ESR REVIEW

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Editorial

by Sandra Liebenberg

The ESR Review is back in production after a break of a year and a half. We herald this event with a special bumper edition of the Review that features the research project and colloquium undertaken by the Socio-Economic Rights Project.

The Bill of Rights in South Africa's 1996 Constitution has been internationally lauded for its inclusion of an impressive array of justiciable socio-economic rights. 2002 is the 5th anniversary of the adoption of the Constitution.

This event offers an important opportunity for reflection on the progress that has been made in realising these rights, and the critical challenges that lie ahead.

As a contribution to this process, the Socio-Economic Rights Project has undertaken a research project since June 2001, which has entailed commissioning research papers on selected themes relating to the realisation of the socio-economic rights in South Africa from a range of authors with both expertise and practical experience in their fields. We have focused on topics that can offer fresh insights and perspectives into the dynamics of realising socio-economic rights in the South African context.

The principles laid down by the Constitutional Court for the interpretation of socio-economic rights in the landmark decision of Government of South Africa v Grootboom 2000 (11) BCLR 1169 (CC) were used as a framework for assessing progress and obstacles in the implementation of these rights.

As will be noted, certain of the papers also critique various aspects of this judgment and suggest areas where our jurisprudence could be developed further. The researchers were also requested to identify key challenges for the future in terms of the implementation and enforcement of socio-economic rights.

We have been fortunate to have a committed team of reference group members who are themselves leading figures in the promotion of socio-economic rights in

South Africa (see box overleaf). They gave advice on the general direction of the project and assisted the authors with comments on drafts of their papers.

These research papers were presented and discussed at a colloquium organised by the Community Law Centre from 17-19 March at the Strand Beach Hotel, Cape. Entitled, Realising Socio-Economic Rights in South Africa: Progress and Challenges, the colloquium was attended by about 150 delegates. They represented a cross-section of government officials, parliamentarians, representatives of the South African Human Rights Commission (SAHRC), the Commission for Gender Equality (CGE), the judiciary, legal profession, academics and NGOs. In addition, a number of international guests attended and presented papers on international developments relating to socio-economic rights (see box below). The discussion and feedback from delegates was invaluable to the research team in developing and finalising the papers. The debates were lively, provocative and constructive. We sincerely thank all delegates for attending the event and engaging actively with the research and presentations.

This edition of ESR Review contains a synthesis of the key themes and challenges for government and civil society emerging from both the research papers and the discussions at the colloquium. The full version of the papers can be obtained from the Project staff, and will be edited over the course of the next six months for publication in book form or as a special edition of a journal.

We would like to extend a special word of thanks to the Ford Foundation for funding this research project and colloquium. Thank you also to my co-editor on this special edition of ESR Review, Prof. Pierre de Vos of the UWC law faculty.

In the final instance, we hope that the work that has been done on this project will be useful to both public institutions and civil society in their on-going work to make socio-economic rights meaningful to the millions of people afflicted by poverty in our country. We trust that you will find this edition of ESR Review stimulating, and that it will inspire you with new ideas to carry forward the struggle for universal access to socio-economic rights.

Reference Group Members:

Charlotte McClain is a Commissioner on the SA Human Rights Commission
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Salim Vally is with the Education Policy Unit at Wits University

International Guests at the Colloquium:

Judge Ariranga G. Pillay, Chief Justice of Mauritius and Member of the UN Committee on Economic, Social and Cultural Rights
Sam Amadi, Centre for Public Policy and Research, Lagos
Prof. Viviene Taylor, UN Commission on Human Security, New York

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The International Covenant on Economic, Social and Cultural Rights

Time for South Africa to ratify

Judge Ariranga G. Pillay

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is the most important international treaty brought into existence to protect the social, economic and cultural rights of people all over the world. This treaty forms part of what is often called the 'International Bill of Rights.' When a State ratifies this treaty, its government agrees to begin to take steps immediately to start realising the rights contained in the Covenant. There are many similarities between how the socio-economic rights protected in the South African Constitution are drafted, and the provisions of the ICESCR.

Advantages to ratification

Although the South African government has signed the ICESCR, it has not yet ratified it. On the face of it, there is no plausible reason for this failure, as the South African Constitution is a guiding light in the fight for the protection of social and economic rights. The Covenant imposes no greater duties than the South African Constitution already imposes on its government. Some might argue that it is not important for the South African government to ratify the ICESCR because the Constitution already protects the vast majority of social and economic rights contained in the Covenant. This view would not be accurate because when a country ratifies the Covenant several advantages flow from this action.

Firstly, when a country is unable to meet its obligations under the Covenant due to a lack of resources or technical know-how, the Covenant provides for a country to call for support and assistance from members of the international community, for example, the various United Nations (UN) agencies.

Secondly, when a country is required to implement a Structural Adjustment Programme (SAP) designed by one of the world's financial institutions, it can resist some of the harshest conditions of the programme if it can show that it would impose measures that are contrary to the obligations in the ICESCR. If South Africa ratifies the Covenant it would therefore be able to use this as a bargaining chip to ensure that the conditions set by financial institutions are compatible with the country's obligations under the Covenant.

Interpreting socio-economic rights

The Covenant is also important because its provisions - and the interpretation of these provisions by the UN Committee on Economic Social and Cultural Rights (see box overleaf) - can assist South African courts in the interpretation of the socio-economic rights in the South African Bill of Rights. When activists and lawyers engage with social and economic rights, there are therefore important lessons to be drawn from the interpretation of the relevant provisions of the Covenant.

In the first place, a distinction can be drawn in the Covenant between those rights that can only be implemented over time and other rights that should be implemented immediately.

Rights that should be implemented immediately include the right to non-discrimination, for example, on the basis of race, colour, sex, political or other opinion, national or social origin, property, birth or other status. Thus when legislation or policy has the effect of excluding a particular group from accessing a socio-economic right by, for example, discriminating against female learners in their access to basic education, this is in violation of the Covenant.

The State might also be in violation of its Covenant obligations by omission if it does not adopt appropriate policies and legislation to address cultural and other barriers to female learners accessing basic education.

Minimum core obligations

The Committee on Economic, Social and Cultural Rights has developed the concept of minimum core obligations. The duty to ensure essential levels of the Covenant rights (such as primary health care, access to basic foodstuffs and basic shelter) has a first call on the State's resources.

The Committee has stated that these core obligations are the minimum level of socio-economic conditions, which must be met as a priority.

The Constitutional Court declined to make use of the concept of minimum core obligations in the Grootboom case. However, the General Comments of the Committee on Economic, Social and Cultural Rights, which spell out the minimum core obligations in relation to many Covenant rights, can be used to assist South African lawyers and activists to determine whether the government has acted reasonably in realising socio-economic rights.

The International Covenant on Economic, Social and Cultural Rights can thus make an important contribution to government initiatives, as well as civil society advocacy and litigation aimed at advancing the realisation of socio-economic rights in South Africa.

Facts about the UN Committee on Economic Social and Cultural Rights

- The Committee monitors the implementation of the rights in the ICESCR by considering reports from State parties and making 'concluding observations' about a particular state's compliance with its obligations.
- The Committee meets twice a year and receives information from governments, other UN agencies, as well as from NGOs and other civil society sources (e.g. through the submission of an NGO Shadow-Report).
- The Committee scrutinises a country's performance in public and provides feedback to assist a country to improve its performance.
- The Committee also prepares General Comments on specific key articles of the Covenant. These Comments are very useful in developing the precise meaning of socio-economic rights, and clarifying the duties they impose on the State.

The General Comments of the UN Committee on Economic, Social and Cultural Rights can be accessed on the following www-site: http://www.unhchr.ch/tbs/doc.nsf. (from here click on *General Comments*).

Judge A.G. Pillay is Chief Justice of Mauritius and Member of the UN Committee on Economic, Social and Cultural Rights

ESR REVIEW

The African Charter on Human and Peoples' Rights

Realising its potential

Sam Amadi

Compared to other international human rights treaties, the African Charter on Human and Peoples' Rights is considered to be a radical document that deals with human rights in a uniquely African way. It is one of the few documents which contains civil and political rights (like the right to free speech) in the same document as socio-economic rights. It also makes provision for the full realisation of socio-economic rights and places an immediate duty on the State to begin to realise them.

The socio-economic rights contained in the Charter are phrased in a rather broad way, and it is unclear from the text alone what their extent might be.

Weak enforcement

The African Charter was negotiated and brought into effect at a time when there were many autocratic leaders on the continent. The mechanisms providing for its enforcement are therefore particularly weak. At present the African Commission on Human and Peoples' Rights ('the Commission') is tasked with overseeing the implementation and enforcement of the Charter. It must consider reports from member countries and is also tasked with considering complaints from individuals and groups alleging violations of the Charter.

However, the Commission is hampered by a lack of funding and human resources. This means there is an unacceptably long delay in finalising complaints brought before it. More importantly, high volumes of complaints are never considered because the Commission finds that the complainant did not exhaust all the available domestic remedies in the country of origin.

Although the Commission has held that local remedies do not have to be pursued if they are inaccessible or if it will take an unduly long time to exhaust them, it does not apply these principles consistently. For example, the Commission has found that even when it is clear that the remedies in a specific country are inaccessible, the complainant must still try to pursue these remedies before referring the matter to the Commission for investigation and decision.

It is therefore difficult not to draw the conclusion that the Commission is sometimes reluctant to deal with controversial complaints against member states.

But even where the Commission admits a complaint, investigates it and makes a conclusion on the merits, its decision is not binding on the individual state.

In the final instance, the Commission reports to the Organisation of African Unity (OAU, now the African Union, AU), which consists of the heads of State of all member countries. This means that the Commission is accountable to a political body and can therefore not be said to be an independent watchdog for the Charter's rights.

Towards an African Court

To improve the Commission's effectiveness, non-governmental organisations in Africa should begin to play a more proactive role by engaging with it.

To ensure that the socio-economic rights in the African Charter become more than mere words on paper, the very structures of enforcement will have to be changed. To that end, a protocol has been drafted that will - when ratified by the appropriate number of states - establish an African Court of Human Rights. The protocol provides for the establishment of a Court, but this does not automatically mean that individuals and NGOs will be able to bring complaints against an offending country. Only when an individual country has explicitly agreed to its jurisdiction will individuals be able to bring complaints to the court.

In conclusion, it is important to bear in mind that changes will not come solely from the formal work of the Charter bodies, but from political mobilisation and community participation in campaigns to protect socio-economic rights more effectively in Africa.

However, the Charter has a large degree of unexplored potential in the area of socio-economic rights. It should be used as part of a broader campaign to give teeth to socio-economic rights in Africa.

Sam Amadi is a doctoral student at Harvard, and Director of the Centre for Public Policy and Research, Lagos, Nigeria.

The courts and socio-economic rights

Carving out a role

Sandra Liebenberg

Although the jurisprudence on the socio-economic rights in the Bill of Rights is still in its infancy, the number of cases coming before the courts is gathering momentum. In particular, the Constitutional Court judgment in the case of Government of the RSA v Grootboom 2000 (11) BCLR 1169 (CC) [the Grootboom case] is a landmark in socio-economic rights enforcement in South Africa. Several important insights can be garnered from the emerging jurisprudence, particularly from the Grootboom case.

The Constitutional Court has confirmed that the socio-economic rights in the Bill of Rights place both a duty on the State and other important role players to respect these rights, and a positive duty on the State to protect, promote and fulfil them.

The duty to respect

The duty to respect socio-economic rights means the State must refrain from law or conduct that would result in people being deprived of access to their socio-economic rights. For example, in Despatch Municipality v Sunridge Estate and Development Corporation 1997 (8) BCLR 1023 (SE) the court declared that old apartheid legislation permitting landowners to summarily (without an order of court), demolish informal structures on their property, was in conflict with section 26(3) of the Constitution. Section 26(3) explicitly prohibits arbitrary evictions and requires a court to take into account 'all relevant factors' before ordering peoples' eviction from their homes.

It is still unclear what circumstances will be considered relevant in eviction proceedings, and who bears the onus of proving that these circumstances exist - the owner of the property or the person being evicted. A full bench of the Cape High Court held in Ellis v Viljoen 2001 (4) SA 795 that section 26(3) does not place a duty on the owner of property to allege and prove the existence of these 'relevant circumstances'. The Ellis decision suggests that 'relevant circumstances' will be interpreted in the light of common law principles governing eviction proceedings. There is, however, scope to challenge this decision in other jurisdictions because it seems in effect to negate the essence of section 26(3). It would accord more with the value of human dignity and social justice underlying the Constitution if section 26(3) were interpreted to place a duty on the courts to consider the circumstances of vulnerable groups facing the loss of their homes through eviction proceedings.

Positive duties

The courts have also demonstrated a clear willingness to enforce the positive duties imposed by those socio-economic rights. The Grootboom decision was important as it set out criteria for judging whether the State has fulfilled its positive duties to realise the socio-economic rights in sections 26 and 27 of the Constitution - access to adequate housing, health care services (including reproductive health care), sufficient food and water, and social security. In terms of the relevant subsections, the State must:

- take 'reasonable legislative and other measures'
- 'within its available resources'
- to achieve 'the progressive realisation' of each of these rights.

The Grootboom Principles

The Court established several important principles for evaluating whether the State has fulfilled its positive duties:

- The key question is whether the measures adopted by the State are 'reasonable'. This means that a court will not tell the State it could have adopted a more favourable policy or spent public money better. Rather, the State will have to show that the measures it has adopted are reasonable, given its positive duties under the Constitution to realise access to socio-economic rights.
- The reasonableness of the measures adopted by the State must be considered in their social, economic and historical context.
- The State must establish comprehensive and coherent programmes, which are capable of facilitating the realisation of the right.
- A reasonable programme must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.
- When deciding on the reasonableness of a programme, the court will pay special attention to the question of whether the needs of the most vulnerable sections of society have been addressed. In the words of the Court, 'The poor are particularly vulnerable and their needs require special attention'. In practice this means a State programme designed to promote access to socio-economic rights must make provision for people in desperate need. In the context of the right to housing this means that the housing programme must provide relief for people 'who have no access to land, no roof over their heads, and who are living in intolerable conditions

or crisis situations'. An example would be an accelerated land release programme for people in dire circumstances. It was on this ground that the Court found that the current state housing programme in the area of the Cape Metropolitan Council did not comply with section 26 of the Constitution.

- However, it is not enough to merely design reasonable policies and legislation. The relevant programmes must also be reasonably implemented. This means, for example, that if the government does not allocate enough resources for the implementation of a programme or where people's access to a socio-economic right is hampered by bureaucratic inefficiency or very onerous regulations, it could be challenged in court as unreasonable.
- Progressive realisation means the State has a duty to examine legal, administrative, operational and financial barriers to accessing socio-economic rights and, where possible, to take steps to lower them over time. Housing must be made accessible to both a larger number and also a wider range of people as time progresses. The Court also accepted that the State would have to fully justify any deliberately retrogressive measures that reduced people's access to socio-economic rights. An example in the housing context would be abolishing the housing subsidy scheme without putting in place a suitable alternative programme to facilitate access to housing by the poor.
- Finally, the availability of resources would be an important factor in assessing the reasonableness of the measures adopted by the State.

The Grootboom judgment paves the way for civil society advocacy aimed at ensuring that the Government applies the principles set out in the judgment, not only in the housing sphere, but also in relation to the other socio-economic rights.

Key challenges

A number of key challenges remain in using the courts as a vehicle for enforcing socio-economic rights.

- The application of the separation of powers doctrine and the extent to which courts are willing to intervene in socio-economic policy matters remain highly contested terrain. Arguments must be developed to demonstrate that the separation of powers doctrine can be interpreted in such a way that it allows for a strong role for the courts to enforce socio-economic rights in our democracy. The case brought by the Treatment Action Campaign relating to the prevention of mother-to-child transmission of HIV (MTCT) is an important test of the extent to which the Constitutional Court is prepared to go in enforcing socio-economic rights, particularly the nature of the remedy that is given if a violation is found.
- There is a need to develop a coherent jurisprudence on the way in which courts should engage with the issue of available resources. Any move to insulate the courts from examining the allocation of resources to socio-economic rights should be resisted.
- The concept of retrogressive measures could be developed further to ensure that where the State or other role players take action that reduces access to socio-economic rights, the courts will find these actions unreasonable. This is an untapped area of the law that might well provide activists with a potent weapon against poor-unfriendly policies and actions.
- The Court in Grootboom did not endorse the idea that the socio-economic rights in the Bill of Rights impose a minimum core obligation on

government to provide a basic level of services to the poor. Neither did it completely close the door to this argument. This basic level of services is essential to make the value of human dignity a reality, and is part of the obligations that States parties have under the International Covenant on Economic, Social and Cultural Rights.

- The interpretation that the Court in Grootboom gave to the children's socio-economic rights has been criticised by children's rights activists. The interpretation that the Constitutional Court gives to the right of children to basic health care services (s 28(1)(c)) in the TAC-MTCT-prevention case will be important for the development of the jurisprudence on children's socio-economic rights.
- NGOs and other civil society organisations have the challenge of supporting poor communities in their struggle to realise socio-economic rights. Litigation should ideally be part of a broader campaign of mobilisation for social justice and development.

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The SA Human Rights Commission and socio-economic rights

Facing the challenges

Charlotte Vuyiswa McClain

The Constitution gives the South African Human Rights Commission (SAHRC) an important role to play in the monitoring of socio-economic rights. One of its most important tasks in terms of s 184(3) of the Constitution is to monitor the measures taken by the State to progressively realise the rights to housing, health care, food, water, social security, education and the environment. The Commission monitors not only legislation and policies adopted to realise these rights, but also the budget allocated towards realising them and the actual results of the measures adopted by Government.

Monitoring tools

To this end the Commission has developed, and continues to fine-tune, protocols (or questionnaires) as a monitoring tool for each socio-economic right. These protocols are sent to each relevant government department, which must then complete the questionnaire and send it back to the Commission.

Apart from generating information on the measures taken by government to realise socio-economic rights, these protocols are also intended as a tool to raise awareness among government officials of their socio-economic rights obligations. Departments should not merely see the completion of the questionnaires as a form-filling-in exercise.

The protocols are also designed to encourage departments to set goals and benchmarks against which their future performance can be measured.

The protocols are not tools to monitor general economic development trends, but are based on human rights indicators. They highlight human rights concerns, for example, whether vulnerable groups enjoy equal access to socio-economic rights.

Each year the Commission compiles a report on this monitoring process, which is submitted to Parliament.

Complaints

The Commission has a second important role to play in the enforcement of socio-economic rights. It has a duty to deal with complaints received from members of the public about alleged violations of their human rights, including socio-economic rights. In fact quite a high proportion of the complaints received by the Commission relate to socio-economic rights. The Commission usually investigates complaints and attempts to find an amicable solution to the satisfaction of the complainant.

The Commission also has the power to take a complaint to court, but has not yet initiated any litigation in its own name based on an individual complaint concerning a socio-economic rights violation. The Commission has, however, jointly with the Community Law Centre, intervened as amicus curiae ('friend of the court') in the Grootboom case.

Inquiries

A third aspect of the Commission's work relates to its power to conduct inquiries into human rights violations. For example, the Commission has recently launched an inquiry into human rights abuses in the farming community. Although this inquiry deals primarily with safety and security rights, the socio-economic rights of farm workers are also addressed. The importance of such an inquiry is that the Commission can make contact with individuals who would not have heard of, or would not have approached the Commission on their own accord mainly because they live in extremely disadvantaged circumstances. This particular inquiry will hopefully enable the Commission to gather information at a grassroots level, and to appraise itself of the reality under which people live and how they do or do not enjoy their constitutional rights. At its conclusion, the Commission will draw up a report that will contain its findings and recommendations. The Commission will then hold a national conference at which the report will be deliberated and during which a plan of action is expected to be developed. The report will also be submitted to the President and Parliament who must decide how to take the issues raised in the report further.

Key challenges

The Commission faces several challenges directly or indirectly related to its role in relation to socio-economic rights:

- The Commission would like to move towards a system of monitoring government policies and actions relating to socio-economic rights that mirrors those of the United Nations treaty bodies. This would mean that civil society, especially NGOs, would play a more important role in providing information and challenging the inputs made by government departments. NGO's should begin to engage the Commission on this issue to ensure that its annual report improves.
- The Commission would like to work more closely with the members of the legislatures - especially provincial legislatures - to ensure its work is relevant to what is happening in the legislatures.
- The Commission recognises the need to embark on more vigorous public education programmes in the area of socio-economic rights. For example,

very few individuals have lodged complaints about an infringement of their right to food. If people knew more about this right, perhaps they would come forward and seek remedies to have it enforced.
- The Commission is striving to improve its working relationship with the various Departments with a view to a more constructive engagement in the socio-economic rights reporting process. Governments should comply with their reporting obligations without the Commission having to resort to its subpoena powers.
- The Commission wishes to develop more precise human rights indicators that could be used to measure the progressive realisation of socio-economic rights from year to year. To this end, academics, researchers and grassroots organisations can greatly assist the Commission.

The Commission has been criticised for its failure to follow-up on reports and for producing long and inaccessible reports. The Commission is in the process of revisiting these aspects of the reporting process, and also of seeking more active civil society participation in the process.

A key constraint for the Commission is that it has a constitutional mandate to monitor socio-economic rights, but grossly inadequate funding to fulfil this critical mandate. As a result, the Commission has to rely on donor funding for many aspects of the socio-economic rights reporting process. In order to be more effective, a greater allocation of government funding is required. The Commission is also striving to work in partnership with both the government and civil society in promoting the realisation of socio-economic rights in South Africa.

Points for reflection:

- How can government officials be persuaded to take their reporting obligations relating to socio-economic rights more seriously?
- What is the best way for the Commission to monitor the actual impact of government policies and legislation on poor communities?
- How can civil society organisations get more actively involved in the work of the Commission relating to the monitoring of socio- economic rights?
- How can NGOs make use of the reports and recommendations produced by the Commission to mobilise support and advocate for policies, legislation and programmes that help realise socio-economic rights?
- How should the Commission follow-up on the recommendations contained in its various reports?
- What is the role of Parliament in the socio-economic rights reporting process? Which portfolio committee in Parliament should consider and deal with the Commission's Report?

Charlotte McClain is a member of the SA Human Rights Commission. Socio-economic rights are her main areas of responsibility.

Public finance and socio-economic rights

Kam Chetty

A critical concept in the realisation of the socio-economic rights - especially those in section 26 and 27 of the Bill of Rights - is that of 'available resources'. It is an indisputable fact that macro-economic policy will influence the availability of resources to fulfil socio-economic rights.

The government can use macro-economic policy to provide an economic environment with appropriate incentives for economic growth and job creation, and to maximise opportunities for disadvantaged people to participate meaningfully in the economy and in society. These goals of macro-economic policy are not necessarily mutually exclusive, but trade offs often have to be made. The question raised here is: given the Constitutional commitment to socio-economic rights, is the government making the correct macro-economic policy choices?

Three phases

There are three distinct phases in the post-apartheid government's macro-economic policy. The first phase - which started in 1994 and lasted until 1997 - was characterised by the government's Reconstruction and Development Programme (RDP). The RDP was explicitly adopted to reduce poverty and inequality in our society and was primarily conceived as a typical project-driven programme aimed at alleviating poverty through the implementation of specific prestige development projects. It set clear targets for public investment and social programmes as well as transformational objectives. The RDP required a more expansive macro-economic policy with a relatively large annual increase in social expenditure of between 13% and 15.5% for 1994 to 1996. The RDP was criticised, however, because it operated as a band-aid to address the poverty of only the few who lived in a community affected by an RDP project. It did not adequately influence the government's mainstream development approach and was not adequately funded to make a huge impact.

The second phase - which lasted from 1997 to about 2000 - was characterised by a move away from the RDP to the introduction of a Growth, Employment and Redistribution Programme (GEAR). The programme was introduced as an attempt to foster growth and employment while at the same time stabilising the macro-economic environment. GEAR required the government to maintain strict fiscal discipline and expenditure increases were contained to around 4.6% to 6.2% for this period. In real terms (after taking inflation into account) this meant an actual decrease in spending, including a decrease in some forms of social spending. The aim was to establish a framework for consistent and predictable macro-economic policies with a view to attracting foreign investment. It was hoped that this would lead to healthy growth margins and increased employment opportunities. GEAR also required the government to set stringent targets to bring down inflation and to bring down the budget deficit.

Critics of GEAR argued that the stringent targets set by GEAR reduced the amount of resources available for the realisation of socio-economic rights. While many agree that fiscal discipline is important, they argue that the government has been overzealous in sticking to stringent targets that cut social spending and negatively affected the socio-economic well-being of the poor. Critics say that while GEAR was successful in bringing down the budget deficit (and to a lesser extent, keeping inflation in check) it has failed dismally to attract foreign investment or to stimulate economic growth. The GDP growth averaged 2.4% a year for this period, compared to the GEAR projection of 4.2%. GEAR also projected a modest growth in formal employment, while in reality, there has been a catastrophic reduction of jobs in the formal sector.

The 2001 budget reflects a slight change in government policy, which suggests that we have now entered the third phase of the government's macro-economic policy. This phase is characterised by a proposed increase in expenditure of

between 7.4% and 9% - or a 3.7% increase in real terms in non-interest expenditure. These proposed increases in expenditure include some social expenditure but also expenditure on infrastructure. The increase in spending proposed in the Medium-Term Budget Policy Statement has been welcomed by critics of GEAR but some concerns remain.

Current macro-economic policy: Key constraints

For one, the government has not yet proven itself capable of spending the increased budget allocations. This failure to spend allocated resources supports the view that capacity constraints is a key factor hindering the realisation of socio-economic rights.

It is important that the State also makes concerted efforts to harness and draw on the capacities that exist in civil society to improve the effectiveness of socio-economic rights delivery.

A second concern with the present macro-economic policy is that even these increased levels of spending will not be adequate to fulfil the State's obligation to progressively realise socio-economic rights. This is because:

- The resource increases do not take into account the huge backlogs in providing social services and access to socio-economic rights which have built up over the years;
- Given the uncertainty in the global economy and the continuing job losses in the South African economy, it is possible that a downturn in the South African economy would result in increased levels of poverty and unemployment that would far outweigh the effects of any increased spending;

A third concern in relation to the present macro-economic policy is that, although there has been an increase in overall spending, an analysis of the proposed expenditure over the next five years for the provision of social and economic services actually shows a reduction in the real spending on some of these services. For example, the education sector faces real per capita cuts of between 0.2% and 0.7% over the next five years. Given that basic education is a constitutionally guaranteed right, and the cuts in real expenditure cannot be justified in terms of either declining enrolment rates or major efficiency gains, these real expenditure cuts could be viewed as a retrogressive measure on the part of the State. The real expenditure on water delivery will also be cut by between 1.8% and 4.1% over the next five years. Given the constitutional commitment to provide all South Africans with access to water, this cut seems difficult to justify.

Challenging the budget process

The Budget process does not allow for effective civil society participation or the presentation of arguments about the need to allocate sufficient resources to fulfil socio-economic rights obligations. It is therefore important that civil society vigorously engage the Government during the drafting of the Budget and the next medium-term expenditure framework to ensure that the constitutional obligation to realise socio-economic rights is placed firmly on the budgetary agenda.

Kam Chetty is the Municipal Manager, Boland District Municipality, Worcester.

ESR REVIEW

Realising socio-economic rights

The role of the state and civil society

Edgar Pieterse & Mirjam van Donk

Socio-economic rights are not simply conferred by the Constitution and thereafter realised through purposeful action by the State. The monitoring of these rights is consequently not simply a matter of tracking whether the State is adopting policies, allocating enough resources or enacting legislation to implement the rights.

On the contrary, the realisation of socio-economic rights is a profoundly political process depending on a commitment by the State to prioritise socio-economic rights and State capability. Without a strong democratic developmental State, it is unlikely that much progress will be achieved in concretising these rights.

But the realisation of socio-economic rights does not only depend on the State and on political elites. It also depends on civil society mobilisation and pressure to ensure the steadfastness of State commitment and the effectiveness of State capability. Without consistent and principled civil society pressure it is unlikely that socio-economic rights will be realised over time.

The realisation of socio-economic rights, thirdly, depends on the judiciary and on institutions such as the South African Human Rights Commission (SAHRC). These institutions are located in the political space between the State and civil society and therefore play an important role in shaping the contestation between the State on the one hand and civil society on the other.

An integrated approach

The present government's development agenda seems to suggest that significant sections of the State are indeed committed to the realisation of socio-economic rights. Because socio-economic rights are interrelated, they require an integrated approach to development in the public sector. However, the often laudable policies are confronted with many obstacles at the coalface of implementation. There is widespread evidence of continued inefficiency and lack of performance across the public sector and this represents a profound obstacle to the realisation of socio-economic rights. Two problems are of particular concern. Firstly, public sector financial and administrative rules hinder effective co-operation in planning between government departments. Secondly, there seems to be a lack of a critical mass of committed public sector officials with the required knowledge and skills to drive the transformatory aspects of new policies.

No amount of budgetary and planning reforms can induce the kind of effective integrated planning required for the effective implementation of socio-economic rights. Such reforms must be combined with effective political pressure and incentives, appropriate civil society engagement and, crucially, shifts in attitude amongst public servants.

Grassroots mobilisation

South Africa possesses a large and diverse range of civil society organisations that could play a vital role in the realisation of socio-economic rights. According

to a recent study there are almost 100 000 non-profit organisations across all sectors in South Africa. More than half are voluntary organisations concentrated in poorer communities. This must surely be viewed as a significant source of social capital in our society that could play a major role - in partnership with the State - in eradicating poverty and unemployment.

Such organisations have the potential to undermine patronage politics and are well placed to engage effectively with the State to improve service delivery. However, because of the significant political demobilisation of civil society since 1994 the space for such organisations to mobilise and engage with the State is limited. State effectiveness in realising socio-economic rights is unlikely to improve without political empowerment and mobilisation of grassroots organisations in poor communities. There is a direct link between grassroots mobilisation and effective service delivery in local communities.

Treatment Action Campaign as a model

In recent years the Treatment Action Campaign (TAC) has emerged as a new kind of organisation that might be held up as a model for civil society mobilisation around social and economic issues. In its relatively short history, the TAC has been remarkably successful in its various campaigns around HIV treatment. The organisation's success has partly been ascribed to its ability to galvanise the media. Nevertheless, its success can also be ascribed to other significant factors:

- It has a positive message in the face of the devastating HIV/AIDS epidemic, highlighting that HIV/AIDS is not necessarily a death sentence and can be treated.
- It has developed distinct, yet interconnected campaigns with specific objectives and target groups.
- It has developed a dynamic relationship with the Government, opposing it on certain issues and co-operating with it on others. It has therefore shown a sophisticated understanding of how to engage with the State in a critical and constructive way that is appropriate for the new democratic era.
- It has developed extensive and strategic networks with both local and international stakeholders to ensure maximum publicity for, and maximum impact of, its campaigns.
- It has successfully combined mass mobilisation strategies with sophisticated political and legal strategies. In particular, the organisation has embarked on strategic litigation to advance access to health care rights in the area of HIV/AIDS.

The lessons learnt from the TAC are important. Social dialogue and contestation will become ever more important as growing unemployment and income inequality sharpen the many social cleavages in South Africa. Given these trends, it seems likely that TAC's strategies will become a template for future civil society advocacy campaigns.

Selected indicators of social and economic inequalities in South Africa

Poverty and income inequalities:

- In 1995, 49.9% of the population lived below the poverty line (a monthly income of R 353). This means that about 19 million citizens live in absolute poverty.

- 61% of Africans, 38% of Coloureds, 5% of Indians and 1% of Whites are poor.
- 60% of female-headed households are poor, compared to 31% of male-headed households.

Unemployment:

- In 1999, the unemployment rate (expanded definition) stood at 36.2%.
- The unemployment rate among Africans was 44.0%, Coloureds 23.6%, Indians 20.2% and Whites 6.8%.

Water and sanitation:

- In 1999, 39% of all households had piped water inside their dwellings and 27% had access to a tap on site.
- Only 21% of Africans have piped water in their dwellings, compared to 96% of Indians and 97% of Whites.
- Between 1995 and 1999, 72 000 rural households have lost access to flush or chemical toilets because of their inability to pay for the service.

Education:

- In 1999, 14.8% of the African population of 20 years and over had no schooling, compared to 0.2% of the White population.

Health:

- One in five children in South Africa is affected by malnutrition.
- The ratio of medical practitioner to population is 1:4 452 in the public sector, compared to 1:389 in the private sector.

Housing and land:

- In 2000, the housing shortage was estimated at between 3 and 4 million units.

Sources: May (2000), SAIRR (2001a, 2001b), UNDP (2000).

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Implementing Grootboom

Supervision needed

Kameshni Pillay

The decision of the Constitutional Court in the Grootboom case has been hailed as a great victory for the homeless and landless people of South Africa. However,

the actual impact of the judgment on the housing situation of the litigants and others who find themselves in a similar situation has been less dramatic.

From a Constitutional law perspective the judgment has made a large contribution to the development of the jurisprudence on socio-economic rights and the nature of the positive duties placed on the State to realise these rights. The judgment has also been hailed in international law circles for its use of international law and for its contribution to the development of a 'transnational consensus' on what exactly is required from a State to progressively realise a specific socio-economic right.

Failed expectations

Despite these positive aspects, the judgment has failed to live up to the expectations of the litigants. It has also failed to live up to the expectations of those who were hoping to witness a dramatic change in government policy on housing. A key problem lies with the nature of the orders handed down by the Constitutional Court.

The Constitutional Court handed down two orders in Grootboom. The first essentially made a settlement agreement between the parties an order of court. This offer contained an undertaking that the Grootboom community would be provided with temporary accommodation and would also be provided with sanitation, basic services, and running water.

This settlement order was implemented to a limited extent. R200 000 was made available to the community for basic shelter and the community used the money to buy rudimentary building materials like zinc sheets, windows and doors. Ten taps were installed and twenty toilets were also erected on the sports field. There is, however, no drainage on the sports field and after rain stagnant water creates unhealthy living conditions, especially for the children. Members of the community also allege that the municipality has not serviced the toilets or maintained the taps properly, and have also not provided other basic services (e.g. refuse removal). The main problem with the settlement order is therefore that while the parts of the order requiring once-off involvement have been fulfilled, other parts of the order, which require continuous involvement - like maintenance and the provision of services - have not been fulfilled.

The Court handed down a second general order which is the one featured in the judgment. It declares that the State is obliged 'to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing'. This programme must include measures such as an accelerated land settlement programme to provide relief for people 'who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations'. The Court then went on to declare that the State housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements of the Constitution because it failed to make reasonable provision for people in desperate need.

No time frames for action

This general order is far weaker than the order handed down by the High Court because it is merely a declaratory order and does not compel the State to take steps to ensure that its programme complies with the Constitutional requirements. A further problem with the Constitutional Court order, which also

stems from the declaratory nature of the order, is that the order does not contain any time frames within which the State has to act. The result is that, more than a year after the Grootboom judgment was handed down, there has been little tangible or visible change in housing policy so as to cater for people who find themselves in desperate and crisis situations.

The SA Human Rights Commission (SAHRC) has been monitoring the situation. In a report prepared by the SAHRC, they indicate that it took one year for the local administration (the City of Cape Town) and the Western Cape provincial administration to finally decide where 'the locus of responsibility' lay with regard to the implementation of the Grootboom judgment. Even after this one-year period of inaction, the efforts by these two administrations to implement Grootboom is limited to putting together a plan to deal with the permanent resettlement of the Wallacedene Community. There is a clear lack of understanding that the judgment requires systemic changes to national, provincial and local housing programmes to cater for people in desperate and crisis situations.

No supervision

With both the interim and general order the Constitutional Court has declined to play any role in supervising or overseeing the implementation of the various orders. In the judgment the Court did indicate that the SAHRC had agreed to monitor and report on the compliance of the State with its s 26 obligations. However, the Commission is not required to report back to the Court in the actual order handed down. The SAHRC has tended to focus more on monitoring the implementation of the first order dealing with the situation of the Grootboom community. There is a lack of information on whether nationally and at provincial level there is compliance with the obligation to put in place and implement accelerated land release programmes.

While the SAHRC filed a 'report' with the Constitutional Court over a year after the handing down of the judgment, the report does not indicate what specific efforts were made by the SAHRC to interrogate the three spheres of government on the implementation of the order. The 'report' is also silent on exactly what steps were taken to change the national housing programme to bring it in line with Grootboom.

However, it seems as though the Court does not regard itself as still seized of the case. This means that a whole new case will have to brought by poor communities and their representatives if they want to test the State's compliance with the Grootboom order.

Key challenge

A key challenge for organisations working on housing rights is monitoring and advocacy aimed at ensuring that the State's housing programmes give effect to the Grootboom judgment - particularly the duty to make specific provision for the landless and homeless.

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Land redistribution

ESR REVIEW

Neglecting the urban and rural poor

Edward Lahiff & Sam Rugege

The property clause in the South African Bill of Rights explicitly provides for the redistribution of land in South Africa. Section 25(5) places a positive duty on the state to take 'reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis'. These provisions are a direct response to the history of racial discrimination and forced dispossession that denied ownership of land and security of tenure to the majority of the population. The legacy of widespread landlessness and rural poverty has persisted into the democratic era.

Willing seller, willing buyer

Since 1994, the ANC-led government has implemented a multi-faceted land reform programme that has included the restitution of property rights to those dispossessed under previous regimes and reforming the highly unequal system of land tenure. In addition, the redistribution programme aims to foster access to land for the historically disadvantaged in line with the obligation contained in s 25(5). This programme has largely consisted of the provision of grants and other assistance to would-be landowners to acquire land through the market. This so-called 'willing seller, willing buyer' approach allows groups to pool their resources to acquire and jointly hold land, as well as offering opportunities to individuals to access grants that will enable them to purchase land.

The principal mechanisms used to implement redistribution have been the Settlement/Land Acquisition Grant (SLAG) and, more recently, the Land Redistribution for Agricultural Development Programme (LRAD). Other mechanisms, such as the Municipal Commonage Programme and share equity schemes, have been used to a lesser degree.

Slow delivery

Since its inception, the redistribution programme (along with other aspects of land reform) has attracted much criticism for its slow rate of delivery, having transferred little more than one percent of total agricultural land by the end of 2001. Among the reasons for this are cumbersome systems for planning and approval of projects within the Department of Land Affairs, reliance on the open market to supply land and a lack of coordination between the national Department and other State institutions at provincial and local level.

In urban areas, responsibility for the provision of land has fallen between the Department of Land Affairs and various local and provincial government structures, working largely under the banner of housing policy. This has resulted in the lack of a clear, national policy for the provision of land in urban areas, and has given rise to extreme shortages of land for housing in many areas. The failure to develop a distinct land redistribution policy for urban areas is a major weakness of the government's land distribution policy, and it can be argued that the government has not taken all reasonable steps to provide access to land for people living in urban areas.

Illusive nature of policy process

While government is currently addressing many of the problems around design and implementation of the redistribution programme, fundamental weaknesses within land reform policy remain. One is the illusive nature of the policy-making process, with major changes in policy going largely unexplained in official statements or publications. SLAG, for example, has been effectively replaced by LRAD, yet SLAG is still being used in some provinces, for certain types of projects, in the absence of a clear public policy statement that explains how the two programmes relate to each other. Likewise, municipal commonage programmes are being extensively implemented in the Northern Cape and the Free State, but not in the Northern Province, for no obvious reason. Targets for redistribution announced from time to time by political leaders have varied widely, and bear little relation to the available budgets or the actual performance of the programme to date.

A second problem relates to the fact that redistribution projects continue, with few exceptions, to be implemented on a project-by-project basis. Because of the 'willing seller, willing buyer' principle, the pace of redistribution is effectively determined by numerous uncoordinated negotiations between landowners and would-be purchasers. This creates difficulties in the provision of infrastructure and agricultural support services to beneficiaries, and makes it virtually impossible to meet all the land needs in a particular area in a comprehensive manner.

No overarching legislation

Problems with the implementation of the redistribution programme are compounded by the paltry budget allocated by the national treasury, which falls far short of what is required to meet the targets set by political leaders. To make matters worse, the Department of Land Affairs has repeatedly failed to spend the budgets it has been allocated and, largely as a result of this, the budget for land reform is set to fall over the coming years.

In contrast to other policy areas, such as water and housing, the government has not adopted a comprehensive, overarching piece of legislation that sets out the rights and obligations of citizens and all spheres of government to guide the redistribution process. This results in major shifts in policy with minimal public consultation or parliamentary oversight.

Meeting the needs of the poor

The Grootboom judgment emphasised the duty on the State to pay particular attention to people in desperate need or living in intolerable conditions. The White Paper on South African Land Policy commits the government to addressing the needs of the poor, among other disadvantaged groups. Recent shifts in policy towards support for 'commercial' farming, both under LRAD and in the disposal of state land, appears to represent a move away from this position, although this has been denied by policy makers. In the absence of clearly documented alternative programmes, specifically designed to meet the needs of people wishing to acquire land on a small scale for non-commercial purposes, it is difficult to see how the needs of the poor will be adequately addressed. Overall, the land redistribution programme does not prioritise cases on the basis of need and does not have mechanisms in place to deal with 'emergency' cases.

More co-ordination, more intervention

Considerably more effort is needed if the State is to meet the obligations imposed by section 25(5). This will require adequately funded programmes that can meet the range of land needs that exist in both urban and rural areas and a more interventionist approach by the State to the acquisition of land and the design of land-use projects. This does not necessarily require expropriation, but the failure to consider the use of expropriation to further the ends of redistribution is likely to perpetuate the current piece-meal approach to land acquisition.

A co-ordinated approach to development and resettlement is urgently needed. Such an approach will undoubtedly increase the demands on the Department of Land Affairs and other key institutions, and can only be brought about on the basis of a dramatic improvement in performance by all institutions concerned with redistribution of land.

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Food security, social security and Grootboom

Danie Brand

A large proportion of people living in South Africa do not get enough or the right kind of food to eat, despite the fact that the country produces more than enough food to feed its people. Hunger and malnutrition are prevalent among almost 30% of the South African population, and are stratified along racial, class and gender lines. For example, while 30% of black children under five are stunted, the rate among white children is only 5%. At the same time 38% of rural black South Africans report going hungry at least once a month as opposed to almost no rural white South Africans.

Legal strategies

When considering the Government's obligation to realise the right to food in South Africa, the focus should be less on how to maintain an adequate national food supply, but on how to provide sufficient, equitable access to this food supply in South Africa. Actual access to food (also called food entitlement) is determined largely by social and political factors. Legal strategies - especially strategies that engage with the right of access to food guaranteed in s 27 of the Constitution - could play an important role in enhancing access to food.

In Grootboom, the Constitutional Court held that one of the factors to be taken into account when measuring whether the Government's policies and programmes were reasonable in progressively realising socio-economic rights, was the extent to which the policy responded to the needs of people in desperate situations. These people cannot wait as their needs are urgent, and require immediate attention. In the context of the right to food, those people who suffer from hunger and do not have access to basic essential levels of food are clearly in desperate need.

Given the desperate situation of many South Africans' nutritional status, the State has a constitutional duty to take immediate measures to ensure that these groups have access to food. It cannot only rely on longer-term policies to improve food

production and distribution in the hope that this will eventually benefit those who experience immediate hunger or the dangers of malnutrition.

Programmes to improve access to food

Two kinds of programmes have been adopted by the various departments involved in realising the right to food:

- Capacity-building programmes aimed at strengthening people's abilities to generate food themselves; and
- Programmes to ensure direct access to food, for example, the social grants programme and the primary schools nutrition programme.

The emphasis, however, falls on the first kind of programme. This suggests a preference for longer-term interventions in food accessibility through capacity-building and income-generation, rather than through direct food transfers. The absence of a comprehensive minimum food transfer component in the food policies of the various government departments represents a gap in the current policy framework, which arguably does not give effect to the Grootboom principles.

But how can the government adjust its programmes to give effect to the obligations imposed by s 27 of the Constitution? More direct interventions as envisaged by Grootboom can be achieved in a variety of ways in the context of the right to food. These include the direct provision of food to people in crisis, price subsidisation or tax zero-rating of basic foodstuffs to facilitate food acquisition, or different kinds of social assistance grants such as food vouchers or cash grants.

Social grants

I have reached the conclusion that the most effective way of ensuring direct access to food for people living in extreme poverty is through the provision of social assistance grants.

There are several reasons for reaching this conclusion:

- Social security grants are logistically more manageable than the direct provision of food to those in crisis.
- Social security grants are more sensitive to individual choice and are consequently more alive to the requirements of human dignity and freedom than other forms of direct transfers of food.
- Social security grants can contribute not only to food security, but also to other aspects that impact on a person's quality of life such as clothing and transport costs.
- Social grants can facilitate development through providing a basic income to enable job-seeking, and participation in developmental programmes

For these reasons, an extension of the State's social assistance grants programme would be a reasonable policy option to pursue in the quest for the realisation of the right to food for all South Africans. The recommendations in the Report of the Committee of Inquiry into a Comprehensive Social Security System for South Africa (March 2002) are thus of particular relevance to the realisation of the right to food. These include a phased expansion of the child support grant to children up to the age of 18 years and the introduction of a universal basic

income grant (or 'solidarity grant'). If government adopts these recommendations, they will greatly facilitate the realisation of the right of access to food in South Africa.

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The free basic water supply policy

How effective is it in realising the right?

Jaap de Visser, Edward Cottle & Johann Mettler

The Constitution places a duty on all three spheres of government to realise the right of access to water by acting in partnership with one another. While the national government is required to establish a national framework to ensure the realisation of this right, local government must play the critical role of ensuring delivery of water to all.

The right of access to water can be seen to place two interrelated but distinct obligations on the State:

1. It must ensure that all people have physical access to water. This means that the facilities that give access to water must be within safe physical reach for all sections of the population, especially for vulnerable and marginalised groups.
2. It must ensure that all people have economic access to water. This implies that the cost of accessing water should be pegged at a level that would ensure that all people are able to gain access to water without having to forgo access to other basic needs.

Free basic water supply

The South African government has taken several legislative and other measures aimed at realising the right of access to water in s 27 of the Constitution. The Local Government Municipal Systems Act of 2000 contains two principles of key relevance to government policy on water delivery. Firstly, that local government must aim to provide broad access to basic services and should make use of cross-subsidisation to achieve this goal. Secondly, the Act is based on the principle that local government must recover costs when delivering services to ensure that local government remains financially sustainable.

The government has issued regulations in terms of the Water Services Act of 1997 to give effect to the right of access to basic water services to all people in South Africa. These regulations are based on the assumption that each individual person needs 25 litres of water per day or, calculated differently, that each household requires 6 kilolitres per household per month and provides for the free delivery of the 6 kilolitres of water per household per month.

In order to ensure the financial sustainability of the provision of free water, municipalities are required to adopt a block tariff system. According to this system, the cost of water increases with usage, subject to the requirement that the first block of water for up to 6 kilolitres per household per month should be provided free. The price of water then increases for every additional block of water used by a household to ensure that those who use large amounts of water

subsidise - to some extent - the free provision of 6 kilolitres of water for all households. Municipalities are also encouraged to make use of available subsidies for water to recover the costs of supplying free basic water to all.

Problems with the policy

Although on paper this legislative framework seems to be in line with the constitutional requirement to progressively realise access to water by all South Africans, some serious issues remain:

- There are vast areas in South Africa where water infrastructure does not exist and water delivery of any kind is not possible. The policy to provide free basic water therefore needs to be supplemented with a policy that aims to rapidly increase access to water infrastructure - especially for the rural poor.
- Especially in rural communities where there are not a sufficient amount of high volume users to cross-subsidise the provision of free water to all, the policy creates serious problems for local governments, which are often not able to finance the free provision of basic water for all. This leads rural municipalities to take drastic measures (e.g. disconnections) that deprive their residents of access to water. The policy therefore does not seem to be properly targeted to meet the needs of the rural poor - a particularly vulnerable group in society.
- For the urban poor who are used to relatively high levels of water usage, 6 kilolitres of free water for each household per month will not be adequate. For a household of 8 people, six kilolitres of water amounts to two flushes of a toilet per person per day and will therefore be completely inadequate.

Disconnections: What the courts have said

Due to the cost-recovery principle, households that use more than their 6 kilolitres of free water and find themselves unable to pay will face having their water supply disconnected. In the case of Manquele v Durban Transitional Metropolitan Council 2001 JOL 8956 (D) the High Court found that the City Council had a right to disconnect the water supply of the applicant because she chose not to limit herself to the water supply provided to her free of charge. She therefore used more than what can be considered as a basic water supply, and if she could not pay for this extra amount, she should face the consequences. The irony is that by completely disconnecting her water supply, Mrs Manquele was deprived even of the free basic amount. This is surely constitutionally suspect in view of the right to a basic level of water supply that exists notwithstanding the ability to pay. The Department of Water Affairs is apparently reviewing the Water Services Act to prevent water being disconnected before the free 6 kilolitres has been exhausted. However, it remains to be seen to what extent a national department can prescribe tariff and debt collection policies to municipalities. It is noteworthy that the City of Cape Town has, for example, started experimenting with limiting defaulters' water usage to 6 kilolitres per month, instead of completely disconnecting their supply.

The High Court (WLD) took a different approach in the unreported case of Residents of Bon Vista Mansions v Southern Metropolitan Local Council, where the Court found that the disconnection of water supply would constitute a prima facie breach of the State's duty to respect the right of access to water. The procedures employed to effect a disconnection also have to be fair and equitable. They should not result in a person being denied access to basic water services for non-

payment where the person proves, to the satisfaction of the water services authority, that he or she is unable to pay for the basic services.

The cost recovery principle combined with a practice by many local authorities to cut off water supply to those who cannot pay, constitutes a severe impediment in the realisation of access to water for all.

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Equal access to socio-economic rights for people with disabilities

Tobias van Reenen

People with disabilities are one of the most marginalised groups in society. This marginalisation stems not only from prejudice and stereotyping but, more importantly, from socio-economic deprivation. The available statistics show that poverty is rife among the disabled as well as among their caregivers.

Although the disabled are guaranteed the same access to socio-economic rights as others, they are often effectively denied access to existing social services and economic support because of physical barriers such as the lack of wheelchair-friendly ramps to buildings. Many disabled persons are also denied access to information that would enable them to gain access to social services and economic support because the information is not available in a form that they can use.

The right to equality

The Grootboom judgment emphasised that the various rights in the Bill of Rights - whether they are civil and political rights or socio-economic rights - are interdependent and interconnected. This insight could be used in the legal arena to fight for the rights of disabled people in South Africa.

The interdependence of rights implies that socio-economic rights must be viewed in the light of the right to equality and the right to human dignity. This means that disabled people are guaranteed equal access to the social services, resources and opportunities in society, and cannot be discriminated against in gaining access to these essential dimensions of human welfare and dignity.

It is important to remember that the right not to be discriminated against is not limited by resource constraints and must be implemented immediately, irrespective of available resources. Unfair discrimination against people with disabilities in accessing socio-economic rights can be challenged in the courts.

It is important to note that apart from the equality right in the Constitution, Parliament has enacted the Promotion of Equality and Prevention of Unfair Discrimination Act (2000) which enables people with disabilities to challenge unfair discrimination by both the public and private sectors.

The Act applies to a broad range of sectors relevant to socio-economic rights, and also places positive duties on the State and certain private organisations to take concrete steps to eliminate discriminatory practices and promote real equality.

Using Grootboom

The Grootboom judgment established the principle that the State must attend to the needs of vulnerable groups in society when it devises plans to meet its obligations concerning socio-economic rights.

People with disabilities are clearly a vulnerable group in society. This implies that all government plans to provide access to social services which do not take account of the needs of people with disabilities would become constitutionally suspect.

The disability sector should therefore use this important principle in the Grootboom judgment to pressurise government to include the concerns of people with disabilities in its plans and actions.

Employment equity

The South African Parliament has not, as yet, adopted any specific legislation addressing the needs of people with disabilities. However, Parliament has adopted the Employment Equity Act, which explicitly acknowledges the history of discrimination and prejudice suffered by people with disabilities.

To this end, people with disabilities are classified as one of the 'designated' groups - along with women and black people.

In the Act, a legal duty is placed on medium- and large-sized employers to draw up and implement employment equity plans to increase the number of people from designated groups employed at all levels of the company or institution. These plans are required to contain numerical goals and targets in order to ensure that there is measurable progress towards representivity in the workplace. There are, however, two important issues around which the disability lobby could organise to ensure that the Act is more effectively implemented.

Firstly, employers do not always include people with disabilities in the numerical goals and plans they submit to Government because they argue that people with disabilities form a statistically negligible part of their workforce. Their employment equity plans also often fail to take cognisance of the special needs of workers with disabilities such as special technology to assist visually impaired employees.

Secondly, there has been some criticism of the way in which the implementation of employment equity plans has been monitored. The monitoring process has at best been less than vigorous. No special emphasis has been placed on the needs of people with disabilities both in terms of actually employing people with disabilities and in providing existing employees with the resources and facilities that would enable them to advance in the workplace

Although the disability lobby is underfunded and stretched to the limit, these issues are important ones that should be taken up to ensure that existing legislation is implemented in a way that assists people with disabilities to gain the access to socio-economic rights that is their constitutional entitlement.

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Universal access to health care services

Are we any closer to our goal?

Karrisha Pillay

The South African Constitution guarantees to everyone the right of access to health care services. In realising this right, the State is up against the legacy of apartheid health policies. The Constitution does not guarantee the right to health, but the right of access to 'health care services'. This term should be defined so as to address mental and physical health needs at primary, secondary and tertiary levels.

To fulfil its duty to progressively provide access to health care services, the State is required to take 'reasonable legislative and other measures'. In the light of the Grootboom judgment, there are a number of important questions that can be asked to determine how reasonable State action or inaction is in realising this right. Valuable guidance can also be obtained from General Comment No. 14 adopted by the UN Committee on Economic, Social and Cultural Rights, which monitors State parties' obligations under the International Covenant on Economic, Social and Cultural Rights.

Mixed success

Measuring the Department of Health's policies and programmes against the criteria established in Grootboom (see box below), it becomes clear that it has had mixed success. Although the Department has adopted a White Paper on Health and has also prepared a National Health Bill and a Mental Health Care Bill, these Bills have not been enacted by Parliament despite long delays. It is imperative that this legislation is adopted because, given the fragmented history of health care in South Africa, framework legislation is essential to facilitate the realisation of this right within the context of a unified health system.

A second point of concern is whether health care services are affordable and of adequate quality for all. The Government has taken laudable steps to provide pregnant mothers as well as children under six with free health care services. In addition, it has embraced a primary health care approach, which has affordable and accessible health care services among its central tenets. However, the issue of affordability is intricately linked to the quality of health care services. Whilst the overall approach to the delivery of health care services within the public sector certainly embraces the principle of affordability, the quality of these services is still highly inadequate. The Medical Schemes Act does, to some extent, aim to ensure the better management of resources in the private health care sector through its prohibition of criteria such as health status for acceptance onto medical schemes and for determining premiums. However, in spite of positive initiatives such as the Medical Schemes Act, the disparity in the quality of health care services between the public and private health care sectors is still stark.

A high priority should be the passing of legislation dealing with social health insurance that will require all formally employed people to be insured for the costs of treatment of themselves and their dependants in public hospitals.

It is also open to question whether the government's health policy responds adequately those in desperate need or those who face a crisis situation. The White Paper on Health gives special attention to meeting the health needs of the poor, the 'under-served' (although it provides no guidance on exactly who constitutes the under-served), the aged, women and children. However, people living with HIV/AIDS are not expressly mentioned in this context.

Quality of health services

A key issue is the implementation of health policies and legislation, particularly in relation to the quality of health care services provided for the poor. Reports abound on the numerous challenges state hospitals face, many of which adversely impact on the quality of health care services. These include ageing hospital buildings, a shortage of medication and equipment, higher patient loads and inadequate care by health care staff. Recent reports on the brutal treatment of women undergoing abortions at a Mpumalanga hospital lend further support to the contention that quality health care services are lacking in the public health sector. The underspending of the health budget is a matter of particular concern in the light of the fact that lack of affordability ranks high among the factors precluding access to health care services.

Key challenges

Despite the fact that the government has taken some important initiatives in the health sector, many South Africans still do not enjoy affordable and adequate access to health care facilities. The health sector therefore provides many challenges for government as well as civil society. Some of these urgent challenges are:

- Lobbying for the passage of the National Health Bill and the Mental Health Care Bill.
- Monitoring the implementation of legislation, policies and programmes, particularly the extent to which they ensure the availability, accessibility and affordability of quality health care services;
- Researching the precise nature of the barriers that impede access to health care services;
- Identifying especially vulnerable groups and tailoring policies to address their special health needs;
- Ensuring that health care services are both physically and economically accessible to the poor. This includes an assessment of whether appropriate human and financial resources have been allocated to different spheres of government to fulfil the tasks and functions allocated to them;
- Ascertaining the reasons for the consistent under-expenditure of the national health budget and ways to maximise the utilisation of existing resources.

The challenge posed by the transformation of a historically fragmented, discriminatory health system into a unified one that is responsive to the health needs of its people is indeed formidable. Although we have made some progress in this regard, equitable access to quality health care services is still far from a reality. It is accordingly critical that both the extent as well as the pace of progress be tracked so as to ensure that the goal of 'Health for All' becomes a reality.

Evaluating the realisation of the right of access to health care services

- Have a comprehensive programme and a national framework to facilitate the realisation of the right of access to health care services been put in place?
- Are health care services available, affordable, accessible and of good quality?
- Is there is a clear allocation of responsibilities and tasks to the different spheres of government?
- Have appropriate financial and human resources been made available for the realisation of the right?
- Are legislative measures supported by appropriate, well-directed policies and programmes?
- Does the programme respond to the needs of the most desperate members of society?

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Anti-retrovirals

Pierre de Vos

South Africa is facing a national health emergency. Between four and six million South Africans are presently living with HIV/AIDS and this number is still rising. From a medical perspective, any government response to this crisis should address ways in which HIV infections can be prevented, as well as ways in which people living with HIV/AIDS can be provided with access to appropriate treatment. There are several strategies that the government can and should employ to ensure that people living with HIV/AIDS have access to appropriate treatment. One particularly thorny, but potentially highly effective strategy, would involve the use of anti-retroviral drugs.

The context

In the light of the Grootboom decision, the government has a positive duty to take reasonable steps, within its available resources, to begin the process of progressively providing access to anti-retroviral drugs to those who need them. To evaluate whether the steps taken are reasonable, it is necessary to take into account the larger social and economic context. This larger context includes, firstly, the fact that the most marginalised and vulnerable sections of the community are most severely affected by the HIV/AIDS epidemic. Secondly, the fact that this crisis is such a catastrophe, means that what might have been considered to be reasonable in other circumstances would be deemed outright callous when dealing with HIV/AIDS.

The Government has taken some steps and has put in place some policies to provide anti-retroviral drugs in cases where it might prevent HIV infection. For example, it is government policy to provide short courses of anti-retroviral therapy to health professionals exposed to the virus in the line of their duty. The Department of Health also established a pilot study at 18 sites to provide anti-retroviral drugs to pregnant mothers to reduce mother-to-child transmission of HIV. Some provinces have begun to expand this service to all public health sites. At the same time, the Department prohibited doctors who were not part of the pilot sites from prescribing Nevirapine to pregnant mothers to prevent mother-to-child transmission, even in cases where the capacity to administer the drug existed (e.g. testing and counselling facilities).

An unreasonable programme

The Transvaal Provincial Division of the High Court in Treatment Action Campaign and Others v Minister of Health and Others (the MTCT case) found that the State's mother-to-child transmission prevention programme was unreasonable and was therefore in breach of the State's obligation in terms of s 27 of the Constitution to progressively expand access to health care services. The Court closely followed the reasoning in Grootboom. The judgment of the High Court also states that the lack of any coherent and tangible plan to progressively expand access to the mother-to-child HIV transmission prevention programme is unreasonable and thus in breach of the government's positive constitutional duties.

This State appealed to the Constitutional Court and its case was argued in early May. Judgment was reserved and has not been delivered at the date of publication (see 'stop press' overleaf). If the judgment does require the State to roll-out a comprehensive MTCT programme, civil society can play an important role in monitoring the implementation of the judgment. It is critical to ensure that adequate funds are budgeted to finance the costs of the roll-out of a comprehensive mother-to-child transmission prevention programmes in all nine provinces.

Capacity

The Government has been extremely slow in taking any steps to provide increased access to anti-retroviral drugs to people living with HIV/AIDS. Anti-retroviral drugs can prolong and improve the quality of life of people living with HIV/AIDS. But the government argues that the public health system does not have the capacity to provide the comprehensive support needed to ensure that these (often complicated) drug therapies are administered in a safe and efficient way. The high cost of anti-retroviral therapy has also been cited as a stumbling block in providing wider access to such therapy. Thus the official government policy is to prohibit the prescription of anti-retroviral drug as a life-prolonging drug in the public health sector.

The reasons forwarded for this ban are not all that convincing. In many places the capacity already exists in the public health sector to provide the kind of service that would allow people living with HIV/AIDS to use anti-retroviral drugs safely and effectively. This does not necessarily mean that the State has a constitutional duty to provide immediate access to anti-retroviral drugs to all people in South Africa living with HIV/AIDS. But Grootboom does suggest that the State must draw up, and implement over time, a reasonable plan of action for progressively expanding access to anti-retroviral therapy to people living with HIV/AIDS.

What would be required is evidence that the State is responding in an appropriate manner to the health emergency facing the country and that it has altered its policies accordingly. This would require some evidence that it has started taking steps to improve the capacity of the public health sector to deal with the provision of access to anti-retroviral therapy.

Cost

The cost of anti-retroviral therapy is high and, in terms of Grootboom, this will be an important factor in evaluating the reasonableness of the Government's action (or inaction) in extending access to anti-retroviral drugs to all. Many have argued

and developed models to demonstrate that it is more cost effective to provide anti-retroviral therapy than it is to rather wait for people to fall ill and then to treat their opportunistic infections. If this can be conclusively shown, the failure to work towards the provision of anti-retroviral therapy for people reliant on the public health system for treatment would clearly be unreasonable, if not irrational. As anti-retroviral therapy can make the difference between a longer and better life and an early death, the unreasonable nature of the State's failure to work towards provision of these drugs becomes even more apparent.

Even if the arguments around cost-effectiveness are rejected, the State can take steps to bring down the cost of these drugs by allowing for exceptions to the country's patent laws. The prices of drugs could be reduced directly through price controls on the sale of pharmaceutical products, and the parallel importation of patented products from where they are sold at the lowest international price. This is exactly what the government attempted to do when it passed the amendments to the Medicines Control Act, but it has as yet not implemented these amendments. This failure to act - when existing legislation allows for action - is deeply unreasonable.

The prices of drugs can also be reduced indirectly through the issuing of compulsory licenses, something that is in accordance with the government's international obligations in terms of the TRIPS agreement. The TRIPS agreement empowers a government to issue compulsory licences to companies who would be able to produce generic versions of the same drug at a much cheaper cost that the original patent holder in cases of national health emergencies (e.g. the HIV/AIDS epidemic). The South African government has not utilised this power in any way. In the context of the HIV/AIDS emergency this failure to act is completely unreasonable and potentially a violation of the right of access to health care. Either by using existing patent law more effectively, or by introducing amendments to this body of law, the Government will be in a position to issue compulsory licenses that would lower prices considerably and bring anti-retroviral drugs within reach of far more people.

Recent developments indicate that the Government is reviewing its hardline position on anti-retrovirals with the announcement that it will extend anti-retroviral treatment to rape survivors and roll-out a MTCT-prevention programme throughout the country. Civil society needs to closely monitor the implementation of these announced policy changes, and also continue to advocate for Government to reduce the prices of anti-retroviral drugs. As the TAC has shown, legal strategies can be an important part of a broader strategy of community mobilisation around affordable treatment for people living with HIV/AIDS.

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Too little, too late?

Provisioning for child-headed households

Julia Sloth-Nielsen

Projections indicate that the number of AIDS orphans in South Africa will double to 800 000 by the year 2005. Indications are that the majority of children orphaned by AIDS at present are not being accommodated through formal placements in alternative care structures. The African kinship care system that would once have absorbed children without parents into communal life can no

longer be relied upon to fulfil that function. Current figures suggest that foster parents are looking after 35% of orphaned children and only 0.1% are being adopted.

A significant percentage of children orphaned by AIDS will find themselves in households headed by children.

Recent community-based research into approaches to caring for children orphaned by HIV/AIDS details seven typical models currently in use for these vulnerable children. These include:

- Independent orphaned households in which children have no formal assistance in looking after one another;
- Orphaned households where informal care is offered by community members to children in their area (also called indigenous care);
- Government- or NGO-run programmes that seek to identify and support children, for example, through income-generation and awareness-raising programmes;
- Home-based care offered both to critically ill adults, and their dependent children;
- Non-statutory residential care, operating from private homes without them being registered as places of care or children's homes; and
- Recognised formal placements of orphans with other families.

A right to family life

Although international treaties affecting children do not adequately deal with the position of States facing large-scale orphanhood, these treaties clearly endorse a policy that orphaned children should not be institutionalised, but should, where at all possible, grow up in some form of family environment.

In the Grootboom judgment the Constitutional Court held that the socio-economic rights of children to basic nutrition, shelter, basic health care services and social services (s 28(1)(c)) should be understood in the context of the child's right to family care or parental care, or appropriate alternative care (s 28(1)(b)). Parents and other family care-givers thus have the primary duty to provide children with the socio-economic necessities set out in s 28. But when children are orphaned or abandoned and thus find themselves without families, the responsibility for fulfilling their socio-economic rights rests squarely on the State.

Ensuring the survival and development of children

The State consequently has two distinct constitutional duties:

1. It has a duty to ensure that children in child-headed households are linked with some form of parental, familial or institutional care.
2. It has a duty to provide the resources necessary for the survival and development of the children.

The latter duty in s 28(1)(c) of the Constitution is not subject to the qualification of available resources. This means that ultimately the State has a constitutional duty, as the surrogate 'parent' of such children, to ensure that their basic needs are met. Given the especially vulnerable position of children in child-headed households, it can be argued that the State has a primary obligation to provide immediate and direct assistance to such children to ensure their continued

survival and development. The State could fulfil these obligations through the payment of grants, the direct provision of food and clothing, providing relief from payment of school fees and the like.

Too little, too late?

The government has begun to take steps to fulfil its constitutional obligations with regards to child-headed households with the adoption of a National Integrated Plan for Children and Youth Infected and Affected with HIV/AIDS (NIP). This plan endorses a community and home-based care model, which has reportedly been most successful in other African countries. These models are based on a children's rights approach and accepts that children orphaned by AIDS face special challenges. Such children face threats to their survival, threats to their security, and have special needs such as the need for self-actualisation, palliative care and bereavement counselling. These needs, it is said, are often best met in supportive community settings. Community and home-based care models mostly use volunteers as the backbone of a care-giving strategy. However, given the fact that the State bears the primary responsibility for the welfare of orphaned children, such home-based care must include some form of material assistance to ensure the survival and development of orphaned children.

The NIP does not only provide for community and home-based care, but also for voluntary counselling and testing for HIV, life skills and community outreach programmes. Currently, the preponderance of the annual NIP budget has been allocated to the life-skills and education component of the programme, and is thus spent on HIV-prevention programmes in schools. Only a relatively small proportion of the overall budget is dedicated to the community and home-based care programme, although this proportion increases over time. Even then, the budget allows for an amount of R120 million to be spent on community and home-based care programmes in the 2004-2005 fiscal year, which given the huge demand, seems like a very small amount indeed.

Although the State's chosen policy response towards children living in child-headed households can be regarded as a reasonable one, the programme falls short of the criteria spelt out in the Grootboom case because of the low priority given to the care of AIDS orphans within the fiscal allocations. In addition, the programme does not make adequate provision for emergency relief for those in desperate need. Seen together with the difficulties that are presently experienced at grassroots level in accessing material support and social security, there are substantial barriers to the implementation of the socio-economic rights of children living in child-headed households.

Although this is a difficult and complex issue, the failure on the part of the State to allocate adequate resources to address the very serious needs of one of the most vulnerable groups in society cannot be judged as reasonable.

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A right to free basic education for all?

Mandla Seleoane

The South African Constitution protects the right to basic education, including adult basic education. Unlike the right of access to housing, health care services and the other socio-economic rights in s 27, this right is not qualified by terms

such as 'reasonable legislative and other measures', 'available resources' and 'progressive realisation'. The State is thus required to provide this right immediately. The Constitution also guarantees the right to further education, which the State, through reasonable measures, must make progressively available and accessible.

The South African courts have not yet clarified what the right to basic education and adult basic education actually entails and whether it means a right to free primary education for all. In some United Nations documents, basic education is associated with reaching a specific standard or set of outcomes. These outcomes usually include the skills of literacy, oral expression, numeracy, problem solving, and developing the skills, values and attitudes that human beings require to survive and develop their full capacities. In other international human rights instruments, basic education is often equated with primary or fundamental education, which usually means education for a set period of time.

In South Africa the Department of Education has embraced this concept, adopting a policy of compulsory school attendance from the age of seven to 15, or from grades one to nine, whichever happens first. It could therefore be argued that the basic education guaranteed in the Constitution is education until grade nine or until a learner reaches 15.

International human rights treaties to which South Africa is a party - such as the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights - suggest states have a duty to make primary education compulsory and free of charge. This is also an obligation under the International Covenant on Economic, Social and Cultural Rights, which has been signed, but not ratified, by South Africa.

Compulsory, but not free

Although basic education is compulsory in South Africa, it is not free. The direct and indirect costs of education include school fees, the costs of school uniforms and textbooks, etc. To avoid the potentially harsh consequences of this policy, the Department of Education prohibits schools from turning learners away and excluding them from cultural and social activities at school if their parents are indigent. However, this does not mean that basic education is provided free of charge because parents can still be sued for non-payment of school fees.

Given that many South Africans live in conditions of extreme poverty and that it is hard or almost impossible for them to finance their children's education, the policy of not providing free basic education seems constitutionally suspect. Although legislation provides for special arrangements for children of indigent parents, they might feel their human dignity is undermined by a process in which they have to 'flaunt' their poverty to gain access to education for their children. Evidence from the National 'Speak Out on Poverty' Hearings suggests that the existing policy has the effect of excluding learners from poor families from accessing basic education.

Learners with disabilities

In Grootboom the Court stated that the State has a duty to take special measures to ensure that vulnerable groups in society also gain access to socio-economic rights. Learners with disabilities are an especially vulnerable group whose full enjoyment of the right to education requires special attention. According to

available statistics close to three million people in South Africa have some physical disability. The relevant legislation deals with this situation by directing ordinary public schools to admit learners with special educational needs wherever it is practicable and requiring such schools, as far as possible, to make their facilities accessible to learners.

On the face of it, this policy seems to comply with the requirements set out in Grootboom, but when one looks at the statistics, the picture changes radically. Only 14.8% of disabled children of school-going age actually attended school, according to the 1996 census. This suggests that a substantial number of disabled learners do not attend school because appropriate learning facilities are not being made readily available.

Monitoring implementation

Although current education policy aims to ensure access to basic education, a number of practical problems arise with its implementation. The net effect is that learners from poor families and those with special needs encounter many difficulties in accessing this basic right. Education rights advocacy groups, who wish to make the right to basic education a reality for all learners in South Africa, will therefore have to monitor how education policies and legislation work in practice and what their actual impact is on disadvantaged groups.

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Realising environmental rights

Developing indicators

Robyn Stein & Clinton Beinart

The environmental rights in s 24 of the Constitution must be read in conjunction with the overarching obligation on the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights' in s 7(2).

The nature of the State's duties

- In the context of environmental rights, the State has at least four kinds of duties:
- The duty to respect environmental rights means that all three spheres of government must not engage in activities which result in an environment that is harmful to people's health or well-being, e.g. a local authority dumping toxic waste materials in the vicinity of poor communities.
- The duty to protect environmental rights would require the State, for example, to enforce laws prohibiting industries from polluting the environment.
- The duty to promote a healthy environment would include the duty to inform and educate people about their environmental rights. Environmental health education programmes have been shown to significantly improve the health status of those living in severely degraded environments.
- The duty to fulfil the right to a healthy environment requires the State to take reasonable legislative and other measures to improve the environmental situation. Comprehensive fulfilment of the right would

include a duty on the State to provide equal access to civic services such as water, sanitation and electricity. It will also require the State to take steps to improve the environment through the formulation and implementation of national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead in petrol.

NEMA Principles

The State has taken certain steps towards fulfilling its constitutional obligations, most notably the passing of the National Environmental Management Act (NEMA). The Act contains a set of principles that serve as a general framework within which environmental management and implementation plans must be formulated. These principles include the requirement that development must be socially, environmentally and economically sustainable. The principles emphasise that sustainable development will require the State to develop programmes that avoid or minimise the disturbance of ecosystems and loss of biological diversity, that avoid or minimise pollution and degradation of the environment, and that avoid or minimise the disturbance of landscapes and sites that constitute the nation's cultural heritage. Most importantly, the Act confirms that environmental justice must be pursued in such a way that adverse environmental impacts are not distributed in a manner that unfairly discriminates against vulnerable groups in our society.

These principles have established a sound basis for a reasonable environmental policy. In accordance with the principles enunciated in the Grootboom case, what is required is an intersectoral comprehensive policy that is implemented in a reasonable manner.

Developing indicators

In order to assist with an evaluation as to whether there has been reasonable formulation and implementation of environmental programmes, it is necessary to develop environmental indicators. Indicators perform a vital role in helping us understand how the right is breached and, in turn, provide insight into the required measures to be taken to remedy the breach. The indicators must be devised in such a way that they capture two essential pieces of information, namely the willingness and the capacity of the various spheres of government to protect and promote the environmental rights.

To monitor the protection and fulfilment of environmental rights, we need to develop a comprehensive, multi-faceted tool for analysis and evaluation. The aim would be to monitor, firstly, the overall commitment of national Government in giving effect to environmental rights. Secondly, the indicators should aim to monitor the effects of policy at a local level and to direct policy interventions and development efforts towards the areas most in need of assistance.

On the right is an example of the proposed indicators developed to measure the future environmental health impact of current and planned environmental initiatives in Alexandra, taking into account the communities' priorities. This project to develop and measure these indicators arose from planned development initiatives. But it is those areas not currently targeted for comprehensive development projects that are most in need of mechanisms to measure the realisation of environmental rights.

A fundamental principle established in Grootboom is that any government plan, to be reasonable, has to address the immediate needs of those living in intolerable conditions. This means the State has a duty to take immediate initiatives to address environmental degradation in marginalised and disadvantaged communities.

Proposed environment and health indicators for Alexandra

Category	Proposed indicator/s
Ambient air quality	Levels of particulate matter (PM10), sulphur dioxide, nitrogen dioxide. Annual noise complaints.
Access to safe water	Proportion of households with access to sufficient quantities of safe water.
Disaster episodes	Number of homes destroyed/number of people left homeless annually by fire.
	Number of homes destroyed/number of people left homeless annually by floods.
Housing	Proportion of people accommodated in informal or unhealthy' housing.
Safety and crime	Number of children/people injured in traffic events.
	Number of cases of murder reported.
	Number of cases of rape reported.
	Number of cases of child abuse.
Surface water quality	Levels of coliforms in the Jukskei River at Alexandra.
Indoor air quality	Levels of particulate matter in indoor air.
Socio-economic	Proportion of unemployed people.
	Proportion of people without functional education.
Food quality	Proportion of food samples not meeting guidelines in annual surveys.
Health	Number of cases of diarrhoeal disease reported at Alexandra clinics/health centers annually.
	Proportion of people who smoke.
	Proportion of people with tuberculosis.
	Childhood blood lead levels.
Public perceptions	Public perceptions of the state of the environment in Alexandra.
	Public perceptions of the prevalence of threats to health in Alexandra.
	Levels of awareness among Alexandra residents of the links between the environment and health.

Source: Mathee et al, The State of the Environment and Health in Alexandra, 2001, 43.

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Concluding observations

Key themes and challenges for government and civil society

Kgomosoane Mathipa and Geoff Budlender

Kgomosoane Mathipa

This colloquium has raised a number of key challenges for Government in the realisation of socio-economic rights. These include the following:

1. It is important to remember that the primary responsibility to realise socio-economic rights lies with Government. The first challenge is to define more clearly what the precise division of responsibilities is amongst the various spheres of government. In some cases there appears to be confusion about who should do what.
2. The second challenge is to work in an integrated fashion, since many socio-economic rights are interrelated. There are limitations to what can be achieved if socio-economic rights are not looked at inter-sectorally.
3. A third challenge relates to the fact that South Africa has not yet ratified the International Covenant on Economic, Social and Cultural Rights. There was a strong call for government to ratify the Covenant. As Judge Pillay pointed out, ratification would imply a number of core responsibilities. It is necessary that Government consider the ratification of the Covenant.
4. The interpretation of the Grootboom case has an impact in terms of how government sees and carries out its responsibilities. It is not advisable for government to take too narrow an approach. A limited interpretation of the Grootboom judgment tends to see government as having limited responsibilities. Government will do better if it sees Grootboom as setting out the minimum criteria for constitutional compliance, and building on these basic requirements. Grootboom was a cautiously crafted judgment, the first of its kind in South Africa.
5. Regarding the implementation of socio-economic rights, the debates showed that a wide range of legislation and policies are in place. Critical gaps remain, though, in the areas of food security, social assistance and health care. The point was made that we can have the laws, but if we don't have committed officials willing and able to carry out the ethos of the Constitution, we will not realise socio-economic rights. A court judgment alone will not be able to deliver on these rights. So much also depends on budgets and the allocation of money. It is interesting to note that the money allocated for the realisation of socio-economic rights is often not spent due to a lack of effective capacity. The challenge is therefore to build the capacity or capability of Government to deliver.
6. The South African Human Rights Commission clearly has an important role to play in monitoring socio-economic rights despite its limited budget. Government should bear in mind that the monitoring and feedback provided by the Commission will in fact assist it to reflect on the process of implementing socio-economic rights. It is also important that monitoring is not only carried out by the SA Human Rights Commission, but also by NGOs. In addition, all three spheres of government should devise means of monitoring and evaluating their own performance in implementing socio-economic rights.

7. The capability of public officials to understand the Constitution and their constitutional obligations relating to socio-economic rights is clearly critical. A key challenge is therefore the introduction of constitutional rights education programmes. This needs to be taken seriously as the fundamental objectives of the Government are based on the Constitution.

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Geoff Budlender

I am surprised by the doom and gloom with which some regard the Grootboom case. Elsewhere in the world, people see it as a huge victory for socio-economic rights, and they envy us. Here, we complain that it is not good enough. Much has been said about Afro-pessimism, but this seems to be a case of South African pessimism. This does not mean that we should not be critical - but we should also celebrate our victories.

The law is not static. Grootboom reversed the thrust of the Soobramoney case. The TAC/MTCT case will be the next attempt to move things forward. Grootboom is a foundation of the TAC case. It is a powerful tool to help people assert their socio-economic rights.

The key purpose of socio-economic rights is to transform our society into one that is based on human dignity. They seek to make it possible to bring about this change. We have sometimes overlooked this, assuming that these rights are always against government. But the rights are also there to enable government to transform, in the face of those who seek to protect vested interests. Socio-economic rights are not only about fighting government, but also about government fighting for people.

Lessons to be drawn

What lessons can be drawn from discussions at the colloquium?

1. It is high time SA ratified the International Covenant on Economic, Social and Cultural Rights . It should be a matter for national embarrassment that we, with our generous Constitution, have not done so. The content of the rights in the Covenant has been elaborated, and this could be very helpful to us.
2. The Constitution creates the opportunity for Parliament and the courts to engage in dialogue . We need to clarify the role of courts in the constitutional dialogue with other parts of government. There is, of course, a role for institutional modesty on the part of the courts. Decisions about macro-economic policy are not a matter for the courts. There are limits to the role of the courts, in terms of their legitimacy and accountability. The courts are also limited by the way in which cases come to them - they are limited to the facts placed before them by the parties. Some decisions require broader knowledge. But the fundamental truth remains: whether the Government has carried out its duty to respect, protect, promote and fulfil these rights is a legal question, and is a matter for the courts.
3. We need to give more attention to legal remedies. The critical issue is not whether these rights are justiciable, but how to enforce them. Sometimes, an order should be made for government to take specific action to give

effect to the right. Other times, where there are various permissible options, the legislature or executive should decide which option to adopt. The task of the courts is then to define the range of constitutionally permissible options, and to review policy and its implementation to see whether they meet the constitutional standard. We need to become more imaginative in designing effective remedies to achieve this.

4. We need to examine how legal strategies can form part of broader social mobilisation . How do we integrate legal strategies into community strategies? Legal cases cannot stand on their own. It is no good if we have a legal victory, but nothing changes on the ground.
5. Socio-economic rights are not only for people in desperate situations. Grootboom dealt with people who were in a desperate situation. The court was not asked about the rights of people who have inadequate housing, but only about people who had no housing at all. This does not mean that socio-economic rights are only for people in desperate situations. Everyone has the right of access to adequate housing. This has to be developed. The court has spoken the first word, not the last word, on housing.
6. In interpreting socio-economic rights it is important that Government does not adopt an overly legalistic approach. Government will do better if it sees Grootboom as setting the minimum of what it must do, while taking broader measures to transform our society.

This has been a rich colloquium, which shows how Grootboom can be used both in governance and in advocacy by civil society. The case gives us powerful tools in asserting socio-economic rights.

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Closing address

Socio-economic rights essential for human security

Viviene Taylor

The concept of 'human security' is emerging as an important rallying point in the international arena for those who fight for the improvement of the lives of ordinary people all over the world. It is based on the idea that all human beings should be able to live a life of dignity and respect and that this can only be achieved when human beings are free from both political fear and socio-economic want. Human rights issues and socio-economic issues are therefore intertwined and must be taken up and fought for at the same time.

The interdependent relationship between civil and political rights and socio-economic rights was underscored by Judge Yacoob of the Constitutional Court, who said in the Grootboom judgment that the foundational values of our Constitutional state - human dignity, freedom and equality - are denied to those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy all the other rights enshrined in the Constitution.

The UN Commission on Human Security

In response to a call of UN Secretary-General Kofi Annan, the Commission on Human Security (CHS) was formed in 2001 to advance human security for all the people of the world. It is a manifestation of the growing awareness in the international community that collective efforts are needed to significantly reduce human suffering and insecurity where it is most acute and prevalent. The CHS is therefore tasked to convince the governments of countries all over the world that the concept of human security should be a central focus of their policy imperatives.

This means that nations should move away from the idea that the security of a country's population depends only on political action or military aggression. Instead, governments should accept that social, economic and environmental factors can also pose a major threat to the security of the people of the world.

The emergence of the concept of human security is an important development in the fight against poverty and oppression because it focuses on people rather than on the nation state. This shift is significant because it acknowledges the fact that in the globalising world the decisions made and policies pursued by a nation state are by far not the only factors influencing the human security of people all over the world. There are a range of forces and factors at regional and international level that also influence the human security of people.

The fight against human insecurity

This insight raises at least three further points that should be considered in the future in the fight against human insecurity.

1. Nation states can no longer insulate themselves from the outside world without severe costs because states are interdependent on one another. Where individuals claim rights within a nation state, global processes, the rules of the global market and global institutions often play a role in determining or constraining the possible outcomes. This means that fundamental change that will allow for a more equitable and efficient system guaranteeing better human security, will often depend on changing these global processes, rules and institutions. We should therefore not only concentrate our advocacy and mobilising efforts at changing the policies of our individual governments, but should also focus attention on those aspects of the global world that might perpetuate unfairness in the world.
2. When we look at the issue of core obligations of states with regard to socio-economic rights, we need to push to the centre of the debate the concern that certain fundamental human needs should be non-negotiable.
3. When we talk about civil society engagement and participation in the process of attaining socio-economic rights and human security we must also talk about the capacity of both the State and of civil society to ensure that these rights are realised. Although the engagement and contestation of civil society is an essential part of this process, civil society cannot and should not become service providers and take over the role that should be played by the State.

I end with a quote from the late Mahbub Al-Haq, who provided much of the inspiration for the Human Development Reports:

'Human security is not a concern with weapons. It is a concern with human dignity. In the last analysis, it is a child who did not die, a disease that did not

spread, an ethnic tension that did not explode, a dissident who was not silenced, a human spirit that was not crushed.'

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