapter of her book 'Responsive remedies'. It seems to me that this is a very apt way of describing what is needed. I will say something more about that a bit later.

The significance of this work has been described by Karl Klare, of Northeastern University School of Law in Boston, Massachusetts, as follows: 'This book establishes South African socio-economic rights jurisprudence as an academic discipline.'

In my opinion, that judgement is right. The publication of this book marks the emergence of a systematic jurisprudence of social and economic rights in South Africa. This book will, I think, become the primary text on which we rely, and the primary text to which we will refer, for some years to come. It will also be the primary text to which foreign courts and scholars will refer when they want to understand social and economic rights in South African law.

The book bears Sandy's fingerprints. It is meticulous, comprehensive and thoughtful. It does not, unfortunately, reflect the extent to which she is herself responsible for the jurisprudence which has developed – through her writing, through her work as an expert adviser in the constitutional negotiations, and through her participation and advice in some of the most important cases she discusses. I can confirm, for example, that in the Grootboom case, she played a critical role in formulating the general approach which ultimately found favour in the Constitutional Court. And that was not a lone example.

Sandy has been a scholar-activist. This book is the product not of just a few years of study and writing, but of a substantial career thinking about and working on these issues.

In the few minutes which are left to me, I want to refer to the part of this book which I hope will become the most influential. It is pages 434 to 438, which deal with 'The transformative potential of structural remedies'.

We are all too painfully aware of the problem. On the one hand, we have, for example, a constitutional right to education. On the other hand, we have a school system, large parts of which are broken and non-functional. For the children in these schools, their situation mocks the Constitution. Those children are almost all doomed, from the first day when they enter school, to a schooling which will fail them, and which will prevent them achieving their potential as human beings.

It is a desperate situation, and one which the courts seem powerless to address in any meaningful way. The courts cannot simply order the schools to do better.

This book brings to our attention the pioneering writing which has been done in these areas by Charles Sabel and William Simon. Sandy describes it as follows:

> This type of structural interdict is capable of facilitating the 'experimentalist' remedial approach described by Charles Sabel and William Simon in their classic study on new directions in public interest litigation in the United States. These innovative structural remedies represent a departure from the normal finality, and 'command-and-control' features of judicial remedies. Initially a court gives an order which defines the broad goals to be achieved to cure the constitutional violation. The order further requires the respondents, through a process of deliberative engagement and negotiation with the applicants, to devise a plan detailing the concrete measures and steps to be taken in order to meet those goals. The approval of the plan and its implementation are subject to ongoing judicial supervision. However, the court leaves as much latitude as possible for the formulation, implementation and monitoring of the plan to be resolved through deliberative negotiation between the claimants, relevant organs of State and, possibly, other stakeholders (Liebenberg, 2010: 435).
>
> These orders also reinforce the foundational constitutional values of accountability, responsiveness and openness. Executive officials 'must make explicit policies and subject themselves to mechanisms of measurement and monitoring that make their performance more readily accessible …' (Liebenberg, 2010: 436).

Sandy shows that the Constitutional Court has taken initial steps in this direction through its orders for 'meaningful engagement' in cases such as *Port Elizabeth Municipality* and *Olivia Road*. Those cases show how the courts can address the fundamental inequality between the parties, and create a mechanism through which those who hold formal power (often the local municipality) and those without formal power (the people threatened with eviction) can be brought to the table in a position of relative equality. If the parties are ordered to engage with each other to attempt to resolve the problem, and to report to the court on what has been done, the power relations shift quite dramatically.

This is most clearly illustrated by *Olivia Road*. There, the City of Johannesburg had taken the view that there

was no alternative to the immediate eviction of the occupiers of several unsafe and unhealthy buildings, and that it (the City) could provide no effective relief for the people who would be rendered homeless. In short, the City took the view that this was not its problem. Conversely, the occupiers took the view that they would not move at all unless they were to remain in the inner city. They said that they would rather remain in the unsafe buildings than be removed to the periphery of the city. A stalemate had been reached.

When the 'engagement' order was made, each party was uncertain whether it would achieve its goal. Each was therefore required to engage with the other seriously, and not in a purely formal manner – because it knew that the proposals it put forward in the engagement, and the results of the engagement, would be reported to the Court, which would then decide what remedy (if any) to order. The outcome was, at least for me, quite unexpected. Remarkably, a solution was arrived at which was not only satisfactory to all, but consistent with the Constitution: arrangements were made for urgent steps to be taken to minimise the health risk caused by the buildings, alternative accommodation was made available within the City on terms which were agreed, and the occupiers agreed to move.

If one tries to understand why this happened – and the parties had, after all, been litigating against each other for some time, without finding this solution – it seems that it happened because the order made by the Constitutional Court had destabilised the existing inequality: the powerful were obliged to take the powerless seriously, and the powerless were no longer simply the passive beneficiaries of government largesse: they were the holders of rights. That is, of course, in the very nature and purpose of rights: they affect power relations. It is precisely why social and economic rights are so important.

This literature and learning is still largely unknown to South African lawyers and courts. We are still locked into the paradigm of treating structural remedies as punitive, rather than as a practical method for addressing a constitutional breach. The justification for these orders does not have to rest on a finding that the government is untrustworthy, which is the premise from which many of the previous arguments and judgments have proceeded. The orders can open up democratic space, enabling people to participate in the formulation of policies and programmes that affect their lives. And this can be done by carving out an area where the court has a legitimate role which is consistent with the separation of powers.

> The publication of this book marks the emergence of a systematic jurisprudence of social and economic rights in South Africa.

I am hopeful that Sandy's work in opening this up will lead us to innovative approaches which will enable us to ensure (for example) that our children are not mocked by the Constitution. In many areas of our national life, we need to adopt this approach to enable the courts to play their proper role: to declare when conduct is inconsistent with the Constitution, to enable the parties to take the necessary steps to bring about compliance with the Constitution, and to ensure that this is done.

All that remains for me is to congratulate Sandy on this book, and to thank her on behalf of all of us for the foundation she has laid for the next phase of this work, which lies ahead.

Sandy, we are all in your debt, and we join you in celebration.

Geoff Budlender is a senior counsel at the Cape Bar.

To order copies of the publication, contact Juta Law Customer Services on 021 763 3500 or cserv@juta.co.za. Or get in touch with Hanlie Wroth, International Sales Manager, Juta & Company, on 021 659 2584 (tel), 021 659 2662 (fax), 083 450 2789 (cell) or hwroth@juta.co.za.

To order online, visit www.jutalaw.co.za/catalogue/item-display.jsp?item_id=11894.

Lilian Chenwi, 2010. *South Africa: State of state reporting under international human rights law*

This research paper was presented at the seminar on 'Promoting constitutional rights through international human rights law: The state of South Africa's state reporting' held in Cape Town on 22 September 2010. It outlines South Africa's reporting obligations and provides an update of its reporting status under core international human rights treaties at the UN and African regional levels. The paper examines South Africa's obligations, emphasising those that it has ratified as well as relevant optional protocols. It also considers South Africa's reporting obligations and status under other mechanisms, such as the Universal Periodic Review (UPR) and African Peer Review Mechanism (APRM).

The paper also sets out the objectives of state reporting in relation to treaties, and the general guidelines on reporting. Treaty-specific guidelines are further considered for each treaty. The objectives of the UPR and APRM are also stated. The paper further considers the role of other actors in the reporting process, such as National Human Rights Institutions (NHRI), Civil Society Organisations (CSOs) and Parliament.

It shows the gloomy picture of the status of South Africa's reporting under core UN and African human rights treaties. Reporting under other mechanisms, such as the UPR and APRM, is also a matter of concern. It seems that reporting is approached not as a self-critical assessment of South Africa's efforts to realise the rights in the treaties it has ratified, but rather as a mere formality. The government's general non-compliance with its reporting obligation in terms of the UN and the AU is glaring. Further, a number of reports fail to meet the reporting guidelines and do not include information on the implementation of recommendations made on previous reports.

Accordingly, the paper makes recommendations for improving compliance with South Africa's reporting obligations, including the following:

- The effective participation of other stakeholders in the reporting process is important to ensuring compliance with the reporting obligation, as the preparation of the State report requires input from a variety of sources.
- Civil society involvement in the reporting process is weak. Although the government has commissioned specific CSOs or consultants to prepare reports, this does not qualify as CSO engagement in the reporting process.
- There is also need to improve institutional capacity and coordination between government departments in the preparation of reports.
- The limited role that Parliament has played in the reporting process is also of concern. While Parliament has been more visible in relation to the APRM, the same cannot be said for reporting under the UPR or human rights treaties.
- Parliament must be more involved in the State reporting process. Its oversight function provides it with an opportunity to interrogate government on complying with its reporting obligation and to question the veracity of the information in State reports. Further, Parliament is free to provide inputs on draft reports.
- South Africa does not also seem to take its reporting obligation in relation to the UPR and APRM as seriously as it should. It failed to submit its report under the UPR in advance and the APRM process was rushed, which impacted negatively on the consultation process with other stakeholders.
- State report-writing has placed a burden on the South African government. Though the reporting process requires resources, data and technical expertise and can be time consuming, investment in resources to produce a quality report that is part of a continuing process of realising rights can assist in governments' accountability to its citizens and its international accountability on human rights issues. It should be noted that States can seek technical assistance from a range of UN agencies.
- Preparing concrete and comprehensive reports requires political will and positive action.
- Government must prepare a methodology to deal with the reporting backlog.
- Findings and recommendations arising from concluding observations or UPR and APRM reports must be mainstreamed into policy discussions and documents, to ensure their effective implementation.
- CSOs and NHRIs need to be proactive in participating in the reporting process and the submission of shadow reports on South Africa's compliance with its human rights obligations.

The full paper is available at www.communitylawcentre.org.za/news/south-africa-state-of-state-reporting-research-paper/. See also www.peopletoparliament.org.za