ESR REVIEW

Economic and Social Rights in South Africa

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Editorial

Sibonile Khoza

We are pleased to present the second issue of the *ESR Review* for 2005.

In this issue, Peris Jones and Kristian Stokke analyse the role of democracy in realising socio-economic rights in the post apartheid context. They argue that democracy is a necessary, but not sufficient, condition for realising these rights and for achieving development. They contend that democracy deficits limit the possibilities of advancing socio-economic rights. To correct these deficits, they argue that an element of political uncertainty should be introduced.

Annette Christmas reviews the recent Constitutional Court judgment in the *Modderklip* case. She observes that increased land invasions not only pose a threat to the orderly implementation of housing and land programme, but also compel the courts to balance the competing rights of landowners to property and of unlawful occupiers to housing in eviction situations. She argues that *Modderklip* demonstrates the narrow and retrogressive nature of the state's understating of its constitutional duties in relation to housing rights. She concludes that this judgment sends a clear message that the state cannot escape its obligations in addressing land invasions.

Following immediately after the *Modderklip* judgment was the government's decision to move the more than 40 000 people living there to other land. The commentary article questions the wisdom of this decision. While acknowledging that it could have been taken in good faith and in compliance with the Court order, the article questions the inexplicable and unsubstantiated nature of the decision. It argues that moving people should not be based on uncertain and unfounded grounds, but in addition to tangible grounds, it should be motivated by reasonable intentions and plans to improve their socio-economic conditions.

Pierre de Vos examines the implications of the recently issued General Comment 16 (GC 16) for advancing the equal rights of men and women to the enjoyment of all

CONTENTS

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socio-economic rights. De Vos commends the GC 16 for endorsing an expansive and progressive notion of gender equality that takes heed of the structural inequalities between men and women, instead of the traditional formalistic notion of gender equality. He observes that the approach taken by the GC 16 is similar to that embraced in the South African jurisprudence. He concludes by applauding the GC 16 for clarifying the state's obligations in ensuring equal access to social and economic goods by men and women.

Finally, Danwoood Chirwa reviews a book entitled *Privatisation and human rights in age of globalisation* (2005).

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

From democracy deficits to democratising development

The politics of socio-economic rights in South Africa

Peris Jones and Kristian Stokke

The politics of socio-economic rights in the post-apartheid context is replete with ambiguity. On one hand are the enabling democratic, constitutional and institutional 'spaces' created in the post-apartheid era. They are underpinned by oversight institutions, free and fair elections and a constitution considered to be one of the most liberal and progressive in the world. They also give broad scope for enabling the extension of socio-economic rights to the majority. On the other hand, the progressive spaces for manoeuvre are hemmed in by the legacy of class and race inequalities. This is in addition to the character of the negotiated transition and the balance of power behind the making of social and economic policy.

The contemporary context of neo-liberal globalisation and conservative macro-economic policy present additional constraints. With unquestionable popular electoral support for the African National Congress (ANC), it may appear trite to suggest limitations in the electoral system. But that said, the vertical accountability between the state elite and the citizenry appears to have been eroded. The citizenry does not have the leverage to ensure substantial government concessions towards socio-economic transformation.

The question, then, is to what extent and by which means should the liberal democratic dispensation of post-apartheid South Africa

function as a basis for a transformative politics of socio-economic rights? This calls for an understanding of the complicated relationship between human rights and democracy and how they may be articulated to maximise socio-economic transformation.

Democratic transitions and human rights

The answer to the above question depends on how we conceptualise democracy and human rights. It also depends on whether we extend the conception of human rights beyond civil and political rights to include economic and social rights. While there is a growing attention to socio-economic rights and popular democratic participation, contemporary global debates tend to revolve around narrow conceptions of both democracy and human rights. These discourses depict democracy as a matter of liberal democratic institutions and human rights as being identical to civil and political liberties.

The last three decades have seen a global expansion of liberal democracy. This has been famously labelled as a 'third wave of democratisation', which is celebrated as a global triumph of Western economic and political liberalism. Less triumphalist scholars have problematised the dynamics and substance of these new democracies, describing them as elitist and formal rather than popular and substantive, thereby questioning their political and socio-economic relevance to ordinary people.

The transitions of the 'third wave' have revolved around the formal rules, procedures and institutions of liberal democracy. The most notable procedures and rules include the conduct of regular, relatively free and fair elections, with competition between at least two political parties. Negotiations and pacts within the political elite are emphasised, especially between reformers within an authoritarian regime and moderate dissidents. Democratic transitions are conceived narrowly, which excludes popular forces from the process of bringing about consolidated and deepened democracy.

But doesn't this elevate means to an end, thereby mistaking institutional instruments for their democratic purpose? In our view, a system of decision making is democratic to the extent that it embodies the principles of popular control and political equality. And institutions are democratic to the extent that they help realise these principles. Without fundamental civil and political rights, however, there can be no guarantee of popular control over government. Such rights are integral to democracy, even in its minimalist form.

Democracy becomes severely compromised if the privileged can use wealth or status to purchase undue political influence.

Socio-economic rights and democracy

What about the relationship between socio-economic rights and democracy? Are socio-economic rights a requirement for democracy and is democracy a precondition for socio-economic rights? On the first question, there are many who argue that democracy will remain a formality unless it also includes substantive social and economic equality. Democracy becomes severely compromised if the privileged can use wealth or status to purchase undue political influence. The same is true if the poor are so deprived that they are incapable of exercising their basic civil or political rights. Nevertheless, civil and political equality do not require complete economic levelling.

This may be exemplified by South Africa's record of democratic elections in the post-apartheid period. Despite persistent problems of absolute and relative poverty, South Africa has successfully conducted regular free and fair local and national elections. Likewise, consultation forums have been established to ensure that people can voice an opinion. Such forums may be used even amid severe resource deprivation and inequality. This means that the redistribution of political power has entailed a transformation of the political spaces for popular participation. The question then regards the prospect for using these political spaces to promote socio-economic rights.

There are diametrically opposed positions regarding the developmental outcomes of liberal democracy. On one hand, there is the assumption that civil and political rights play an instrumental role in promoting socio-economic rights. This is most famously expressed by Amartya Sen in his argument that democratic institutions are guarantors for public deliberation and effective responses to poverty and deprivation.

Radical critics, on the other hand, argue that democracy in capitalist societies is no more than a capitalist democracy when public policy is subject to the economic and ideological influence of powerful economic interests. This means that the socio-economic rights of the many will be subordinated to the

requirements of profitability for the few. This renders human rights discourses void of substance for ordinary people and may even serve to depoliticise popular forces.

We subscribe to a more open-ended position which endorses that democracy introduces mechanisms through which economic policies have to be publicly justified and the activities of public officials subjected to public accountability. Democracy is a necessary, but not sufficient, condition for the realisation of socio-economic rights and development. Issues of social justice, for example, cannot be achieved solely through the existence of liberal democracy.

There is therefore no guarantee that democracy will deliver development of a certain kind or extent. It may, however, provide vital means for asserting interests and rights in regard to development. It therefore remains an important task to examine the politics of socio-economic rights within formal democracies. This requires examining the ways in which socio-economic rights may be politicised and political representatives held accountable to these rights. But how do we then examine the politics of socio-economic rights?

The politics of socio-economic rights

There are several ways of examining the democratic politics of socio-economic rights. One entry point is to recognise that real world democracies contain a complex mix of democratic and non-democratic institutions and practices. These coexisting democratic spaces and deficits create both opportunities and obstacles for democratic politics of socio-economic rights.

Three general observations can be made about the types and locations of such democracy deficits. At the level of citizenship, democracy has limited meaning if people cannot enjoy equal rights. Such 'hollow' citizenship happens when the formal legal and constitutional arrangements fail to guarantee civil/political and social/economic rights. This can occur because rights are narrowly defined, citizenship is socially and ethnically exclusive or access to the legal system is systematically biased against minorities and those who are poor and unorganised.

Democracy deficits at the level of citizenship may also be of a political rather than a constitutional nature. This happens, for example, when marginalised social groups are excluded from the public sphere due to a lack of resources and organisation or due to cultures of intolerance.

Democracy deficits limit the possibilities for realising soico-economic rights.

At the level of vertical accountability, citizens may be unable to hold government and political delegates accountable. This may be due to formal procedural deficits. Such deficits include electoral systems distorting the outcomes of democratic processes, disenfranchisement of minorities and over-centralisation of the constitution and structures of governance.

Lack of democratic accountability may also result from a lack of formal contact points between civil society and political/administrative structures, thereby impairing accountability. Beyond such formal structures, vertical accountability problems may also originate in politics. Examples include when voters have little effective choice between alternative political programmes, when there is weak interest aggregation by political parties and especially in regard to the interests of the poor and marginalised, or when there are few effective civil society associations.

Democracy deficits may also originate from weak mechanisms for horizontal accountability. These deficits may be due to weak constitutional checks and balances between the executive, the legislature and the judiciary. They may also arise where 'watchdog' institutions to ensure accountability of the political institutions, the rule of law, controls on military, police and intelligence bodies are absent or weak. They may also occur where the government is subordinated to narrow self-interests and patronage, the judiciary is weak or co-opted, opposition parties are weak or where there is a legacy of authoritarian governance. Democracy deficits limit the possibilities for realising socio-economic rights. However, the formal arrangements and practical politics of real-world democracies also contain diverse spaces for democratic politics. Such spaces may also originate in collective action by class and social movements. Collective action may include mobilising for the implementation of citizens' rights, but in the process also challenging and transforming the meaning of citizenship. Government accountability is thus structured by both the formal arrangements of the political sphere and the way in which active citizens understand and make use of these political spaces. This requires political channels through which active citizens may pursue both socio-economic rights and civil and political freedoms.

A South African perspective

This brief discussion leads to the conclusion that democratic institu-

tions and politics offer both obstacles and opportunities for socio-economic rights. The pursuit of development through democracy is facilitated by the complex coexistence of democratic and non-democratic institutions and politics.

Few cases illustrate the complexities and tensions of the democratic politics of socio-economic rights in post-apartheid South Africa. A collection of chapters in our forthcoming book provides some clues on how democratic, constitutional and institutional spaces may be harnessed in the fulfilment of socio-economic rights. The fundamental concern is the need to introduce an element of political uncertainty if we are to work towards correcting democratic deficits. This conclusion draws on a number of case studies on the politics of policy-making, on the roles of the labour movement, civil society and social movements, on the Constitutional Court and on specific issues such as litigation, HIV/Aids, the social wage and land issues.

In the South African case, it can be argued that the vertical accountability between the state elite and the citizenry has been eroded, in the sense that the citizenry does not have the leverage to ensure substantial government concessions towards socio-economic transformation. The erosion of vertical accountability leads to a call for the reintroduction of substantive uncertainty into the political system and especially into economic policy-making. Without it, the realisation of socio-economic rights for the broad citizenry will elude South Africa's democratic transition.

But given the absence of a viable political opposition in South African politics, where may the sources of substantive uncertainty lie? One source may be found in the large, well-organised and highly politicised labour movement. Based on the current political role of labour within the governing alliance, it seems that the future power and gains of labour within the alliance will depend largely on its strength outside the formal political sphere. General socio-economic rights and specific labour rights served as a basis for mass mobilisation of workers in the 1980s. Likewise, labour's ability to mobilise its constituency on the basis of the same rights will largely determine its political influence and the realisation of rights in the future.

Another source of political contestation is found in civil society. A range of new social movements has emerged around diverse socio-economic issues and rights since the late 1990s. The political strategies of these new movements are highly varied, but many are characterised by creative combinations of strategies of engagement and disengagement with the state. These strategies often invoke the Constitution in rights-based struggles. Many of the new movements are fragmented, under-resourced and issue-based. In spite of this, their presence and activities nevertheless challenge the government and reinforce government's accountability to marginalised social groups and their struggles.

Judicial remedies are certainly key mechanisms in upholding the state's obligations to respect, protect, promote and fulfil socio-economic rights. In South Africa they have on occasion proved to be catalytic in widening democratic spaces and strengthening account-ability.

Where this broader catalytic effect has emerged, the role of mobilised political and social forces has been vital. This underscores the critical role of the political process and the politicisation of socio-economic rights.

Conclusion

Following these theoretical reflections and the concrete politics of socio-economic rights in South Africa, we conclude that there is a strong positive relationship between democracy and socio-economic rights. It can be argued that various freedoms are not only indivisible but have a virtuous effect on each other.

Ten years of democracy in South Africa has demonstrated that civil and political rights are not in themselves a guarantee of the rapid elimination of poverty and inequality, but the democratic dispensation is a structure that can be used to address past and present injustices.

Furthermore, the state of poverty and inequality in South Africa shows that it is not sufficient merely to codify socio-economic rights. Such rights come about as a result of struggle and their exercise and extension require continuing struggle of diverse kinds and in multiple arenas. South African experiences demonstrate both that there is no realisation of socio-economic rights without politics and that democratic politics of socio-economic rights deepen democracy itself. To put it programmatically, democratic politics of socio-economic rights democratises development while also developing democracy.

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CASE REVIEW

The *Modderklip* case
The state's obligations in evictions instituted by private landowners

President of the Republic of South Africa, Minister of Agriculture and Land Affairs v Modderklip Boerdery (Pty) Ltd (CCT 20/04).

Annette Christmas

On 13 May 2005, the Constitutional Court handed down judgment in the *Modderklip* case. The progression of this case, as reported in greater detail in earlier editions of the *ESR Review*, captivated the attention of not only the legal fraternity but also other interested parties in South Africa.

The plight of Abraham Duvenhage, the owner of Modderklip Boerdery (Pty) Ltd, and his bid to find assistance in evicting a community of occupiers from his land, highlighted the many tensions that are prevalent in eviction situations.

The judgment comes at a critical stage of South Africa's development in light of recent countrywide demonstrations against poor service delivery by provincial and local governments. These demonstrations reveal a deep-seated dissatisfaction about, among others things, the condition of homelessness that continues to pervade our communities.

The housing crisis continues although about five years have now passed since the Constitutional Court handed down the landmark decision in *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) (*Grootboom*), defining the obligations of the state in relation to the right of access to housing.

The courts have had to confront the question of balancing the competing rights of private landowners to property and of unlawful occupiers to housing in eviction situations. This is within the highly politicised context of increased land invasions, and the threat that these invasions pose to not only the orderly implementation of land and housing programmes but also to the stability of property markets.

This was the important issue the courts were called upon to consider in the *Modderklip* case.

With the Nkuzi Land Development Association in collaboration with the Legal Resources Centre, the Socio-Economic Rights Project and the Programme for Land and Agrarian Studies of the University of the Western Cape made joint *amici curiae* submissions in both the Supreme Court of Appeal (SCA) and the Constitutional Court hearings of this case.

This intervention was motivated by a common concern about the continued vulnerability of unlawful occupiers facing eviction, and the need to, at least, guard the protection extended to such occupiers in the *Grootboom* judgment.

The submissions of the *amici* centred on ensuring that when interpreting the provisions of such protective legislation as the *Prevention of Illegal Eviction from and Unlawful Occu-pation of Land Act 19 of 1998* (PIE), and the duties of the state in eviction situations, the needs of "the most vulnerable in society" must be the primary consideration.

The *Modderklip* case in the lower courts

The case before the Constitutional Court originated from a long and complicated legal battle that began in October 2000 in the Johannesburg High Court.

Modderklip, acting in terms of PIE, applied for and successfully obtained an eviction order against a group of occupiers who unlawfully settled on a portion of the farm Modder East on the East Rand.

Having no alternative accommodation, the occupiers remained on Modderklip's farm in violation of the

eviction order that was granted by the Johannesburg High Court.

What ensued was a prolonged battle by Modderklip to gain assistance from the state in executing its eviction order. The state, however, refused to intervene in what it considered to be a 'civil matter'.

Modderklip applied to the Pretoria High Court for an order compelling the state to enforce the eviction order.

Having evaluated the circumstances that gave rise to the occupation of the land and Modderklip's attempts to vindicate its property right in section 25(1) of the Constitution, the High Court found that the state had breached the constitutional rights of both Modderklip and the occupiers.

By failing to provide alternative accommodation to the occupiers, and by allowing them to continue to occupy Modderklip's land unlawfully, the state essentially sanctioned the expropriation of Modderklip's land in violation of section 25(1) of the Constitution, which provides that "no-one may deprived of property except in terms of a law of general application".

It also found that the state had failed to take reasonable steps within the available resources to progressively realise the occupiers' right of access to adequate housing in terms of sections 26(1) and (2), as read with section 25 (5), of the Constitution.

The duty to provide access to housing, the High Court held, does not bind private landowners, and by requiring Modderklip to provide the occupiers with accommodation, the state infringed the right of Modderklip to equality recognised in sections 9(1) and (2) of the Constitution.

The High Court therefore ordered the state to devise a plan that would end the unlawful occupation of the land in question and vindicate the rights of both Modderklip and the occupiers. The state appealed against this decision to the SCA.

The SCA confirmed the findings of the Pretoria High Court.

It found that by failing to make alternative accommodation available to the occupiers, the state simultaneously breached Modderklip's right to property as well as the right of the occupiers to housing.

The state simultaneously breached Modderklip's right to property as well as the right of the occupiers to housing.

On the 'queue jumping' argument raised by the state, the SCA held that there was no indication that the occupiers had moved onto the land with the intention of 'jumping the queue'.

The SCA also held that the state has an obligation in relation to the right of access to adequate housing in section 26 (1) of the Constitution to ensure that, at the very least, evictions are executed humanely.

In this context, it was held that the state cannot not be said to be in compliance with this obligation unless it provides alternative land for the occupiers' relocation.

This finding conforms largely to the arguments presented by the *amici*, namely that the state is inextricably involved in all eviction situations, whether the eviction is directly initiated by a state or non-state organ.

The state's duties in relation to the rights of access to adequate housing apply in any eviction situation, and even more where it is known that the eviction will have the effect of leaving people homeless.

Significantly, the SCA acknowledged that a distinguishing fact of this case is that the occupiers were not demanding that houses be built for them. The SCA held that:

> the extent of their right [of access to adequate housing] at stake in this case is limited to the most basic, a small plot on which to erect a shack or the provision of an interim transit camp.

This fact makes it particularly difficult to comprehend the state's failure to make any effort to try and resolve the problem.

The SCA therefore ordered that the occupiers were entitled to remain on the land until such time as alternative accommodation was made available to them by the state.

In short, the SCA found that the state had breached the rights of both the landowner and the unlawful occupiers.

It ordered the Department of Agriculture and Land Affairs to pay Modderklip damages as compensation for the breach of its proprietary rights and the loss of the use of the land on which the occupiers had established themselves.

The award of damages was to be calculated in terms of the Expropriation Act 63 of 1975.

The state then applied to the Constitutional Court for leave to appeal against this decision.

Key arguments in the Constitutional Court

The state based its appeal to the Constitutional Court (the Court) on

two main grounds. First, it argued that it could not have infringed Modderklip's right to property in section 25 (1) of the Constitution because this right is only enforceable against the state.

It therefore followed that the occupation of the land by the occupiers was not a constitutional breach perpetrated by the state, but rather a breach by private individuals.

It was argued that Modderklip had at its disposal both private and public law remedies which it could use to obtain relief. It was therefore incumbent on Modderklip to use those remedies effectively to protect its interests.

The state therefore argued that it had fulfilled its duties to Modderklip by providing for remedies and by ensuring access to the courts.

The second argument the state raised was that Modderklip was not entitled to the relief that it claimed because it contributed to the breach of its property rights by failing to take action against the occupiers sooner.

The state argued that Modderklip should have instituted an urgent application for the eviction of the occupiers in terms of section 5 of PIE.

This section makes provision for urgent applications for eviction (pending a final order) and allows landowners to circumvent some of the procedural safeguards included in PIE, in order to obtain immediate relief.

These applications are only allowed where certain defined circumstances are present. In order to succeed with such an application, there must be, among other considerations, "a real and imminent danger of substantial injury to any person or property".

The Constitutional Court's decision

Unlike the SCA, the Constitutional Court did not engage with arguments relating to whether the section 25(1) rights of Modderklip had been violated, and whether, or to what extent, these rights have horizontal application.

Neither did it comment on whether the state had violated the occupiers' rights of access to adequate housing.

In contrast, the Court premised its judgment on the right of access to courts entrenched in section 34 of the Constitution, as read with constitutional principle of the rule of law. According to section 34, the state is obliged to provide the necessary legislative and institutional mechanisms for citizens to resolve disputes that arise between them.

The Constitutional Court did not comment on whether the state had violated the occupiers' rights of access to adequate housing.

The Court therefore evaluated the extent to which the state had, as it submitted, fulfilled these duties to Modderklip.

While accepting that PIE provides the legislative framework for regulating disputes between landowners and unlawful occupiers, the Court found that, on the basis of the facts in the present case, the provisions of this Act were not sufficient to ensure Modderklip's right to an effective remedy.

On the contrary, it held that it was "obvious" in this case that only one party, the state, held "the key to the solution of Modderklip's problem".

The Court therefore held that the obligation on the state goes much further than the mere provision of protective and promotional mechanisms and institutions. It held further that:

> the precise nature of the State's obligations in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature of the right or interest that is at risk as well as the circumstances of each case.

The Court held that it was unreasonable for the state to do nothing in circumstances where it was impossible for Modderklip, because of the number of occupiers and the lack of alternate accommodation, to enforce the eviction order.

It was similarly unreasonable, the Court ruled further, to expect Modderklip to be burdened with the duty of providing accommodation to all the occupiers.

Furthermore, the Court held that the state bears the constitutional duty of progressively realising the rights of access to adequate housing or land for the homeless.

The Court did recognise the importance of the state's objectives in maintaining structured land and housing programmes and discouraging land invasions.

It clearly stated, however, that housing programmes that are so rigid that they cannot be adapted to meet evolving circumstances cannot be regarded as being reasonable. It said that:

> if social reality fails to conform to the best laid plans, reasonable and

> appropriate responses may be necessary...indeed, any planning which leaves no scope whatsoever for relatively marginal adjustments in the light of evolving reality, may often not be reasonable.

The Court found that, by failing to take any steps to relieve Modderklip of the burden of accommodating the occupiers, the state had breached Modderklip's right to an effective remedy as enshrined in section 34 of the Constitution.

In respect of the state's arguments relating to Modderklip's tardiness in instituting proceedings in terms of PIE, the Court rightfully held that none of the requirements of that Act were applicable to Modderklip's situation, and that:

> any delay on its part to assert its rights would only be considered to be material if it were found to be culpable and unreasonable.

It found, on the contrary, that Modderklip had at the earliest juncture tried to engage the municipality in trying to find an effective and humane solution to the problem. The municipality had failed to take any action to assist Modderklip or to assert its right in terms of section 6 of PIE to evict the occupiers themselves.

The Court held that:

> the conduct of the State throughout was consistent with the view articulated on its behalf in this Court that the responsibility for the implementation of the evictions rested solely on Modderklip.

This case demonstrates that the state's understanding of its constitutional obligations in relation to the right of access to adequate housing, in particular, is very narrow and retrogressive.

In the *Grootboom* case, the state argued that it was the scarcity of available resources that hindered its efforts to meet its duties in relation to this right.

In this case, the state deliberately chose not to even en-gage with Modderklip to try and find a feasible solution to the problem.

Appropriate relief

The state argued that the relief of compensation granted in favour of Modderklip by the SCA was inappropriate in the circumstances and that a declaration of rights would have been more appropriate.

In evaluating the award of damages, the Court found that Modderklip was entitled to appropriate relief and that if a constitutional breach is established, the courts are mandated to grant relief that is not only appropriate but also *effective*.

The award of damages as formulated in the SCA was therefore upheld, so was the occupiers' right to remain on the land until alternative accommodation is provided.

In determining appropriate relief for the occupiers, the Court took into account the tone and purpose of legislation governing evictions and the fact that:

> a court should be reluctant to grant an eviction order against relatively settled occupiers unless it is satisfied that a reasonable alternative is available.

It also addressed arguments as to whether expropriation of the land would have been appropriate relief.

In this case, expropriation would not have been necessary because Modderklip was willing to sell the occupied portion of land to the state.

While considerations of the courts' authority to le-gitimately order the state to expropriate land was canvassed, no conclusive decision was reached on whether and under what cir-cumstances a court may make such an order.

Conclusion

While the final relief granted by the Constitutional Court favours both Modderklip and the occupiers, the case highlights the difficulties that vulnerable occupiers continue to face.

During the course of argument, Justice Yacoob J, told the State that its "treatment of the occupiers throughout this case could be likened to that of rodents".

The real issue, as asked by Wim Trengove, representing the *amici* , is: "Where are the homeless people entitled to be when they have no home to go to?"

While the Court failed to define the minimum entitlements for the landless people in relation to the right of access to adequate housing, it sent a clear message that the state cannot use blanket excuses of housing backlogs, resource constraints or the threat of land invasions to justify a failure to fulfil its socio-economic rights obligations to the most vulnerable in our society.

It reiterated the protection extended to occupiers in *Grootboom* and the duty to treat all people humanely.

The Court therefore impressed upon the state the need for it to actively ameliorate conditions of homelessness and to adjust its

policies to meet the evolving needs of communities which face such conditions. It can only be hoped that as social mobilisation around housing delivery intensifies, the state will take up the challenge to fulfil the promise of *Grootboom* and the vision of a South African society where everyone has security of tenure and the dignity of having a place that they can call a 'home'.

Annette Christmas is a former researcher with the CLC's Socio-Economic Rights Project and is currently a student at the School for Legal Practice at UCT.

The Project is indebted to the combined efforts of all the key players who contributed to the *amici curiae* submissions: Geoff Budlender and Steve Kahanovitz of the Legal Resources Centre; Marc Wegerif of the Nkuzi Development Association and Dr. Edward Lahiff and Karen Kleinbooi of the Programme for Land and Agrarian Studies (UWC). Prof Sandra Liebenberg, former Project Co-ordinator and Senior Researcher of the Socio-Economic Rights Project (now Harry Oppenheimer Chair in Human Rights Law at the Stellenbosch University), assisted by Annette Christmas, pioneered the Project's involvement in this case. Last but not least, many thanks to Adv. Wim Trengove and Adv. Michelle Norton who ably presented the *amici's* submissions in the CC and SCA. respectively. It is hoped that these collaborative efforts have contributed in some way to the greater jurisprudence on the right of access to adequate housing.

Questioning the wisdom of moving 40 000 people

The *Modderklip* saga continues

Sibonile Khoza

Immediately after the Constitutional Court delivered judgment in the Modderklip case, the government indicated that it would move the more than 40 000 people who had invaded a piece of private land to alternative land.

This was in compliance with one of the Court's orders stating, among other things, that the community must stay on the land until alternative land is made available to them and that the government must pay compensation to Modderklip Boerdery, calculated in terms of the Expropriation Act.

The decision to move people to alternative land means that the government has failed to take advantage of the opportunity to expropriate the Modderklip land, in spite of evidence that the landowner is prepared to sell it. The reason for this decision, the government argues, is that there are underground mining activities on this land and it is therefore unsuitable for human habitation.

At face value and in principle, the decision to move invaders to alternative land is not questionable. As noted, it is in compliance with the court order which is based on the established legal principle that people should not be evicted or moved until alternative accommodation or land is made available to them. It was this principle that the *amici curiae* ('friends of the court', in this case, the Community Law Centre and Programme for Land and Agrarian Studies at UWC and Nkuzi Development Association in collaboration with the Legal Resources Centre), sought to defend in the Supreme Court of Appeal and the Constitutional Court, respectively

Also, the government's decision can hardly be challenged if there is

valid expert evidence to support the claim that the invaded land is hazardous for human occupation. On the contrary, its decision would seem sound, reasonable and responsible under those circumstances.

However, the claim of existing mining activities is inexplicable and strange for two reasons. First, at no stage during the five-year legal battle did the state advance this issue, nor did it present any evidence about it. Rather, it was AgriSA (another *amicus*), that led (inconclusive) expert evidence suggesting that the land was "probably unsuitable for formal township development since it may be undermined", based on its own privately commissioned evaluation of the land.

Second, even if the mining activities exist, it is strange that such activities affect the Gabon community and not the adjacent Daveyton and Chris Hani communities, as the distance between them is less than a kilometre.

The wisdom of hastily moving 40 000 people to other land without conclusive proof supporting the compelling nature of such a move is thus questionable.

Putting the dubious underground mining activity argument aside, our visit to the community after the judgment was delivered had some useful revelations which, in our view, raise compelling grounds for the expropriation of the land as an alternative to moving the people elsewhere. The Gabon community is now well established: it has been provided with a tar road by the municipality and has a taxi rank and a couple of temporary water tanks. A nearby graveyard is shared with the Daveyton community. It has functioning community structures. Most members of the community work in the nearby economically active areas. It is situated near to the Daveyton and Chris Hani communities, in which children attend schools.

Against this background, one wonders if the government decision was well considered and taken in good faith.

Practical questions need to be asked: is the identified alternative land suitable or appropriate for the people in question? Put differently, is moving people from the current land a compelling and reasonable measure, considering all relevant factual circumstances (particularly the socio-economic circumstances) of the community?

What are the real implications of moving them, for both the government and the community?

Moving people to alternative land should not put them in a more vulnerable position. It should not interfere with their access to existing socio-economic activities such as work, schooling and so on.

Rather, it should be motivated by the reasonably calculated intentions and plan to improve their social and economic well-being.

The government has not indicated to which land will the people be moved, but only that it is nearby. It is not clear whether the community was consulted before this decision was taken.

What is also questionable is the government's attitude on this issue. Had the government not wasted thousands of Rands on legal fees and dragged the matter from court to court, this problem would have not been as huge and complex as it is now. The government was always aware that people could not be evicted until alternative land was made available. A sensible approach would have been to find such land much earlier.

It is not advocated here that people should be left on land that is hazardous for occupation. Rather, such hazards should be proven with certainty before taking such a huge step and disrupting people's lives in this way. Moving people must not be based on some ill-informed and unfounded ground.

The following steps are important:

1. An environmental impact assessment that government has reportedly undertaken with regard to the alternative land is important, but equally important would be to conduct it on the invaded land, particularly in the light of the landowner's willingness to have the property expropriated.
2. The findings of such assessments must be made accessible to the affected community so that they can appreciate why they are being moved.
3. The affected community must be given reasonable time to respond.

The state must make an effort to adequately consult with the people with the view to arrive at an amicable solution.

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General Comment no. 16

The equal right of men and women to the enjoyment of all economic, social and cultural rights

Pierre de Vos

The General Comments issued over the past two decades by the UN Committee on Economic, Social and Cultural Rights (CESCR) have played a pivotal role in our understanding of the scope and content of the various obligations engendered by social and economic rights. Although the South African Constitutional Court has refrained from a wholesale adoption of these General Comments, they have nevertheless been influential in the development of the South African jurisprudence on social and economic rights.

One of the themes running like a golden thread through these various General Comments is that states have a general obligation to guarantee social and economic rights without discriminating against anyone because of their race, sex, religion, language or other relevant characteristic.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) contains both a general clause prohibiting discrimination in the exercise of the rights in the Covenant in article 2(2), and a specific injunction in article 3 that States Parties must ensure the equal right of men and women to the enjoyment of all economic social and cultural rights in the Covenant.

Substantive equality requires the state to take cognisance of the structural inequality between men and women and to adopt legislation and programmes that begin to address this problem.

The Committee issued General Comment 16 (GC 16), which deals specifically with this injunction. The GC 16 is important and noteworthy because it rejects the traditional formalistic notion of gender equality that merely requires equal treatment of men and women. Instead, it endorses a particular, progressive, notion of equality that takes cognisance of the structural inequalities between men and women in our society.

Formal equality merely requires the state to adopt neutral rules and regulations regardless of the entrenched patterns of sex and gender inequality in a society. Substantive equality, on the other hand, requires the state to take cognisance of the structural inequality between men and women and to adopt legislation and devise programmes that begin to address this problem.

As a starting point, the GC 16 makes it clear that equal enjoyment of social and economic rights requires not only that states *formally* treat men and women equally, but also that *in practice* the end result must be that men and women can enjoy the various rights equally.

The Committee therefore endorses the notion of substantive equality, arguing that the obligation of states goes beyond the requirement of ensuring legal (formal) equality to that of moving towards actual (substantive) equality.

The GC 16 argues that substantive equality between men and women "will not be achieved simply through the enactment of laws or the adoption of policies that are gender-neutral on their face".

What is required is to take into account existing economic, social, and cultural inequalities experienced by women with a view to eradicating them.

This approach is in line with the equality jurisprudence of South Africa's Constitutional Court (see *Harksen v Lane No and Others*, 1997 (11) BCLR 1489 (CC). The state therefore has a duty to take special measures to ensure that women have a better chance at gaining fair access to the social and economic benefits in our society.

This duty to take special measures is qualified, in that the GC endorses

the need for *temporary* measures in order to bring marginalised and disadvantaged persons or groups of persons to the same substantive level as others. The measures must be "necessary to redress actual discrimination" and must be terminated as soon as the actual equality is achieved. Although this qualification appears to limit the scope for affirmative action to deal with women's inequality, the actual structural inequalities between men and women are so deeply entrenched all over the world that one would envisage these "temporary" measures being needed for a very long time indeed.

Progressive definition of discrimination

The Comment adopts the definition of discrimination contained in Convention on the Elimination of All Forms of Discrimination Against Women, stating that discrimination against women is:

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

This definition, focusing on both the "effect" and the "purpose" of the distinction, is in line with the notion of substantive equality, which looks beyond the formal requirements of equal treatment towards the impact that even neutral rules may have on excluding women from the enjoyment of the rights.

The GC 16 also endorses the notion that women experience discrimination both because of their sex (biology), such as refusals to hire women because they could become pregnant, and because of their gender (stereotypical assumptions), such as tracking women into low-level jobs on the assumption that they are unwilling to commit as much time to their work as men.

The inclusion of gender is an important development. Women often experience disproportionate social and economic hardship because of their gender, in other words because of the "cultural expectations and assumptions about the behaviour, attitudes, personality traits, and physical and intellectual capacities of men and women, based solely on their identity as men or women".

GC 16 endorses the need for states to take special measures to ensure that women have fair access to social and economic benefits.

As these gender-based assumptions and expectations generally place women at a disadvantage with respect to substantive enjoyment of rights, and because gender-based assumptions about economic, social and cultural roles preclude the sharing of responsibility between men and women in all spheres that is necessary to equality, the GC 16 implies that states have a special duty to take steps that will allow women to overcome these disadvantages.

South Africa's Constitution prohibits both direct and indirect discrimination based on the understanding that laws and regulations, which on their face might be neutral, may nevertheless have a disproportionate impact on one group or another (see *City Council of Pretoria v Walker,* 1998 (3) BCLR 257 (CC)).

The GC 16 endorses this view, stating that direct discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and on characteristics of men or women, which cannot be justified objectively, while indirect discrimination occurs when a law, policy or programme does not appear to be discriminatory on its face, but has a discriminatory effect when it is implemented.

By endorsing the notion of indirect discrimination, the GC 16 acknowledges that the application of a law that is gender-neutral may leave the existing inequality in place or exacerbate it.

From the above, it must be clear that the GC 16 encompasses a progressive and expansive notion of gender equality. Much like the South African jurisprudence, it rejects the traditional formalistic notion of gender equality and endorses the need for states to take special measures to ensure that women have fair access to social and economic benefits.

Obligations imposed on states

The GC 16 goes further, though, by setting out the specific legal obligations of states to ensure the equal rights of men and women in the enjoyment of all social and economic rights.

Regarding the negative obligation to *respect* the rights in the Covenant, the GC 16 requires states to "refrain from discriminatory actions that directly or indirectly result

in the denial of the equal right of men and women from their enjoyment of economic, social and cultural rights".

This means that states have a duty not to adopt, and where appropriate, to repeal laws and rescind policies, administrative measures and programmes that do not conform to the right protected by article 3.

What is therefore required, according to the GC 16, is for states to take a second look at all the apparently sex-neutral laws, policies and programmes to see whether they could result in a negative impact on the ability of men and women to enjoy their human rights on a basis of equality.

Regarding the positive duty to *protect* the rights in the Covenant, the GC 16 requires steps to be taken:

> aimed directly towards the elimination of prejudices, customary and all other practices that perpetuate the notion of inferiority or superiority of either of the sexes, and stereotyped roles for men and women.

What is therefore required is for states to adopt legislation or amend their Constitutions to ensure that a legal framework is put in place that will, *inter alia*, prevent third parties from interfering directly or indirectly with the enjoyment of this right.

Regarding the positive duty to *fulfil* the rights in the Covenant, the GC 16 requires that steps are taken:

> to ensure that in practice, men and women enjoy their economic, social and cultural rights on a basis of equality.

According to GC 16, States Parties must, among other things:

- ensure the availability and accessibility of appropriate remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes and prevention programmes;
- establish appropriate venues for redress, such as courts and tribunals or administrative mechanisms that are accessible to all on the basis of equality, including the poorest and most disadvantaged and marginalised men and women;
- develop monitoring mechanisms to ensure that the implementation of laws and policies aimed at promoting the equal enjoyment of economic, social and cultural rights by men and women do not have unintended adverse effects on disadvantaged or marginalised individuals or groups, particularly women and girls;
- design and implement policies and programmes to give long-term effect to the economic, social and cultural rights of both men and women on the basis of equality. These may include the adoption of temporary special measures to accelerate women's equal enjoyment of their rights, gender audits and gender-specific allocation of resources;
- conduct human rights education and design and implement training programmes for judges and public officials;
- raise awareness and design and implement training programmes on equality for workers involved in the realisation of economic, social and cultural rights at the grassroots level;
- ensure the integration in formal and non-formal education of the principle of the equal right of men and women to the enjoyment of economic, social and cultural rights, and promotion of equal participation of men and women, boys and girls, in schools and other education programmes;
- promote equal representation of men and women in public office and decision-making bodies; and
- promote equal participation of men and women in development planning, decision-making and in the benefits of development and all programmes related to the realisation of economic, social and cultural rights.

Conclusion

In most parts of the world, the full realisation of many of the rights contained in the Covenant remains in the distant future. Limited resources mean that many states cannot fully realise these rights in the short term.

At the same time, it is clear that women often have less access to (the limited) social and economic benefits that are available.

This GC 16 is a timely clarification of states' duty to 'level the playing field' to ensure that women gain equal access to available social and economic goods.

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Danwood Mzikenge Chirwa

Koen de Feyter & Felipe Gomez (eds), *Privatisation and human rights in the age of globalisation,* **Antwerp: Intersentia, 2005**

This book examines, in 11 chapters, one of the most critical and topical issues of our time. The chapters are written by wide range of reputable scholars in international law and human rights.

Privatisation is by no means a new policy. But it has gained currency in recent times because of its extension to the provision of basic services.

Unlike previously, the provision of such basic services as water, health, electricity, social security and food are being privatised.

Analyses abound of the socio-economic and political implications of privatisation. However, these have hardly ever been approached from a human rights perspective.

This book is therefore not only a timely academic exercise offering detailed accounts of the interaction between privatisation and human rights, but also an invaluable tool for policy designers and analysts, state officials, activists and other stake-holders concerned with the issue of privatisation.

The central question it addresses is: "How can the state ensure compliance with its human rights obligations when its role in service delivery changes?"

Several chapters are dedicated to establishing the links and interplay between the privatisation of certain services, such as social security, prisons, water, health care and education, and some specific human rights.

The authors are united in making the fundamental point that privatisation does not affect the role of the state as the primary duty-bearer of human rights.

They therefore emphasise that the state remains duty-bound to respect, protect, promote and fulfil human rights in the context where services are privatised.

Suggestions are made as to how it can fulfil these duties in practice and how individuals can claim their rights when they are threatened or violated in the context of privatisation.

Of the many salient points made in the book, two can be noted here.

The first is that while human rights can be regarded as the most potent tool for ensuring that privatisation of basic services does not adversely affect the welfare of human beings, some of the rights that are directly affected by this policy belong to the so-called second generation of rights, which are not fully recognised in international law and comparative constitutional law.

For example, privatisation of water and electricity concerns some of the most basic needs of society.

However, the rights to water and electricity are rarely recog-nised expressly as separate rights, if at all.

There is therefore an urgent need to improve the normative framework of human rights as well as their enforcement mechanisms so that the issues raised by privatisation particularly, and globalisation generally, are addressed effectively.

The second point relates to the conventional position that human rights only bind the state. The question of privatisation helps to challenge this view. The book amply demonstrates that non-state actors are increasingly performing functions traditionally carried out by the state.

Furthermore, the relationships between the state and non-state actors created by privatisation render the distinctions between private and public spheres so obscure that it is conceptually problematic to draw a fine line between them as far as the application of human rights is concerned.

Thus, if the human rights concerns raised by privatisation are to be addressed effectively, it is critical that serious consideration be given to extending the application of human rights to non-state actors.

Privatisation raises several complex problems that are not fully addressed, if at all, in this book.

As conceded in the introduc-

tory chapter, the meaning of 'privatisation' is very broad. This term, while commonly associated with the complete transfer of a public enterprise to a private service provider, embraces a wide range of methods of private sector involvement in service delivery, including partnerships between public and private institutions, leasing of business rights by the public sector to private enterprises, outsourcing or contracting out of specific activities to private actors and management or employee buy-out.

The human rights implications of these specific forms of privatisation will therefore vary and require different responses from the state.

Secondly, the policy of privatisation is invariably implemented together with such other market principles as liberalisation, deregulation, full-cost recovery measures, performance based management and financial ring-fencing. While some chapters contain some discussion on liberalisation and deregulation, the human rights implications of the other principles are not considered.

It is possible for a public enterprise to operate on a commercial basis without involving a non-state actor in the provision of a public service. This process is called corporatisation.

Municipalities in South Africa, for example, have increasingly resorted to this model of service provision following the failures of the public-private partnership model of privatisation implemented earlier. States also implement these market principles before embarking on full-scale privatisation.

Thus, apart from the accountability concerns, the human rights problems raised when a service is provided privately are the same as when the service is provided by the state on a commercial basis. It is therefore critical to consider the question of privatisation more broadly, in the light of all other market principles used when providing a service, than the authors do in this book.

It must also be pointed out that the question of privatisation cuts across many disciplines. Surprisingly, all contributors to this book have a strictly legal background. As a result, the chapters tend to be too legalistic at times, with less detail on what is actually happening on the ground.

Notwithstanding these observations, this book tackles a contemporary problem from very original perspectives and will no doubt provide an impetus for further research into the area.

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Call for contributions/letters

We welcome contributions and letters relating to socio-economic rights. Contributions must be no longer than 2000 words in length and written in plain, accessible language.

All contributions are edited.

Please email contributions to Sibonile Khoza at skhoza@uwc.ac.za

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