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Editorial

by Sibonile Khoza and Danwood Chirwa

We are pleased to present another edition of ESR Review featuring a number of recent developments relating to socio-economic rights.

Predictably, the highly publicised case of Minister of Health and Others v Treatment Action Campaign and Others, Case No. CCT 8/02 (unreported) has been given prominence in this edition. The case is a significant addition to the fledgling jurisprudence on socio-economic rights and is critical to the national emergency caused by the HIV/Aids pandemic. The two feature articles in this edition provide a concise overview and a critique of the case and its implications for the jurisprudence of socio-economic rights.

Two articles in the legislation and policy section discuss the report of the Committee of Inquiry into a Comprehensive Social Security System for South Africa, and the proposed National Health Bill. The former article focuses on the issue of providing universal income support as a means of realising the constitutional right of access to social assistance. The report and the National Health Bill are both analysed against the backdrop of the Bill of Rights and the evolving jurisprudence on socio-economic rights in South Africa.

In the monitoring section, we offer an overview of the research of the Education Rights Project into the barriers against realising the right to education. The constitutional issues arising from education policies such as user fees are highlighted.

We also review two cases. The first is a Supreme Court of Appeal judgment involving the application of the constitutional right of access to health care services to a common law action.

The second case review is on the first decision of the African Commission on Human and Peoples' Rights, dealing directly with the application of a range of socio-economic rights under the African Charter.

Some of the international developments, events and publications relating to socio-economic rights during the last eighteen months are also discussed.

We would like to express a special word of thanks to Karrisha Pillay for supplementing our efforts in editing this issue. We are also very grateful to the authors.

We trust that readers of the Review will find this edition stimulating and relevant to the advancement of socio-economic rights.

Reducing mother-to-child transmission of HIV: The Nevirapine case

Sibonile Khoza

On 5 July 2002, the Constitutional Court delivered judgment in the widely publicised case of Minister of Health and Others v Treatment Action Campaign and Others, Case No. CCT 8/02, (unreported) (the TAC case). The outcome of this case has serious ramifications for the protection of socio-economic rights in the context of the national HIV/Aids pandemic.

At present between four and six million South Africans live with HIV/Aids. The alarming statistics present two key challenges for government. The first relates to reducing the rate of HIV infection, and the second to the plight of those living with HIV/Aids. The TAC case contains important principles that can inform government's approach to both these issues.

The respondents in the Constitutional Court were the Treatment Action Campaign (TAC), Dr. Haroon Saloojee (a professor in paediatrics) and the Children's Rights Centre. They instituted proceedings in the Transvaal Provincial Division, challenging the government's failure to adopt a comprehensive policy aimed at preventing mother-to-child transmission (MTCT) of HIV. On 14 December 2001, the High Court ruled in their favour. The government appealed this decision in the Constitutional Court (the Court).

This article provides an overview of some of the key issues before the Court. It also highlights the fundamental principles articulated by the Court in the enforcement of socio-economic rights. In so doing, it raises certain challenges posed by the Court's ruling.

Factual background

Nevirapine is a widely recommended anti-retroviral drug used in reducing MTCT of HIV. It is listed as an essential drug on the World Health Organisation's Model List of Essential Drugs (as revised in December 1999, s 6.4.2). The Medicines Control Council of South Africa registered the drug in 1998, thereby confirming its quality, safety and efficacy.

However, in spite of endorsement by both these bodies, the South African government adopted a policy that resulted in extremely limited access to Nevirapine for the purposes of preventing MTCT at State health facilities. Use of

Nevirapine was restricted to 18 pilot sites (two for each province), providing access to approximately 10% of the population. Doctors in public hospitals could not prescribe Nevirapine to pregnant mothers outside the pilot sites, even where the capacity to administer the drug existed.

Challenge in the High Court

In the High Court, the respondents argued that the government's policy violated a number of provisions of the Constitution, including s 27(1)(a) as read with s 27(2) and s 28(1)(c). Section 27(1)(a) provides that everyone has the right of access to health care services, including reproductive health care. Section 28(1)(c) provides that every child has the right to basic health care services. The respondents sought an order compelling government to devise an effective national programme aimed at preventing MTCT of HIV, including providing voluntary counselling and, where appropriate, providing Nevirapine or other appropriate medicine and formula milk for feeding. The relief sought also included an order requiring government to make Nevirapine available, where it is medically indicated, to all pregnant women giving birth in public health facilities.

As noted above, the High Court found in favour of the respondents. It held that as the government's programme denied people access to Nevirapine outside the pilot sites, it was unreasonable and constituted a barrier to the progressive realisation of the right to access to health care services. The policy was also held to be unreasonable due to the absence of a coherent plan and a failure to stipulate the timeframe for a national programme to prevent MTCT of HIV. The order granted by the High Court was substantially in accordance with the relief sought by the respondents.

Dissatisfied with the High Court ruling, the government appealed to the Constitutional Court. The relief sought by the respondents in the Court was supported by a joint amicus intervention by the Community Law Centre (UWC) and Idasa, and another by Cotlands Baby Sanctuary.

Key arguments advanced in the Constitutional Court

The government challenged the High Court's decision on the basis that the order made was essentially a judicial prescription of policy for the executive. It argued that the order was in conflict with the principle of separation of powers and was accordingly constitutionally untenable.

The government also contended that its policy was justified on account of the following uncertainties and factors:

- the efficacy of Nevirapine was questionable;
- there was a risk of resistant strands developing as a result of the use of the drug;
- the safety of the drug was unclear; and
- there was inadequate capacity to administer the drug nationally.

According to the government, restricting the use of Nevirapine to pilot sites was an essential exercise in light of the above uncertainties and concerns. It argued that the policy enabled it to evaluate the effectiveness and feasibility of administering Nevirapine throughout South Africa. This cautious approach, it contended, was universally recognised and in accordance with the State's obligations in s 27 of the Constitution.

The respondents, on the other hand, submitted that the policy was unreasonable and in conflict with the State's constitutional duties imposed particularly by sections 7(2), 27 and 28.

The judgment

Judicial enforcement of socio-economic rights

The Court reaffirmed its position on its role and powers in the enforcement of socio-economic rights. It reiterated that it is constitutionally mandated to evaluate, using the test of reasonableness, whether government action or omission complies with the constitutional imperatives.

It confirmed that socio-economic rights are justiciable. However, the crucial question for consideration was whether the government programme to prevent MTCT of HIV was reasonable in both its formulation and implementation.

Minimum core

The Community Law Centre and Idasa (in their joint amicus intervention) introduced the 'minimum core' argument in respect of the protection of health care rights. They argued that the right of access to health care services under s 27(1) was a self-standing, individual right that was vested in everyone.

When s 27(1) is read with the State's duty to 'respect, protect, promote and fulfil the rights in the Bill of Rights' (s 7(2)), they submitted, it imposes certain minimum core obligations on the State. The amici conceded that although this minimum core might not be easy to define, it includes at least the minimum decencies of life consistent with human dignity. When applied to the context of pregnant women with HIV, they argued that the provision of Nevirapine, including voluntary testing and counselling, constitutes the minimum core obligations of s 27(1)(a) of the Constitution.

The Court rejected the argument that s 27(1)(a) creates a self-standing minimum core obligation independent of the 'progressive realisation' obligation imposed on the State in s 27(2). It noted that it is 'impossible to give everyone access to a core service immediately'. Instead, it reiterated that all that is possible is for the State to act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis. This determination reaffirmed its earlier ruling in Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC) (Grootboom).

In rejecting the concept of minimum core obligations, the Court emphasised that it is not institutionally equipped to determine such obligations. This determination, it noted, would require the Court to make wide-ranging factual and political enquires into how public revenues should most effectively be spent. It accordingly concluded that the Constitution envisages a much more restrained and focussed role for the courts that centres on whether State duties meet the constitutional imperative of reasonableness. It acknowledged that while such determinations of reasonableness may in fact have budgetary implications, they are not themselves directed at rearranging budgets. This approach, according to the Court, ensures adherence to the principle of separation of powers.

The Court reiterated that the minimum core standard was possibly relevant to the reasonableness test. However, it did not clarify the weight this consideration

carries in relation to other factors that are relevant to establishing reasonableness.

The Court accordingly read s 27(1)(a) and s 27(2) together to mean that the right of access to health care services has to be realised progressively within the available resources of the State. This interpretation essentially means that this right and, by implication, other socio-economic rights in sections 26 and 27, are entirely programmatic.

It is arguable that the Court's ruling in respect of minimum core obligations has the effect of reducing socio-economic rights to the status of 'reasonable policy entitlements'. The ruling is also of particular concern when examined against the backdrop of international law. For instance, the Committee on Economic Social and Cultural Rights has emphasised that if the International Covenant on Economic, Social and Cultural Rights were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'étre. The Court's position on minimum core obligations does not sit comfortably with that of the Committee.

The test of reasonableness

The Court considered the four factors that government advanced in support of its 'cautious approach' to the policy on Nevirapine. In respect of the efficacy of the drug, the Court stated that it was clear from the evidence that 'the provision of Nevirapine would save the lives of a significant number of infants even if it were administered without the 'full package' and support services that were available at the research and training sites. It noted that although the evidence produced by both sides indicated that sero-conversion of HIV can take place, this was so in some cases, but certainly not all. It accordingly concluded that Nevirapine remained efficacious to some extent in combating MTCT, even in cases where the mother breastfed her baby.

In response to the concern that resistant strains of HIV might emerge as a result of the use of Nevirapine, the Court held that although this possibility existed, the mutation was likely to be transient. It further noted that even if such resistance persisted, the potential benefits of Nevirapine outweighed the risk involved.

On the issue of safety, the Court ruled that no evidence had been led to suggest that a single dose of Nevirapine to both the mother and her child at the time of birth would result in any harm to either of them. It also relied on the drug's endorsement by the World Health Organisation and the Medicines Control Council attesting to its safety.

The final question of capacity was held to be relevant to the ability of government to make a 'full package' available throughout the public health sector. It was not relevant, the Court concluded, to the question of whether Nevirapine should be used to reduce MTCT of HIV outside the pilot sites where facilities for testing and counselling existed.

In applying these findings to the test for reasonableness, the Court found that the policy of confining Nevirapine to research and training sites failed to address the needs of mothers and their newborn children who do not have access to these sites.

Significantly, the Court reiterated that, in order to satisfy the test of reasonableness, 'those whose needs are most urgent and whose ability to enjoy all rights therefore is most in peril' must not be ignored in the measures aimed at realising a relevant social-economic right. However, it is of concern that the Court did not give any guidance as to which people constitute those 'whose needs are most urgent.'

The Court acknowledged that the government's research into the use of Nevirapine was a worthwhile exercise. However, it did not find justification for withholding Nevirapine from those who did not have access to the pilot sites until the completion of the research, or until the best programme was formulated and the necessary funds and infrastructure were provided for implementing the programme. The Court's reasoning was further informed by the fact that the cost of Nevirapine was not an issue in the matter and that it was admittedly within the resources of the State. It further held that the safety and efficacy of Nevirapine for the purposes of preventing MTCT was established by the fact that it was being provided by government at pilot sites. The Court also acknowledged that the administration of the drug is a simple procedure and is potentially life saving.

The State's policy was thus held to be unreasonable within the meaning of s 27(2) as read with s 27(1)(a) of the Constitution. The Court also held that the government had violated the obligation engendered by s 27(2) of the Constitution by failing to adopt a comprehensive plan to combat MTCT of HIV.

Children's rights

The Court reaffirmed the Grootboom interpretation of children's rights to family or parental care and to basic nutrition, shelter, basic health care services and social services. It maintained that the primary obligation to provide basic health care services rests with parents who can afford to pay for them. In the absence of such parental care, it confirmed that the State assumes the primary obligation.

Remedies

The Court also emphasised that it has wide constitutional powers to grant effective relief where there is a violation of any right recognised in the Bill of Rights. It noted that these broad powers enable the Court, where necessary, to make mandatory orders and to assume a supervisory jurisdiction. On this basis, it rejected the government's contention that the powers of the Court were limited to issuing a declaratory order.

Although the Court substantially agreed with the High Court, it made a materially different order. It noted that government had since moved positively towards expanding the provision of Nevirapine nationally.

It declined to make an order regarding the use of formula feed as a substitute for breastfeeding and as part of a measure to combat MTCT of HIV, noting that this matter raised complex issues. It also found that 'there was insufficient evidence to justify an order that formula feed be made available by government on request without charge in every case'. This aspect of the Court's ruling is of particular concern, given the critical role of formula feed in the reduction of MTCT of HIV. It also effectively denies poor mothers living with HIV the right to choose between breast-feeding and formula milk if the latter is not available at State expense.

The Court conceded that a structural interdict might be made requiring government to revise its policy and submit such policy to the Court to ensure that it is satisfactory and consistent with the Constitution. However, it was emphasised that such an order should not be made unless it is necessary to secure compliance with a court's order. In the present case it was considered unnecessary, as the Court concluded that there was no reason to believe that the government would not respect and execute the order given its good conduct in the past in this regard. (The Court's failure to exercise supervisory jurisdiction in this matter is of concern, given the government's publicly stated resistance to complying with an order requiring a shift in policy.)

Accordingly, the High Court's order was set aside and a fresh order made that included the following terms:

A declarator:

- That s 27(1) and (2) of the Constitution require government to devise and implement, within its available resources, a comprehensive and co-ordinated plan to progressively realise the rights of pregnant women and their children to have access to health care services in order to combat MTCT of HIV.
- That the plan be realised progressively within available resources and include reasonable measures for counselling, testing of pregnant women for HIV, counselling on options available to them to reduce MTCT and making appropriate treatment available to them for such purposes.
- That the government policy for reducing MTCT of HIV fell short of compliance with the above terms.

An order requiring government without delay to:

- Remove the restrictions on the use of Nevirapine outside the research and training sites.
- Permit and facilitate the use of Nevirapine for the purposes of reducing MTCT of HIV, and make it available for this purpose at health facilities where it is medically indicated.

Conclusion

Despite certain disappointing aspects for the jurisprudence on socio-economic rights, the Constitutional Court judgment marks a positive step in addressing poverty and HIV in South Africa. However, the real impact of jurisprudence of this nature lies in the commitment to (and extent of) implementation, on which we await assessment.

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Relevant information:
The full text of the judgment can be accessed on the Constitutional Court website: www.concourt.gov.za
The Heads of Arguments of the joint intervention of the Community Law Centre and Idasa can be accessed online: www.communitylawcentre.org.za

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Children's socio-economic rights: Do they have a right to special protection?

Paula Proudlock

In addition to the socio-economic rights provided to everyone in sections 26 and 27 of the Constitution, s 28(1)(c) is specifically targeted at children's socio-economic rights. It accords every child a right to basic nutrition, shelter, basic health care services and social services.

Section 28(1)(c) is informed by a recognition of the particular vulnerability of children. The inclusion of a provision expressly dedicated to children's socio-economic rights, complemented by the distinct textual differences between this provision and the socio-economic rights entrenched in sections 26 and 27, indicate a need to accord some degree of priority to the realisation of children's socio-economic rights.

The Constitutional Court has been presented with two opportunities to interpret s 28(1)(c), in *Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC) (Grootboom)*, and *Minister of Health and Others v Treatment Action Campaign and Others, Case No. CCT 8/02, (unreported) (TAC)*. However, on both occasions, the Court found it appropriate to base its findings on the socio-economic rights of everyone as entrenched in sections 26 and 27.

Despite the fact that children represent a significant portion of the group of persons affected and that arguments based on children's socio-economic rights were placed before the Court, the judgments provided limited guidance on the interpretation of s 28(1)(c). The absence of jurisprudence dealing with an interpretation of s 28(1)(c) has resulted in a lack of clarity as to exactly how this section enhances the legal protection accorded to children.

While the South African government has clearly indicated in various policy documents and international forums that it supports the call for 'children first', the majority of children in South Africa are not being provided with their basic needs: food, water, social security, shelter, health care services and social services. It is in this context that clarity is needed from the Constitutional Court on the nature and scope of the obligations imposed on the State by s 28(1)(c).

This article briefly examines these obligations. It also refers to relevant findings of the Constitutional Court in the Grootboom and TAC cases and examines their implications for the future of children's socio-economic rights in South Africa.

State obligations regarding children's socio-economic rights

In Grootboom the Court held that the primary obligation in respect of children's rights to basic nutrition, shelter, basic health care services and social services rests with parents. The inference is that the State assumes the primary obligation to ensure that these rights are realised only when the child is removed from parental or family care. This interpretation of s 28(1)(c) was viewed as a great disappointment for children's socio-economic rights as it provided extremely limited protection to the majority of children in South Africa whose families cannot afford to meet their basic needs.

In the TAC case, Counsel for the State attempted to rely on this interpretation in support of its argument that the State bears no obligation to provide a child, who is living with his or her parents, with health care services. The Court responded that this argument was premised on an inaccurate interpretation of the Grootboom judgment. It stated that '[w]hile the primary obligation to provide health care services no doubt rests on those parents who can afford to pay for such services', this does not mean that the State 'incurs no obligation in relation to children who are being cared for by their parents and families'. The Court went on to observe that 'the State is obliged to ensure that children are accorded the protection contemplated by section 28 that arises when the implementation of the right to parental or family care is lacking'. In the context of the right to basic health care services, this obligation was held to apply in respect of children born in public hospitals and clinics to mothers who are poor and unable to gain access to private medical treatment. The Court accordingly acknowledged that the State has an obligation to provide every child with basic health care services if the child's parents are unable to do so.

This analysis of the right to basic health care services has positive implications for interpreting other socio-economic rights in s 28(1)(c). For example, a child suffering from malnutrition because his or her family is poor would arguably be entitled to assistance from the State to ensure that the right to basic nutrition is realised.

The TAC case therefore deserves merit for having cleared the ambiguity that arose after Grootboom regarding the State's obligations in respect of children's socio-economic rights in s 28(1) (c).

What is the State's obligation to provide special protection to children?

Although the Court has not based a decision on s 28(1)(c) to date, it is likely to be presented with such an opportunity in the near future, particularly in light of the levels of poverty and lack of access to basic services among children in South Africa.

In anticipation of such a case, some questions worth considering and exploring include the following:

- If the segment of society most affected by the outcome of a case involves children, under what circumstances will the Court consider it appropriate to base its judgment on a violation of s 28 as opposed to the general socio-economic rights of everyone?

Possible scenarios include challenges to the reasonableness of programmes that are directly aimed at satisfying children's basic needs, such as the Child Support Grant and the Primary School Nutrition Programme.
Another scenario could be a matter in which the Court is requested to make decisions that would have considerable cost implications for the State, such as a challenge to the lack of social security provisioning for children aged between 7 and 18 years.

- What are the implications of the use of the words 'right to' in s 28(1)(c) in comparison with the use of the words 'right to have access to' in sections 26(1) and 27(1)? In other words, does s 28(1)(c) impose positive obligations on the State or are such obligations limited to the general socio-economic rights?
- If the State has a positive obligation to children in terms of s 28 (1)(c), is it subject to the same qualifications as the rights for everyone in s 27?

In Grootboom, the Court held that s 28 must be read in context with s 26.

However, it is unclear whether this interpretation means that children's right to basic nutrition must be progressively realised through reasonable legislative and other measures, within available resources. If the latter interpretation was intended by the Court, it would mean that the obligation under s 28 (1) (c) is essentially the same those as under sections 26 and 27. If this were so, s 28(1)(c) would be hollow.

- When considering a challenge based on s 28(1) (c) as opposed to s 27, will the courts use the reasonableness test or adopt a different or more stringent test?
- What are the implications of the use of the word 'basic' in relation to nutrition and health care services in s 28 (1) (c)? Does it imply a minimum core to the right to food and health care services that must be delivered to children as a matter of priority?

This short critique can merely raise these questions. It is intended to stimulate the debate on how s 28 can be interpreted in a way that gives it teeth in ensuring that children's basic needs are prioritised.

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Universal access to social security rights: Can a basic income grant meet the challenge?

Sandra Liebenberg

Access to social assistance for those unable to support themselves and their dependants is a fundamental human right enshrined in the Constitution.

In March this year, the Committee of Inquiry into a Comprehensive System of Social Security for South Africa, chaired by Prof. Viviene Taylor, released its consolidated report, entitled Transforming the present -protecting the future. It recommends a range of policy measures aimed at building a comprehensive social security system in South Africa.

The report's underlying philosophy is that social security reform should form part of a comprehensive social protection 'package'. This package of developmental strategies and programmes should be 'designed to ensure, collectively, at least a minimum acceptable living standard for all citizens'. Without such a core minimum of social provisioning, the constitutional promises of socio-economic rights, human dignity, equality and freedom will have a hollow ring.

Key findings

The following findings of the Committee are of particular relevance to the constitutional obligation of ensuring universal access to social security:

- Depending on precisely which poverty line is used, between 45% and 55% of South Africans are living in poverty (between 20 and 28 million citizens).
- Income distribution in South Africa is highly unequal.
- High unemployment, including the massive net loss of formal sector jobs, and the growing shift towards peripheral, insecure work, is exacerbating the poverty situation.
- The impact of the HIV/Aids epidemic will exacerbate poverty and inequality.

- The patchwork of social grants inherited from the apartheid era is inadequate to meet the challenge of stamping out extreme poverty, and there are huge gaps in the system. Poor children over the age of 7 essentially have no access to social assistance (those under 7 qualify for a child support grant), nor do poor adults under the age of 60/65 (after which they qualify for a grant for the aged). Currently about 60% of the poor, or 11 million people, are not covered by the social security system.
- From a comprehensive social protection framework, 'the existing programme of social assistance grants is considerably high cost relative to its level of social effectiveness'.

The Committee concluded that the current social security programmes 'fail to satisfy the constitutional imperatives and thus make the State vulnerable to Constitutional Court challenges, and are clearly inadequate'.

The Committee's major policy recommendation is the phasing-in of a basic income grant (BIG). According to analysis conducted by the Committee, the grant 'has the potential, more than any other possible social protection intervention, to reduce poverty and promote human development and sustainable livelihoods'.

Interpreting the constitutional right of access to social security

The Grootboom case is the leading precedent for interpretating the socio-economic rights provisions in the Constitution. In assessing whether the State has fulfilled its positive obligations to realise socio-economic rights, the Court will evaluate the 'reasonableness' of the measures adopted by the State to give effect to the rights. The following principles are key to the reasonableness test:

- the relevant programme must be co-ordinated, comprehensive and capable of facilitating the realisation of the right in question;
- it must include measures to provide immediate relief for those in desperate need and living in intolerable conditions or crisis situations;
- the legislation, policies and programmes adopted must satisfy the test of reasonableness in both their formulation and implementation;
- the right should be made progressively accessible over time to both a larger number and a wider range of people; and
- the availability of resources will be an important factor in assessing the reasonableness of the measures adopted by the State.

Assessing the Committee's recommendations

Applying these principles to the findings of the Committee, it is evident that the BIG is the most effective and appropriate measure for fulfilling the right of access to social assistance.

A co-ordinated and comprehensive programme

In the first place, the grant represents a co-ordinated and comprehensive response to the current fragmented and inequitable system of social security. Expanding access to social insurance schemes (e.g. unemployment insurance, compensation for occupational injuries and diseases) and encouraging private savings (e.g. for retirement) are undoubtedly important components of a comprehensive social security system. However, high structural unemployment, the decline in formal sector employment and the deep levels of poverty in South

Africa render these measures an inadequate response to the challenge of ensuring universal access to social security.

Expanding access to social assistance must play a major role in a comprehensive social security strategy that is responsive to South African realities.

Providing relief to those in desperate need

The BIG is, by its very nature, well suited to ensuring that the basic subsistence needs of destitute groups are met. In its assessment of the impact of the BIG, the Committee points out that the incidence of extreme poverty would be nearly completely eliminated, and that closing the poverty gap would improve from 23% under the current grant system (37% assuming full take-up of existing grants) to 74%.

Although the grant will be paid universally, the Basic Income Grant Coalition (the BIG Coalition) has proposed that it be recuperated from middle and upper income earners through the income tax system. In this way, people living in poverty will ultimately end up being the real beneficiaries of the BIG.

The BIG will also benefit particularly vulnerable groups such as women and children living in poverty. It will substantially increase net household resources whereas an exclusive focus on children's social grants overlooks the fact that the entire household generally consumes whatever grants are received for children.

Reasonable implementation

The design of the BIG proposal makes its reasonable implementation more feasible than the current social grants system. The Committee points out that the current system does not meet its full potential because of the way it is structured.

Some of the barriers to accessing social grants include means testing, rigid eligibility criteria contained in complex regulations and the high relative cost of applying for grants.

The BIG is designed to avoid administrative complexity and costs, as well as the perverse incentives of means testing and a range of other eligibility requirements.

The BIG Coalition proposes that the tax system should be used to recover progressively a substantial portion of the cost of the grant. As the Committee points out, the South African Revenue Services (SARS) 'is one of the most capable arms of government', and the proposals to use the tax system will facilitate efficient administration of the BIG.

The availability of resources

The BIG will have a significant developmental impact. As noted by the Committee, '[b]y providing such a minimum level of income support, people will be empowered to take the risks needed to break out of the poverty cycle'.

It also has the potential to support economic growth and job creation, thereby increasing the overall resources available to South African society. The Committee of Inquiry concluded that the implementation of a universal system of social assistance grants is both feasible and affordable.

Progressive realisation

While the right of access to social security can be realised progressively, the Constitutional Court has held that a significant number of desperate people in need must be afforded relief in the short-term. Two factors are important in justifying the urgent need to introduce a BIG:

- The huge gaps in access to social security provisioning inherited from the apartheid regime have existed for a number of years.
- Social assistance grants play a critical role in addressing the basic survival needs of people living in poverty. As long as these needs remain unsatisfied, it is very difficult for the poor to access and utilise other government services and developmental programmes. For example, in rural areas many people lack the income for transport to get to health clinics, social welfare offices, or to seek employment. Income poverty thus results in a poverty trap for many people.

The Committee recommended phasing in a BIG, commencing with the extension of the child support grant to all children up to the age of 18. A phased approach is necessary to put in place the necessary institutional and administrative arrangements for implementing the BIG. However, this should be tied to a concrete plan of action for its speedy and effective implementation, including clear goals and benchmarks for measuring progress. This plan should be devised and implemented through a transparent process involving full participation of all stakeholders.

The ball is now in government's court. Civil society will be watching closely to see how government responds to the constitutional challenge of ensuring universal access to social security rights.

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This article is based on the Community Law Centre's submission to government on the Taylor Commission's report. The full submission, as well as the submission of the BIG Coalition, can be accessed on our website at: www.communitylawcentre.org.za

The National Health Bill: A step in the right direction?

Karrisha Pillay

When passed into law the National Health Bill (the Bill) will be a vital piece of legislation that could potentially both improve the quality of life of our nation's people and increase their life expectancy.

However, in order to achieve these laudable objectives, it is critical that the Bill's provisions are structured in a way that is responsive to the population's health needs and that meets the imperatives of s 27 of the Constitution.

Section 27(1)(a) of the Constitution provides that everyone has a right to have access to health care services, including reproductive health care services.

Section 27(2) obliges the State to take reasonable legislative and other measures within its available resources to progressively realise this right.

Section 27(3) provides that no-one may be refused emergency medical treatment.

In addition, s 7(2) of the Constitution enjoins the State to respect, protect, promote and fulfil the rights in the Bill of Rights.

These constitutional provisions are the skeletal framework for the realisation of health care rights in South Africa. National framework legislation is obviously required to supplement and give effect to them.

The inadequacies of the Health Act (No. 63 of 1977) have long been recognised and have largely necessitated the current legislation.

Though the adoption of the Bill is a welcome initiative, the delay in its adoption has been cause for concern.

This article examines some of the key provisions of the Bill that are likely to have significant implications for the realisation of health care rights in South Africa. In particular, it focuses on the definition of certain important terms and on the rights and duties of health care users.

Purpose of the Bill

The Bill was enacted to give effect to s 27(1)(a) read with s 27(2) and s 27(3) of the Constitution. Its purpose is to establish a national health system which encompasses public, private and non-governmental providers of health services, and provides the population with the best possible health care services that available resources can afford. It sets out the rights and duties of both health care providers and users, and provides for matters connected therewith.

Given that the Bill itself sets out its purpose, it is important that its specific provisions accord with its overall purpose.

Definition of health care services

Despite the fact that the Bill intends to give effect to the right of access to 'health care services', it fails to define the term.

Unlike the international focus on the right to health, the South African Constitution refers more specifically to the term 'health care services'. As the term 'health care services' is not generally used in international instruments or national constitutions, its content and definition are fairly unclear. Hence, it would be useful for the Bill to include a definition of this term.

Furthermore, the international trend reflects a commitment to health care services aimed at ensuring physical, mental and social well-being. In light of the impending Mental Health Care Bill, it is clear that the South African commitment to health care services includes both physical and mental health care services.

However, in addition to its failure to define health care services, the Bill fails to stipulate the ambit of its focus. For instance, the extent to which the Bill covers

issues of mental health care is unclear, as is its overall interaction with the Mental Health Care Bill.

In addition, the definition of health in international law includes both preventative and curative health care services. However, the focus of the Bill seems to be largely weighted in favour of curative health care services. While mention is made of preventative and promotive health care services as being within the function of municipal health care services, the content of these aspects of health care, as well as their role in ensuring the overall vision of s 27(1)(a) are sadly lacking from the content and focus of the Bill.

Provision of health care services

The Bill allocates vast responsibilities to the Minister of Health. Section 4 enjoins the Minister, within the limits of available resources, to ensure basic health care services are rendered to South Africa's population. 'Basic health care services' is defined in s 1 of the Bill as 'those services as prescribed by the Minister after consultation with the National Health Authority'.

As has been pointed out in a submission by the Aids Law Project, Aids Consortium and Treatment Action Campaign, in essence this provision empowers the Minister to make decisions that have the potential to limit access to health care services.

However, the Bill provides no direction in respect of the factors that should be considered in making such a determination. In order to ensure that the basic health care services that are provided are in fact responsive to the health needs of South African society, it would be preferable for the Bill to refer to certain factors that should inform their provision.

Emergency medical treatment

The Bill notes that, subject to any limitations that the Minister or the relevant members of the Executive Council may prescribe, a public or private health establishment shall not deny a person emergency treatment, if the establishment is open and able to provide the necessary treatment. Section 1 of the Bill defines emergency treatment as follows:

Treatment which is needed to treat a life threatening but reversible deterioration in a person's health status and it continues to be emergency treatment until the condition of the person has been stabilised or has been reversed to a particular extent.

While the Bill's attempted definition of emergency treatment and State and private sector obligations in this respect is welcomed, its exact articulation is concerning.

The Constitution accords a particular priority to emergency medical treatment. It notes in unequivocal language in s 27(3) that no-one may be refused such treatment. The Constitutional Court (the Court) has held that emergency medical treatment refers to treatment for someone 'who suffers a sudden catastrophe which calls for immediate medical attention' (Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 at para 20).

As has been pointed out in the submission by the Aids Law Project, Aids Consortium and Treatment Action Campaign, the Bill defines emergency

treatment as including ongoing treatment, which is substantially broader that the interpretation envisaged by the Court. While legislation may clearly provide for a more expansive definition than the Court might accord, it is important that such legislative provisions are capable of being implemented. It is unlikely that the current provision is in fact capable of proper implementation given the current constraints within the health sector. The onerous obligations placed on the private sector are also likely to raise potential constitutional challenges.

A second aspect of the provision relating to emergency medical treatment that is concerning is that one of the criteria for accessing such treatment is the ability of the health establishment to provide it. The Bill offers little guidance on what constitutes the 'ability to provide'. For instance, a particular health facility might be constrained by a policy limiting the provision of emergency medical treatment to instances where the individual has the capacity to pay. This Bill should thus offer some guidance on this criterion.

Children's basic health care services

Section 28(1)(c) of the Constitution provides that every child has the right to basic health care services. Significantly, and unlike the right canvassed in s 27(1)(a), this right is neither qualified by the availability of resources nor subject to progressive realisation. Hence, s 28(1)(c) creates an immediately enforceable right in respect of children.

However, a proper definition of 'basic health care services' in respect of children is required in order to give effect to the right. Particular reference to children's health care services is glaringly absent from the Bill.

Health care services in respect of vulnerable and marginalised groups

The Bill is a departure from the White Paper on Health in respect of the health needs of vulnerable groups. The White Paper gives special attention to meeting the health needs of the poor, the under-served, the aged, women and children, who are considered to be among the most vulnerable members of society. However, the Bill fails to accord any priority to meeting the health needs of these or other vulnerable groups.

Rights and duties of users and health care providers

A significantly positive aspect of the Bill is its particular focus on the rights of health care users and concomitant duties on health care providers. The Bill obliges the relevant structures to ensure that adequate and comprehensive information is disseminated in respect of the health services for which they are responsible.

While the principle is an important one, referring to appropriate health information can enhance its value. Appropriate health information is particularly important in light of issues such as high levels of illiteracy, variances in language of choice, etc.

In addition, the Bill allows health users to participate in decisions affecting their personal health. It places substantial emphasis on health care users obtaining full knowledge and information about issues pertaining to their health.

The Bill also attaches substantial weight to user consent and confidentiality. Furthermore, it protects health care users from discrimination. Finally, it allows users or any other people to lay complaints about the manner in which they are treated at a health establishment, and to have their complaint investigated.

Conclusion

The adoption of the Bill is certainly a step in the right direction in light of the glaring absence of health framework legislation since the adoption of the 1996 Constitution. While this article has by no means attempted to be comprehensive, it has highlighted a few issues that are likely to have severe implications in the realisation of health care rights for vulnerable and marginalised sectors of South African society. It is hoped that such concerns, aimed at enhancing the quality of health care services and ensuring increased access to them, will be taken into account in finalising this key piece of legislation, which is likely to have profound consequences for the future health of our nation.

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Relevant information:
The submission of the Aids Law Project, Aids Consortium and the Treatment Action Campaign can be accessed on www.alp.org.za and www.aidsconsortium.org.za
For the submission of the Children's Rights Institute, contact Paula Proudlock at +27 (21) 685 1583 or paula@rmh.uct.ac.za

Eradicating barriers to education: An introduction to the Education Rights Project

Faranaaz Veriava

Racially skewed access to education is one of the legacies of apartheid, which included a deliberate policy of unequal financing of educational institutions and deeply entrenched patterns of discrimination. It is this legacy that impedes equal participation in all spheres of life for many individuals and communities.

Introducing the Education Rights Project

The Centre for Applied Legal Studies (CALS) and the Education Policy Unit (EPU) at the University of the Witwatersrand established the Education Rights Project (ERP) as a response to post-apartheid challenges in the education sector. The ERP aims to secure access to basic education of a suitable standard for all people living in South Africa, with particular attention being given to the most vulnerable sectors of society. The ERP will draw on the experience and resources of CALS in research, advocacy and strategic litigation on human rights issues and the extensive knowledge base of the EPU on education policy and the education sector.

The ERP will engage in activities such as litigation, research, advocacy, community activism and legal education on education rights in order to achieve its objectives.

Identifying the barriers to education

The ERP has established a reference group to assist in its work, comprising individuals from non-governmental and community-based organisations involved in human rights and the education sector, as well as public institutions such as the South African Human Rights Commission.

One of its principal tasks has been identifying key focus areas for the ERP's work. This task has entailed identifying sectors of the community that face particular difficulties in accessing basic education and the factors that continue to impede people's full enjoyment of the right to education.

Thus far, the reference group has identified the following focus areas for research by the ERP:

- the difficulties faced by learners on farm schools;
- sexual harassment and sexual violence in schools;
- the impact of the current infrastructure provisioning for schools on education; and
- the constitutionality of 'user fees' (school fees).

The ERP seeks to propose mechanisms to ensure access to education for all in the light of the relevant legal requirements and the current problems and challenges.

User fees as a barrier to education

As has been noted, the constitutionality of user fees is one of the ERP's focus areas. This topic is complex. School budgets are currently funded by allocations from State revenue. School fees are required to supplement these budgets so that schools are able to run smoothly. According to the South African Schools Act (SASA) (No. 84 of 1996), the decision to require payment of school fees lies with learners' parents. The Act provides that a majority of parents at a public school may determine whether or not school fees are charged and, if so, what amount should be paid.

The Minister of Education has drafted regulations that provide for exemptions from paying school fees for parents who cannot afford to do so. A further exemption is provided for in the regulations pertaining to School Governing Bodies for parents whose income is less than 10 times the amount of the annual school fees. These regulations also allow for a partial exemption (on a sliding scale) for parents whose income is less than 30 times but more than 10 times the amount of the fees.

The ERP's research into the constitutionality of school fees, although still under way, highlights some of the difficulties inherent in the current regulatory framework. One of the major concerns about the current system is that it does not comply with key international human rights instruments, which require that States parties provide free education. Of particular relevance are the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, both of which have been ratified by South Africa.

Furthermore, the ERP's research thus far has identified a number of problems in respect of user fees. For example, many parents do not benefit from the exemptions because they are unaware of them or because the process is too cumbersome. A media report of a learner who was forced to repeat a standard because his report card was withheld due to non-payment of school fees is a case in point (The Star, February 2002).

In some instances the cost in dignity is too high. For instance, schools have been known to discriminate against those learners whose parents have been granted exemptions by subjecting them to humiliating treatment, such as forcing them to sit on the floor. Also, the system does not include exemptions from secondary fees such as uniforms and transport in most instances. Finally, the available data suggest that school governing bodies often abuse their discretion by significantly restricting partial exemptions to cover insignificant amounts of money or by denying applicants partial exemptions arbitrarily.

It must be noted that the right to basic education in s 29 (1)(a) of the Constitution, unlike other socio-economic rights, is not internally qualified by 'progressive realisation', 'reasonable measures' or 'available resources'. The absence of these qualifiers implies an immediate entitlement. Accordingly, the State should give effect to basic education rights as a matter of priority.

The cases of Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC) and Minister of Health and Others v Treatment Action Campaign and Others CCT 8/02, 5 July 2002, (unreported), are also instructive regarding the State's obligations in respect of socio-economic rights. In reviewing the housing and health care policies, the Constitutional Court stated, among other things, that relevant programmes must respond to the needs of the 'most desperate'. It is unlikely that the current framework does in fact respond to the education needs of the 'most desperate'.

The challenges posed in the education sector are both numerous and profound. The work of the ERP will seek to ensure that these challenges are addressed in a way that meets both the constitutional imperatives and norms and standards of international law.

Faranaaz Veriava is a legal researcher in the Education Rights Project based at CALS and is also a member of the Johannesburg Bar.

A review of international developments

Danwood Mzikenge Chirwa

A number of developments took place at the international level over the past eighteen months, which have implications for the enjoyment of economic, social and cultural rights in South Africa and other countries. This review highlights some of these developments.

The African Committee on children's rights

On 10 July 2001 members of the African Committee of Experts on the Rights and Welfare of the Child were elected at the 37th Assembly of Heads of State and Government of the Organisation for African Unity (OAU) held in Lusaka, Zambia. The Committee's 11 members are from Cameroon, Chad, Guinea, Kenya, Lesotho, Mauritius, Rwanda, Senegal, South Africa, Togo and Uganda.

The Committee had its first meeting from 29 April to 3 May 2002 in Addis Ababa, Ethiopia. Ten of the 11 members attended, along with representatives of UN agencies, NGOs and organisations. Apart from swearing in the members, the meeting's major outcome was the adoption of the Rules of Procedure and the Guidelines for the Initial Reports of States Parties.

The Committee is the supervisory body of the African Charter on the Rights and Welfare of the Child, which was adopted by the OAU on 11 July 1990. The Charter was intended to place children's rights within the African context by, among other things, expressly recognising a range of economic, social and cultural rights of children. It entered into force on 29 November 1999. At the time of writing, 26 states were parties to the Charter.

South Africa ratified the Charter on 7 January 2000 and its first report to the Committee was due two years later, on 7 January 2002. At the time of writing, the report had not yet been submitted.

The International Criminal Court

The International Criminal Court (ICC) has become a reality sooner than expected. The ICC is a creature of the Rome Statute of the International Criminal Court, which was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

The Statute entered into force on 1 July 2002. At the time of writing, 77 states were parties to the Statute. South Africa ratified the Statute on 27 November 2000.

Although crimes falling under the jurisdiction of the Court predominantly concern gross violations of civil and political rights and international humanitarian law, some have implications for the protection of economic, social and cultural rights. For example, genocide under the Statute has been defined to include acts intended to destroy in whole or in part a national, racial or religious group. Such acts include the deliberate infliction on a group of conditions of life calculated to bring about its destruction, the imposition of measures intended to prevent births within a group and the forcible transfer of children from one group to another. Likewise, crimes against humanity include acts such as the devastation or plunder of public or private property and destruction of institutions dedicated to religion or education.

The ICC should therefore be heralded as a powerful enforcement mechanism of both civil and political rights and economic, social and cultural rights.

The Third UN Conference on the Least Developed Countries

The European Union hosted the Third United Nations Conference on the Least Developed Countries (LDCs) from 14 to 20 May 2001. The Conference was an affirmation of the commitment of the international community to the eradication of poverty and the achievement of peace and development in the LDCs. The overarching goal was the adoption of a plan of action designed to achieve these ends. The LDCs consist of 49 countries - 33 from Africa.

The Conference resulted in the Brussels Declaration. Among other challenges, the Declaration identified the HIV/Aids pandemic and external debt as major obstacles to the development of the LDCs. It emphasised that the welfare of the people is a pre-requisite to sustainable development. The international community accordingly made a commitment to improving the lives of the people living in the LDCs. This was to be achieved in a manner outlined in the Programme of Action adopted on 20 May 2001 at the Conference.

Among the documents that were influential at the Conference was the Statement of the Committee on Economic, Social and Cultural Rights, adopted on 4 May 2001, entitled Substantive issues arising in the implementation of the international Covenant on Economic, Social and Cultural Rights: Poverty and the international Covenant on Economic, Social and Cultural Rights.

This Statement emphasised that poverty amounts to a denial of human rights and encouraged the integration of human rights with poverty eradication initiatives. The Statement defined poverty in the light of the International Bill of Rights to mean 'a human condition characterised by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights'.

Significantly, the Statement emphasised that although the rights enshrined in the International Covenant on Economic, Social and Cultural Rights are of central importance, the right to development and all civil and political rights are 'indispensable' to those living in poverty. This statement by the Committee is critical given the great resistance by developed countries to the recognition of the right to development.

The Statement highlighted the need for poverty eradication strategies to be informed by the principle of non-discrimination and equality, with particular attention being given to vulnerable groups. The inclusion of the beneficiaries of the poverty reduction strategies was also underscored as a requirement emanating from the existing international human rights law.

In conclusion, the Statement called upon all states and non-state actors such as human rights institutions, civil society organisations and private businesses, to take part in the struggle against poverty. It called for the removal of 'global structural obstacles, such as unsustainable foreign debt, the widening gap between rich and poor, [and] the absence of an equitable multilateral trade, investment and financial system'.

These recommendations are clearly reflected in the Plan of Action adopted at the Conference, which emphasises measures aimed at fostering:

- a people-centred policy framework;
- good governance at national and international levels;
- building human and institutional capacities;
- building productive capacities to make globalisation work for LDCs;
- enhancing trade in development;
- reducing vulnerability and protecting the environment; and
- mobilising financial resources as a means of eradicating poverty and securing peace and development.

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Relevant information:
The African Union was launched on 8 July 2002 in Durban, South Africa, to replace the OAU.

ESR REVIEW

Disclaimers in hospital admission contracts and constitutional health rights: Afrox Healthcare v Strydom

Danie Brand

Afrox Healthcare v Strydom
Supreme Court of Appeal, Case No. 172/2001, 31 May 2002 (unreported at date of writing)

In *Afrox Healthcare v Strydom* the Supreme Court of Appeal (the Court) upheld an appeal against a High Court decision (*Strydom v Afrox Healthcare (2001) 4 All SA 618 (T)*) finding a disclaimer in a private hospital's admissions contract unenforceable.

The facts

The respondent had an operation at the appellant's hospital. A nurse dressed his wound negligently, causing irreparable harm. He sued, alleging the contract between him and the appellant implicitly required treatment with reasonable care. The negligence of the nurse, he argued, constituted a breach of contract, resulting in a claim for damages.

In response, the appellant relied on a clause in the contract indemnifying it against damage to a patient, except damage resulting from 'wilful default' (a standard disclaimer). This blocked the claim, the appellant argued, as the claim was based on negligence.

The respondent contended that the disclaimer was contrary to public policy and unenforceable. He further contended that the disclaimer was contrary to good faith and the appellant was legally obliged to alert him to the disclaimer when the contract was concluded, which was not done.

The High Court decision

The High Court ruled in favour of the respondent. Mavundla AJ interpreted the rule that a contract contrary to public policy is unenforceable in terms of s 39(2) of the Constitution, which requires courts, when interpreting any law or developing the common law, to 'promote the spirit, purport and object of the Bill of Rights'. He reasoned that the respondent's right of access to health care services (s 27(1)(a) of the Constitution) entitled him to health care administered with reasonable care. Therefore, the disclaimer, insulating the appellant against claims for negligence, limited the respondent's right of access to such health care. As such, the provision was held to be contrary to public policy and unenforceable.

The Supreme Court of Appeal judgment

The Supreme Court of Appeal rejected the following arguments advanced by the respondent, in support of their contention that the indemnity clause offended public policy:

- the contracting relationship was unequal;
- the disclaimer excluding liability for gross negligence was too wide; and

- the clause violated constitutional values, as it prevented the applicant from enforcing his right of access to professional health care and promoted negligent conduct.

Although the Court acknowledged that unequal contracting relationships were a factor in determining the enforceability of the clause, it concluded that there was no evidence of unequal bargaining positions in this case.

While the Court accepted that an indemnity clause excluding liability for gross negligence could be contrary to public policy, it held that in this matter the respondent had alleged only negligent, not grossly negligent conduct by the appellant. In addition, it held that the Court could interpret the clause as excluding liability for simple negligence only.

In response to the third argument, the Court, acknowledging its duty to develop the common law consistent with constitutional values, denied that the clause violated those values. It denied that the clause promoted negligent conduct. Other 'sanctions', notably the professional code to which the appellant's employees were subject, and the concern for the reputation of the appellant, it held, ensured that it avoided negligent conduct. The Court also noted the s 27(1) values were not the only values to feature. Freedom of contract also had to be considered.

The respondent's argument that the clause was contrary to good faith was dismissed out of hand. The Court held that principles of good faith, although underlying the law of contract, were not in themselves grounds to invalidate contractual terms.

Finally, the Court considered whether the appellant was legally obliged to inform the respondent of the indemnity clause. The respondent reasoned that, since a hospital should provide its services with reasonable care, a reasonable person would not expect an indemnity clause in an admissions contract. As such, the appellant should have alerted him to the clause.

The Court held that indemnity clauses are common in standard contracts. It observed that there was no reason for treating a contract to provide health care differently from a contract for the provision of any other service. It concluded that there was every reason to expect to find an indemnity clause in a hospital admissions contract.

A critique

The Court's judgment puzzles.

The Court's finding that there was equality of bargaining power ignores the self-evident inequality inherent in the contractual relationship. It is submitted that the nature of the service at stake created an unequal bargaining position. One cannot do without health care services, which are a fundamental constitutional right. Since all private and public hospitals in South Africa use indemnity clauses, it is clear that the respondent had no bargaining power regarding the indemnity clause - if he objected to it he had nowhere else to go and would not have gained access to health care services.

The Court's reasoning on the clash between the indemnity clause and constitutional values is equally suspect. The Court concluded that, in the absence

of the threat of action for damages, disciplinary action by professional bodies and concern for a hospital's reputation ensure that hospitals avoid negligent conduct. The Court's reasoning ignores the fact that the respondent litigated precisely because of negligence that occurred despite these 'sanctions' and that caused the respondent damage, for which he now cannot be compensated.

In addition, the case seemed significant because it concerned the indirect horizontal application of a socio-economic right. It allowed the Court an opportunity to demonstrate its regard for constitutional values. However, the judgment raises doubt as to the extent to which the Court considers these values. This observation is most evident in the consideration of whether the indemnity clause offends public policy. This consideration comes down to a balancing of the individual interests of the contracting parties and the general, constitution-alised interests of the public. The Court opted for the protection of individual (commercial) interests while ignoring almost completely the fact that the service the parties bargained about was a constitutional right. With regard to the scope of the limits engendered by an indemnity clause, the Court held that those limits should be defined by business considerations such as savings in insurance premiums and competitiveness.

The Court's refusal to recognise that private hospitals do not provide just any service, but a public service and a constitutional right, is also concerning. Holding that the appellant was not obliged to alert the respondent to the indemnity clause, the court saw no reason to distinguish private hospitals from other private service providers. This aspect of the ruling is equally disturbing.

The Court missed an opportunity: it again insulated the common law from constitutional infusion.

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A fresh commitment to implementing economic, social and cultural rights in Africa: Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria

Danwood Mzikenge Chirwa

Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria, Communication No. 55 of 1996

The African Commission on Human and Peoples' Rights delivered a groundbreaking decision involving the direct interpretation and application of the economic, social and cultural rights enshrined in the African Charter on Human and Peoples' Rights (the Charter). This was at its ordinary session from 13 to 27 October 2001.

The facts

The State-owned Nigerian National Company and the Shell Petroleum Development Corporation (in which the former had a majority of shares) had been exploiting oil reserves with no regard for the environment or health of the local communities in Ogoniland, Nigeria. Toxic wastes were deposited into the local environment and waterways but no facilities were put in place to prevent the wastes from spilling into villages.

As a result, water, soil and air contamination brought about serious short-term and long-term health problems such as skin infections, gastrointestinal and respiratory ailments, increased cancer rates, and neurological and reproductive complications.

The Nigerian government condoned these harmful operations. It also aided their perpetration by placing the legal and military powers of the State at the disposal of the oil companies. The government neither monitored the oil companies nor consulted the Ogoni people on issues concerning the development of their land.

Other allegations included the repressive measures taken by the government to prevent resistance by the Ogoni people to these violations.

Admissibility

This communication was brought to the Commission by two NGOs on behalf of the Ogoni people, pursuant to the provisions of the Charter. It had previously not been brought before a domestic tribunal or court in Nigeria.

In spite of the failure to exhaust domestic remedies, the Commission considered the communication admissible on three grounds.

First, the communication had alleged multiple atrocities committed by the oil companies.

Second, the military government had passed several decrees, which had the effect of ousting the powers of domestic courts.

Finally, the Nigerian government had had ample notice to remedy the situation, particularly in light of the extensive international attention it had received.

The merits

In considering the merits the Commission emphasised that all rights impose duties to respect, protect, promote and fulfil. These obligations have both positive and negative dimensions.

The right to health and a clean environment

The Commission found that the Nigerian government had violated the right to health and the right to a clean environment by directly contaminating water, soil and air, which harmed the health of the Ogoni people, and by failing to protect the community from the harm caused by the oil companies.

The Commission emphasised that the right to a clean and safe environment is critical to the enjoyment of economic, social and cultural rights. This right, it was held, requires a state to take reasonable measures to prevent pollution and ecological degradation, to promote conservation and to secure an ecologically sustainable development and use of natural resources.

It held that the right to enjoy the best attainable standard of physical and mental health and to a generally satisfactory environment favourable to development, as recognised under article 16 of the Charter, enjoins governments to desist from directly threatening the health and environment of their citizens.

The duty to respect these rights largely entails non-interventionist conduct from the state, such as refraining from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.

The Commission stated that compliance with the above rights must include undertaking or at least permitting independent scientific monitoring of threatened environments, and requiring and publicising environmental and social impact studies prior to any major industrial development.

These rights also require that appropriate monitoring is undertaken, information is disseminated to the communities exposed to hazardous materials, and that meaningful opportunities are guaranteed for individuals to be heard and to participate in development decisions affecting their communities.

The Nigerian government, it was held, had discharged none of these obligations.

The right to shelter and food

Interestingly, the African Commission also found violations of the rights to housing and food, neither of which are expressly recognised by the Charter. In quite an innovative interpretation, it held that the right to housing or shelter is implicitly entrenched in the totality of the right to enjoy the best attainable standard of mental and physical health, the right to property, and the protection of the family.

Likewise, the right to food was implied in the rights to life, health and to economic, social and cultural development.

With respect to the content of the right to shelter, it was held that it obliges the state not to destroy the housing of its citizens or obstruct efforts by individuals or communities to rebuild lost homes. The duty to respect this right also requires that the state and its agents refrain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon the freedom of an individual to use available resources to satisfy individual, family, household or community housing needs.

The duty to protect, it stated, includes the prevention of violations of this right by any individual or non-state actor such as landlords, property developers and landowners.

According to the Commission, the right to shelter goes beyond having a roof over one's head. It includes the right to be left alone and to live in peace whether under a roof or not. It also extends to protection against forced evictions.

The right to food was held to bind states to protect and improve existing food sources and to ensure access to adequate food for all citizens. The minimum core of this right obliges the government to desist from destroying or contaminating food sources or from allowing private actors to contaminate food sources or to prevent people's efforts to feed themselves.

Other infringements

The issue of whether a group of people within a state may constitute 'a people' has long been a contested topic. In this case, however, the Ogoni were implicitly considered to be such.

The Commission held that the destructive and selfish role played by the oil companies, supported by the repressive style of the Nigerian government and the lack of material benefits to the Ogoni people, constituted a clear violation of the latter's right to freely dispose of their wealth and natural resources and other kindred rights provided under article 21 of the Charter.

The Commission also found that the facts disclosed a violation of the right to life. Among other facts, the destruction of food and villages, the killing and other widespread terror activities perpetrated by the military, and the environmental degradation the Nigerian government had tolerated, grounded this finding.

The Commission expressly held that the Nigerian government could not escape liability for acts of private actors that violate human rights.

It stressed that its duty to protect citizens entailed the adoption of appropriate legislative and effective enforcement measures and other measures to protect them from harmful acts of private persons.

Remedy

The Commission concluded in its usual style by making an appeal to the Nigerian government to ensure the protection of the environment, health and livelihood of the people of Ogoniland through stipulated measures. It also urged the government to keep the Commission informed of the outcome of the work of several domestic institutions mandated to address issues of the environment and human rights in Ogoniland.

Conclusion

This case is significant in the development of jurisprudence on economic, social and cultural rights in Africa and elsewhere. It effectively and unequivocally rejects all arguments against the recognition of economic, social and cultural rights and the so-called third generation rights.

The Commission has convincingly shown that arguments that these rights are vague and incapable of judicial enforcement are often overstated. It has also illustrated how the Charter can be interpreted generously to ensure the effective enjoyment of rights. Perhaps more importantly, the case highlights the pressing need to have an African Court on Human and Peoples' Rights with increased powers to enforce such important decisions.

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Inaugurating ESCR-NET: Mexico, March/April 2003

Evarist Baimu

ESCR-Net is set to have its inaugural conference in March/April 2003 in Mexico City. Two hundred participants from around the world are expected to attend.

Arrangements are being made to facilitate the participation of some organisations from Africa.

ESCR-Net is an international network for economic, social and cultural rights. It arose as a result of the difficulties that anti-poverty groups face in articulating economic, social and cultural issues from a rights perspective. These difficulties stem partially from non-application of new tools and concepts that a rights-based approach requires. They also partly arise from the fact that anti-poverty groups often work in isolation from each other.

Over the last few years, there have been many attempts to establish a network of economic, social and cultural rights (ESCR) activists. The Ford Foundation funded two planning meetings - in October 2000 in New York and in March 2001 in Cape Town. ESCR-Net came about as a result of these meetings.

ESCR-Net has four aims, namely:

- to develop an information-sharing resource through a website and other communications;
- to establish direct links between groups pursuing common interests in human rights and social justice;
- to facilitate collective actions through working groups and meetings; and
- to develop a collective voice on ESCR developments worldwide.

ESCR-Net is founded on a set of principles. Its primary focus is on ESCR issues. It strives to be a global, multilingual and diverse network. It is inclusive - reaching out to groups as well as individuals and academics committed to ESCR.

ESCR-Net's activities are shaped and defined by the lived experiences of people affected by economic, social and cultural rights violations.

ESCR-Net will seek to further the work of the groups involved by promotion, collaboration and information sharing.

In addition, it will serve as a forum for exchanging experiences related to the enforcement and promotion of ESCR.

It will also seek to influence media, governments, donors and others with regard to the promotion of ESCR.

Organisations and individuals from Africa interested in, and working on, ESCR are invited to join the network.

The interim structure of ESCR-Net comprises three organs. The first is the General Assembly, which is composed of all participants in the network. The second is the Interim Council, consisting of a number of organisations from the Americas, Africa and Asia. The Secretariat of the network, currently hosted by the Centre for Economic and Social Rights (CESR) in New York, USA, is the third organ.

ESCR-Net has a website (www.escr-net.org) which could be very useful to organisations and individuals interested in ESCR. The website is user-friendly and provides the potential for organisations and individuals to enter and maintain information by themselves.

It has four databases: contact information for organisations and individuals; events; projects and activities; and ESCR case law.

Evarist Baimu is a doctoral candidate at the University of Pretoria and Research Fellow at the University's Centre for Human Rights.

For more information on the ESCR-Net and the conference, contact:
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The Basic Income Grant Coalition in action

Karen Kallman

The Basic Income Grant Coalition (the Coalition) held a national strategic meeting from 27 to 29 July 2002 in Johannesburg. At this meeting it adopted a strategic plan for taking the campaign on the basic income grant forward. The plan includes provision for:

- establishing a national steering committee, comprising the national leadership of the various sectors that join the Coalition, and approaching high-profile South African personalities to serve as patrons;
- engaging in public education and awareness campaigns on the basic income grant in order to mobilise support for the grant;
- the Coalition's participation in the World Summit on Sustainable Development (WSSD) as part of its awareness campaign;
- hosting an international conference jointly with the WSSD to facilitate information sharing on the universal income support grants;
- producing a monthly newsletter, Masitye ('Let's Eat'), as a tool for campaigning; and
- engaging in advocacy activities to ensure that the government implements the grant.

The Coalition was founded in June 2001 by a wide range of civil society organisations 'to co-ordinate the efforts, to develop a common platform, and to build popular support' for the basic income grant.

The grant has been widely acknowledged as an important measure to ensure respect for human dignity in South Africa. For example, the White Paper on Social Welfare (1997) recommended the 'the provisioning to all South Africans of a minimum income sufficient to meet basic subsistence needs'. The report of the Committee of Inquiry into a Comprehensive Social Security System chaired by Professor Vivienne Taylor, entitled Transforming the present - protecting the future, also recommends the creation of a comprehensive social protection package that addresses not only income poverty, but also capabilities poverty, asset poverty and special needs.

Karen Kallman co-ordinates the BIG Coalition (Western Cape) and is Advocacy Worker at the Black Sash, Cape Town.

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The Taylor Commission report can be accessed on www.socdev.gov.za The BIG Coalition submission on the Report can be accessed on www.communitylawcentre.org.za

HIV/Aids Treatment Congress

Sibonile Khoza

Sibonile Khoza, a researcher in the Socio-Economic Rights Project, Community Law Centre (UWC) attended the HIV/Aids Treatment Congress organised by the Treatment Action Campaign (TAC) and the Congress of South African Trade Unions (COSATU) in Durban from 27-29 June 2002.

The Congress was aimed at establishing a common purpose between government and civil society, and developing practical strategies to strengthen and support existing interventions dealing with the HIV epidemic.

It adopted a Consensus Statement urging government to develop and implement a national HIV/Aids treatment plan to deal effectively with the emergency that has been created by the HIV pandemic in South Africa, strengthening the existing five-year strategic plan.

It proposed that any reasonable plan should be premised on the following principles and goals:

- preventing HIV infection, improving and prolonging life through access to treatment;
- fulfilling everyone's right to have access to health care services;
- promoting the dignity and equality of every person living with HIV/Aids so as to eliminate social stigma and discrimination;
- enhancing the use of the best scientific knowledge about HIV/Aids, including treatment for HIV; and
- promoting investment in the public health service, including eradicating inequalities between provinces, districts and communities.

Recognising that the HIV/Aids crisis has also affected other countries, particularly those in Africa, the Congress organisers resolved to explore the possibility of hosting an international conference before the end of 2002, drawing participants from other African countries.

The Congress called for a new partnership 'to save lives' between the national, provincial and district health departments and civil society organisations.

Workshop on the right to food security

Sibonile Khoza

Sibonile Khoza attended a workshop on the right to food security held at Venda Sun Hotel, Thohoyandou from 5-7 June 2002.

The workshop was organised by the Ishmael Mahomed Centre for Human and Peoples' Rights in partnership with the Norwegian Institute for Human Rights and the South African Human Rights Commission.

It was a follow-up workshop on the national seminar held in Pretoria in January 2002. The alarming food insecurity and malnutrition rate in the Limpopo province was the main concern that gave rise to the workshop.

The workshop provided a platform for information sharing on the impact of food insecurity for households and individuals in South Africa.

Particular attention was given to the impact of food insecurity in the context of the HIV epidemic.

Debate on HIV/Aids related issues centred on breastfeeding and formula feeding for infants living with HIV/Aids, the use of nutritional supplements as a preventive measure in mother-to-child transmission of HIV and the special nutritional needs of people living with HIV/Aids.

The participants came to the following conclusions and recommendations:

- The proposed National Food Security Bill is an important step towards realising the right to sufficient food.
- Hunger and malnutrition affect the poorest and most marginalised households and individuals. Unless there is vibrant social mobilisation and litigation on the right to sufficient food and nutrition, accompanied by effective monitoring mechanisms, the poorest groups will be pushed further down the 'food poverty' line.
- Relevant institutions should investigate and conduct public awareness programmes on the nutritious nature of traditional food which most poor people and those with HIV/Aids may easily access.
- Integration must be promoted not only between government departments responsible for the right to food but also between these departments and civil society.

Participants resolved that similar workshops be hosted in other provinces throughout the country so as to respond to their food security challenges.

Book Review

A Eide et al (eds.) Economic, social and cultural rights: A textbook

Dordrecht: Martinus Nijhoff Publishers, 2001

Reviewed by Danwood Mzikenge Chirwa

This book is a second revised edition. As the title makes plain, it deals, in considerable detail, with the historically neglected economic, social and cultural

rights. It makes a significant contribution to the emerging writings on socio-economic rights.

Part I traces the development of economic, social and cultural rights from the margins to mainstream human rights discourse. The authors convincingly contend that these rights are human rights and have legal force. Not only does the book orientate the reader to the international protection mechanisms of economic, social and cultural rights, but a full chapter is also dedicated to their protection in municipal legal systems. This is commendable given that the increasing internationalisation of human rights has detracted attention from the fact that states must provide the primary means of protecting human rights.

It is striking that Part I is not exclusively dedicated to socio-economic rights. Two chapters deal with the right to self-determination and the right to development. This serves to highlight the interdependence and indivisibility of human rights.

Part II discusses selected economic, social and cultural rights on a chapter-by-chapter basis. They include the right to an adequate standard of living, cultural rights and the rights to food, housing, health, property, social security, education and work. There is also a chapter-long discussion of the environment and human rights. This section is a substantial contribution to the development of the precise content of economic, social and cultural rights, the absence of which has been a major criticism of these rights.

Part III discusses the economic, social and cultural rights of selected beneficiaries and situations. There is little room for disputing that women, children, minorities, indigenous peoples and migrant workers deserve a special place in this section. The proliferation of armed conflicts also justifies an in-depth discussion of the economic, social and cultural rights issues involved in such situations.

Predictably, the last part focuses on implementation and realisation. The monitoring mechanisms available at the UN level and within the European Union are discussed in detail. Part III is particularly notable in that it tackles crucial topics such as the role of the World Bank, the International Monetary Fund, and multinational corporations, in the realisation of economic, social and cultural rights.

However, if a chapter could be added to this book in the next edition, one would suggest a discussion of regional protection mechanisms.

As this brief overview makes clear, this book is an important and valuable resource for researchers, advocates, activists, academics, field workers and other role-players in economic, social and cultural rights. It has utilised the expertise of a wide range of internationally recognised authors. Also striking is the book's stable compromise between theory and practice, a challenge that few writings meet.