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Editorial

Sibonile Khoza

We are pleased to present the second issue of the *ESR Review* for 2004.

In this issue, Christopher Mbazira investigates the implications of the New Partnership for Africa's Development (Nepad) for the realisation of socio-economic rights in Africa. Although acknowledging Nepad's potential contribution to achieving sustainable development, he critiques, among other things, its failure to integrate a human rights approach to development. He argues that achieving Nepad's objectives depends on a commitment to its implementation.

Professor Pierre De Vos analyses the potential of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 for protecting socio-economic rights in South Africa. He concludes that the provisions of the Act can sometimes be used to prevent the State, individuals or private institutions from denying individuals access to socio-economic benefits and advantages.

Budgeting is crucial for realising socio-economic rights. Lerato Kgamphe evaluates the extent to which the current budgetary allocations for social grants and projected spending by the government contribute towards realising children's rights to social assistance.

Ashfaq Khalfan and Paula Galowitz discuss the implications of the planned mass evictions in Nairobi by the Kenyan government, the national and international responses the evictions have attracted and the lessons that can be drawn from them. They argue that while the campaigns led to the suspension of the evictions, recent statements by various ministers indicate that the threat of evictions remains.

It is common knowledge that there is a rapidly increasing food crisis in Zimbabwe. Kevin Iles investigates the extent of the crisis and reasons for its escalation, as well as the responses of the Zimbabwean government and the international community. He argues that the government's failure to respond to the problem adequately means it is in breach of its international and regional obligations.

We would like to thank all our guest contributors to this issue. We hope that our readers will find it stimulating and useful in advancing socio-economic rights.

CONTENTS

ESR REVIEW
Economic and Social Rights in South Africa

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The New Partnership for Africa's Development

Implications for the realisation of socio-economic rights in Africa

Christopher Mbazira

The realisation of socio-economic rights in Africa remains a distant goal. The majority of Africans live in poverty. Chronic hunger, malnutrition, HIV/Aids, ignorance and illiteracy continue to plague the continent.

Military dictatorships, poor leadership, corruption, political conflicts, globalisation and structural adjustment programmes (SAPs) have all contributed to this situation. The debt burden exceeds manageable levels. States have increasingly withdrawn from providing such essential services as education, electricity and health. Welfare programmes have been reduced while retrenchment has increased unemployment and household poverty.

Against this background, African leaders declared this century as 'the African century' and committed themselves to the continent's transformation. This will be achieved through a programme and plan of action called the New Partnership for Africa's Development (Nepad), which was adopted in 2001.

African leaders declared this century as 'the African century' and committed themselves to the continent's transformation.

The adoption of Nepad

After two decades it was clear that Africa had not benefited from SAPs. It was also realised that Africa's marginalisation in the global economy, bad governance and insecurity adversely affect the continent's socio-economic development.

These realisations contributed to the adoption of Nepad. It was preceded by the Millennium Africa Recovery Plan, conceived of in 2000 by Presidents Mbeki of South Africa, Obasanjo of Nigeria and Boutefilka of Algeria. At the same time President Wade of Senegal developed a similar programme, the OMEGA plan. The two were merged in 2001 to produce the New African Initiative (NAI), which was renamed Nepad later in the same year.

In July 2002 the 37th Summit of the Organisation of African Unity (now the African Union) formally adopted the Nepad document as a strategic framework for the socio-economic development of Africa.

Nepad's objectives

Nepad is a pledge by African leaders, based on a common vision and a firm and shared con-

viction, to eradicate poverty and place their countries, both individually and collectively, on a path to sustainable development.

Through Nepad, African leaders have set an agenda for the continent's renewal. The agenda is based on national and regional priorities and development plans that must be prepared through participatory processes.

It is a framework that intends to define the nature of the interaction among African states and between Africa and the rest of the world, including industrialised countries and multilateral organisations.

To achieve Nepad's objectives, African leaders have taken on the responsibility for:

- strengthening mechanisms for conflict prevention, management and resolution;
- promoting and protecting democracy and human rights;
- restoring and maintaining micro stability through fiscal and monetary policies;
- regulating financial markets and private companies;
- promoting the role of women in social and economic development by reinforcing their capacity through education and training;
- revitalising health training and education with a high priority being given to HIV/Aids;
- maintaining law and order; and
- promoting the development of infrastructure.

Nepad's institutional set-up

The implementation of the Nepad programme is to be overseen by the Heads of State Implementation Committee (HSIC). Its functions include:

- identifying strategic issues that need to be researched, planned and managed at the continental level;
- setting up mechanisms for reviewing progress in achieving mutually agreed targets and compliance with mutually agreed standards; and
- reviewing progress in implementing past decisions and taking appropriate steps to address problems and delays.

The HSIC established the African Peer Review Mechanism (APRM) as the main body for monitoring the effective implementation of Nepad's objectives.

The operation of APRM

The APRM is a self-monitoring mechanism. Participating states accede to it on a voluntary basis and 16 have done so to date. Its mandate is to ensure that the policies and practices of participating states are in conformity with the agreed political, economic and corporate governance values, codes and standards contained in the Declaration on Democracy, Political, Economic and Corporate Governance.

By requiring states to account for their progress in achieving Nepad's objectives, the APRM might indirectly enhance the realisation of socio-economic rights. However, a major weakness is its optional status.

One of Nepad's long-term objectives is to place African countries, both individually and collectively, on a path to sustainable development.

Nepad and socio-economic rights

One of Nepad's long-term objectives is to eradicate poverty in Africa, placing African countries, both individually and collectively, on a path to sustainable development. There is a commitment to reduce the proportion of people living in extreme poverty by half and to ensure the enrollment in primary school of all children of appropriate age by 2015. Nepad also seeks to bridge the education gap by ensuring the realisation of universal primary education, curriculum development and expanded access to education, as well as by promoting networks of specialised research and institutions of higher education. Achieving these goals has a direct impact on the enjoyment of socio-economic rights.

Another goal is to reduce infant mortality ratios, maternal mortality rates and to provide access to reproductive health care. This objective will be achieved through, among other strategies, increasing employment opportunities and enhancing African integration.

Peace, security, democracy and human rights are preconditions for sustainable development. Nepad contains provisions obligating states to ensure that these conditions are attained in their respective countries. According to the UN Secretary-General, more than 30 wars have been fought in Africa since 1970, the vast majority of which are intra-state in origin.

Armed conflicts not only disrupt the provision of socio-economic services but also consume a large portion of states' national budgets.

To promote peace and security, Nepad is committed to the following:

- prevention, management and resolution of conflict;
- peacemaking and peace enforcement;
- post-conflict reconciliation, rehabilitation and reconstruction; and
- combating the proliferation of small arms, light weapons and landmines.

If these commitments are fulfilled, income previously spent on wars and conflicts may be diverted to realising socio-economic rights.

African governments traded their power to direct their own economies for foreign aid and investment.

Nepad also enjoins states to protect democracy and ensure good governance as preconditions for sustainable development. It places an obligation on states to promote political pluralism, including workers' unions, and to adopt an administrative framework that accords with the principles of democracy, transparency, accountability, integrity, respect for human rights and promotion of the rule of law. The promotion of the latter enhances avenues for realising socio-economic rights.

Corruption, lack of accountability and bad leadership are some of the factors that have negatively affected the realisation of socio-economic rights in Africa. In addition to enhancing accountability and reducing corruption, the promotion of pluralism that Nepad seeks to achieve will have a positive impact on the realisation of the rights of workers enshrined in the African Charter on Human and People's Rights (the African Charter). Respect for labour rights is particularly important in the African context, as workers' unions in many African countries have been suppressed because of their persistent demands for socio-economic reforms.

Nepad acknowledges that energy for commercial and domestic use is necessary for sustainable development. Thus, provision is made for the reversal of the environmental degradation that is associated with the use of traditional fuels in rural areas.

Nepad also seeks to enhance sustainable access to water and sanitation, particularly by the poor. Although the right to water is not guaranteed in the African Charter, it can be argued that it is implicitly recognised, just as the African Commission held in respect of the right to food and shelter in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*.

It has been noted that one of the major impediments to Africa's development efforts is the widespread incidence of such communicable diseases as HIV/Aids and tuberculosis. One of Nepad's objectives is to ensure improved health. This will be achieved by, among other things, mobilising resources and committing them to this cause. Particular attention is given to the struggle against HIV/Aids.

As mentioned earlier, Nepad seeks to redress Africa's marginalisation in globalisation processes. Globalisation includes the domination of world trade by transnational corporations and the domination of economies by international financial institutions.

For instance, numerous African countries had to adopt SAPs in the early 1980s under the direction of the International Monetary Fund (IMF) and the World Bank. African governments traded their power to direct their own economies for foreign aid and investment.

SAPs, among other policies, compelled governments to reduce expenditure on socio-economic services like education and health and to retrench members of their civil services. These policies had a negative impact on the realisation of socio-economic rights.

Nepad's integration is aimed at creating a single African block to enable the continent to speak with a single voice and to place it in the global economy on the same footing as the West. This would allow Africa to direct resources to socio-economic development without being affected by diversionary conditionalities.

The integration would also facilitate the maximum exploitation of Africa's resources and the mobilisation of resources for socio-economic development. Cross-border trade in an integrated economy has the potential to improve the economies of individual countries. This would result from expanded markets, free movement of labour and raw materials and friendly fiscal policies.

Critique of Nepad from a human rights perspective

Nepad has been rightfully criticised for its failure to take a rights-based approach. Economic, social and cultural rights are referred to by implication only, from commitments made to enhancing access to basic services.

Nepad must adopt a human rights-based approach to socio-economic development to guarantee the protection of human rights.

Nepad does not integrate human rights in its development process. A human rights approach to development demands that development initiatives are guided by human rights and have their attainment and respect as an overriding objective.

Nepad, like the African Charter for Popular Participation of 1990, has encountered some problems of legitimacy because it was adopted without the participation of its beneficiaries. It is for this reason that some commentators have criticised Nepad as 'dubious economic globalisation'.

Furthermore, Nepad does not establish a direct nexus with the African human rights system. The role of the African Commission in Nepad has not been specified or acknowledged. This would have avoided the problem of creating parallel human rights institutions, which has always posed dangers.

Conclusion

Nepad has the potential to contribute to the achievement of sustainable development in Africa. The implementation of its plans and the achievement of its objectives have positive implications for the realisation of socio-economic rights on the continent.

However, more attention should be given to making its primary objective the achievement of human rights, especially socio-economic rights.

To guarantee the protection of human rights, Nepad must adopt a human rights-based approach to socio-economic development. The participation of communities in the implementation process must be allowed and human rights streamlined in all Nepad's projects and programmes.

A direct nexus, and not a derived one, should be established between Nepad and the African human rights system. For instance, the African Commission on Human and Peoples' Rights has the potential to contribute to the APRM through the human rights and democracy review.

Most importantly, unlike the earlier initiatives such as the Lagos Plan of Action and the African Charter for Popular Participation, Nepad should move beyond being a 'paper tiger'. Realising Nepad's objectives is heavily dependent on high levels of commitment towards its implementation. It is only through such commitment that Nepad's socio-economic objectives will be realised.

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The Promotion of Equality and Prevention of Unfair Discrimination Act and socio-economic rights

Pierre de Vos

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Act) became fully operational in the second half of 2003. The Act prohibits unfair discrimination on any ground, including the 16 grounds explicitly listed in the 1996 Constitution (the Constitution). It also provides for the establishment of Equality Courts. These courts are unique in that they do not entail many of the legal formalities that ordinary people often find alienating and difficult to follow. The Act ensures easy access to these courts by providing for expansive rules on standing. Any person or institution acting on their own behalf or on behalf of someone else can lodge a case with an Equality Court.

The exclusion of socio-economic status from the listed grounds

When the draft Act was first submitted to the cabinet for consideration, the listed grounds included 'socio-economic status'. The cabinet decided to exclude this ground. When the Bill went before Parliament, many lobby groups pushed for its re-inclusion.

Parliament compromised by including a directive principle, which acknowledges that there is overwhelming evidence about the 'importance, impact on society and link to systemic disadvantage and discrimination' of, among other things, the ground of socio-economic status.

This means that although socio-economic status has not been included as a listed ground in the Act, claims could still be brought alleging unfair discrimination on the basis of this status.

For interest groups involved in the realisation of social and economic rights, the exclusion of socio-economic status from the listed grounds raises questions about the potential effectiveness and relevance of the Act in advancing these rights. This is an important question because the Act provides prospective claimants with easy and relatively cheap access to Equality Courts.

Though socio-economic status has not been included as a listed ground, claims could still be brought alleging unfair discrimination on the basis of this status.

More importantly, it allows a claimant to enforce his or her right not to be discriminated against unfairly, against both State and private actors.

Unfair discrimination and social and economic rights

Section 6 of the Act, read with section 1(1)(vii), prohibits unfair discrimination by both the State and "any person". It defines discrimination as:

> *Any act or omission that causes harm to an individual because it imposes burdens or withholds benefits, opportunities or advantages on one or more of the prohibited grounds (s 1(1)(vii)).*

Prohibited (listed) grounds include race, sex, gender, sexual orientation, age, pregnancy and disability. Thus, denial of access to such benefits as housing, health care, social security, sufficient food and water and education on any of the listed grounds, or any ground similar to the listed grounds, constitutes discrimination.

It must be noted that the Act does not prohibit discrimination but *unfair* discrimination. Discrimination on a listed ground is assumed to be unfair. Where it is on a ground similar to those listed, the complainant will have to prove that that the discrimination is indeed unfair (section 13). This means that it will be easier to show that the denial of access to some social and economic benefit is unfair if it is based on the listed grounds. Consequently, it will be more difficult to show that discrimination is unfair if the denial of access to some socio-economic benefit is based on the claimant's socio-economic status alone.

Although the Act is less than coherent in explaining how unfair discrimination can be proved or disproved, it seems that two things are important: firstly, the determination of the impact of the denial on the complainant and the group s/he belongs to; and secondly, the question of whether this denial can be justified (section 14). The latter would almost always be decisive in the context where an applicant claims access to some social and economic benefit or advantage. During the first stage one would ask whether the denial of the benefit that impaired the individual's human dignity is systemic in nature, and then determine how serious the impact is on the complainant and the group s/he belongs to. It stands to reason that the dignity of a poor person denied access to a socio-economic benefit would invariably be seriously affected. The question of unfairness will be determined by a three-fold inquiry:

1. Was there sufficient justification for this impairment of dignity, taking into account factors such as the purpose of the different treatment?
2. Are there less restrictive means to achieve the same purpose?
3. Has the respondent taken reasonable steps to address the disadvantage?

Where individuals claim that they have been unfairly discriminated against because they have been denied access to some social and economic benefit, the outcome will therefore often depend on whether the respondent acted reasonably.

What is reasonable will depend on the larger context and the facts of the particular case. As noted, it

will be relatively easy for a complainant to win a case where the denial of access to a socio-economic benefit is based on one of the listed grounds such as race, sex or sexual orientation, or an analogous ground such as HIV/Aids status or citizenship.

Unfair discrimination on these grounds is prohibited because these are the kinds of grounds on which many South Africans have been discriminated against in the past. They carry a special stigma of marginalisation and oppression. Thus, it will be difficult for a respondent – whether the State or a private individual or institution – to show that the denial of a socio-economic benefit on one or more of these grounds constitutes fair discrimination.

For example, if a person is refused access to a hospital on the sole ground that he or she is black, it is inconceivable that any hospital would be able to convince a court that such denial of access was reasonable and justifiable. The hospital would have to argue that the denial of access was not based on the race of the complainant at all, but on other factors such as financial considerations. It will then depend on the larger context and the facts of the particular case whether the denial of access indeed constituted unfair discrimination.

Where individuals are denied access to some socio-economic benefit or advantage it will be difficult for them to show that they were unfairly discriminated against. The cabinet excluded socio-economic status from the listed grounds exactly because it feared it would open the floodgates to claims by poor and marginalised individuals who are regularly denied access to socio-economic benefits and advantages because they cannot pay or are perceived as carrying a larger financial risk.

The Act itself provides examples through which individuals can use it to gain access to socio-economic benefits.

It will often not be too difficult for the State or private individuals or institutions to justify the denial of access to socio-economic benefits as being reasonable. This is so because the economic system embraced by the government is based on the idea that people should pay for social and economic services. Secondly, it is not generally thought that private individuals and companies are burdened by social and economic duties towards those who are economically less fortunate.

This does not mean that individuals can never use the Act to gain access to socio-economic benefits. In fact, the Act itself provides examples through which this may be done.

Using the Act to gain access to socio-economic rights and benefits

For the purposes of illustration and emphasis, a schedule to the Act lists widespread practices that may constitute unfair discrimination (section 29). This list is, however, not conclusive. What is clear is that the grounds on which individuals are discriminated against often overlap. In particular, given the particular history and racial nature of poverty in South Africa, distinctions made on the basis of socio-economic status will often also indirectly constitute distinctions based on race.

The list states that excluding learners from educational institutions on any of the listed or unlisted grounds could constitute unfair discrimination. For example, it would constitute unfair discrimination on the basis of socio-economic status if a learner were excluded from a school because s/he could not pay the school fees. It may also constitute indirect unfair discrimination on the basis of race if the policy on school fees disproportionately affects learners from a specific race.

The list also states that the arbitrary eviction of individuals and the 'red-lining' of neighbourhoods on one or more prohibited grounds could constitute unfair discrimination. This means a bank that targets a certain area, either because mostly black people and/or mostly poor people live there, might be discriminating unfairly against people in the area. As with a refusal to admit learners to school, the unfair discrimination may be on the ground of both race and socio-economic status.

The list further suggests that unfairly refusing a person access to health care or to emergency medical treatment on one or more of the prohibited grounds could constitute unfair discrimination. For example, it could constitute unfair discrimination on the basis of socio-economic status if a private hospital refuses to admit a critically injured patient because s/he appears to be poor and unable to pay. If it could be proved that the

determination that the patient was poor was based on her race, the unfair discrimination would also be based on the individual's race.

Remedies

The Act recognises that one-off remedies do not solve systemic violations of equality. Thus, section 21 provides for a variety of remedies. Most of these are well suited to the task of addressing both individual and systemic forms of inequality. These remedies would also assist individuals who are denied access to some socio-economic benefit or advantage.

The Equality Court has extraordinary powers to prevent the recurrence of patterns of unfair discrimination, in addition to powers to ensure that individual complainants have effective relief. Thus, the Court can make an order restraining unfair discriminatory practices and can direct that specific steps be taken to stop unfair discrimination. Such an order will be helpful to ensure that others who find themselves in a similar position to the complainant are not denied access to socio-economic benefits.

Even more important is the power of the Court to make an order to make available specific opportunities and privileges that were unfairly denied to the complainant. Where an individual is denied admission to a school, for example, because s/he is unable to pay school fees, the Court could order that s/he should be accepted as a learner by the school in question.

The Act also allows the Court to make any order that would direct the respondent to make a reasonable accommodation for a group or class of persons. This power can be of particular use where a group is denied access to a socio-economic benefit, but where it is not reasonably practicable to provide all members of the group with immediate access to the benefit.

Such a situation could arise where, for example, a group of visually impaired students is unfairly denied access to library facilities at their University, but where it is not financially viable to immediately provide all such students with the equipment needed to access all facilities.

The Court could then order the University to make a reasonable accommodation to ensure that the needs of the visually impaired students are catered for over time.

Conclusion

The above analysis shows that the right to equality and social and economic rights are interrelated and interdependent. Although there are some limits, it is clear that the provisions of the Act can sometimes be used to prevent the State, individuals and private institutions from denying individuals access to socio-economic benefits and advantages. In this regard, it would be relatively easy to win a case where the denial can be shown to stem from the complainant's attachment to a group specifically mentioned in the act or to a group recognised by the Constitutional Court as being marginalised and disadvantaged.

Convincing a court that the discriminatory exclusion of a group from socio-economic benefits or advantages stems from the complainant's socio-economic status will be difficult, but not impossible. It will depend on the larger context and the facts of each case whether such a claim will be successful.

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The government's budgeting for childrens' right to social assistance

Lerato Kgamphe

The much-anticipated budget speech of 2004 broadly spoke to the duty of the State to meet the basic needs of all South Africans.

When presenting this speech in Parliament, the Minister of Finance, Trevor Manuel, spoke about the need to progressively extend the social security system, "with a focus particularly on the needs of children who cannot be expected to provide for themselves".

While South Africa celebrates ten years of democracy, poverty remains one of the biggest chal-

lenges for the government. The need to provide social assistance to poor children, who are a most vulnerable group in our society, is highlighted by the extent and depth of child poverty in South Africa. It is estimated that by 2000 there were 13.3 million children under 17 years old who had a per capita income of below R430/month. These children need social assistance, without which they are not able to access the minimum income that facilitates access to other basic rights.

Without social assistance children are not able to access the minimum income that facilitates access to other basic rights.

Section 27(1)(c) affords everyone, including children, "the right of access to social security, *including, if they are unable to support themselves and their dependents, to appropriate social assistance*".

As held in the landmark case, *Government of the Republic of South Africa and others v Grootboom and others* 2000 (11) BCLR 1169 (CC) (*Grootboom*), this right primarily binds the parents or primary caregivers of children. Only in the absence of parental or familial care does it bind the State.

However, the State still has the duty to assist parents in fulfilling their obligations towards their children. Among other things, the State must provide the legal and administrative infrastructure to enable parents and child caregivers to access social assistance on a progressive and coordinated basis.

As noted by the Constitutional Court in *Grootboom*, legislative measures alone are not enough to give effect to socio-economic rights. The State is obliged to take other measures by conceptualising and implementing programmes geared towards realising these rights.

When determining whether measures taken by the State comply with the constitutional obligations implicit in socio-economic rights, the court will ask whether the measure is reasonable.

An important element of this test is whether the measure or programme gives priority to meeting the needs of the most vulnerable members of our society.

The reasonableness test is relevant to analyses of the State's budget insofar as the latter impacts on the realisation of socio-economic rights.

Social assistance programmes in South Africa

There are three child-specific programmes through which the government intends to fulfill its obligations relating to children's right to social assistance. They are the child support grant (CSG), the care dependency grant (CDG) and the foster care grant (FCG).

At present, the CSG takes the form of a monthly payment of R 170. It is claimable by the caregiver on behalf of children under the age of 11 years. This age limit will be extended to 14 years in April 2005. A means test applies to the grant. This means that a person must demonstrate, through a set test, that they are in need of this grant in order to be able to claim it. The CSG is critical to poverty alleviation efforts.

The CDG is targeted at poor children who have severe mental or physical disabilities and are in need of full-time care. It takes the form of a monthly payment of R740. It can be claimed for any child under 18 whom a medical assessment proves has a severe disability. If the child is still in secondary school, he/she must be under 21.

The FCG targets children who are placed in foster care by a social worker on behalf of the Children's Court. The monthly payment of the grant is R530. Any caregiver with a court order indicating foster care status can claim it.

These grants are financed and administered by provincial government departments through the equitable share allocation and the conditional grant allocation. The equitable share allocation comes from the National Revenue Account to which all provinces are constitutionally entitled. The conditional grant is an allocation of money from national government to the provinces for rendering a specific service. Thus, provincial governments do not have the discretion to spend the conditional grant allocation on any other item than that for which it was intended.

The following discussion evaluates the current budgetary allocations for these grants and the projected spending by the government over the Medium-Term Expenditure Framework (MTEF).

Grant allocations – nominal vs. real amounts

Evaluating the nominal amount (the actual allocation) and the real amount (the allocation after tak-

ing inflation into account) per grant from 1999 to 2004 helps assess what growth there has been in the purchasing power of grant allocations in that time. It is commendable that the government has increased the real value of the CSG from its 1999 value. As a result, CSG beneficiaries' money has more purchasing power now than it did then.

However, the CDG and FCG allocations are now much lower in real value than they were in 1999, although the nominal allocations have increased each year since then. This means that CDG and FCG beneficiaries' money does not have the same purchasing power now as it did in 1999.

The government should ensure that, at a minimum, the real value of the money beneficiaries receive over time is constant.

Programme		1999	2000	2001	Apr. 2002	Oct. 2002	2003	2004
CSG	Nominal	100	100	110	130	140	160	170
	Real	100	92.8	95.7	103.0	110.9	120.3	121.5
CDG	Nominal	520	540	570	620	700	740	
	Real	520	500.9	496.0	491.4	526.4	528.9	
FCG	Nominal	374	390	410	450	500	530	
	Real	374	361.8	356.8	356.6	375.97	378.8	

Source: ***Budget Review*** **2004: 53 and** ***Budget Review*** **2002:44**

Provincial budgets for children's social grants

A review of the provincial budget allocations to the three social grants and the government's planned spending over the next three years provides a useful understanding of whether there is growth in nominal budget allocations and whether such growth keeps up with inflation.

The CSG budget allocation to provinces since 2002/03 increased progressively to cater for the extension of the CSG to children up to 14 years old. The Eastern Cape and KwaZulu/Natal have had the largest nominal allocations of all provinces over the MTEF, while the Northern Cape and the Free State have had the lowest. The Eastern Cape and Mpumalanga have had the largest average real growth rate over the MTEF (35.6% and 34.4% respectively). Over the same period, the Free State had the lowest average real growth of only 8%.

The real growth of allocations slows down over the MTEF, with Gauteng and the Northern Cape having a small to negative overall growth to allocation in 2006/07 (2.8% and -1.32% respectively).

In essence, it seems that over the MTEF the government has allocated more to provinces with higher poverty rates, namely the Eastern Cape (85.69%) and KwaZulu/Natal (78.98%).

The Eastern Cape and KwaZulu/Natal have the largest nominal budget allocation for the CSG for the period between 2002/03 and 2006/07, while the Northern Cape and the Free State have the lowest. However, the latter provinces have the highest average real growth allocation over the MTEF (33.7% and 22.6% respectively). Gauteng has the lowest average real growth (-0.46%).

In 2004/05, the real allocation to Gauteng and Mpumalanga for the CDG decreased dramatically, by 16.8% and 11% respectively.

The allocation increases or decreases for the CDG seem to follow no logical pattern over the MTEF. It would be logical to assume that the provincial allocations are based on the number of potential grant beneficiaries over the medium term, over and above those already benefiting from the grant. This would ensure that every beneficiary is catered for in the budget and would allow room for the inclusion of more beneficiaries over the medium term. If this approach were adopted, real growth would show higher provincial allocations than the inflation rate. At present, real growth for all provinces shows no such trend.

Nominal allocations for the FCG to provinces show that Gauteng and the North-West have the highest average growth over the MTEF (50% and 35.6% respectively). Gauteng and KwaZulu/Natal have received the highest nominal allocations over the MTEF.

Concluding remarks

However commendable this step to realise the child's right to social

assistance is, there are still children who, though vulnerable, are not catered for in the current system of social assistance programmes. For instance, children over 14 are still excluded, despite the fact that the Constitution defines a child as a person under the age of 18. The current system also remains largely inaccessible to children living on the streets and those made vulnerable by HIV and Aids. As such it is vulnerable to constitutional challenge.

Although the government's nominal allocations are increasing, it is still difficult to ascertain whether the allocations are sufficient to support the grants. This is due to the lack of accurate eligibility data for, and actual costing of, all grants.

The budget allocations to the CDG currently show no consistency regarding the number of beneficiaries to be budgeted for or any possible increases in such numbers over time. Unless accurate eligibility data are maintained, the budgetary allocations will be made haphazardly.

Considering that the State's duty is to ensure the progressive realisation of the right to social assistance, it is submitted that the government should ensure that the real grant values of the CDG and FCG keep up with inflation. This would ensure that the actual grants received retain the purchasing power they had when the grants were introduced.

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National and international responses to planned mass evictions in Nairobi

Lessons and challenges

Ashfaq Khalfan and Paula Galowitz

In February 2004, various ministries in the Kenyan government announced an unprecedented series of mass evictions that threatened over 330 000 residents of informal settlements in Nairobi. The prospect of this wide-ranging violation of housing rights led various Kenyan and international groups to start a campaign to resist the evictions through direct appeals to the government, the local and international media and the donor community, as well as through litigation. The combination of these efforts put pressure on the Kenyan government to suspend the evictions. However, recent statements by individual ministers indicate that the threat of evictions remains.

A new threat to informal settlements

The planned evictions threaten some of the most vulnerable people in Kenya. Over two million people inhabit 168 informal settlements in Nairobi. They comprise 55% of the city's population, yet occupy only 5% of the total land area in the city. The target of planned evictions is the largest settlement, Kibera, which has an estimated population of 750 000, at least 90% of whom 'rent' their homes. They live in cramped conditions, with limited or no access to piped water, sewage systems or garbage collection.

In December 2002 the newly elected government declared that it would respect the right to adequate housing as a human right. Accordingly, it enacted a National Housing Policy that included the upgrading of slum areas, and entered into an agreement in January 2003 with the UN Human Settlements Programme (UN-Habitat) to upgrade the informal settlements in Nairobi, starting with three villages in Kibera. Although this development was welcomed, the project did not make provision for consultation with residents.

In February 2004, a number of ministries appeared to break with the above policies. The Ministry of Public Works, Roads and Housing declared that it would evict all structures illegally built on land set aside for road reserves in order to build a bypass road. The Energy Ministry announced that it would evict all persons occupying land near power-lines on the grounds that the area was not safe. The Kenya Railway Corporation (KRC) announced that it would evict all persons within 100 feet of the rail-

way for safety reasons. The Ministry of Local Government announced that it would demolish all structures built near roads. A survey by local groups showed that 330 000–400 000 persons would be affected by the cumulative evictions.

Residents knew that the threats of eviction were serious. In 2003 the government showed remarkable resolve in achieving its objectives. For example, it demolished houses in wealthy suburbs built illegally on public land. In the case of the current demolition, however, this resolve was going to destroy a large number of people's homes. On 8 February, a village of over 2 000 people in Kibera was demolished while most of the residents were at church. The government's surveyors then began marking red crosses on the houses, schools and religious institutions that were to be demolished in other parts of Kibera.

A storm of protest: civil society responds

The threatened mass evictions have led to sustained national and international campaigns by Kenyan non-governmental organisations (NGOs) and community organisations. In early February, the KUTOKA Network of Catholic Churches in the informal settlements of Nairobi and NGOs such as Kituo Cha Sheria, Shelter Forum, Maji na Ufanisi and Pamoja Trust, among others, joined together to oppose the planned evictions.

The UN Special Rapporteur on Housing, on mission to Kenya at the time, publicly challenged the government on the evictions. International NGOs, from countries as diverse as Philippines, Egypt, Pakistan, Brazil, South Africa and India, wrote to the Kenyan government and to the local and international media.

The Centre on Housing Rights and Evictions (COHRE) wrote to the government, warning it of the evictions' potential to breach Kenya's commitment under international human rights law and its goal to reduce poverty. It pointed out the social and economic cost of forced evictions, including deeper poverty, reduced levels of employment and lower health standards. It was noted that the upcoming displacement could affect the security of the area, particularly since disputes in Kibera over rent levels and ownership rights had previously led to violent conflicts with an ethnic dimension.

Even influential donor governments, international organisations and international religious institutions made their concerns about this issue well known to the Kenyan government.

The government's response: an uneasy suspension

The Kenyan government announced on 29 February 2004 that it had suspended evictions in Nairobi's informal settlements until plans had been made to resettle those who would be uprooted.

In spite of this apparent victory, contradictory statements from the ministers involved have left residents in suspense as to what will happen next. The day after the suspension was announced, the ministers of Roads and Public Works stated that the suspension did not apply to the demolitions related to the construction of the bypass road. The Minister for Energy also subsequently announced that the demolitions near power lines had only been suspended. On 29 April, the Minister for Energy warned in Parliament that demolitions would resume soon, on the basis that the suspension would remain for only 10 weeks in order to give people time to move and to give the government time to develop its policy on demolitions. However, he also indicated that the ministry was willing to negotiate with structure owners to move power lines at their cost.

From these statements, it appears that there is a lack of coherence within the Kenyan government on issues affecting housing rights. An inter-ministerial committee chaired by the Vice-President has been established to discuss the planned evictions, but has not yet shown signs of activity.

There have been positive developments in relation to the planned demolitions of homes near railway lines, which would affect 108 000 people. Kituo Cha Sheria brought a lawsuit in February 2004 against the KRC on behalf of affected residents. The court ordered the KRC and the residents to enter into negotiations. Pamoja Trust, a local NGO, arranged for representatives of the KRC to visit sites in India where resettlement had occurred. On 26 April 2004, the KRC agreed to formally withdraw its eviction notices pending re-settlement plans by the government.

Representatives of COHRE visited Kibera in March. They, along with a number of local NGOs, met a representative of the Department of Housing and visited the planned eviction sites. They found that the majority of Kibera residents live in intolerable and, in

many cases, unsafe conditions, even though most of them are tenants and pay high rentals to the owners of their dwellings. Many residents agreed that a certain degree of voluntary relocation to alternative sites would be required to address the problems they face. However, it was equally clear that using forced evictions would be counterproductive and cause even more suffering than people are enduring at present.

Lessons and challenges

The challenge in Kibera is therefore to ensure that the government comprehensively applies a moratorium on evictions until it can design and implement a national policy that is consistent with international human rights standards. It is necessary to ensure that all levels of government, including the local administration, are aware of and adhere to these standards. However, preventing evictions is only an emergency and preliminary step in addressing the housing situation in Kibera. It is necessary to carefully consider a variety of solutions to improve the situation. Resettlement of at least some people will be necessary.

A key challenge will be to ensure that such remedial programmes truly consult with the residents and that they meet their needs with regard to housing, proximity to places of work, schools and social services. Such programmes must also address the lack of secure tenure for the residents, which has reduced their ability to invest in improving their housing situation.

Reform efforts must also empower and strengthen community governance structures, which are weak due to decades of centralised government administration that selected neighbourhood leaders.

The lessons of the campaign against the evictions will not be fully realised until the Kenyan government comes to a decision on the balance between housing rights and its development and safety goals. However, three provisional lessons emerge.

Firstly, the campaign has given some respite to those threatened by evictions and has forced the government to concede, at least, that there must be adequate resettlement for those displaced. It also demonstrated the possibility of launching a multi-faceted campaign at very short notice.

Secondly, although there was no centralised leadership or coordination, messages sent to the government were consistent and mainly based on housing rights contained in international human rights law.

Thirdly, many of those involved included largely human rights institutions. While some have questioned the extent to which a rights-based approach to development adds any value, this campaign has shown that, at the very least, human rights actors bring energy and initiative and can show results in the struggle to ensure adequate housing for all.

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The food crisis in Zimbabwe

Kevin Iles

Most people are familiar with the rapidly growing food crisis in Zimbabwe. In March 2003, it was reported that 7.5 million people (at least 60% of Zimbabwe's population) needed food aid and that deaths from starvation were occurring at an alarming rate in both rural and urban areas.

The high prevalence of HIV/Aids in Zimbabwe demands that the food problem is resolved quickly. Hunger weakens the immune system, as does HIV. With a third of Zimbabwe's population reportedly infected with HIV and affected by chronic hunger, the progression to full-blown Aids increases rapidly. Recent statistics indicate that the average life expectancy of the population has dropped from 56 in the mid-1970s to just 35 today. In December 2003, it was reported that Aids-related deaths in the country were occurring at a rate of 3 800 per week.

The response of the government and the international community

Food production in Zimbabwe has declined progressively since 2001. It is estimated that maize and wheat production have fallen by 66% and 90% respectively since

2000. Before 2001, Zimbabwe was a main supplier of the UN World Food Programme's (WFP) African relief stocks and the WFP maintained a small procurement office in Harare, Zimbabwe's capital. By 2001, however, the food crisis in Zimbabwe had reached such critical levels that President Robert Mugabe declared a 'state of disaster'.

The government attempted to curb the growing crisis by, among other things, establishing a state grain procurement and distribution agency, the Grain Marketing Board (GMB). The GMB was designated by law as the sole buyer and distributor of wheat and maize in the country. Its prices are regulated by the government and are generally significantly lower than the market value of the crops.

The WFP launched an emergency food relief programme and hired hundreds of international and local aid workers to help distribute food. To support this, it received contributions of US$300 million from Western governments including US$6.5 million (equivalent to US$ 5.8 million) from the European Commission. Food aid was to be distributed among the poorest families in 19 districts of the country, a total of 5.5 million people (nearly 50% of the country's population).

However, misrepresentations by the government of its food production yields has made it difficult for the WFP to get the appropriate level of assistance required to address the problem.

Why has the crisis escalated?

Despite these early responses, there are a number of reasons why the food crisis in Zimbabwe is far from being eliminated. Firstly, the price controls exercised by the government on the GMB have compelled farmers to cultivate crops at a considerable financial loss because of the escalating prices of seed and fertiliser resulting from inflation (currently at 602.5%, which is 200% higher than the bank credit interest rate). As a result, both commercial and small-scale farmers have abandoned the cultivation of maize and wheat in favour of products that are not price controlled.

Secondly, although the GMB grain is heavily subsidised, it is still difficult for poor people in Zimbabwe to gain access to food. For example, the Food Security Network (Fosenet) has reported that poor people are selling off household assets in order to feed their families. Fosenet has urged the government to take special measures, as a matter of priority, to ensure that the elderly, orphans and the poorest have access to GMB food. It appears that no such measures have been adopted to date. Worse still, the government has refused to disclose the levels of GMB food stocks to the public. International journalists enquiring about GMB food levels have been expelled from the country.

Child-headed households have problems accessing food relief because of the requirement to show proof of residence.

Thirdly, while international aid groups concentrate on feeding those in the rural areas, food supplies in the cities are equally difficult to access. This is not only due to the decline in overall supply, but also because of the way in which available supplies are distributed. Recent research has highlighted the need for African countries to decentralise food storage in order to facilitate distribution and enhance access. However, GMB deliveries in Zimbabwe reach very few districts. As a result, old people are made to wait in long food queues while others, especially informal workers, lose out on potential income because of these queues. Child-headed households have encountered particular problems in accessing food relief because of the requirement to show proof of residence. Corruption, bribery and 'back door' sales have also hindered accessibility to GMB food.

Fourthly, the government has used the food crises as a political weapon to gain more support. In order to obtain food or be included on the food lists, people are often required to provide proof of party membership, attend local political meetings or chant political slogans. Human Rights Watch has reported on how Zimbabwean authorities deny political opponents access to food programs and manipulate international food relief.

Fifthly, the government has not accompanied the land reform process in the country with the provision of the necessary agricultural resources such as pesticides, fertilisers, marketing support and credit to new farmers and many active farms seized for redistribution have become idle as a result.

Finally, the Zimbabwean Human Rights NGO Forum has reported that close to 600 000 farm workers and their dependants

have been displaced during the land reform process, many of these due to illegal evictions effected by ruling party militia. In many cases the police have also failed to take any positive action to curb thes evictions. The displacements have left these people without access to food, water and shelter.

International obligations concerning the right to food

The Zimbabwean Constitution does not recognise the right to food. However, Zimbabwe has international and regional obligations relating to this right. Internationally, it has ratified the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. Regionally, it has ratified the African Charter on Human and People's Rights (the African Charter), and the African Charter on the Rights and Welfare of the Child. With the exception of the African Charter, these instruments expressly bind the government to respect, protect and fulfil the right to food. They also oblige the government to take appropriate steps to the maximum of its available resources to ensure the progressive realisation of this right.

Although the African Charter does not expressly recognise the right to food, the African Commission has read this right into the Charter. In the recent case of *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (*SERAC*), the African Commission found that a right to food is implicit in such rights as the right to life, the right to health and the right to economic, social and cultural development, which are expressly recognised by the Charter. It held that a right to food is essential for the enjoyment of these rights and other rights and that it is inseparably linked to the dignity of human beings. The African Commission found that the Nigerian government was obliged to refrain from interfering in the enjoyment of fundamental rights and was obliged to protect its citizens against interference in their rights by others. At a minimum this required the government to enact legislation and provide effective remedies for the enforcement of rights and the protection of rights holders from interference with their rights. It was also obliged to improve existing food sources and to ensure access to adequate food for all citizens. It also held that the minimum core of the right to food, among other things, required that states do not prevent peoples' efforts to feed themselves.

While international law is clear that states have a margin of discretion to make policy choices, they remain obliged to give effect to basic human rights within the policy framework they have chosen. It is clear that the food crisis in Zimbabwe deprives the majority of people of the full enjoyment of their right of access to food, as well as of many other human rights.

Conclusion

In the *SERAC* case, the African Commission held that the realisation of socio-economic rights is vital in the African context and that all rights in the African Charter can be made effective. Where a government does not live up to the minimum expectations of this instrument, it should and will be held to account.

Against this backdrop, Zimbabwe appears to be in breach of its international and regional obligations. The government has failed to respond adequately to the food crisis. Among other things, it has failed to take steps to end bribery and corruption in the supply and distribution of food. Instead, it appears to be actively participating in the infringement of its citizens' right of access to food by, among other things, politicising the food aid programmes.

Unfortunately, it is unlikely that any complaint to a domestic tribunal would have a favourable or effective outcome for the victims. As pointed out above, the right to food is not domestically enforceable. Besides, recent events such as the arrest of two judges and the resignation of others, media attacks on judges and the wide powers that the President has in judicial appointments have threatened the independence of the judiciary in Zimbabwe.

Given the unlikelihood of domestic relief, the appropriate forum in which to bring a complaint against the Zimbabwean government would seem to be the African Commission. Although the decisions of the Commission are not binding, the potential exists for relief for the victims of the crisis. The mere filing of a complaint with the African Commission could draw international attention and solicit the necessary pressure on the Zimbabwean government to remedy the food situation.

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