ESR REVIEW
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Editorial

by Sandra Liebenberg

We are pleased to present another edition of ESR Review featuring a number of key developments relating to socio-economic rights. Our guest contributor from Canada, Bruce Porter, describes how Canadian NGO's utilised international human rights mechanisms to challenge welfare cuts in Canada. The strategies used and lessons learnt in the process can benefit South African NGO's as they begin to engage with international human rights bodies following South Africa's ratification of a number of important human rights treaties. Gina Bekker reviews the initial reports submitted in terms of two of these treaties, both of which contain a number of provisions protecting socio-economic rights - the African Charter on Human and Peoples' Rights and the Convention on the Rights of the Child.

Three important pieces of legislation mandated by the Constitution are due to be tabled in Parliament during the latter half of this year. They are the Open Democracy Bill, the Administrative Justice Bill and the Equality Bill. These Bills seek to provide a legislative framework for access to information, reasonable and fair administrative action, and effective protection against unfair discrimination. All three are vital to the effective implementation of socio-economic rights in South Africa. The realisation of socio-economic rights depends on open, accountable and participatory institutions for delivering these rights as well as equal access to the rights for vulnerable and disadvantaged groups. It is also vital that this trilogy of legislation provides accessible, speedy and effective remedies for redressing violations of the rights they protect. In this way broadly framed constitutional promises can be claimed and defended by those they are intended to benefit. This edition examines the implications of two of these Bills - the Administrative Justice Bill and the Equality Bill - for the realisation of socio-economic rights in South Africa.

Danie Brand review the first report of the SA Human Rights Commission in fulfilment of its mandate in terms of s 184(3) of the Constitution. He identifies the weaknesses in the process and final report, and suggests ways for improving the process during the second monitoring cycle. This edition also contains a number of other articles and features which we hope will stimulate interest and active engagement in socio-economic rights advocacy by our readers.

ESR REVIEW

Socio-Economic Rights Advocacy - Using International Law

Notes From Canada

by Bruce Porter

Whether in litigation, public advocacy or academic discourse, those working in the area of social and economic rights have relied extensively on international human rights law, and particularly on the International Covenant on Economic, Social and Cultural Rights (ICESCR) to elucidate the content and meaning of rights. Even where social and economic rights achieve explicit protection in domestic law, as in South Africa's new constitutional democracy, the paucity of domestic jurisprudence and judicial unfamiliarity with social and economic rights means that courts, NGOs, academics and politicians will continue to turn to international human rights law for guidance.

Of particular importance are the views of the U.N. Committee on Economic, Social and Cultural Rights (UNCESCR) which is charged with overseeing the compliance of State parties with the Covenant. The U.N. Committee releases "Concluding Observations" after each periodic review of State parties to the Covenant (approximately every five years apart). It also adopts "General Comments", now numbering ten, on particular aspects of the Covenant such as the right to adequate housing, the rights of persons with disabilities, the role of human rights institutions or the domestic legal application of the Covenant. All of these provide important sources for social and economic rights advocates.

Those of us who work with people living in poverty often need to clarify that social and economic rights are not the sole preserve of a U.N. Committee meeting in the marble halls of the *Palais des Nations* in Geneva in one of the most affluent and expensive cities in the world. For the majority of those who struggle for social and economic rights, the proceedings of U.N. treaty monitoring bodies may seem entirely irrelevant, or to relegate social and economic rights to international "experts" rather than developing them as a field of domestic rights practice.

Establishing connections

It would be a mistake, though, for social and economic rights advocates to ignore the potential of using U.N. treaty monitoring bodies, and particularly the UNCESCR, to strengthen domestic social rights practice. Like all other human rights practitioners, and perhaps more than others, we need to work on a number of fronts simultaneously. Political advocacy will often be strengthened by judicial actions, and judicial actions assisted by public education and advocacy. Similarly, domestic social rights advocacy may be advanced by work at the international level, which in turn needs to be informed by domestic advocacy. To reject the international fora as being too remote or elitist would mean losing important opportunities for establishing meaningful connections between international monitoring processes and grassroots advocacy.

RELEVANT WEBSITES
www.web.net/cera
www.web.net/ngoun98
www.web.net/ccpi

A traditional conception of social and economic rights, which was thankfully rejected by the drafters of the South African Constitution, characterizes this category of rights as being in the nature of social objectives agreed upon by States but not enforceable by citizens. According to this approach, these rights may be made the subject of expert review and comment, assessing whether states are living up to their "aspirations", but not of rights claims adjudicated by courts or other bodies.

Documents of the UN Committee on Economic, Social and Cultural Rights can be located at the following address:
www.unhchr.ch/tbs/doc.nsf

Until recent years, it was the traditional paradigm of social and economic rights which prevailed within the U.N. treaty monitoring system. The process was conceived as a dialogue between governments and a committee of appointed experts without any formal recognition of a role for NGO's or constituencies whose rights were at stake. This usually made the process somewhat stultified. Governments like Canada submitted lengthy documentation of all of their accomplishments and the Committee was extremely limited in its ability to challenge governments' self-congratulatory approach.

Out of the shadows

In 1993, with Canada's second periodic report coming up for review, Canadian NGOs decided to challenge the traditional paradigm. We petitioned the Committee for a new procedure through which it would hear oral submissions from domestic NGOs as part of the periodic review process. The Committee decided to break new ground at the U.N., setting aside time at the beginning of each session for NGO presentations relating to the periodic reviews of State parties. The new procedure had a dramatic effect, allowing NGOs to play a central role and fundamentally transforming the nature of the review process.

NGO submissions at treaty monitoring bodies are often referred to as "shadow reports" but the CESCR really brought the NGO role out of the shadows in 1993. Rather than pretending that it has the resources or expertise to assess complex social and economic issues in country, the Committee has recognised that it functions best in a more adjudicative role, facilitating and then drawing conclusions from a rights-based dialogue between domestic NGO's and governments. Admittedly, this is not always possible. It depends on the ability of domestic NGO's to participate freely and effectively in the review process. Where such participation is possible, however, the Committee relies on the NGO's to identify the most critical issues regarding the implementation of the Covenant and to provide the necessary background for members to put these issues to government delegates for a response. The Committee does not necessarily agree with the NGO's any more than it would necessarily agree with an individual petitioner, but it is placed in a stronger position to assess governments' submissions in the light of NGO submissions and evidence.

The prominent role of NGO's in the review of Canada's compliance with the Covenant in 1993 made the process highly visible and the subject of extensive public debate. The Committee's concerns and recommendations made headlines across Canada, were the subject of raucous debate in parliament, and were enthusiastically disseminated by anti-poverty and human rights groups across Canada. They have since been cited in the pleadings in a number of cases under the *Canadian Charter of Rights and Freedoms* and human rights legislation.

Poverty amidst affluence

In 1993, the oral submissions by NGO's focused on two major themes which have continued to dominate social and economic rights advocacy in Canada: (1) increasing poverty, homelessness and hunger in the midst of affluence; and (2) the failure by both courts and governments in Canada to provide effective domestic remedies for violations of social and economic rights. We provided concise information on the extent and depth of poverty among vulnerable groups in Canada - usually drawn from government data - as well as demonstrating comparative measures of Canada's wealth and "available resources." We accompanied our presentation with slides showing what homelessness and poverty looked like in Canada. In addition, we provided summaries of cases in which social and economic rights claims had been brought before Canadian courts and human rights tribunals.

The Committee's concluding observations addressed most of the issues we brought to the Committee and which have been directly relevant to our domestic struggles. For the first time, the Committee issued a stern rebuke to an affluent country for violations of social and economic rights. It made it clear that the doctrine of "progressive realisation" is as much a sword as a shield. The doctrine can be used to hold countries responsible for failing to apply "the maximum of available resources" to fulfilling social and economic rights:

12. In view of the obligation arising out of article 2 of the Covenant to apply the maximum of available resources to the progressive realisation of the rights recognised in the treaty, and considering Canada's enviable situation with regard to such resources, the Committee expresses concern about the persistence of poverty in Canada. There seems to have been no measurable progress in alleviating poverty over the last decade, nor in alleviating the severity of poverty among a number of particularly vulnerable groups.

Equally important was the Committee's unequivocal statement that there is an obligation to provide effective remedies for all rights in the Covenant, including, in particular, the right to an adequate standard of living in article 11 of the Covenant:

21. The Committee is concerned that in some court decisions and in recent constitutional discussions, social and economic rights have been described as mere "policy objectives" of governments rather than as fundamental human rights. The Committee was also concerned to receive evidence that some provincial governments in Canada appear to take the position in courts that the rights in article 11 of the Covenant are not protected, or only minimally protected, by the Charter of Rights and Freedoms. The Committee would like to have heard of some measures being undertaken by provincial governments in Canada to provide for more effective legal remedies against violations of each of the rights contained in the Covenant.

The Committee pointed out that, even without explicit protection of social and economic rights in the Canadian Charter, many social and economic rights could be protected through expansive interpretations of rights such as "equality" and "security of the person".

30. The Committee encourages the Canadian courts to continue to adopt a broad and purposive approach to the interpretation of the Charter of Rights and

Freedoms and of human rights legislation so as to provide appropriate remedies against violations of social and economic rights in Canada.

These important themes have recently been reaffirmed in the Committee's General Comment on the Domestic Application of the Covenant (General Comment No. 9, E/C.12/1998/24). We have raised them before courts in Canada at every possible opportunity.

Removing the pillar of social rights protection

While the U.N. Committee's observations were widely publicised in Canada, the response by the government was extremely disappointing. Rather than implementing any of the recommendations or addressing the concerns of the Committee, Canada has moved decisively backward with respect to the implementation of the Covenant rights.

The most dramatic of recent developments was the federal government's decision in 1995 to revoke the provisions of the Canada Assistance Plan (CAP). For a generation of Canadians this had been the pillar of social rights protections. CAP was federal legislation governing cost-sharing in respect of provincial social assistance programmes. In exchange for a 50% contribution to such programmes from the federal government, provinces were required to ensure that every person in need was provided with financial assistance at a level that covered basic requirements, that there was an appeal mechanism, and that no one would be forced to work against their will in order to receive social assistance.

There is little jurisprudence in international law on the right to social security and the right to an adequate standard of living, but it is clear that CAP embodied some of the most important features of these rights - universal entitlement regardless of the cause of need, adequacy of benefits, procedural and administrative fairness, and freedom from coerced labour in exchange for benefits. CAP, in fact, provided a justiciable right to social security and an adequate standard of living after the Supreme Court of Canada determined that the standards or conditions in CAP, including the principle of adequacy, were legally enforceable by individual social assistance recipients.(*Finlay v Canada (Minister of Finance)* [1986] S.C.R. 607).

Under the new "block funding" arrangement which came into effect in 1996, however, called the Canada Health and Social Transfer, all of these basic features of the right to social security and an adequate standard of living in Canada were eliminated - both the entitlements and the mechanism for providing legal remedies.

When the government of Canada announced its intention to revoke the provisions of CAP, NGO's and international legal experts made submissions to the parliamentary committee reviewing the proposed legislation. They argued that such a step would be in breach of Canada's obligations under the Covenant not to take "deliberately retrogressive measures" with respect to the protection of Covenant rights. When the government appeared to pay little heed, we petitioned the U.N. Committee directly which granted permission to make oral submissions on the issue. In May 1995 a delegation of Canadian NGO's appeared before the Committee, outside of the regular periodic review process, and presented an urgent request that the Committee address this issue. The Committee responded by sending a letter to Canada relating the NGO concerns and asking for a report on the legislation later that year in the context of Canada's third periodic report.

Nothing was submitted until two and a half years later when Canada finally submitted its overdue report and was scheduled for review in November 1998.

During the intervening time, provincial social assistance schemes had been seriously eroded. In Ontario, social assistance rates were slashed by 22%, forcing over 100,000 households out of their housing and doubling the demand on foodbanks. American-style "workfare" schemes were introduced in a number of provinces. When poor people went to courts to challenge the cuts to social assistance, citing the U.N. Committee's 1993 concluding observations, governments argued that there is no constitutional right to a particular level of adequacy of benefits in Canada. The court agreed, making no reference at all to the U.N. Committee's recommendations with respect to the interpretation of the *Charter of Rights and Freedoms* or the provision of legal remedies.

Turning to the U.N. Committee

In this climate, NGO's in Canada again turned again to the UNCESCR's review process as a forum that at least offered some neutral distance from the political and ideological developments at home. A diverse group of Canadian NGO's began preparing for Canada's review, scheduled for November 1998. Consultations were held with poor people and other constituencies across the country to identify primary concerns and charitable funding was secured to pay for NGO's transportation and accommodation costs in Geneva.

Six months prior to the scheduled review by the Committee of a government's periodic report, a pre-sessional Working Group meets to prepare a list of issues to send to the State party for a response. NGO's have the opportunity to make oral and written submissions to the Working Group. This is an important opportunity to ensure that the list of issues includes the most critical concerns of NGO's, as the list will be used to frame the oral review at the subsequent session. Two of us were sent to Geneva in May of 1998, representing a broad spectrum of Canadian NGO's to brief the pre-sessional Working Group. They in turn sent to Canada an extensive list of questions, addressing the revoking of CAP and a number of other concerns.

The opening day of the Committee's meeting of November - December 1998, at which both Canada and Israel were to be reviewed, was literally crammed with NGOs. - a dozen or so from Canada, at least as many Palestinian NGOs, and a few from other countries being reviewed. It seemed appropriate that it was the Chairperson, Philip Alston, chairing his last session of the Committee, who had to deal with the confusion. He had always been an advocate for recognising the role of NGO's and played a major role in the transformation of the Committee into a more activist body during the past decade.

The oral presentations and the submission of written briefs at the outset of the Committee's session is the most visible role for NGO's in the process. However, as with all other treaty monitoring bodies, submissions to individual Committee members on issues of particular interest or concern to them is all important. As members are generally overwhelmed with information, providing concise summaries of issues is the key. Canadian NGOs prepared a collective summary of our most critical issues, which was invaluable in assisting the Committee to focus its review. As NGO's have no ability to reply to government submissions, it is important to anticipate how one's government will respond to questions, and to provide relevant information to Committee members demonstrating why the anticipated response is inadequate. We anticipated correctly, on the basis of the

government's written responses, that the government delegation would deny the importance of CAP entitlements, describing CAP as merely an "administrative arrangement" between the federal government and the provinces which was in need of "updating". We therefore highlighted in our materials Canada's submissions to the Committee in previous periodic reviews and other official statements in which CAP was described as fundamental to the protection of social and economic rights and national standards in social assistance programmes. As a result, Committee members rigorously challenged the Canadian delegation to reconcile past submissions with their present denials. One member, on putting the previous statements to a Canadian delegate, asked: "Were you lying then or are you lying now?"

NGO's had done considerable advance work with the Canadian media. Reporters from the national newspaper chains and from national radio attended the two day exchange between the Committee and the delegates for the Canadian Government. NGO's from all sectors issued ongoing press releases and we established websites containing the government's report, the list of issues and the NGO submissions. The review process received extensive media coverage and commentary in Canada - even a spoof of the Governments' denials by a national television comedy show!

The Committee's conclusions

Substantively, the 1998 concluding observations on Canada reiterated and strengthened concerns and recommendations expressed at the previous review and contained a strong denunciation of the revoking of CAP:

19. The replacement of the Canada Assistance Plan (CAP) by the Canada Health and Social Transfer (CHST) entails a range of adverse consequences for the enjoyment of Covenant rights by disadvantaged groups in Canada.... The Committee regrets that, by according virtually unfettered discretion to provincial governments in relation to social rights, the Government of Canada has created a situation in which Covenant standards can be undermined and effective accountability has been radically reduced.(E/C.12.1.Add.31, 4 December 1998)

The Committee recommended the reinstatement of "a legally enforceable right to adequate assistance for all persons in need" and all other CAP standards.

The Committee also issued strong concerns and recommendations with respect to many other issues in Canada, including: cuts to provincial social assistance rates, the failure to address rising homelessness, increased reliance on foodbanks, cuts to unemployment insurance, failure to fairly address Aboriginal land claims and poverty among Aboriginal People, workfare programmes, the prevention of unionization among workers in these programmes, and the adverse consequences for women of social programme cuts.

Provincial governments were again criticised for arguing in court that Canada's *Charter of Rights and Freedoms* should be interpreted so as to deny legal remedies to those whose social and economic rights were violated. The Committee reiterated that "economic and social rights should not be downgraded to "principles and objectives". It urged that the Covenant rights be made enforceable within the provinces and territories "through legislation or policy measures and the establishment of independent and appropriate monitoring and adjudication mechanisms."(para. 52).

Using the Civil and Political Covenant

In March of this year, Canadian NGO's focusing on poverty and homelessness decided to participate in the five year review of Canada's compliance with the International Covenant on Civil and Political Rights by the U.N. Human Rights Committee. Significantly, this Committee raised similar concerns to those expressed by the Committee on Economic, Social and Cultural Rights. In particular, the Human Rights Committee expressed concern about the extent of homelessness in Canada, recommending that the government "take positive measures required by article 6 (the right to life) to address this serious problem." The Human Rights Committee joined the Committee on Economic, Social and Cultural Rights in expressing concern about discrimination against social assistance recipients and the invasion of their privacy rights, failure to address Aboriginal land claims and self-determination rights, discrimination against Aboriginal women, the denial of the right to an effective remedy before human rights tribunals, denial of social benefits to refugees and the adverse effect of major cuts to social programmes on women and other disadvantaged groups.

Through advocacy at the international level we have begun to fashion a consensus among U.N. treaty monitoring bodies about violations of human rights occurring in Canada. In so doing, we have also encouraged these bodies to deal with important social and economic rights issues which might otherwise have been ignored. While we have not, at this point, succeeded in reversing any of the erosion of social rights in Canada, we have at least found one forum which allows us to articulate the most important rights claims and have them fairly considered in the light of international human rights law.

Social and economic rights violations are increasingly linked with global economic developments and trends. Increasingly, we find that we must advance our claims within the international as well as the domestic legal orders and, in so doing, enhance the capacity of both domestic and international human rights institutions to address global developments. Courts are less likely to hold their governments to a purely internal standard of the right to social security or to an adequate standard of living, for example, than to enforce standards and entitlements linked to internationally recognised social and economic rights. Our domestic claims are more likely to be successful if international human rights bodies have identified certain areas in which domestic protections fail against international standards.

Dialogue between international and national institutions

We are in the midst of what the Chief Justice of Canada's Supreme Court has called the "institutional moment" of international human rights law, the growth of institutional dialogue between international human rights bodies and national courts." (Rt. Hon. Antonio Lamer, *Enforcing International Human Rights law: The Treaty System in the 21st Century*, address at York University, June 22, 1997 at 6.) Social rights advocates in particular must encourage that institutional dialogue. We will be increasingly reluctant to advance novel domestic social rights claims without positive reinforcement in international human rights law. This being the case, it is important that we advance our claims internationally as well as domestically and ensure that U.N. treaty monitoring bodies give clear directions to our courts and governments.

Advocates in all countries need to work collaboratively to ensure that the pressing issues of domestic social and economic rights struggles are addressed at the international level. Presumably, we will benefit from each other's work. The

consideration by the UNCESCR of the right to social security and to an adequate standard of living in Canada may be useful, for example, in convincing the South African courts and parliamentarians of the importance of effective legal remedies for these rights and justiciable standards of universality and adequacy.

The treaty monitoring system at the United Nations is full of weaknesses and problems. The fact that Canada has been able to largely ignore the concerns raised by U.N. Committees without significantly compromising its international reputation as a defender and promoter of international human rights is evidence of how powerless the system can be. But the first step in reforming the system is to bring to it the struggles in various countries for social and economic rights. As in our domestic advocacy, I think we will find that the institutions will generally be built around the rights claims rather than *vice versa.*

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Paper Tigers?

Resources For Socio-Economic Rights

by Conrad Barbeton

The South African Constitution is widely regarded as one of the most progressive constitutions in the world. The principle reason for it being accorded this status is the inclusion of socio-economic rights in the Bill of Rights. This emphasis has raised peoples' expectations and placed tremendous pressure both on politicians and on departments to show real progress in the delivery of a wide range of goods and services.

Of particular interest to the vast majority of South Africans, and more particularly those people living in poverty, are:

- the right to gain access to land (section 25(5));
- the right to have access to adequate housing (section 26);
- the right to have access to health care services, sufficient food and water and social security (section 27); and
- the right to further education (section 29(1)(b)).

Also of paramount importance are the rights of children contained in section 28, as well as the right to a basic education in section 29(1)(a). However, these latter rights are accorded special status relative to the other rights mentioned above. Whereas the other rights are limited in certain significant respects, the rights of children and the right to a basic education are not qualified in the same way or to the same extent. What this means in practice will need to be discussed on another occasion.

Do these rights mean that the homeless can expect the government to provide them with housing? Will the landless be provided with land? And is the State obliged to ensure 'everyone' has access to health services, food, water and social security? Can people take the government to the Constitutional Court to get these rights enforced? If this happens, how much power does the Constitutional Court have to force the government to provide people with houses, land, etc.?

The keys to escape?

The first thing to note about these socio-economic rights is the way they are expressed. The writers of the Constitution took great care to frame them in such a way as not to place an absolute and unambiguous obligation on the government to fulfil them. In other words, the Constitution does not say, for instance, "everyone has the right to land". In fact, the Constitution provides the government with the keys to escape from what many would see to be its obligations in relation to these rights. This can be illustrated with reference to the 'right to housing'.

Section 26(1) and (2) of the Constitution read as follows:

26.
(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

To start with, what is understood by "*adequate* housing" is open to interpretation. Is it a four roomed, brick built structure or a 'starter home'? Will a self-built structure in a site and service scheme suffice?

Notice also that the wording does not confer a 'right to adequate housing', but only the "right *to have access to* adequate housing". One interpretation of this may be that the government merely has to ensure that there are no legal restrictions on people wishing to participate in the housing market (i.e. something like the Group Areas Act would therefore not be permitted.) According to this view the government is not obliged to assist poor people who have the right to have access to adequate housing, but not the financial resources to exercise it.

However, this interpretation is not compatible with section 26(2). This section indicates that the writers of the Constitution expected the government to do more than merely provide a legal and market framework. Indeed, "the state must take" action and, in doing so, is expected to use available resources to give real content to the right over time. In my view, one would be hard pressed to find a voter, politician or Constitutional Court Judge that does not see it this way. However, the range of actions that the government is *obliged* to take is not spelt out. The Constitution does not oblige the government to build houses, nor provide housing subsidies.

In fact, the more important effect of section 26(2) is to limit the extent of the 'right to housing' in such a way that it becomes a matter of interpretation (by the Constitutional Court, in the final analysis) as to whether the government is meeting its obligations or not. The interpretation given to following concepts is of particular importance:

- *"reasonable legislative and other measures"*
- *"within its available resources"*
- *"progressive realisation"*

It is quite conceivable that the government could pursue a very minimalist housing policy and justify it by arguing that, given the limited resources available, it is taking reasonable measures to progressively realise the right as best it can.

Since these concepts underpin the description of the other socio-economic rights mentioned above, how they are interpreted is going to impact on whether a significant portion of the Bill of Rights is simply a paper tiger or has real teeth. Is the government going to use them to justify slow progress in the meeting of these rights? Or can the Court interpret them in a way that places significant spending obligations on government? Of particular interest, from an economist's perspective, are the concepts "within available resources" and "progressive realisation".

A Pandora's box

The government is required to act "within its available resources". How does one begin to define what resources are available to government? The simplest answer would be to point to the national budget and argue that the government can only spend what it raises as revenue. For the financial year 1999/2000 national revenue is expected to be R191 billion. Does this represent the 'resource envelope' available to government to spend in pursuit of its constitutional obligations.

However, this 'resource envelope' does not just appear out of the blue. Government policy with regard to the balance between the public and private sector activities, taxes, user charges, the deficit, debt, etc. all contribute to determining its size. This opens a veritable Pandora's box of issues relating to the reasonableness (or otherwise) of the government's fiscal and monetary policies. Are current tax rates too high or too low? Are the deficit targets set out in the GEAR macro-economic framework unrealistic? What measures should the government take to curb inflation, regulate the money supply and stabilise the exchange rate? Should the government borrow money to build houses? In fact, should the government be building houses, or should this be left to the private sector?

People of different ideological persuasions hold different opinions on these issues, but it is becoming increasingly apparent that certain positions are simply untenable. By and large the 'right position' at present is a function of the current structure and prevailing conditions in the international economy, of which South Africa is a very small part.

In economics there are a range of measures are used to indicate whether a particular government is living within its means. Details of these measures can be found in the annual *Budget Review* published by the Department of Finance. Since 1996 there has been a general improvement in the government's fiscal management in line with the overall thrust of the GEAR policy framework. This trend is viewed positively by the international financial markets, resulting in improvements in South Africa's credit rating. In addition, our economy weathered the recent 'Asian crisis' fairly well compared to many other emerging economies. Both these factors suggest that the government is managing the economy responsibly, and at the aggregate level is operating "within its available resources" - more or less.

Globalisation and tax competition

It is often argued that socio-economic rights are affordable, and that the funds to pay for them can easily be raised by increasing taxes, particularly company taxes. Why then has the government lowered company tax from 35% to 30% in the most recent budget?

The reality is that there is a trade-off between current and future tax revenues, especially where companies are concerned. If the government over-taxes companies in the present period, private sector investment in the economy will decline and some companies may even relocate with the result that future tax revenues will stagnate and possibly even fall. To increase future tax revenues the government needs to (a) look after its current tax base and (b) create an environment that fosters investment and economic growth. Within the context of a globalised economy this means it has to ensure its taxes are internationally competitive.

Burdening future generations

Certain organisations argue that the government should use debt to finance meeting certain socio-economic rights. This usually involves questioning the appropriateness of the GEAR deficit targets in the light of South Africa's current level of development. However, the government has to incur debt to finance the deficit, and the reality of debt is that it is has to be repaid - with interest.

Where debt is used to finance public capital goods that have an extended life-span (e.g. roads) the users of those goods in each period pay for the benefits they derive by paying the interest. However, where debt is used to fund current expenditures (e.g. personnel salaries) it becomes a means of forcing future generations to finance present consumption. This is grossly unfair as the benefit future generations derive from such expenditures is very limited. Against this background, debt should not be considered as part of the resource envelope available to finance current expenditure.

As it is, the cost of servicing State debt is already absorbing a disproportionate share of government revenue. In 1998/99 the cost of servicing state debt was R43 billion, which is more than the government spends on health and welfare combined. This is projected to rise to R52 billion in 2001/2. Total government debt is expected to rise from R377 billion in 1999 to R413 billion in 2001, which is in excess of 50% of GDP - and this is operating within the GEAR policy framework! It would therefore be completely counter-productive to increase the debt burden further to gain some short-term benefit in the area of socio-economic rights at the expense of the government's ability to meet its obligations with regards to those same rights in the medium term.

Intergovernmental finances

The structure of government and the system of intergovernmental fiscal relations introduced by the Constitution impacts significantly on the concept of "within its available resources". Provinces are responsible for providing the most important social services: health, education and welfare. However, about 96% of their revenue comes by way of intergovernmental transfers and conditional grants. Provinces' capacity to give effect to the rights for which they are responsible is therefore largely dependent on the way nationally collected revenue is divided. The Minister of Finance has also made it abundantly clear that he expects provinces "to live within their means".

Could the Constitutional Court intervene in the division of revenue between the different spheres of government, or change the formula used to allocate the provincial share of revenue between the provinces? This is certainly a possibility if it can be shown that the division of revenue does not take account of the factors listed in section 214(2) of the Constitution. An area that may be challenged is the

division of national revenue between the three spheres of government - the so-called "vertical split". The Constitution requires the government to use objective criteria to determine the needs and interests of national government (s 214(2)(c)). It is not at all clear what "objective criteria" are being used or whether the split is simply the result of a political process. The Court could certainly make an order requiring greater transparency in this process. Provinces might also argue that their "equitable shares" of revenue are not in fact equitable relative to available national revenue, the division of functions, and the need to enable them to "provide the basic services and perform the functions allocated to them"(s 214(2)(d)).

The system of intergovernmental finances also has ramifications for the setting of national norms of standards for the fulfilment of socio-economic rights. When the national government has sought to set such standards in areas of concurrent responsibility, the provinces have resisted implementing them, claiming they are unfunded mandates and cannot be financed "within their available resources". The proposed pupil/teacher ratios are a case in point.

From a provincial perspective the concept of "within its available resources" is further complicated by the fact that province's only have effective control of some 15 to 20 percent of their budgets. The other 80% of provincial budgets are composed of personnel (mostly teachers and nurses) and social security transfers, which are by and large determined by national government. This is likely to have a significant impact on the kinds of orders the courts can reasonably expect the provinces to comply with.

The Court as a player

Another area in which the concept of "within its available resources" is relevant is in the allocation of resources to different functions, and between different programmes within functions. Should the government be purchasing corvettes or using the money to build houses? Should the government spend more on adult basic education and less on tertiary education? At a conceptual level, the scope for trade-offs is endless. But at some point the government needs to govern. In doing so, it must seek to deliver a socially acceptable mix of goods and services with a view to maximising economic growth and social development. Inevitably, whatever mix of goods it chooses will be contested.

Should the Constitutional Court become a player in this process? The fact of the matter is that the Court is already a player. When it enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the orders it makes often have cost implications for which the government must budget. The question is whether the Court should become more involved? I would argue in the affirmative given that:

- the government has failed to act decisively in certain important areas, e.g. providing secure care for children awaiting trial;
- there is still significant scope for re-prioritisation in expenditures (especially between programmes within functions);
- many departments are still hopelessly inefficient in carrying out their responsibilities, and
- the level of resources being lost due to mismanagement and corruption is unacceptable.

In dealing with these matters the Court is unlikely to need to become involved in the technicalities of budgetary decision-making. In most instances, it will probably be sufficient for the Court to highlight an issue or an area of neglect and require the government to "take reasonable legislative and other measures" to address it. The Court also has an enormously important monitoring role to play to ensure that the government's commitment to socio-economic rights does not wane either in the allocative choices it makes in the budget or in its efforts to improve the efficiency of service delivery. The power of the Court to get politicians and senior civil servants to concentrate their minds on resolving so-called 'funding problems' that effect the fulfilment of people's socio-economic rights must not be underestimated. This is especially true at the departmental level.

(Conrad Barbeton will discuss the concept "progressive realisation" in the next issue of the ESR Review.)

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Just Administrative Action

The Key To Accessing Socio-Economic Rights

Patricia Martin

The South African Constitution is both radical and unique in its recognition and entrenchment of a cluster of socio-economic rights, as well as the right to just administrative action as fundamental human rights.

The concurrence of these two innovative steps is not accidental. The entrenchment of socio-economic rights in the Bill of Rights represents an unequivocal commitment to their realisation. Their entrenchment renders them justiciable and hence enforceable. However, the translation of this principled commitment into positive results by way of actual social and economic upliftment is intrinsically dependant on the simultaneous entrenchment of the further right to just administrative action as a fundamental human right.

A symbiotic relationship

The two clusters of rights enjoy a symbiotic relationship. Their interdependency may be likened to the interdependence between the traditional liberal democratic political rights such as the freedom to make political choices, to form a political party, to participate in the activities of a political party on the one hand, and on the other hand, the fundamental democratic right to vote. Recognition of the former rights as democratic fundamentals in the absence of a similar recognition and protection of the latter would be fatal to
the realisation of a democratic order.

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A democratic dispensation is one governed by the founding principle of "rule by the people". Hence, a dispensation which does not afford "the people" the tools through which they may rule, i.e. the vote, is inherently unable to deliver on the primary democratic objective. A similar conclusion may be drawn in respect of a constitutional order which chooses to include a full range of socio-economic rights in a Bill of Rights, but fails to simultaneously recognise the right to just administrative action as a fundamental human right. A State which is governed not only by the traditional democratic principles, but also by a desire and commitment to attain social justice through its beneficent social and economic policies is commonly referred to as a 'benefactor', or 'administrative' State. By its very definition therefore, an administrative State that does not place the highest premium on just administrative action is doomed to fail in its objectives of social justice.

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The SALC's Discussion Paper 81 on Administrative Law can be accessed through the SALC Wits Law School website.

To find out more about a civil society initiative to conduct advocacy around the administrative justice legislation, contact:

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Tools for access

At the end of the day social justice will only be realised if the intended beneficiaries are provided with the tools for access to the relevant programmes. Those tools are the cluster of rights making up the right to just administrative action. The denial of these tools is as fatal to the realisation of the socio-economic rights, the primary objective of an administrative State, as the denial of the right to vote is to democracy. It is fatal because the realisation of these rights is wholly dependant on the beneficiaries' ability to access the relevant socio-economic programmes. In the absence of such access, the entrenchment of the fullest complement of socio-economic rights will come to nought and be as farcical as a "democratic" order with no right to vote.

The South African Constitution has recognised the fundamental relationship between the realisation of social justice and just administrative action by entrenching both socio-economic rights and the right to just administrative action. In addition, it recognises that the realisation of socio-economic rights is dependant on the beneficiaries being able to access these rights. Achieving access to the rights is in turn dependant on whether or not the State administration conducts its affairs in a socially just and appropriate way.

A question of access

The way in which socio-economic rights are formulated in the Constitution reflects the close alliance between the realisation of these rights and the ability of the intended beneficiaries to access the relevant programmes. The formulation used places a higher premium on access to the socio-economic benefits, as opposed to the actual benefits themselves.

These rights, such as the right to housing, health care, food, water and social assistance are framed as rights of 'access to' the relevant social and economic entitlements, as opposed to a right to food, water and housing. For example, section 27(1) of The Constitution states that:

Everyone has the right to have access to -

- *(a) health care services, including reproductive health care;*
- *(b) sufficient food and water;*
- *(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.*

De Vos concludes, it is submitted, quite correctly that:

"...this formulation explicitly limits the obligations of the State and will never include an obligation for example, to provide individuals with free [food and water]." (P de Vos, " Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution" (1997) 13 *South African Journal On Human Rights*, p 87)

The disparity between limited available resources and the limitless number of impoverished South Africans means that his conclusion is practically speaking, the only viable one.

This disparity does not, however, mean that these rights are non-justiciable, unenforceable, and hence meaningless. Objections to the inclusion of socio-economic rights in the Bill of Rights were vociferous. Advocates for exclusion argued that their inclusion would require an illegitimate, unelected judiciary to enforce these rights. They assumed that the enforcement of these positive, as opposed to the traditional negative rights, would be premised on claims by individuals or groups to the delivery of benefits by the State. Their enforcement through the judiciary would implicitly require "the courts to direct the way in which government distributes the state's resources and is thus beyond the scope of the judicial function." (J De Waal, I Currie, G Erasmus, *The Bill of Rights Handbook*, 2nd (ed), Juta & Co Ltd, 1999, p 420).

The primary underlying concerns informing this argument were anticipated and eliminated in the Constitutional formulation of these rights as the right of "access to" a benefit. Any residual concerns were undermined by the Constitutional Court's confirmation that the socio-economic rights, as contained in the Constitution are, despite the potential budgetary implications implicit in their adjudication:

...at least to some extent, justiciable...The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion. (*Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* (First Certification judgment) 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 78).

The language used by the Court:

"*...makes it clear that negative protection is merely the minimum extent to which the rights can be judicially protected and does not exhaust the possibilities of justiciability.* (De Waal, p. 420).

Negative protection of entrenched rights is the traditional approach adopted to the classic civil and political rights. Their entrenchment has traditionally been perceived as imposing negative obligations on the State - a duty on the State not to interfere with the individual's rights in the relevant spheres.

In the case of socio-economic rights, there is certainly, a negative duty on the State "to refrain from interfering with the enjoyment of the socio-economic rights." However, as pointed out by the Constitutional Court, this negative duty constitutes the bare minimum.

Positive duties

As noted above the core obligation on the State is to guarantee "access to" food, water and social security etc. The State is under a duty to facilitate the realisation of these rights by ensuring access to socio-economic benefits. The duty to ensure "access" is a positive, rather than a negative duty. What does it mean?

The right of access must be read in conjunction with a further feature common to the socio-economic rights' provisions in the Constitution. Sections 26(2) and 27(2) state:

"*The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.*

In other words, the State is required, as far as is possible, to legislate social and economic upliftment programmes. However, the formulation of the socio-economic rights provisions is such that the enactment of this legislation is not the primary positive or justiciable obligation. Instead, the primary positive obligation is providing access to the programmes established through the legislature's initiative.

The realisation of these socio-economic rights is largely dependant on the conduct and attitudes adopted by those State organs responsible for administering access to, and the delivery of social and economic benefits made available by Parliament.

The language of the Constitution strongly suggests a positive duty on the State to facilitate, protect and promote access to socio-economic rights. This means that the administrative branch of the State is under a positive duty to ensure that all those entitled to the social and economic benefits enacted by Parliament are able to gain effective access to these benefits.

Social justice and just administrative action

The critical importance of just administrative conduct to the realisation of a society based on social justice is recognised in section 33 of the Constitution. In terms of this section, just administrative action is entrenched as a fundamental human right. Everyone is entitled, in terms of this provision, to:

(1) administrative action that is "lawful, reasonable and procedurally fair". (2) written reasons for administrative action that adversely affect their rights.

In addition to the duty imposed on the administrative branch to act justly, Parliament is under a positive duty to guarantee access to socio-economic entitlements. Thus if Parliament is aware that the conduct of the administrative branch of government routinely frustrates access by the intended beneficiaries to their socio-economic entitlements, it is under a duty to enact legislation to positively compel the administrative branch to remedy its conduct. In other words, it must react concretely to known problem cases and enact measures capable of addressing those problems.

Social security injustices

The legislative socio-economic programmes envisaged by subsections (2) of the socio-economic provisions have been put in place in many areas. For example, the *Social Assistance Act*, 59 of 1992 has established legal entitlements to old-age pensions, disability grants and child support grants. However, those entitled to these grants in terms of the Act are not in fact gaining access to the benefits. It is routine for applicants to wait months and months, sometimes even years, for their applications to be processed. Applications that are eventually processed are often refused, apparently arbitrarily, despite the applicant fulfilling the relevant criteria. Child support grants are simply not being processed and accessed on the scale promised. For example, of the 300 000 grants available, approximately 30 000 were in fact accessed in the first year - and not for want of trying on the part of the intended beneficiaries.

Parliament is clearly aware of these problems which are a common and routine feature of the State's public service and administration. Its knowledge of these undesirable administrative practices is evidenced in the *White Paper on Transforming Public Service Delivery* (*Batho Pele* White Paper). The White Paper recognised that these practices led to a deprivation of access to social benefits by the intended beneficiaries. However, the *status quo* has not changed substantially since the publication of the White Paper in 1997.

As I have argued above, Parliament is under a constitutional duty to remedy the situation in which routine administrative conduct leads to a denial of people's fundamental human right to have access to, for example, social security.

An Administrative Justice Act: the key to social justice

Parliament is at present afforded an ideal opportunity to discharge this obligation through the enactment of an appropriate and effective Administrative Justice Act. Section 33(3) of the Constitution obliges Parliament to enact national administrative justice legislation to give effect to the cluster of rights comprising the right to just administrative action. The preliminary drafting process is currently underway. It is vital for the drafters of this legislation to take heed of the Constitutional duty of the State, in terms of the socio-economic rights provisions, to guarantee access to socio-economic benefits. The Administrative Justice Act must, at the end of the day, be designed so as to ensure compliance with this obligation.

The Administrative Justice Act can, and must, facilitate, protect and promote access to the socio-economic benefits administered by the administrative organs

of State. It can do so through formulating and imposing positive prior duties on these organs which, if complied with, will guarantee effective access.

The Act is required, in terms of section 33(3), to give effect to the rights to lawful, reasonable and procedurally fair administrative action, and to the right to written reasons. It is further required to impose a duty on the State to give effect to these rights. This requires the Act to give content to these administrative justice rights. The content they are given must address people's right of access to the social benefits administered by the relevant organs of State.

These organs must be obliged to act lawfully. This means that they must act in accordance with, and further the legislature's intention as expressed in the relevant acts of Parliament giving effect to people's rights to socio-economic benefits. This implies that the organs of State must be placed under a concrete obligation to ensure access to these benefits by the intended beneficiaries. At the end of the day, this is the ultimate intention of the legislature. The Administrative Justice Act is the appropriate site for the creation and imposition of administrative duties of this nature. At the end of the day, the success or failure of the public's access will depend on the routine procedures adopted by administrative officials, as well as the reasonableness of their conduct.

The route to ensuring access is through the creation and enforcement of duties on State organs to act lawfully, procedurally fairly and reasonably. The Administrative Justice Act must address these issues and is therefore a fundamental key to the success of social justice.

Accessible remedies

Apart from imposing positive duties on the administrative organs of State, the administrative justice legislation must provide accessible remedies in the event of a breach of those duties. This is also part of the State's duty to guarantee access to socio-economic rights. Accessibility implies that the legislation should provide remedies other than the traditional route of High Court review of administrative action. This route is expensive, time-consuming and out of reach of the intended beneficiaries of socio-economic rights. At present the process of drafting an Administrative Justice Act is underway. It has reached the stage of a draft Bill, prepared by the South African Law Commission (SALC). The draft, in its current form, falls far short of the State's obligation to guarantee access to the socio-economic entitlements in the Constitution.

A number of submissions have been addressed to these inadequacies by a group of interested NGO's and state institutions, such as the Human Rights Commission, Black Sash, the Socio-Economic Rights Project, the Human Rights Committee and NADEL's Human Rights Research and Advocacy Project.

These submissions are being considered by the SALC. It will be hosting workshops on the draft Bill in early June to consider the draft and key issues raised in the submissions. Anybody interested in the process of influencing the content of this legislation may contact the SALC in Pretoria, or one of the organisations listed above.

** Patricia Martin is the researcher responsible for producing the Black Sash's submission on the Administrative* Justice Bill

Advancing Equal Access To Socio-Economic Rights

ESR REVIEW

The New Equality Legislation

by Sandra Liebenberg

The Equality Legislation Drafting Unit is in the process of finalising draft legislation to give effect to the constitutional right against unfair discrimination. The Unit was appointed by the Department of Justice and is based in the offices of the South African Human Rights Commission.

New Equality Legislation

Section 9 of the Constitution prohibits both the State and private parties from discriminating unfairly against anyone on a range of grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. In order to make this right real and effective, the Constitution requires the State to enact national legislation to prevent or prohibit unfair discrimination. The constitutional deadline for Parliament to pass this legislation is 4 February 2000. In order to meet this deadline, the legislation will have to be tabled in Parliament during the course of this year. It is seems likely that the Portfolio Committee on Justice will hold public hearings on the Bill once it is introduced.

This legislation has a critical role to play in facilitating access to socio-economic rights by groups that experience discrimination and prejudice by society. Many of these groups also experience social and economic disadvantage which reinforces their marginalised position in society. For example, poor black women are disadvantaged through a combination of their race, gender and socio-economic status. They face many barriers in gaining access to decent employment, living conditions and social services. Persons living with disabilities also have to cope with housing, banking and insurance services, and educational facilities that do not cater for their special needs and circumstances. A commitment to equality and a special concern for disadvantaged and vulnerable groups lies at the heart of socio-economic rights.

The Constitution describes equality as including "the full and equal enjoyment of all rights and freedoms." (s 9(2)). This clearly includes the socio-economic rights that are recognised in the Bill of Rights. This means that all forms of direct and indirect unfair discrimination must be effectively prevented and prohibited. Direct discrimination refers to discrimination that is obvious (e.g. an advert proclaiming, "No black tenants accepted here"). However, perhaps the more pervasive and difficult form of discrimination to eradicate will be indirect discrimination. Indirect discrimination is a situation, policy, practice or rule which appears neutral on its surface, but which adversely affects a disadvantaged group. Thus, building houses that do not accommodate the needs of persons with disabilities not only indirectly discriminates against them, but also violates their constitutional right of access to adequate housing.

Advancing effective equality

The new equality legislation has the potential to provide redress for these injustices by prohibiting direct and indirect unfair discrimination in a range of sectors corresponding with the socio-economic rights included in the Bill of Rights - education, land and housing, health care services and other social services. Unfair discrimination in employment is currently dealt with in the Employment Equity Act No. 55 of 1998. It is important to note that the equality legislation will

not only deal with discrimination against the State, but also the private sector. This is particularly important in situations where private parties control people's access to and enjoyment of socio-economic rights: e.g. landlords, banks, privatised service providers etc.

The legislation can also define direct and indirect discrimination in a way that will promote equality of outcomes (substantive equality) as opposed to simply requiring equal treatment (formal equality). In fact, it is obvious in the South African context that real equality will not be achieved without positive measures to promote people's access to resources and opportunities. Equality will in fact be undermined by treating everyone identically, regardless of their special needs and circumstances. Thus pregnant women and nursing mothers require reasonable adjustments to working schedules in order to participate and advance equally in the workplace. Discrimination can be defined to include a failure to make reasonable accommodation for disadvantaged or vulnerable groups. Furthermore, the legislation can encourage positive measures by providing for the publication of Codes of Good Practice e.g. dealing with building modifications for persons living with disabilities. The drafters should make every effort to ensure that the Bill promotes structural changes in the social and economic institutions of our society to make them more accessible to disadvantaged and marginalised groups. Finally, the way in which the Act deals with the burden of proof in discrimination cases may make it more or less easy for complainants to prove discrimination cases.

To join the Equality Alliance or to find out more about the legislation contact:

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Copies of the Alliance submission to the Reference Group of the Equality Legislation Drafting Unit can be obtained from the secretariat.

'Socio-economic status' as a ground of discrimination

The Constitution provides for an open-ended list of grounds of prohibited discrimination. This leaves open the possibility of recognising new forms of discrimination in the proposed equality legislation. The new grounds that are being considered are: HIV-status, family responsibility, nationality and socio-economic status. All these proposed new grounds will contribute to the achievement of equal access to socio-economic rights for the affected groups.

The ground of 'socio-economic status' has a special significance for groups that suffer discrimination because they are poor and illiterate. The purpose of recognising a ground of this nature is to combat stereotypical assumptions and prejudices against people arising from their lack of income and resources, employment status, and lack of education. Clearly, a single piece of legislation of this nature cannot eliminate the inherent inequalities in a market-based economy. Thus the rich can afford higher quality medical care, housing and education. However, this ground can be used to challenge forms of discrimination against the poor that are based on mere prejudices and stereotyping, and are not reasonable and justifiable. For example, banks may refuse to lend to people who live in certain areas on the assumption that they will be a bad credit risk without

undertaking a proper assessment of the credit-worthiness of the particular individual who has applied for a loan.

A recent Canadian case held that the widespread use by landlords of rigid rent-to-income ratios (minimum income requirements) in assessing applications for leases discriminated indirectly against poor single mothers on welfare. A blanket requirement of this nature did not take into account an individual's credit history and record as a reliable tenant. Accordingly, it would not be regarded as a rational predictor of default (*Ontario Human Rights Commission and Kearney and Luis v Bramalea Limited, The Shelter Corporation and Creccal Investments Ltd.*, 28 December 1998), decision no. 98 - 21, Board of Inquiry under the Ontario Human Rights Code, 1990).

Giving the legislation teeth

The equality legislation will be toothless if does not provide effective, affordable and accessible remedies for people who have experienced discrimination. The large numbers of disadvantaged people in South Africa cannot use normal court procedures because of the expense and time these procedures entail. It is therefore critical that the legislation creates user-friendly mechanisms to assist people to get redress. These could include, for example: the Human Rights Commission and Commission for Gender Equality assisting disadvantaged complainants to litigate cases, alternative forms of dispute resolution, relaxing procedural rules in discrimination cases, and specialised training for judicial officers who hear equality cases.

The Equality Alliance

A number of organisations in civil society have come together to form the Equality Alliance. These include the National Coalition for Gay and Lesbian Equality, NADEL Human Rights Research and Advocacy Project, the Legal Resources Centre, the Socio-Economic Rights Project (CLC), and the SA Council of Churches. The purpose of the Alliance is to mobilise a broad spectrum of organisations around the legislation, to conduct public education, and to work to ensure that the new law is inclusive, powerful and strong. Members of the Alliance are also conducting research on aspects of the legislation such as effective enforcement mechanisms. It is anticipated that many members of the Alliance will make submissions to Parliament when the Bill is tabled later this year. All organisations or individuals that support the objectives of the equality legislation are encouraged to join the Alliance.

Access To Health Care Services:

Language As A Barrier

by K. Pillay

The controversies and difficulties associated with a multi-lingual society, on the one hand, and a primarily monolingual health system on the other are numerous and complex. This article highlights some of the constitutional issues arising from the lack of interpretative and translation services within the health system. The term "interpretation" has been defined as the act of receiving a message in one language and sending exactly the same message in another language through a

verbal exchange. Translation, on the other hand, refers to the rendering, in writing, of a written text from one language to another.

Constitutional rights and the bleak reality

Section 27(1)(a) of the Constitution provides that everyone has the right of access to health care services, including reproductive health care services. Section 27(2) obliges the State to take reasonable legislative and other measures, within its available resources, to progressively realise the right. Section 9 of the Constitution provides for the right to equality which includes "the full and equal enjoyment of all rights and freedoms". In addition, it expressly prohibits the State and private parties from discriminating unfairly, directly or indirectly, on a number of grounds. These grounds include race, language, culture, and ethnic or social origin. Section 27(1)(a) when read with the right to equality clearly means that access to health care services must be provided for on the basis of equality and free from any form of unfair discrimination.

Furthermore, section 6(1) of the Constitution refers to the eleven official languages of the country. Section 6(2) obliges the state to elevate the status of indigenous languages and advance the use of these languages. Section 6(4) provides that all official languages must enjoy parity of esteem and must be treated equitably.

However, in spite of these constitutional rights, the bleak reality remains that many people are denied access to health care services or receive compromised access to these services as a result of language barriers.

Interpretation: integral to health care services?

The challenge is to define the term "health care services" as used in section 27(1)(a) of the Constitution. A definition will be assist in assessing the importance of translation and interpretative services within the health system.

The World Health Organisation has adopted the following definition of health: "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." (*Basic Documents*, WHO 1988, at page 1-2). Applying this definition, I suggest that the term "health care services" in section 27(1)(a) of the Constitution refers to those health services that are necessary to ensure a state of complete physical, mental and social well-being. The definition would include services aimed at preventing, diagnosing, alleviating, curing, healing and treating conditions that threaten or compromise an individual's state of physical, mental or social well-being.

Report available

On 28th January the SA Human Rights Commission in Cape Town hosted a workshop entitled: "Language as a Barrier to Access to Health Care". The workshop was held in

If this definition is given to section 27(1)(a) of the Constitution, it is clear that the patient must be able to communicate his or her symptoms, complaints, conditions etc. to the health care professional who must in turn be able to understand the patient. Effective communication is critical for the health care professional to explain preventative measures, make a diagnosis, cure, heal or treat the conditions that threaten or compromise the individual's state of physical, mental or social well-being. Interpretative services are therefore essential to ensuring effective verbal communication between the patient and health care professional.

Translation: integral to health care services?

As translation refers to the rendering in writing of written text from one language to another, some attention will be given to the role of translation services within the health sector. Institutions within the health sector often produce and distribute various educational materials that can be used to prevent, treat or alleviate conditions that threaten or compromise an individual's state of physical, mental or social well-being. These include educational materials such as pamphlets or posters aimed at preventing HIV, illustrating the importance of cervical screening, outlining the harmful effects of tobacco on the health of individuals etc. In addition, instructions and directions for the usage of medication is often specified in writing. These written materials are used as an important means of promoting a health conscious society, and are vital to the prevention, alleviation or treatment of threatening conditions. It is therefore essential that written materials of the nature described above are translated into the language of its target audience or the recipient of medication.

Resources for translation and interpretative services

response to complaints received from doctors alleging that language barriers were impeding the provision of adequate medical care. The workshop explored:

- the constitutional issues surrounding language barriers within the health system;
- government policies, legislation or other initiatives aimed at addressing language barriers within the health system;
- initiatives undertaken by civil society aimed at addressing language barriers within the health system;
- ways of addressing the complaint received.

Should you require a copy of the workshop report, please contact Faranaaz Veriava (tel: (021) - 426 2277) or e-mail: faranaaz@ct.sahrc.org.za)

Although it is generally acknowledged that access to translator and interpreter services are critical to the realisation of health rights, it is often argued that the *progressive realisation* of the right *within the available resources* of the State can justify the current lack of these services. The International Covenant on Economic, Social and Cultural Rights (1966) uses similar terminology. We should thus consider the interpretation that has been placed on these terms in the international human rights context.

Article 12 of the International Covenant on Economic, Social and Cultural Rights recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Article 2 stipulates that each State party to the Covenant must "take steps?to the maximum of its available resources, with

a view to achieving progressively the full realisation of the rights recognised in the present Covenant ? "

The UN Committee on Economic and Social Rights has interpreted the phrase "progressive realisation" to mean an obligation on the part of the State "to move as effectively and expeditiously as possible to securing its ultimate goal." The Committee has however noted that the phrase "should not be misinterpreted as depriving the obligation of all meaningful content." (UN General Comment No 3 (5th sess.), UN. doc. E/1991/23, para. 9.) This interpretation poses the critical question of whether language barriers within the health system can effectively deprive the right of access to health care services of all meaningful content. As a minimum, health care services must mean the prevention, treatment and diagnosis of conditions threatening health. The inability of patients and health care providers to communicate effectively can lead to misdiagnosis, or a failure to follow recommended treatment or preventative measures.

The UN Committee on Economic, Social and Cultural Rights has also stated that, even when available resources are demonstrably inadequate, the State should still strive to ensure the widest possible enjoyment of the right under the prevailing circumstances (UN General Comment No 3, para. 11). In realising the right of access to health care services, it is important that the available resources are effectively and equitably utilised. In particular, the costs associated with misdiagnosis and ineffective treatment resulting from language barriers needs to be carefully assessed.

Language barriers: a form of unfair discrimination

The UN Committee on Economic, Social and Cultural Rights has further noted that although certain rights are subject to resource availability and progressive realisation, there are certain obligations that are of immediate effect. One such obligation is to ensure that the relevant rights are exercised without discrimination (General Comment No. 3, para. 1). This fundamental principle of non-discrimination is particularly relevant to the issue of language barriers within the health system. The lack of access to translator and interpreter services inhibits the patient's ability to communicate his or her symptoms or conditions to the health care professional who, in turn, is limited in making a diagnosis, providing treatment or explaining appropriate preventative measures. This limited communication between the health care professional and patient results in certain patients receiving a lessor quality of health care services. Ultimately, this results in unfair discrimination against those patients who do not speak the dominant language/s of the health care professionals.

Unfair discrimination on the ground of language within the health sector is rooted in the legacy of apartheid. Along with the oppression of certain race groups came the suppression of the indigenous languages spoken by these groups. As a result, the predominance of the English and Afrikaans languages with the concomitant disregard for indigenous languages, still mars the health care system in South Africa. In short, the oppressive policies of apartheid have bequeathed a health system consisting primarily of White doctors (most of whom speak either English or Afrikaans) and Black patients (most of whom speak indigenous languages). The current language barriers within the health system accordingly mirrors the history of racial inequalities in our society.

The Canadian Supreme Court case of *Eldridge v Attorney General of British Columbia* (1997) 151 D.L.R. (4th) 577 further supports the assertion that

language barriers violate the principles of equality and non-discrimination. The appellants argued that certain legislation violated section 15 of the *Canadian Charter of Rights and Freedoms* by failing to make provision for sign language interpreters for the deaf within the provincial health care system. They contended that the absence of sign language interpreters impaired their ability to communicate with their doctors and other health care providers, and increased the risk of misdiagnosis and ineffective treatment. The appellants thus asserted that they received a lessor quality of medical services than hearing persons, which infringed their right to equal benefit of the law without discrimination based on physical disability.

On appeal, the Supreme Court held that the failure to provide sign language interpreters where necessary for effective communication in the delivery of health care services constituted a denial of the right to equality. The limitation of this right on the basis of resource arguments could not be reasonably justified. The court held that interpretation services should not be conceived of as "ancillary services". Ancillary services such as transport to a hospital are not publicly funded. It stressed that effective communication is quite obviously an integral part of medical services, and should be viewed as the means by which deaf persons may receive the same quality of medical care as hearing persons. It noted that once the State provides a benefit, it is obliged to do so in a non-discriminatory way.

Although the right of access to health care services may be realised progressively and within the available resources of the State, the provision of these services must occur in a non-discriminatory way. Language barriers within the health system clearly do not allow for full and equal access to health care services as they discriminate unfairly on the ground of language against patients who are unable to communicate in the dominant language of the health care system. Interpretative and translation services within the health system are therefore an integral and indispensable component to the provision of access to health care services on the basis of equality.

In order to ensure access to health care services on the basis of equality, as a first step, the National Health Act should make provision for access to interpretative and translation services. The legislative provisions should also be coupled by an appropriate allocation of resources for the provision of these services. In addition, the forthcoming equality legislation should expressly prohibit unfair discrimination resulting from language barriers within the health system. Although legislation alone is inadequate to address the issue of language barriers within the health system, it is clearly a necessary first step to ensuring access to health care services on the basis of equality. A longer-term, but more cost effective strategy to address the issue of language barriers within the health system is to introduce indigenous language proficiency courses into the curricula of health care providers. However, as this option offers no immediate solutions, it is critical that interpretation and translation services are provided until such time that the indigenous language proficiency of the health care providers mirrors the multi-lingual nature of our society.

Challenging The Common Law Of Evictions

by Sandra Liebenberg

V. Ross v South Peninsula Municipality, High Court, Cape of Good Hope Provincial Division (Case No. A741/98)

The Legal Resources Centre was recently involved in a case with potentially far-reaching implications for the common law of landlord and tenant.

The South Peninsula Municipality applied for the eviction of Mrs. Ross and all those holding occupation under her from a council flat in Lotus River. Mrs. Ross, who has a disability has lived together with her four children in the flat since January 1997.

In their Particulars of Claim, the municipality alleged that she had no right to be in occupation of the property as no agreement has been entered into between the parties in terms whereof Mrs. Ross could occupy the property. Mrs. Ross represented by Jon Wilson attorney noted an exception to the Particulars of Claim on the grounds that it did not disclose a cause of action. The exception was based on section 26 (3) of the Constitution that states:

"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."

Adv. Hathorn who represented Mrs. Ross in the Magistrate's Court argued that this constitutional right altered the common law position relating to actions for ejectment, and required the plaintiff in an action for eviction to allege:

1. that the premises in question were a home or not a home as the case may be; and
2. if it is a home, to set out "the relevant circumstances" that would entitle the Plaintiff to an eviction order.

The exception was dismissed in the Magistrate's Court, and Mrs. Ross's attorneys then lodged an appeal on her behalf to the Cape High Court. Judge Desai and Acting Judge Josman heard argument on the exception in the High Court on 28 May 1999.

Relevant circumstances

Advocate Bizos SC of the LRC's Constitutional Litigation Unit with Advocate Hathorn represented Mrs. Ross in the High Court. Adv. Bizos argued that section 26(3) of the Constitution places a duty on the court to consider all relevant circumstances before granting orders evicting people from their homes. He further submitted that the right in section 26(3) forms part of the right of access to adequate housing protected in the Constitution. It sends a clear signal to the courts that orders for eviction are not to be lightly made, and that considerations beyond the strict contract between the owner and occupier were relevant to the decision. For example, the Constitution guarantees the right of every child to shelter (s 28(1)(c)). He thus suggested that a court should inquire whether any children live in the premises, and satisfy itself that the eviction order will not have the effect of depriving the children of shelter.

An allegation in the summons that the premises in question are a home and the circumstances on which the owner relies to justify the eviction are particularly important in situations where the occupier does not defend an eviction order and the owner applies for default judgment. Without these allegations, a court would not be placed in a position to exercise its constitutional duty to consider all relevant circumstances before granting an eviction order. Indeed, if it is not aware that the premises are a home, the court might not even be alerted to the

fact that section 26(3) is triggered. Advocate Bizos even suggested that the court might require the Registrar to telephone the occupier to appear before the court in order to motivate why the eviction order should not be granted. The duty placed on the court to scrutinize eviction orders carefully is particularly important in a context where the affected tenants are poor and illiterate and may not have the means to defend actions for their eviction.

Adv. Bizos went on to argue that it may be appropriate for courts to formulate guidelines for practitioners on the type of circumstances that must be alleged in their eviction pleadings in order to conform to section 26(3). The types of circumstances he suggested were:

1. whether the premises in question were a home or not;
2. the owner's reasons for seeking the eviction order;
3. whether any children or persons with disabilities lived in the premises;
4. the length of occupation;
5. any compensation received by the tenant;
6. the personal circumstances of the occupier insofar as these are known to the owner (the owner could also allege that he or she was unaware of any personal circumstances);
7. particularly if the owner was an organ of State, what, if any, arrangements could be made for the alternative accommodation of the tenant.

Practical implications

Advocate Fagan, who represented the municipality, prefaced his arguments by highlighting the conceptual weakness in a constitutional jurisprudence that divided up rights into rigid categories. He noted that section 26(3) was clearly a justiciable socio-economic right which the courts were bound to enforce.

While he conceded that a court was obliged to consider all relevant circumstances before evicting someone from their home, he argued that plaintiffs could elect which circumstances they wished to rely on in their pleadings. If they decide to rely only on common law contractual grounds, they run the risk that a court would find these grounds insufficient to justify the eviction. The plaintiff also takes the chance in an application for default judgment that a court may not be satisfied that all the relevant circumstances have been placed before it. He thus argued that a court should not prescribe to the plaintiff which circumstances it ought to include in its pleadings. It was up to the plaintiff to plead those circumstances on which it sought to rely in a particular case.

He also argued that requiring plaintiffs to allege certain circumstances in their pleadings would create practical difficulties for a municipality that was seeking an eviction order against a whole community. The municipality might not know whether each dwelling is being used as a home or for business purposes. It may also not know the personal circumstances of those occupying the dwelling. According to Adv. Fagan the Constitution grants occupiers a defence, and it was up to the defendants to plead the relevant circumstances that might persuade a court not to grant an eviction order against them.

Vulnerable groups

Reference was made in the heads of argument filed on behalf of Mrs. Ross to General Comment No. 7 adopted in 1997 by the UN Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, Social

and Cultural Rights (1966). This General Comment requires special consideration to be given to the impact of evictions on vulnerable individuals and groups e.g. women, children, older persons, indigenous people, ethnic and other minorities (para.11). According to the Committee:

"Evictions should not result in rendering individuals homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available." (para. 17)

Section 39(1)(b) of the Constitution requires a court to consider international law when interpreting the Bill of Rights.

If the court upholds the arguments made on behalf of Mrs. Ross, it will have important implications for organs of state such as municipalities that seek orders evicting people from their homes. Although the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (No. 19, of 1998) will govern most eviction applications against unlawful occupiers, the judgment will be relevant in situations not covered by the Act. It could require organs of state to carefully consider all relevant circumstances before proceeding with an eviction, and to set out these circumstances in their Particulars of Claim. A broad interpretation of relevant circumstances would include not only those pertaining to the owner, but also those relating to the occupier insofar as they can be ascertained by the owner.

Judgment in the case was reserved.

The judgment will be featured in this section in the next edition of ESR REVIEW.

A Review Of International Developments

Focus: The African Charter And Children's Rights Convention

South Africa has ratified a number of treaties since 1994 and, as a result, it its reporting obligations have increased rapidly over the last two years. The focus of this review is on South Africa's initial reports to the African Commission on Human and Peoples' Rights and the Committee on the Rights of the Child.

A. The African Charter on Human and Peoples' Rights (1981)

Article 62 of the African Charter requires States Parties to submit a report every two years on the legislative or other measures they have taken to give effect to the rights and freedoms recognised by the Charter. The African Commission on Human and Peoples' Rights is the body entrusted with supervising the implementation of the Charter.

The State reports are discussed at public meetings during sessions of the Commission. One Commissioner is designated as Special Rapporteur and is required to prepare a list of questions to be addressed to the representatives of the reporting State. This list is sent to the State ahead of the consideration of the report. NGO's may address the Commission in advance of the presentation.

When a report is on the agenda, the representative of the State is expected to be present. The State representative makes an introductory statement. The Special Rapporteur poses questions which are supplemented by questions from other Commissioners. The State representative is then given an opportunity to answer the questions. Thereafter the Special Rapporteur sums up and concludes the discussion. While there is no formal finding, the Special Rapporteur includes the views of the other Commissioners in summing up and concluding the discussion. The Commission in its Annual Activity Report lists the countries that have reported together with very brief and general comments.

The African Commission has issued simplified guidelines to assist States in the preparation of the drafting of their reports. These guidelines set out what is required both in terms of initial and periodic reports.

SA's first report to the African Commission

South Africa ratified the Charter on 9 July 1996. The initial report to the Commission was presented by the Deputy-Minister of Justice on 27 April 1998 and was well received.

The report is a lengthy document, which has been divided into 6 chapters. In the introduction to the report, its limitations are acknowledged. The report notes that the information contained in it has largely been provided by national departments and that consequently there may be gaps in the report as far as regional and local activities are concerned. It also acknowledges a deficiency in data and statistics.

FURTHER INFO:

Photocopies of SA's initial report to the African Commission on Human and Peoples' Rights can be obtained from the Centre for Human Rights subject to a reasonable fee to cover copying and postage. Contact Carole Viljoen - tel: (012) 420 3810. E-mail: cviljoen@hakuna.up.ac.za.

Copies of SA's initial report to the Committee on the Rights of the Child can be requested from the Director-General, Dept. of Health, Private Bag X828, Pretoria, 0001 (marked for the attention of Estelle de Klerk, Rm. 1523, Hallmark Bldg. Tel: (012) 312 0217).

Chapter 3 deals with general measures of implementation. It contains information pertaining to socio-economic rights corresponding to the applicable article in the African Charter. Article 15 provides that every individual shall have "the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work." In its report on this right, the government noted the high levels of unemployment the country. It then highlighted the government's "Employment Strategy Framework". Legislation which provides for the health and safety of persons at work was also mentioned as well as the fact that permanent residents should be viewed no differently from South African citizens when it came to reducing unemployment.

Copies of a NGO -'Shadow Report' under the CRC can be obtained from the National Children's Rights Committee, PO Box 616, Rivonia, 2128. E-mail: ncrc@mweb.co.za.

Further info. on the CRC can be accessed through the website of the UN High Commissioner for Human Rights: *www.unhchr.ch*

Article 16 provides that every individual shall have the right to enjoy "the best attainable state of physical and mental health" and furthermore that States Parties "shall take the necessary measures to protect the health of their people and to ensure that they receive medical treatment when they are sick." The report refers to section 27(1)(a) of the Constitution and then goes on to list legislation that has been passed to promote the provision of health care services. Finally, it also refers to a number of other measures taken by government such as the draft policy document towards a national health care system, life skills education, the Presidential Lead Project and the Aids Action Plan.

Article 17 provides every individual with "the right to education", and guarantees that they may take part freely in the cultural life of the community. The report refers to section 29 of the Constitution. It also describes a number of legislative measures taken since 1994 to ensure the right to education. In particular, the major achievements accomplished through the South African Schools Act are highlighted. Other measures taken by government to ensure the right to education are also discussed at some length.

Despite the fact that the South African government report indicates a serious commitment to its reporting obligations under international law, a worrying aspect of the report is its failure to adequately address any difficulties encountered in implementing the Charter.

B. Convention on the Rights of the Child (1989)

The Committee on the Rights of the Child is the body charged with supervising the Convention on the Rights of the Child (CRC). In accordance with section 44 of the Convention, States Parties are required to submit an initial report on the measures taken to give effect to the rights and the progress made on the enjoyment of those rights. This report must be submitted within two years of the entry into force of the Convention. Periodic reports must be submitted thereafter every five years.

These reports should indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations. They should also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the particular country.

The Committee considers reports in two stages. In the first stage the reports are studied by a Pre-sessional Working Group. This meeting is held approximately two months before the formal presentation of the report and is held behind closed doors. Key questions that will be presented to the delegate are raised and the questionnaire is then sent to the State concerned. NGO's are invited to participate in the meetings and to make contributions. Throughout, the concept of constructive dialogue plays an important role. The second stage is that of the consideration of the government report. The meeting commences with an introductory statement by the government representative, followed by a discussion of the report. Thereafter the Committee asks further questions or makes comments. The government representative is the given the opportunity to respond. After deliberation, the Committee issues concluding observations. In terms of articles 44 and 45, the Committee is entitled to make suggestions and recommendations. These suggestions and recommendations are sent to any State Party concerned and are reported to the General Assembly, together with comments, if any from States Parties.

SA's first report to the Committee on the Rights of the Child

South Africa ratified the CRC on 16 June 1995. The first report was due on 15 July 1997 and was submitted on 4 December 1997. This report is to be considered by the Committee in January 2000.

The South African government report is divided into eight chapters. Information pertaining to socio-economic rights is contained in the chapters dealing with general principles, basic health, welfare and education, sport, leisure and cultural activities.

General principles

The report notes that, in addition to the rights contained in section 28 of the Constitution, children are also entitled to the rights to housing, food, water and social security enshrined in sections 26 and 27 of the Bill of Rights. Attention is drawn to the "First Call for Children" and the Presidential Lead Project, both of which seek to provide basic services to children in disadvantaged areas.

Basic health and welfare

The report describes the effects of the inherited health system characterised by fragmentation and inequality, and sets out the government's priorities for restructuring it.

The current status of child health and welfare in South Africa is illustrated through a table. The concept of district development is emphasised as the cornerstone in the promotion of access to essential health care. The implementation of free health care services at all levels for children under 6 years is lauded as a major achievement. An issue of concern is the fact that, due to a lack of proximity to health care facilities and inadequate transport, there are a number of unsupervised home births. With regard to primary health care facilities, the report notes that 300 clinics have been built but that, despite this, there is a need for more services. Mobile clinics fill the gap to some extent. The report notes that health care facilities at both secondary and tertiary levels are quite high in urban areas, but that hospital care in rural areas is dependent on the improvement of infrastructure.

The report refers to a number of special programmes to address issues such as the high number of childhood deaths from preventable causes, substance dependency amongst children, and immunisation.

Children with disabilities, teenage pregnancy and STD/HIV infection in adolescents are identified as national child health priorities. A number of further issues of special concern are identified. These include the effects of environmental degradation on health management, tobacco, HIV/AIDS, child nutrition and breastfeeding. The report discusses measures taken by the Department of Water Affairs and Forestry to provide potable water and improved sanitation to previously disadvantaged rural communities.

A number of traditional practices prejudicial to the health and well-being of children are also discussed. The report notes that many of these practices are disappearing, particularly where health care facilities are accessible. Efforts are being made by those practising allopathic health care to work with traditional practitioners.

The report notes that, due to budgetary constraints, there is no universal social security system in South Africa. The White Paper on Welfare identifies groups of children in especially vulnerable circumstances. According to the report, the foster grant is only provided where a foster care situation has been legally formalised. It does not extend to many families fostering on an informal basis. The report refers to the discriminatory effects of the previous State Maintenance Grant for children. It then goes on to list the recommendations adopted by government pursuant to the Lund Committee's Report on Child and Family Support, particularly the introduction of a new child support grant.

Future challenges

A number of future challenges are identified. One of the most important is the need to resolve the inequitable distribution of funds between primary, secondary and tertiary levels of health care. Another is ensuring that graduates are adequately equipped to handle health and social issues facing the country. The report mentions that solutions will have to be found to address the reluctance of many health professionals to work in rural areas. The need for an efficient health information system is identified as being fundamental to monitoring and evaluating progress. It also notes with concern the problems faced by the Department of Welfare in finding solutions to social problems without the budget to provide an adequate social safety net. Finally, the need to reach World Summit Goals by the year 2000 was seen as a daunting challenge.

Education, sport, leisure and cultural activities

The main challenge identified in the report is to ensure equity and redress in the educational system. The report notes that the focus should be on ensuring that children benefit from being in school.

With regard to drop-out rates, it is noted that girl children drop out earlier than boy children and also that those in rural areas tend to drop out earlier than in urban areas. Furthermore, the report identifies a strong association between household income and enrolment particularly in higher grades, as well as an association between the payment of school fees and income. The Department of Education had published a proposal for school funding which will attempt to address past inequalities.

The report also describes the legal and constitutional context within which the right to education is guaranteed in South Africa. The South African Schools Act is discussed at some length, with specific reference to some of the major achievements of this piece of legislation. Statistics on State expenditure on education for children under the age of 18 are also provided.

Water and sanitation facilities for schools, particularly in rural areas, is identified as a key need. In this regard, the National Schools Construction and Upgrading Programme and the School Register of Needs Survey are listed as measures taken to improve the situation.

The report attaches great value to cultural diversity with regard to languages. It also notes that the Commission for Further Education is in the process of investigating the provision of education to learners over 15 years, and that a White Paper on Higher Education had been approved by Cabinet. The Report also refers to Curriculum 2005, as well as Technology 2005 and SYSTEM (the latter seeks to improve learning in the mathematics, science and technology fields).

The National Primary Schools Nutrition Programme targets children in economically disadvantaged communities. The report also notes hat the long history of discriminatory provision for early childhood development (ECD) has made a quick remedy difficult. The Department of Education had given support to the National ECD Pilot Project. The report refers to the important role of a number of NGO's in addressing widespread illiteracy. Programmes to address the general well-being of children and the creation of a culture of learning are also alluded to.

Future challenges

A number of challenges for the future are identified. There is a recognition of the need for human rights education, and an improvement in the provision of education for disabled children. The need for improved access to schools is highlighted in the report. In particular, transport, the improvement of schools in rural areas and informal settlements, and provision of more books, computers and science facilities are emphasised as key challenges. Better provision must be made for early childhood development programmes at local government level as well as the urgent need for ongoing electrification. The need to train persons in the implementation of Curriculum 2005 is also highlighted. Finally, the mass media must be encouraged to give special attention to issues affecting children's' rights.

The SA Human Rights Commission

First Economic And Social Rights Report

by Danie Brand

On 25 March 1999, after a long and sometimes difficult wait, the first annual Socio-Economic Rights Report of the South African Human Rights Commission (SAHRC) was finally launched.

It has been a long time coming. The preparation for and writing of the report was fraught with delays and difficulties. In his preface to the report, the chairperson of the Commission, Barney Pityana, refers to mistakes made and lessons learnt.

These mistakes, difficulties and delays are apparent in the final product in relation to basic editing, substantive content and overall approach.

To an extent, this was to be expected. The monitoring process that is required to give effect to the Commission's s 184(3) constitutional mandate is an extensive and exacting task. In order to operate in an effective manner, it requires resources, skills, experience, knowledge and focus. The Commission, relevant organs of State and civil society do not have experience in this type of monitoring process. Although there are serious flaws in the report, it should be assessed in the light of the fact that the Commission is on a learning curve in relation to this process.

The Commission must be commended for compiling and publishing the report, given the difficulties and constraints it faced. At the same time, frank and probing question must be asked about the nature of the report, the problems with it and the conception of the Commission's role reflected in it. What are the lessons learnt and the insights gained that can benefit the second monitoring cycle?

To my mind the most important of these lessons and insights have to do with two things. In the first place, there is a need to clarify the role of the Commission when exercising its monitoring mandate in terms of s 184(3). Secondly, a number of practical considerations relating to the Commission's capacity in the process must be resolved.

The Report

The full report is a rather lengthy document, consisting of six volumes of varying length. Volume I contains what is referred to as the Commission's "initial assessment of government compliance"; Volume II consists of examples of the "protocols" or questionnaires sent to relevant organs of State to prompt their reports; Volume III summarises the responses received from organs of State to the protocols; Volume IV contains an evaluation of these reports by the Commission assisted by a group of independent researchers; Volume V contains a study by the Community Agency for Social Enquiry (CASE) on public perceptions relating to the realisation of socio-economic rights; and Volume VI consists of SANGOCO's Report on *Poverty and Human Rights*.

Of the six volumes, the most interesting one is Volume I. It consists of an initial assessment of government's compliance with its obligations. It is from this volume that crucial issues such as the understanding the Commission has of its role, and the practical problems it faced during the drafting of the report, become apparent.

The Commission's Role

It is apparent that the Commission must develop a clear understanding of its role in the s 184(3) process. Must it do no more than collect information on the measures taken by relevant organs of State to realise socio-economic rights, and then pass this information on to Parliament in the form of a report? To what extent is it also constitutionally mandated to evaluate the progress made by government and to make appropriate recommendations? Should the Commission simply report in abstract on the state of realisation of socio-economic rights in South Africa, or can it also assess whether the government is complying with the obligations imposed on it by the Constitution in relation to socio-economic rights? There are indications in the report that the Commission's perceives its role to be

a more neutral one of simply reporting on and evaluating the degree of realisation of socio-economic rights in South Africa.

In his Preface to the Report Chairperson Pityana describes the s 184(3) process as a "mechanism for monitoring and assessing the realisation of economic and social rights" (vol I, p 1). This approach is echoed in Part 2 of the report (methodology), where the drafters of the report state that the Constitution directs the Commission to "monitor and assess the realisation of economic and social rights" (vol I, p 15). Elsewhere the role of the Commission is expressly described as: "...to assist government institutions with the furtherance of achieving socio-economic rights for all South Africans" (p. 14). There appears to be less emphasis on an assessment by the Commission of the extent to which relevant organs of State are complying with their constitutional obligations.

The Commission had the following material at its disposal to prepare its report and to analyse and evaluate government responses: a study of public perceptions relating to the realisation of economic and social rights conducted by an independent research body; an analysis of the obligations imposed by socio-economic rights and a preliminary analysis and evaluation of government responses prepared by a group of independent researchers; and the results of the national Speak out on Poverty Hearings. However, no coherent attempt is made to evaluate the extent to which government is meeting its obligations to respect, protect, promote and fulfil socio-economic rights.

The section in the report, entitled "Evaluation" contains the Commission's response to government reports. It consists of little more than a summary of the responses provided by relevant organs of State. During the first monitoring cycle, organs of State were required to report on four relatively basic main issues: their understanding of their socio-economic rights obligations, the availability of information systems on socio-economic rights, existing legislation and policies to give effect to socio-economic rights, and existing and future plans to improve access to socio-economic rights. However, the report does not evaluate the understanding that particular organs of State have of their obligations, or pronounce on whether they have established adequate information and monitoring systems.

A tool for monitoring

This apparent inability to accept the mantle of responsibility bestowed on the Commission by the Constitution is problematic. The role the Commission should adopt seems clear. The constitutional provisions on which the s 184(3) monitoring process is based points to an evaluative rather than a neutral role for the Commission. In terms of section 184(3) the Commission must require relevant organs of state to provide it with information regarding the measures they have taken towards the realisation of socio-economic rights relevant to them. Organs of state are thus required not merely to provide information on the general state of access to socio-economic rights in the country, but rather to report on what they have done to realise socio-economic rights.

In terms of section 184(1)(c) of the Constitution, the Commission is under a general constitutional duty to "monitor and assess the observance of human rights in the Republic." The key word here is observance: the meeting of obligations. Section 184(3) provides the Commission with a tool for monitoring and assessing the observance of socio-economic rights in South Africa. This means much more than simply assessing in general terms the realisation of

socio-economic rights in the country. It means that the Commission is constitutionally obliged to assess the extent to which organs of State have observed the obligations imposed on them by the socio-economic rights provisions in the Constitution.

Common sense also indicates that the appropriate approach is to evaluate the fulfilment of the State's obligations. The Commission is not in the business of, and does not have the resources and skills for collecting, analysing and evaluating socio-economic data. This is the role of institutions such as the Central Statistical Services, and indeed, of the very organs of State who are required to report to the Commission in terms of section 184(3). In fact, one of the primary obligations imposed on organs of State by socio-economic rights is that of regularly gathering and analysing information pertaining to the extent of realisation or non-realisation of socio-economic rights. The SAHRC is the premier institution tasked with monitoring and assessing human rights observation in the country. It should logically focus its energies on that role.

Much has been said and written about the merits of an evaluative approach: instilling a culture of justification and openness; raising awareness among organs of State about their constitutional obligations; ensuring that these obligations enjoy priority attention; and, as the Commission emphasises in its report, opening up possibilities for a constructive dialogue on the realisation of socio-economic rights between the monitoring body and organs of State.

It is hoped that in future monitoring cycles, the Commission will give greater emphasis to providing a comprehensive evaluation of the extent to which relevant organs of State are fulfilling their obligations.

Practical considerations

Apart from the concern regarding the nature of the Commission's role, a number of important practical considerations have been underscored by problems experienced in the first monitoring cycle.

It is clear from the delays in publishing the report, the lack of incisive analysis and evaluation of information received, and basic problems with editing that the Commission was under tremendous pressure in terms of resources, skills and time in drafting the report. There is little doubt that a monitoring function of this nature requires an enormous amount of detailed, exacting work. It appears the Commission did not have sufficient human and financial resources for this task.

This problem can be solved in two different ways. On the one hand, the Commission can minimise the work load by doing only what is absolutely necessary for now. Later, as skills and resources grow, it can gradually expand its activities. The Commission can also maximise its available resources, making sure that all internal and external resources are utilised.

Setting attainable goals

Rather than attempting to conduct the monitoring process on as large and impressive a scale as possible, the Commission should try to do only that which is manageable.. The first report is replete with indications that too much was attempted. In future cycles, the Commission should rather focus its enquiry more narrowly in order to be more effective.

The Commission did adopt a number of measures in the first reporting cycle to try to narrow the scope of the enquiry and therefore the amount of work. In the first place, it decided to focus initially only on a number of basic issues before moving onto a more detailed enquiry in later cycles - a form of "progressive realisation" of the Commission's obligations under s 184(3).

This approach is to be commended. The problem is, however, that the responses provided by many organs of State to the Commission during the first cycle has made it impossible to build up a coherent picture relating to the issues that were the subject of enquiry. In these circumstances, it might be advisable for the Commission to limit its enquiry in the second cycle to these same set of issues. With the experience and understanding gained by both the Commission and the organs of State during the first cycle, a more complete picture might emerge next time round.

Secondly, the Commission decided to request reports only from national government departments, provincial governments and representative structures of local government. The term "relevant organs of state" in s 184(3) could be interpreted to include a much larger number of state institutions. Given the failure of almost all of the organs of State approached during the first cycle to report timeously and properly to the Commission, it might be a good idea for the Commission to narrow its focus in this regard even further during the second cycle.

Finally, the Commission should focus on ensuring the effective participation of the organs of State it decides to target. Many of the reports received did not constitute an adequate response to the information requested. This is probably more due to a lack of experience in reporting on socio-economic rights on the part of organs of State than recalcitrance. This lack of experience and capacity has to be addressed. The first step would be to redesign the protocols or questionnaires sent to the organs of State and their accompanying explanatory memorandums. Secondly, the Commission needs to engage in some form of training process for those officials who will be preparing reports for submission. This would also contribute to fostering a relationship of constructive dialogue between the Commission and organs of State, thereby enhancing the chances of success of the process.

FURTHER INFO:

Booklets entitled, *Monitoring Socio-Economic Rights in South Africa - the Role of the SA Human Rights Commission* published by the Community Law Centre (UWC), and the Centre for Human Rights (University of Pretoria) can be ordered through Sandy Liebenberg: Fax: (021) - 959 2411; E-mail: sliebenberg@uwc.ac.za.

The SAHRC can be contacted at tel no: (021) 484 8300; fax: (021) 484 7149.

Enhancing capacity and NGO participation

The Commission was woefully under-resourced during the first monitoring cycle. Only two researchers on the staff of the Commission worked full-time on the preparation and drafting of the report. In this context, it is essential that the Commission draws on all the resources at its disposal. There is a need for much closer involvement by organisations of civil society than occurred during the first cycle.

It is still, frankly, impossible to understand the decision by the Commission to deny interested NGO's and research institutions access to government reports before the Commission's report had been finalised. The Commission should not

see the interest of these organisations as a threat, or an attempt to look over shoulders. NGO-input in the form of submissions and comments can only assist the Commission to gain a more holistic picture of issues relating to the realisation of socio-economic rights in South Africa.

The Commission would do well to learn from the mistakes of the first monitoring cycle, and strive to establish a monitoring process that is transparent and participatory. These are not only important constitutional values, but vital to the credibility and success of the process of monitoring the realisation of socio-economic rights in South Africa.

The Editor,

In general, the Constitution defines the 'structures' and 'functioning' of the State. The Bill of Rights defines the State's 'conscience' and its 'purpose', it gives the State its soul.

Through articulating a commitment to the 'progressive realisation' of socio-economic rights - such as the rights to housing, education and social assistance - the Bill of Rights makes it clear that it is one of the *purposes* of governance is to give all in South Africa access to these rights.

As a result, the State's policy-makers are obliged to measure their policies and the detail of their policy instruments against the objectives outlined in the Bill of Rights. Along with specific sectoral policies, the budget is a key instrument of State which enables an assessment of whether sufficient priority is being given to the progressive realisation of socio-economic rights. This assessment relates to both the relative allocation of resources to particular functions and the social impact of particular spending and tax decisions

In my opinion, Lesley Maasdorp in his article published in *ESR Review*(vol. 1, no. 4) jumped to a premature conclusion on these matters. He argued that "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." Rather than seeking to separate economic and budgetary matters from the State's broader constitutional commitments, it would be preferable to seek means to sharpen the budget as a primary tool of rights realisation. Once we have achieved greater conceptual consensus on the relationship between the budget and rights realisation, it will be possible to define more clearly the institutional questions such as the relative check-and-balance roles of the executive, legislatures and judiciary. Rather than ending the discussion prematurely, these are the very matters which should constitute part of the "considerable research" that Maasdorp has called for in his article.

Congratulations to the team behind *ESR Review*. It is a timely and useful publication which is providing a much-needed forum for discussion on the critically important matter of how best to advance economic and social rights in South Africa.

Kenneth Creamer

Book Review

by Karrisha Pillay

***The Right to Health as a Human Right in International Law* by Brigit C.A. Toebes (Intersentia - Hart: Antwerpen, Groningen, Oxford, 1998).**

The purpose of the book is to clarify the significance, content and implications of the internationally recognised right to health. In fulfilling this ambitious purpose, it seeks to address the question of exactly what individuals are entitled to on the basis of the right to health, and the concomitant obligations of the State.

The introductory chapter outlines the historical development of health as a human right and some of the problems with the current definitions of the right to health. Although the second chapter attempts to discuss the most important human rights treaty provisions protecting the right to health, it accords very limited attention to the relevant provisions of some important treaties such as, the Convention on the Elimination of All Forms of Racial Discrimination. The chapter also contains a section on the right to health in national constitutions, which serves little purpose. The constitutional provisions of Finland, Hungary and South Africa are merely repeated with very little analysis.

Chapter 3 deals with reporting procedures at international level. Although the chapter is intended to assist in delineating the content and the scope of the right, it is largely descriptive and with little assessment and analysis. The fourth chapter deals with the role of case law in giving effect to the right to health at both international and national levels. Although the section dealing with national case law represents a fairly haphazard selection of countries and cases, it provides some useful insights into how the right to health has been interpreted within different legal systems.

The last three chapters of the book are particularly useful in contributing to the normative content of the right to health. On the basis of earlier chapters, chapter 5 seeks to delineate the core content and scope of the right to health. It is particularly useful for its outline of the core elements that should be included within the scope of the right. Chapter 6 focuses on State obligations flowing from the right to health. These State obligations are examined in terms of treaty provisions and general human rights obligations.

The final chapter provides some useful recommendations for the strengthening of the right to health at international level. These recommendations take the form of a draft General Comment on the right to health as well as reporting guidelines for both the International Covenant on Economic, Social and Cultural Rights and the European Social Charter. The draft General Comment, in particular, makes a substantial contribution to the normative content of the right to health.