ESR REVIEW

Economic and Social Rights in South Africa

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# Editorial

**Sibonile Khoza**

This is the third issue of the *ESR Review* for 2005.

This issue contains two feature articles, a legislative review, a conference review, a press statement, a bills and policy update, and a book review.

Mark Tushnet challenges the primary objection to the enforceability of socio-economic rights. He begins with the premise that this objection is primarily about the ability of courts to coerce the political branches of government on social policies. He points out that underlying the objection is the assumption that enforcing socio-economic rights necessarily entails granting coercive orders. He provides certain forms of judicial review, including practical examples that may not lead to coercive orders to the political authorities. In particular, he recommends the use of weak remedies for substantive rights, notwithstanding their limitations.

Frans Viljoen discusses the role of national legislation as a source of justiciable socio-economic rights. Viljoen argues that lack of enforcement mechanisms in the international legal system need not be seen as necessarily impeding justiciability in the domestic legal system. He explores three ways of making socio-economic rights enforceable in the legislation at the national level. He argues that the focus of debates about justiciability of these rights should be on the extent to which they are adopted as clear, precise, specific and accessible national laws.

Faranaaz Veriava and Stuart Wilson critique the proposed amendments to the legal framework governing funding and fees in public schools. They criticize the proposed amendments for, firstly, their failure to commit government to achieving the goal of free and quality education and, secondly, their user-unfriendliness. In particular, the amendments propose a formula that is highly complicated for ordinary people.

Edward Lahiff reflects on the National Land Summit recently held in Johannesburg. Lahiff regards the Summit as an historic event for land reform in South Af-

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***Editor-in-Chief***
Sibonile Khoza

***Co-editor***
Lilian Chenwi

***External editor***
Danwood Mzikenge Chirwa

***Contact the Socio-Economic Rights Project***

***Address***
Community Law Centre
University of the Western Cape
New Social Sciences Building
Private Bag X17, Bellville, 7535
Tel (021) 959 2950; Fax (021) 959 2411

***Internet***
www.communitylawcentre.org.za

***ESR Review online***
www.communitylawcentre.org.za/ser/esr_review.php

***Project staff***
Sibonile Khoza: skhoza@uwc.ac.za
Christopher Mbazira: cmbazira@uwc.ac.za
Gaynor Arie: garie@uwc.ac.za
Lilian Chenwi: lchenwi@uwc.ac.za
Bryge Wachipa: bwachipa@uwc.ac.za

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rica. He points out that it came out clearly in support of a comprehensive review of land reform laws and policies, particularly the 'willing seller willing buyer' principle.

The Socio-Economic Rights Project condemns recent evictions in both South Africa and Zimbabwe, which have left many people homeless and vulnerable. We discuss why we regard these evictions as serious violations of the constitutional, legislative and international obligations of the governments of the two countries concerned.

We provide a brief update of bills and policies that have socio-economic rights implications that are currently before various parliamentary structures.

Finally, Lilian Chenwi reviews a book edited by Danie Brand and Christof Heyns and entitled *Socio-economic Rights in South Africa* (Pretoria University Law Press, 2005).

We are grateful to our guest authors for contributions. We trust that you will find this issue insightful and inspiring in the struggle for a better life for all.

# Enforcing socio-economic rights

## Lessons from South Africa

**Mark Tushnet**

Justice Albie Sachs of the South African Constitutional Court has described the primary objection to including socio-economic rights in constitutions as resting on questions about the capacity of courts to enforce these rights. On analysis, the concern over judicial capacity turns out to be about the ability of courts to coerce the political branches of government into creating large programmes of social provision that require significant alterations in the distribution of wealth by means of taxes and transfer payments. That concern, though, rests on the assumption that judicial enforcement of social and economic rights grants coercive orders to the political branches.

### Weak form of judicial enforcement

The creation of a weak form of judicial review – that is, a review that allows courts to declare legislation unconstitutional without issuing coercion orders but still with some substantial effect on the development of policy – questions the assumption that judicial review must involve coercive orders. The South African Constitutional Court (Court) has recently begun to use the weak form of judicial review to enforce socio-economic rights. However, its viability is questionable.

Justice Sachs writes that judges "in general know very little about the

practicalities of housing, land and other social realities". Legislatures are better placed because they hold hearings and get information "from a variety of people with special expertise in particular areas". As Justice Sachs points out, they can engage in practical compromises in contrast to the "all-or-nothing" character of adjudication.

For present purposes, the important point is the assumption that judicial review must take a strong form, with the judges themselves making the trade-offs, determining precisely what level of social support is constitutionally required. But what if review takes a weaker form?

## Types of weak review

Weak-form review comes in several variants. Only those most relevant to the South African experience are discussed here. Firstly, a constitution can enumerate social welfare rights but exempt them from judicial enforcement. For example, the Irish Constitution, like many others, contains a list of social welfare rights, in a part headed Directive Principles of Social Policy. The opening paragraph includes the following:

> The principles of social policy set forth in this Article are intended for the general guidance of the [Parliament]. The application of those principles...shall not be cognisable by any Court under any of the provisions of this Constitution.

Non-justiciable rights are not legally irrelevant. It seems clear, for example, that they can be used as the basis for defences to ordinary tort and contract actions. For instance, they can be used in identifying contract provisions that might be void as against public policy, to interpret ambiguous statutes and even to support interpretations that, without the Directive Principles or similar non-justiciable rights, would not be possible according to accepted standards of statutory interpretation.

In addition, non-justiciable rights can be invoked to explain why the courts refuse to recognise other rights, where their recognition would impair the government's ability to implement – at its discretion – the non-justiciable rights. This point was made in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 (7) BCLR 652 (CC), 2001 (3) SA 1151 (CC), in which the Constitutional Court rejected challenges by property owners to a government decision to provide shelter for people displaced from their homes as a result of floods. The Court's opinion seems influenced by the idea that socio-economic rights deserve some recognition, if only indirectly.

**Non-justiciable rights can be used as the basis for defences to ordinary tort and contract actions.**

Secondly, constitutions can recognise judicially enforceable socio-economic rights, but give legislatures an extremely broad range of discretion regarding the realisation of those rights (or, equivalently, direct that courts defer substantially to legislative judgments). Weak substantive rights are not immune from judicial enforcement. The case of *Government of Republic of South Africa and Others v Grootboom and Others* 2000 (1) BCLR 1169 (CC), 2001 (1) SA 46 (SA) (*Grootboom*) involving the right of access to adequate housing provides a good example of a weak form of review for enforcing a social welfare right.

The remedial order in *Grootboom* has several notable features. For instance, although in form the order simply declared that the Constitution imposed a duty on the government, the rights recognised were not merely declaratory. The order was made in a context where the government did have a programme for building low-cost housing, which implies that the existing plan had to be adjusted to ensure that it contained an element that would provide housing opportunities for the "people in desperate need". Despite the Court's rejection of the "minimum core" requirement, the Constitution's socio-economic rights provisions have some judicially enforceable content.

The Court's order was quite limited in its effects. In particular, under the Court's order, the individual plaintiffs need not receive any relief at all. The government's programme would have been acceptable had it promised to provide some housing for people in desperate need "within a reasonably short time" (para 65). Existing plans did not hold out that prospect. But, according to the Court, it would have been enough to have a programme that had some "end in sight" (para 65).

Treating rights as weak norms is arguably consistent with the Constitution's language, particularly its requirement of reasonableness. The characteristics of weak substantive socio-economic rights include constitutional provisions allowing governments to adopt reasonable programmes to achieve socio-

economic rights, the courts' willingness to find some programmes unreasonable and a remedial system that does not guarantee that any particular plaintiff will receive individualised relief.

Thirdly, social welfare rights can be strong, in the sense that courts will enforce them fully, without giving substantial deference to legislative judgments, whenever they conclude that the legislature has failed to provide what the constitution requires.

The case of *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BLCR 1033 (CC); 2002 (5) SA 721 (CC) (*TAC*) is a good illustration of a strong form of review. There the Court examined in some detail the government's justifications for refusing to make Nevirapine available outside the experimental sites. In my view, the Court's examination of the government's justifications for restricting the drug's availability was quite searching. For example, consider its discussion of the lack of knowledge about long-term effects. Nothing in the judgment indicates that the Court was giving any real deference to the government's judgments.

**Strong remedies provide a better alternative to weak remedies.**

Further, the Court expressed the view that the courts had the power to enter mandatory injunctions directing the government to develop policies that would lead to the "progressive realisation" of social welfare rights (para 105), although it concluded that no detailed injunction was necessary in the Nevirapine case in light of changes in government policy. The Court found no separation of powers barrier to the use of such injunctions to enforce constitutional social welfare rights (para 112).

## Weak or strong remedies?

*Grootboom*'s weak remedy required that government officials develop a comprehensive plan that holds out some promise of eliminating the constitutional violation within a reasonably short, but unspecified, time. Once the plan is developed, the courts step back, allowing the officials to implement it. The best theorisation of weak remedies of this sort is the work of Law Professor Charles Sabel and his colleagues, where they describe how courts in the United States have shaped remedies allowing for government experimentation while setting baselines for the protection of fundamental constitutional rights. They also argue that experimentation can solve problems associated with stronger forms of remedy. (See Charles F Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 *Harv. L. Rev.* 1015, 1062-73 (2004).)

Although examples of the effective deployment of weak remedies are relatively few in number, another characteristic might be judicial encouragement of negotiations among affected parties over the contours of a more detailed plan, which the courts might ratify rather than develop independently.

Similarly, because no-one expects immediate results, the courts would provide only light oversight of the plan's implementation. However, courts and implementing officials would interact. Plaintiffs may periodically complain to the courts that the plan is not being implemented vigorously or according to its terms. The implementing officials may respond to such complaints or may also come to the courts themselves to ask for a modification of the plan in light of the experience they have gained in attempting to implement it.

Sometimes the courts will agree with the plaintiffs and tighten the requirements, setting more precise timetables or identifying specific benchmarks the officials must reach. Sometimes the courts will agree with the officials and loosen the requirements to accord with the realities as they have developed.

Strong remedies provide a better alternative. These are mandatory injunctions that spell out in detail what government officials are to do by identifying goals, the achievement of which can be measured easily, for example, through obvious numerical measures. Such injunctions also set specific deadlines for the accomplishment of those goals. The interaction between the courts and government officials is close, not loose. Instead of relying on plaintiffs to complain, for example, the injunctions may impose reporting requirements, directing that the officials tell the courts periodically how the process of implementing the plan has gone. Typically, the courts will resist easy modification of their orders when officials say that practical difficulties have stood in the way of full implementation.

The conventional wisdom about judicially enforceable social and economic rights rests on the assumption that there are strong

remedies for rights violations. The possibility of using weak remedies for strong substantive rights seems worth exploring.

## Weak remedies for strong substantive rights

We are familiar with the use of strong remedies – damage awards and mandatory injunctions, for example – for violations of first generation civil and political rights. Indeed, the emergence of the weak form of judicial review in systems previously committed to parliamentary supremacy suggests that a fixed point in modern constitutionalism is that first generation rights must be enforced in the courts.

Another fixed point is that modern constitutions must contain guarantees of socio-economic rights. The wave of constitutions adopted after 1989 and the return of constitutionalism to Latin America around the same time added another concern. After 1989, confidence that freedom and democracy would produce social democratic policies was tempered by the concern that they would lead instead to a market society that was too free and unrestrained. Constitutional socio-economic rights would obstruct that development.

Yet the accommodation of a market society to 'constitutionalised' socio-economic rights could not go very far without alienating other important political actors. For example, in South Africa, the inclusion of these rights had to accommodate the interests of the (white) capitalist class, which everyone knew was going to play an important role in the post-apartheid regime.

In addition, the post-1989 constitutions were created in a world with relatively fluid capital, whose reigning ideology was the so-called Washington consensus. That consensus placed substantial constraints on the ability of national governments to implement social democratic policies and, more importantly in the present context, on the ability of the drafters of national constitutions to include robust socioeconomic rights in their constitutions.

In these circumstances, a strategy of protecting strong social welfare rights in the constitution but enforcing them only through weak remedies seems particularly attractive. This is especially so because, at least as the Washington consensus evolved, its supporters came to believe that social provision of basic education and public health made worthwhile contributions to development by subsidising the development of human capital. Can this strategy work?

Law Professor Frank Cross argues that even weak remedies for social and economic rights are unlikely to succeed. His reason is that enforcing rights, even in a weak-form system, requires resources that the beneficiaries of social and economic rights typically lack. A constitution's social welfare provisions might not be enforced at all, even through weak remedies, because no one is available to help the courts run the remedial process. (Frank R. Cross, The Error of Positive Rights, 48 *UCLA L. Rev.* 857 (2001).)

These concerns about the 'support structure' for social and economic rights can be alleviated a bit. The beneficiary groups need not be the ones providing the support structure. Civil society can sometimes supply it. For example, *TAC* was litigated in the name of the Treatment Action Campaign, described by some as South Africa's most well-organised civil society group.

In addition, remedies can be structured to reduce the resources the beneficiary groups must deploy. *Grootboom* required the representatives of the homeless to come back to court to complain if the government's plan was, in their judgment, inadequate. The court might instead have required the government to report in six months, and at intervals thereafter, on its plans and their progress. True, the homeless would have to come to court to point out whatever deficiencies there might be in the government's plans and progress, but the burden on them is smaller than it was in the remedy the court developed.

These observations about civil society may be insufficient to allay all reasonable concerns. Civil society organisations (CSOs) need to gain domestic legitimacy. To some extent they can do so from their activities themselves, as they claim to be working to enforce the nation's constitution. Yet, sometimes CSOs have stronger non-domestic than local support, which might undermine their effectiveness. They might be thin, leading to essentially random interventions by the courts (which might, however, be a signal to other organisations about the possibility for new mobilisations). The thicker the world of CSOs, the more systematically issues will be presented to the courts, but the more likely as well will decisions have, at least cumulatively, a significant fiscal impact.

Finally, the distribution of CSOs in society might be skewed in just the

way that other social institutions are, thereby leading to the reproduction in NGO activities of the limitations of more obviously political organisations.

## Conclusion

There are clear obstacles to the effective enforcement of socio-economic rights, even through weak remedies. Another difficulty is that the courts have some un-stated sense of what an appropriate rate of realisation would be. They may come to find that weak remedies are too weak. Judges may well come to have such a sense. What they seek is the realisation of the social and economic rights.

What are judges likely to do if they observe that nothing is happening as a result of their weak remedial orders? One possibility is that they will begin to strengthen the orders, moving in the direction of converting strong rights protected by weak remedies into strong rights protected by strong remedies.

The same course of action may also be likely if judges observe that almost nothing is happening – that is, if the rate of realisation seems too slow. This may be a fair description of the process by which weak remedies aimed at eliminating desegregation in the US became strong.

The Constitutional Court's forays into the enforcement of socio-economic rights have opened up important and previously unknown perspectives on the relation between rights and remedies. Exploring the possibilities of weak-form remedies for strong-form rights seems an important project for legal theorists and litigators.

**Mark Tushnet** is a Professor of Constitutional Law at Georgetown University (US)

# National legislation as a source of justiciable socio-economic rights

**Frans Viljoen**

As poverty is recognised as the 'big issue' of our time, those working with human rights increasingly focus on socio-economic rights. Much of the debate in this area concerns itself with the question whether socio-economic rights are 'justiciable'.

## Justiciability

Calling the dispute about a right 'justiciable' implies something about the claim, about the setting in which it may be resolved and the consequences of successfully relying on it.

To be 'justiciable', a claim must be based on the alleged infringement of a subjective right. This claim has to be determined by a court or some other judicial body, or by a quasi-judicial body sharing the main features of a court (such as a United Nations human rights treaty body). If a violation of the subjective right is found, a court (or quasi-judicial body) must be able to find a remedy to redress (or correct) the violation.

'Justiciability' should be distinguished from the implementation of a court's decision. Once a court grants a remedy, it still needs to be implemented or given practical application. A court may, for example, declare that people are entitled to basic housing, but these people remain without houses if the government does nothing to give effect to that order.

The issue of justiciability of socio-economic rights is often posed as a question of international (human rights) law. It is most noticeably raised in debates about the feasibility of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) allowing for individual communications against states. It is often questioned due to the lack of implementation and enforcement at this level.

By implication, it would seem as though justiciability at the national level is also regarded as problematic. However, this does not account for important differences between these two levels. Enforcement at the international level is much weaker than at the national level. At the national level, a court's enforcement order is backed up by domestic institutional force. At the international level, enforcement primarily takes the form of 'naming and shaming'

and is only exceptionally bolstered by more concrete measures such as economic sanctions or the threat of institutional expulsion.

Therefore, problems associated with 'justiciability' in the international legal system need not be seen as necessarily impeding justiciability in the domestic legal system.

In my view, the justiciability of socio-economic rights at the international level is, in any event, a non-issue, at least compared with justiciability at the 'domestic' level. The main question is whether such rights are 'justiciable' within the legal system of each country.

## Experiences at the national level

Socio-economic rights may be made justiciable in the positive law of a particular country in three main ways: first, through a constitutional reference to international treaties that contain socio-economic rights; second, as specific socio-economic rights included as justiciable guarantees in the Bill of Rights of the Constitution or as Directive Principles of State Policy (Directive Principles); and third, through domestic legislation.

## Constitutional reference to international treaties

Where an international treaty is referred to in a constitution, mostly as part of the Preamble or in a provision about the constitutional status of international law, justiciability will largely depend on the general approach taken to the relationship between international and domestic law in that particular country.

It has long been accepted that, according to the dualist theory, which views international and national law as two separate systems, specific legislation must be adopted before international treaty provisions can be invoked before domestic courts. However, very few states adopt such legislation.

According to the monist theory, which views international and national law as part of a single, unified system, international treaties are regarded as becoming automatically part of national law. However, in practice, these treaties are rarely invoked effectively before national courts. Even when they are invoked, courts may still require that specific legislation be adopted. This happened, for example, in the case of Hissène Habré, where the highest Senegalese court found that Habré could not be prosecuted for acts of torture that were not specifically criminalised under Senegalese law, despite Senegal being a state party to the Convention against Torture (Case (Arret) no 14 of 20 March 2001, Cour de Cassation).

**International treaties are rarely invoked effectively before national courts.**

## Constitutional inclusion

As noted, the inclusion of socio-economic rights in constitutions comes in two forms: as part of a Bill of Rights (directly enforceable in courts) and as Directive Principles (as mere guides to policy and law making or interpretation of the other constitutional provisions and laws). In principle, a Bill of Rights contains subjective rights, while Directive Principles contain objective legal norms that still need to be converted into subjective claims.

Examples of justiciable socio-economic rights are found in South Africa's Constitution. Directive Principles are recognised, for instance, in those of Indian and Uganda.

Today, most national constitutions provide for some socio-economic rights. Only a handful of states in Africa – notably Botswana, Nigeria and Tunisia – do not explicitly guarantee any socio-economic rights.

To substantiate the constitutional proliferation of socio-economic rights, reliance may be placed on African constitutions from four (colonial) legal traditions (Anglo-American Common Law, Francophone Civil Law, Lusophone Civil Law and Muslim Law-based Arabophone countries). Comprehensive protection of socio-economic rights is found in all four, for example, in Algeria (arabophone), Benin and Burkina Faso (francophone), Cape Verde and Mozambique (lusophone), and South Africa and Ghana (anglophone).

Despite the unequal levels of constitutional protection, some rights – in particular the rights to education and to form trade unions – are almost universally provided for in African constitutions. Examples are the constitutions of Algeria (article 53), Benin (art. 27), Cape Verde (art. 77), Democratic Republic of Congo (art. 23), Egypt (art. 18), Malawi (art. 25), Namibia (art. 20), South Africa (arts. 23 and 29), Senegal (art. 8), Uganda (art. 30) and Cameroon (the Preamble).

They are extensively provided for in most Latin American constitutions, for example those of Chile (art. 19) Colombia (arts. 56, 67 and 70), Costa Rica (arts. 60, 61 and 78) Gautemala (arts. 71, 74, 94 and 100) and Uruguay (arts. 57, 70 and 71).

The Constitutions of Ghana, Namibia, Nigeria, Uganda and Zim-

babwe recognise socio-economic rights as part of Directive Principles. However, the Ghanaian and (to some extent) Ugandan Constitutions dispel the idea that constitutionalised socio-economic rights and Directive Principles are incompatible with each other, by having them alongside each other.

The Indian experience demonstrates that Directive Principles may, in practice, become justiciable. The Indian Supreme Court held, in *Unni Kkrishnan v State of Andhra Pradesh* (1993) 1 SCC 645 (SC), that the Directive Principle that compulsory education should be provided to children up to the age of 14 had matured into a fundamental right.

**National legislation is the most direct way of making rights justiciable.**

Although socio-economic rights are sometimes made justiciable at the constitutional level, very few cases dealing with claims based on these rights have been brought before courts. South Africa and to some extent Benin, are exceptions.

## Inclusion in national legislation

Constitutional reference and inclusion of socio-economic rights poses uncertainties and obstacles. Rights in constitutions are usually vaguely formulated. This fact leads to the argument that courts are given too much power to interpret these rights, that they take over the functions of parliament in the process and so interfere with the principle of 'separation of powers'. The process of accessing the right court is also often very burdensome. These problems are minimised if socio-economic guarantees are included in national legislation.

Indeed, under the ICESCR, one of the primary obligations of states is to adopt 'legislative measures' to give effect to the Covenant rights (article 2(1)).

Concluding its examination of Benin's initial report, the Committee on Economic, Social and Cultural Rights (CESCR) expressed its concern "at the fact that, although the 1990 Constitution guarantees certain economic, social and cultural rights, no specific law, apart from the 1998 Labour Code, has been adopted to give effect to the rights guaranteed by the Covenant". This underscored the importance of specific, domestic legislation (para 9, Concluding Observations, 2002).

In its General Comment No 9 (1998), the CESCR also emphasised that it is desirable that socio-economic rights should be translated into national law, thus allowing that individuals could directly invoke them in national courts.

Domestic legislation is a relatively accessible source of possible redress or a remedy. It provides an important first port of call for the realisation of socio-economic or cultural rights. It may be invoked before any court, significantly increasing the immediate potential of access to a remedy.

Legislation tends to be more precisely formulated than constitutional standards and international treaties, thus overcoming the argument that vagueness implies non-justiciability. To the extent that courts keep their decisions about the 'fulfilment' of socio-economic rights within the interpretative confines of national law, allegations about political legitimacy or separation of powers are also less likely to arise.

National legislation remains the most accessible and direct way of making rights justiciable. Given their relative precise content and the intimate link to a legitimate national consensus, legislation circumvents most of the obstacles raised about justiciability, such as 'separation of powers' and 'vagueness' arguments. As Cottrell and Ghai point out (in Yash Ghai and Jill Cottrell (eds), *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights*, 2002 at 88), by enacting socio-economic guarantees as subjective rights justiciable socio-economic rights will at least create a "deficit in democracy and accountability".

Not all legislation dealing with socio-economic benefits will give rise to justiciable rights as understood here. A distinction may usefully be drawn between subjective rights ('the right to...') and legislative commands ('The Minister shall...') embodied in legislation. A breach of the former entitles the individual to approach a court directly, without further legislative action being required, for a remedy. Yet the latter, such as a legislated duty on states to adopt a housing scheme, does not necessarily give rise to a directly enforceable right, but rather requires the adoption of (mostly legislative) measures by the government.

Legislative commands (just like constitutional commands) may, however, also be the basis of the review of a governmental policy or programme.

## Socio-economic rights as subjective rights in national law

Socio-economic rights are protected in several pieces of South African

legislation. For example, the Extension of Security of Tenure 62 of 1997 (the Act) protects a range of socio-economic rights. It primarily protects the subjective right of the occupier of land on which he or she resided and used on or after 4 February 1997, to "have the right to reside on and use" that land and "to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly" (section 6(1)).

Under certain conditions, an occupier "shall have the right to security of tenure", to "receive bona fide visitors at reasonable times and for reasonable periods", to "family life in accordance with the culture of that family", "not to be denied or deprived of access to water" and "not to be denied or deprived of access to educational or health services" (section 6(2)(a), (b), (c), (d) and (e)).

Under United States federal legislation (Consolidated Omnibus Budget Reconciliation Act of 1985, Section 9121 – Responsibilities of Medicare Hospitals in Emergency Cases), hospital emergency departments are required to screen all patients to determine if they have an "emergency medical condition" (section 1867(a)). If a patient has an emergency medical condition, or is in labour, the hospital must provide either "such treatment as may be required to stabilise the medical condition or to provide for treatment of the labor', or, under certain conditions, for "transfer of the individual to another medical facility". Anyone who proves personal harm as a direct result of a hospital's violation of a requirement may claim for damages.

One may derive from this legislation, including the threat of a claim for damages, a subjective right to a minimum level of medical care in emergency situations, or the right not to be refused medical treatment.

## Conclusion

Justiciablity at the constitutional level is important as a fundamental guarantee against which legislation may be tested, and as a beacon towards which national laws should develop.

However, justiciable national legislation (rather than international treaties or constitutional rights) remains an elusive 'first prize' in the quest to make these rights readily available and accessible to everyone.

In South Africa, the relative small number of socio-economic cases brought so far highlights the need for more accessible routes to attain social justice. Here and elsewhere, the focus of debates about justiciability of socio-economic rights should therefore be on the extent to which they are adopted as clear, precise, specific and accessible national laws.

Increasing domestic legislative assertion of socio-economic rights (especially as subjective rights but also as legislative commands) will underscore the justiciability of these rights, and will contribute to filling the jurisprudential void surrounding their interpretation.

**Frans Viljoen** is a Professor of Law and senior researcher in the Centre for Human Rights, University of Pretoria

**For reprinted versions of all African states' human rights provisions, see Christof Heyns (ed), *Human Rights Law in Africa*, vol. 2 (2004).**

# A critique of the proposed amendments on school funding and school fees

**Faranaaz Veriava and Stuart Wilson**

The Department of Education (Department) recently released its amendments to the legal framework governing fees and funding in public schools. The purpose of the amendments is to ensure that public schools are accessible to South Africa's poorest learners.

These learners and their parents experience many difficulties with regard to school fees. Despite their legal entitlement to relief in terms of the Exemption from Payment of School Fees Regulations (1998),

many learners are denied access to education because their parents are unable to pay school fees.

Media reports and certain civil society organisations' work, such as that of the Education Law Project of the Centre for Applied Legal Studies, Alliance for Children's Entitlement to Social Security (ACESS) and the Global Campaign for Education, have highlighted some of the difficulties faced by poor learners and their parents. According to these sources, some children of non-fee-paying parents experience discrimination by having report cards and transfer cards unlawfully withheld. They are prevented from writing public examinations. Some are 'named and shamed' (embarrassed) in school assemblies and labelled as children of delinquent parents who are un-willing to pay their dues to the school.

Parents are also sued for outstanding schools fees. Consequently, they often have their household goods attached in respect of debts for which they are not liable. It would seem as though these experiences have swayed the Department to amend the school funding regime.

**The current legal framework has failed to protect poor learners and their parents.**

In 2003, the Department released its report to the Minister, entitled *Review of the Financing, Resourcing and Costs of Education in Public Schools*. After receiving several submissions critiquing the report's underlying assumptions and conclusions, it subsequently issued its Plan of Action for Improving Access to Free and Quality Basic Education (Plan of Action). To give effect to the Plan of Action, the Department introduced a series of draft amendments to sections of the South African Schools Act of 1996 (the Schools Act) and the National Norms and Standards for School Funding (Norms and Standards). It also proposed a complete overhaul of the Exemption of Parents from the Payment of School Fees Regulations (Regulations) and called for public comment.

## The current legal framework

Current state funding for schools distinguishes between personnel and non-personnel funding. State provisioning for non-personnel expenditure for schools is guided by the principles set out in the Norms and Standards. This expenditure is allocated by ranking schools from the poorest to the least poor and funding them according to their ranking. Currently, each provincial Department of Education (provincial Department) ranks the schools in its particular province according to a number of poverty indicators.

Notably, non-personnel expenditure constitutes only 8–10% of school budgets. This means that only a very small portion of funding for basic education is actually targeted towards redress. The balance of state spending on schools is directed towards the payment of personnel. This continues to favour historically advantaged schools since the richer schools attract and can afford better-qualified teachers.

According to the Regulations, once state allocations to schools are made, deficiencies in basic provisioning and personnel in particular schools can only be ameliorated by charging school fees or through fundraising.

The legal framework attempts, in two ways, to alleviate the financial burden of charging school fees on parents who cannot afford to pay them. Firstly, the Schools Act provides that a school may only charge fees when a majority of parents attending the annual budget meeting adopts a resolution to do so. Where a decision to charge school fees is taken, parents must also determine the amount to be charged.

Secondly, the Regulations provide for a means test for the exemption of very poor parents from paying school fees. A school must fully exempt parents whose annual incomes are less than 10 times the annual school fee. It must partially exempt those whose annual incomes are less than 30 times but more than 10 times the annual school fee.

Although the School Funding Norms suggest that partial exemptions are granted on a sliding scale approach, their value is legally subject to the discretion of the school governing body (SGB).

Despite the existence of these mechanisms, the legal framework has failed to protect poor learners and their parents in a context where schools have insufficient funds to adequately run them and are therefore determined to extract as much money as possible from the parents.

## The proposed amendments

In general, the proposed policy framework creates a complex two-tier arrangement that distinguishes between *fee-paying* schools and

'*no-fee*' schools. The key features of this arrangement are:

1. *A shift from provincially to nationally determined quintiles.* The rationale for this is that since poverty is unevenly spread in the provinces, setting quintiles nationally seeks to ensure that "equally poor learners across the country will be subject to the same pro-poor targeting" (Plan of Action, p 14).
2. *The establishment of national per learner funding norms and minimum standards.* This will see the national department setting the amount that provinces ought to allocate per learner in each quintile. The national department also sets an 'adequacy benchmark', which it considers the minimally adequate amount for the realisation of a learner's right to a basic education. According to the current national norms, for example, in 2006 the poorest quintile in schools ought to receive an allocation of R703 per learner and the wealthiest quintile, R 117. The adequacy benchmark for 2006 is set at R527 for all quintiles. However, provincial departments will not be required to adopt these guidelines, as they cannot be compelled to make adequate budgetary allocations. This creates a loophole in the enforcement of the 'no fee' principle since the proposed framework suggests that, where no adequate allocation is reached, 'no-fee' schools can charge fees.
3. *The establishment of 'no-fee' schools.* School fees will not be charged in the poorest schools that receive an adequate school allocation from government. Where the allocation from the provinces is lower than the adequacy benchmark, "then a plan would be drawn up to deal with the problem". The Minister will determine which quintiles will be considered 'poor' and, therefore, fee-free. The amendments also suggest that the removing of school fees will only occur in grades R to 9. Thus, learners in grades 10 to 12 will continue to pay school fees despite attending a school considered to be poor.

**The amendments prohibit a school from attaching a parent's home unless alternative accommodation is made available to the parent.**

Where school fees continue to be charged, the amendments seek to improve the exemption policy and strengthen anti-discrimination provisions protecting poor learners. Significant changes include:

- Prohibiting a school from charging anything in excess of a single compulsory fee, subject to strict exemptions criteria. Among other things, this will effectively outlaw registration fees.
- A clear and unambiguous elucidation prohibiting the more pernicious forms of discrimination against children of non-fee paying parents. In terms of the proposed amendments, section 41(5) of the Schools Act states: "a learner has the right to participate in the total school programme despite non-payment of compulsory school fees by his or her parent and may not be victimised in any manner, including, but not limited to, (a) suspension from classes; (b) verbal or non verbal abuse; (c) denial of access to cultural, sporting or social activities of the school; or (d) denial of a school report or transfer certificates".
- Placing an onus on a school to prove that it has implemented the regulations before taking legal action against a parent.
- Prohibiting an SGB from attaching a parent's home unless alternative accommodation is made available to the parent.
- Extending the scope of automatic exemptions to include not only orphans and learners in some form of foster care, but also learners whose parents receive child support grants linked to them. In the past, the national department advised parents to use their child support grants to pay for school fees.
- Devising a new formula for the calculation of a partial exemption that requires an SGB to take into account the number of children for whose fees a parent is responsible and also limiting the discretion of an SGB in the calculation of the amount of the partial exemption.

## A critique of the proposed amendments

The proposed date set for the implementation of this new framework is the beginning of 2006.

While the proposed amendments are generally welcomed, as they seek to eradicate the problems currently faced by poor learners and their parents, they are, however, not without defects.

## No free education

The proposed amendments do not introduce a system of free education in South Africa. Although a reading of the draft amendments suggests a move toward 60% exemption of parents from paying school fees, they do not explicitly commit government to achieve the goal of free and quality education, as the Plan of Action did.

Thus, the proposed framework does not meet the government's obligations in terms of international law, which requires the introduction of free education at the very least during the primary education phase. Article 28(1)(a) of the Convention on the Rights of the Child 1989 (which South Africa ratified on 16 June 1995) guarantees free and compulsory education. Article 28(1)(a) obliges states parties to make secondary education "available and accessible to every child, and to take appropriate steps such as the introduction of free education and offering financial assistance in the case of need".

Also, Article 11(3)(a) of the African Charter on the Rights and Welfare of the Child, which South Africa has ratified, requires states parties to take all appropriate measures to "provide free and compulsory basic education".

According to Fiske and Ladd (in Linda Chisholm (ed), *Changing Class: Education and Social Change in Post-Apartheid South Africa* (2004)), while South Africa's school enrolment rates are high by middle-income country standards, they are declining, especially in grades 10 to 12, where the school fee burden is at its greatest. The exclusion of these grades from 'no-fee' status is particularly worrying. Limiting access for poor learners in grade 10 to 12 severely retards their chances of securing decent jobs or further education.

Furthermore, if media coverage of fee-based exclusions from schools is anything to go by, then the charging of schools fees seriously inhibits not only school enrol-ment but also school attendance. Therefore, school fees continue to represent a significant barrier to access to education.

**The amendments do not explicitly commit the government to achieve the goal of free and quality education.**

## User-unfriendliness

At best, the proposed framework appears to be user-unfriendly to the communities it seeks to serve; at worst, it will continue to provide opportunities for recalcitrant schools and SGBs to abuse the laws.

The proposed framework does not explicitly define which class of schools will no longer be allowed to charge school fees. The Minister must determine this on an *ad hoc* basis, guided by a school's poverty ranking. The Department envisages that information on school poverty rankings will be made available through the *Government Gazette* and on the internet. The poorest households, who are the intended beneficiaries of the 'no-fee schools', are unlikely to have access to these sources of information.

The task of informing a parent whether or not a particular school in a particular year is permitted to charge fees will therefore fall to the Provincial Departments and schools themselves. These two agencies have been notoriously unreliable in informing parents of their rights in the past.

Furthermore, as they stand the draft amendments still appear to allow 'no-fee' schools to charge fees if they do not receive the adequate allocation to which they are entitled.

The Provincial Departments often fail to pass on adequate budgetary allocations to schools and the National Department has no power to enforce spending on specific classes of schools at a specific level. It can only establish 'guidelines' and then 'work together' with provincial departments to ensure adequate allocations.

This potentially creates a loophole in the enforcement of the principle of fee-free schools that could render the principle meaningless to most poor parents, as they are unlikely to know whether a school has actually received its pro-poor allocation in a particular year.

The proposed formula for calculation of an exemption requires that SGBs take into account the number of children a parent has at a school or schools. It also removes the discretion of SGBs in the calculation of the total of partial exemption. But the new formulae are ridiculously convoluted. For example, the proposed formula for calculating a parent's entitlement to a full exemption is as follows:

$$\left[\frac{(E=F+T+fyo)}{(Y+yo)}\right] / [I] \geq [10\%]$$

This is the proposed formula at its simplest. The Draft Regulations define what the different letters stand for as follows:

E per learner expenditure by parent in a school;
F annual school fees charged to any parent in the school;
T additional monetary contributions explicitly demanded by the school;
f the lowest of the following three values; first, the adequacy benchmark for the current year, second, the average fee charged to the parent in the school, and third, the average non-discounted annual fees charges in other schools;
yo the number of learners in other schools;
Y the number of learners for which a parent is charged annual school fees in the current school;
I combined gross income of parents; and
10% is of the gross income spent on education.

Apparently, the formula is highly complicated. The more children you have at a school, the more difficult it becomes.

Parents currently struggle to calculate their eligibility for an exemption with the current formula and are, therefore, likely to be baffled by the proposed formula. They are likely to rely on schools to inform them of the extent of the partial exemption.

Even if school governors and principals can be expected to unpack the proposed formula, they are, sadly, likely to hide behind the complexity of the formula in order to charge parents more than they are required to pay.

## Conclusion

These are some of the key concerns regarding the proposed amendments.

At present, the Education Amendment Bill is before parliament together with submissions from various organisations. The media should continue reporting on the difficulties experienced by poor learners and their parents once the proposed framework is adopted and implemented.

Similarly, civil society institutions should continue to advocate for the end goal of free education, while at the same time educating communities of their rights within the new system.

**Faranaaz Veriava** is the head of, and **Stuart Wilson** a researcher in, the Education Law Project, Centre for Applied Legal Studies (CALS), University of Witwatersrand.

**The submissions of CALS on the proposed amendments are available at www.law.wits.ac.za/cals**

# Will the Land Summit deliver a more radical land reform programme?

**Edward Lahiff**

The National Land Summit held in Johannesburg in July 2005 undoubtedly marked a significant moment in the history of land reform in South Africa. But its significance will depend on the ability of the various role-players, particularly the state, to turn words into actions.

Organised by the Department of Agriculture and Land Affairs (Department), the Land Summit brought together a wide range of interests, including different spheres of government, large and small farmers, landless people, traditional leaders, farm workers, non-governmental organisations, political parties and the banks for a frank reflection on the state of land reform.

Calls for the Summit came mainly from the Landless People's Movement and other activists in the land sector who have been critical of the pace and direction of land reform, raising the possibility of land invasions if their needs are not met.

## Key themes

Issues considered included the need for a more 'people-driven' process, restrictions on foreign land ownership, a greater role for local government and the importance of land for household food production. Attention was paid not only to the policy framework, but also to the

lack of capacity within key institutions, such as the Department.

Four key issues dominated the Summit – the method of acquisition of land, evictions from farms, support to new farmers and the re-opening of the land claims process. All of these pose major challenges for the state and other stakeholders and all must be addressed if the Summit is to deliver tangible results.

Notably absent from the deliberations, however, was the controversial matter of tenure reform in the communal areas of the former homelands.

### 'Willing seller, willing buyer'

The headline issue, announced by Deputy President Mlambo-Ngcuka in her opening address and endorsed by most delegates, was the decision by government to review its 'willing seller, willing buyer' policy. This *laissez-faire* approach has been a defining characteristic of land reform in South Africa since 1994, and is widely blamed for the slow pace and high cost of reform to date. Exactly what will replace it remains to be seen, but there is little prospect of large-scale expropriations at this stage as some commentators seem to imagine.

The clear acknowledgement by Government that past policies have been inadequate, and that a new approach to land and agrarian reform must be found, suggests that a new and more positive relationship between government and this key constituency is possible. The notable exception to the emerging consensus is the commercial farming lobby, which has much to lose from the switch from the 'willing seller, willing buyer' approach

The latter approach gives landowners an effective veto over the land reform process, as landowners themselves decide whether to make their land available and at what price. The switch to a more proactive and aggressive policy of land acquisition – with the selective use of expropriation – would compel owners to negotiate with the state. This does not imply the abandonment of 'the market', or the payment of market-related prices.

Indeed, the South African land market offers many opportunities to the state if it were to become a more effec-tive market player. It does, however, mean that the market would cease to be the only determinant of land reform and become just one of a range of available options.

**Farm dwellers with insecure tenure rights present a strong case for land reform but have been severely neglected to date.**

Delegates were vocal in their support of limitations on farm sizes, and on the need for a 'social obligation' clause in the Constitution that would compel landowners not using their land to forfeit it to the state for redistribution.

### Insecure tenure rights and farmer support

Farm dwellers with insecure tenure rights present a strong case for land reform, but have been severely neglected to date. Strong support was expressed at the summit for a moratorium on all evictions from farms pending the review of relevant legislation and policies. A more interventionist approach by the state would create the possibility of securing land – for both housing and productive purposes – on or close to the farms where people live.

The lack of 'post-settlement' support to land reform beneficiaries has been a recurring complaint since the programme began and is widely blamed for the under-performance of many land reform projects. The Summit made a strong call for more resources for beneficiaries – in terms of training, implements, loans and mentoring – and for greater co-operation at local level between the Department, which implements land reform, and provincial departments of agriculture, which are largely responsible for farmer support.

### Land restitution programme

The restitution programme, which deals with historical land claims, was criticised for its narrow scope – particularly the exclusion of people who lost land prior to June 1913 and those who failed to lodge their claims by 31 December 1998. While the 1913 cut-off is stipulated by the Constitution, the 1998 cut-off is seen as more arbitrary and is believed to have excluded many people with potentially valid claims.

Government is clearly resistant to reopening the claims process, but pressure from groups who feel they were unfairly treated will certainly continue and government may be obliged to make at least some concessions in this regard.

### Binding commitments or mere recommendations?

Resolutions on these and a range of other issues were passed in the

closing session of the Land Summit, with opposition coming only from the representatives of white commercial farmers. As early as the post-summit press conference, however, government ministers and senior officials in the Department were already talking down the importance of these resolutions, preferring to see them as 'recommendations' rather than as binding commitments.

## Concluding remarks

The Land Summit has clearly demonstrated that there is widespread support for a comprehensive review of land reform policies. The jettisoning of the 'willing seller, willing buyer' approach opens up the possibility of a more rational, better coordinated and more equitable approach. A realistic alternative to this principle requires that a number of key elements are addressed:

- abolishing the effective veto enjoyed by landowners over the land reform progress;
- drawing up practical guidelines for 'just and equitable' compensation in cases of expropriation; and
- proactive engagement by national government with landowners, the landless, and the range of state and non-state agencies capable of playing a supporting role in land reform.

An important first step would be an unambiguous message from Government that it is committed to reaching the land reform targets that it has set and that it will make use of a range of instruments to bring this about. In other words, it must serve notice on landowners that the veto powers they have enjoyed over land reform up to now have been revoked and that it is in their interest to find a negotiated solution to large-scale land redistribution.

For this to be convincing, and effective, Government must address the question of resources, both human and financial. It is unlikely that the current staff complement of the Department – in terms of numbers and skills – is sufficient to manage a large-scale, proactive programme of land reform.

In addition, the budget for redistribution has been allowed to stagnate and, regardless of the methods of land acquisition to be used in future, will need to be increased.

Furthermore, Government must make a realistic assessment of the legal instruments at its disposal, and develop procedures to allow these to be used effectively (with legislative amendments where necessary). Policies and procedures that cause lengthy delays in the processing of land reform applications, and release of funds, and that discriminate against very poor applicants requiring small areas of land for 'subsistence' purposes, will also require review. The state must equip itself with the resources and policies necessary to be an effective agent of pro-poor land reform.

The lessons of the past eleven years show that the free market and a *laissez-faire* state cannot deal effectively with all these elements. The Constitution places a clear responsibility on the state to bring about land reform and no other institution in South Africa can possibly play this role.

The challenge is not to abandon 'the market' entirely, but to end the *market fundamentalism* that has characterised land policy to date; to bring the state back in to play the central and proactive role that most stakeholders believe it should and of which only it is capable.

The months ahead will reveal whether the various stakeholders, both in government and in civil society, are capable of turning the sentiments expressed at the Land Summit into actions that will really benefit the rural poor and landless.

**Edward Lahiff** is a Senior Researcher in the Programme for Land and Agrarian Studies (UWC).

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Please visit our website at:
http://www.communitylawcentre.org.za/ser/esr_review.php

# Evictions in South Africa and Zimbabwe leave many people homeless and vulnerable

Recent evictions in South Africa and Zimbabwe have raised serious concerns regarding the right to adequate housing in these countries.

The practice of evictions, with or without judicial backing, has increased at an alarming rate in Africa and elsewhere, despite the recognition in international law of the obligation of states to refrain from depriving people of access to housing.

Large numbers of people have been forced to leave their homes, land and communities as a result of, for example, urban renewal, development projects, environmental protection measures, slum-clearance operations and health and safety measures.

**Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights.**

According to the United Nations Committee on Economic, Social and Cultural Rights' General Comment 7 (1997, para 16), evictions should not result in individuals being rendered homeless or vulnerable to the vio-lation of other human rights (as the right to be protected against forced eviction is part of the broader right to housing). However, the recent evictions in South Africa and Zimbabwe have left many people homeless in violation of their right to adequate housing, and vulnerable to the violation of their other human rights.

The evictions in Bree Street, Johannesburg (in July 2005), rendered most residents (the evictees) desperately in need of a home, which is a serious breach of South Africa's constitutional duty to "respect, protect and fulfil" (s7(2)) people's right of access to adequate housing (s26(1)). Provision for alternative accommodation was made only for the "elderly and infirm". The rest had to find their own accommodation. While the decision to meet the housing needs of the elderly and infirm is welcomed, it is disturbing that other vulnerable groups (such as women in general and young single mothers) were left desperately in need of a roof over their heads.

Although there was a seven-month period between the issuance of the eviction order and its implementation, during which the illegal occupants could have looked for alternative accommodation, not everyone was in the position to do so without assistance from the state. Section 26(1) of the South African Constitution places, at the very least, a negative obligation on the state and all other entities and persons to desist from impairing the right of access to adequate housing (*Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (1) BCLR 1169 (CC), 2001 (1) SA 46 (CC), (para 34).

Further, it is a well-established legal principle that people should not be evicted until alternative accommodation is made available to them. This principle was underscored in the recent case of *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (8) BCLR 786 (CC), 2005(5) SA 3 (CC).

Likewise, recent evictions in Zimbabwe have left hundreds of thousands of people, mostly the economically disadvantaged and destitute, without shelter, food or water. The Zimbabwean government launched a clean-up operation of its cities in May 2005 (known as Operation Murambatsvina) with the intent of destroying what it termed "illegal" vending sites, structures, informal business premises and homes. The evictions have been marked by violence and violations of a range of rights including the right to adequate housing, the right to life, freedom from torture, freedom of movement, the right to education, the right to work and the right of access to health care.

Zimbabwe is a party to major international human rights instruments that guarantee the right to housing (property). They include the

International Covenant on Economic, Social and Cultural Rights 1966 (article 11(1)) and the African Charter on Human and Peoples' Rights 1981 (article 14), which it ratified on 13 May 1991 and 30 May 1986 respectively.

In addition, the Constitution of Zimbabwe (Chapter 3, Declaration of Rights) guarantees a range of civil and political rights, which have also been infringed upon as a result of the evictions.

**The Socio-Economic Rights Project strongly condemns these evictions and the manner in which they were carried out.**

Having regard to its international and constitutional obligations, the Zimbabwean government has the obligation to give adequate notice before it can carry out evictions, to follow the due process of law and to make alternative plans to house those who would be rendered home-less or with no income as a result of the planned evictions (General Comment 7 (1997), para 15).

Interestingly, section 32 of the Regional Town and Country Planning Act 1976, provides that a 30-day notice period must be given before an eviction can be carried out.

The recent evictions ignored all these requirements. They were carried out indiscriminately without giving adequate and reasonable notice to (all of) the affected persons.

Although some of those affected have now been re-located to a large camp more than 20km from the city, their living condition remains deplorable. There is no infrastructure in place and plastic sheets are being used as shelter, a condition that some have described it as "a humanitarian disaster" or as living "worse than animals".

The Socio-Economic Rights Project of the Community Law Centre strongly condemns these evictions and the manner in which they were carried out.

Both governments have constitutional and international duties to respect human rights generally and the right to adequate housing in particular. Such evictions have no place in modern societies based on human dignity, equality and democracy.

**The Socio-Economic Rights Project endorsed a press statement in this regard developed by the Centre for Housing Rights and Eviction which is also available online <www.cohre.org>**

# Bills and policy update

**The Education Laws Amendment Bill (B23-2005)**

This Bill deals with the way in which disciplinary proceedings against learners have to be conducted, school funding, recovery and exemption from fees and classification of fees, the sale of moveable assets and educator appointments. Submissions have already been presented on the Bill, which would amend the South African Schools Act (SASA), 84 of 1996 and the Employment of Educators Act (EEA), 76 of 1998. Minutes of the presentations made to the Portfolio Committee on Education are at www.pmg.org.za/pro-grammes/hearings.htm. The Bill will be discussed and voted on at the 6 and 13 September meetings. Copies of submissions can be requested from Steven Morometsi, smorometsi@parliament.gov.za, 021 403-3740 No more submissions may be made on this Bill.

**Older Persons Bill (B68B-2003)**

This Bill seeks to maintain and increase the capacity of older persons to support themselves and to contribute to the well-being of those around them. Accordingly, the Bill identifies older persons as a vulnerable group in need of protection. Further, General Comment 6 already paved the way for the recognition of Older Persons. The Bill is thus an overdue effort by South Africa as it strives to meet international norms. The Bill will amend the Aged Persons Act 81 of 1967.

Oral and written submissions were made to the Portfolio Committee on Social Development on Older Persons Bill on 30 and 31 August 2005. Written submissions can still be made to Mzolisi Fukula, mfukula@parliament.gov.za, tel 021 403 3663, as the Bill is still being discussed.

**National Credit Bill (B18-2005)**

This Bill aims, among other things:

- to promote a fair and non-discriminatory marketplace for access to consumer credit and, for that purpose, to provide for the general regulation of con-sumer credit and improved standards of consumer information;
- to prohibit certain unfair credit and credit-marketing practices;
- to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting;
- to provide for debt re-organisation in cases of over-indebtedness;
- to establish national norms and standards relating to consumer credit;
- to promote a consistent enforcement framework relating to consumer credit; and
- to establish the National Credit Regulator and the National Consumer Tribunal.

If passed, the Bill will repeal the Usury Act (1968) and the Credit Agreements Act (1980). The Portfolio Committee on Trade and Industry (Committee) held public hearings on the Bill on 5, 8, 10 and 17 August 2005. The submission process is now complete. The Bill is currently before the committee for consideration. It will then go to the National Assembly for the second reading debate after which it will be referred to the National Council of Provinces.

For minutes of the public hearing contact the Secretary to Parliament, PO Box 15, Cape Town 8000, or contact Masibonge Mzwakali, mmzwakali@parliament.gov.za, tel 021 403-3799, fax 021 403-2182.

**The Health Charter**

The Health Charter is aimed at encouraging parties to facilitate and effect transformation of the health sector in the following key areas:

- access to health services;
- equity in health services;
- quality of health services; and
- broad-based black economic empowerment.

The Charter outlines a number of proposals being investigated which include developing a low-cost health service for low and middle-income groups and low-cost insurance options.

It recognises that the government National Health Act No 61 of 2003 is intended, among other things, to remedy the inequities of the past in the distribution of health care and to create a national health system that is patient-centred and for the good of all.

There were closed hearings on the Health Charter by the Department of Health, the outcomes of which are still unknown.

The closing date for submissions was 15 August. However, submissions may still be made to Adele Booyzen, 012 312-0560, or booya@health.gov.za

These will only be used by the task team during interaction with stakeholders deliberating on this document.

## 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

**Danie Brand and Christof Heyns (eds), *Socio-economic rights in South Africa*, Pretoria, Pretoria University Law Press, 2005**

**Lilian Chenwi**

This book is an in-depth study of the meaning and enforcement of socio-economic rights in the South African Constitution (the Constitution), drawing on international law. It is aimed at practicing lawyers, activists, academics and others working towards the advancement of these rights.

In South Africa, these rights have been the subject of scholarly writings, especially in the light of the progressive decisions of the South African Constitutional Court (the Court) that have provided important insights into their meaning and enforceability. In light of these decisions, this book, the first to be published by Pretoria University Law Press, is therefore a worthwhile academic effort as it reviews socio-economic rights in South Africa in a comprehensive and critical manner.

The book has eight chapters. The introductory chapter focuses on the role of socio-economic rights as a tool of political struggle, and advocacy in advancing the socio-economic wellbeing of society. The ways in which these rights can and have been translated into enforceable legal entitlements to advance social justice are considered. The chapter identifies the socio-economic rights that could play a critical role in the protection and advancement of basic economic interests.

A debatable issue arising from this chapter is whether a clear distinction can be drawn between negative duty of the state to respect and the positive duties of the state to protect, promote and fulfil in realising socio-economic rights. The Court has made a distinction between these duties arguing, among other things, that the enforcement of positive duties enables courts to interfere in policy choices of the executive or legislature.

Danie Brand disagrees, arguing that a clear distinction of the above duties is not sustainable. He is of the opinion that, in practice, the distinction between negative and positive duties is little more than a semantic distinction between acting and not acting. He puts forward two points to justify his position. Firstly, in some cases, the same conduct of the state can be described as a breach of both the positive and negative duty. Secondly, the enforcement of the negative duty is as likely to have resource implications as the enforcement of positive duties.

Brand's view is consistent with the opinions of scholars such as Mark Tushnet and Cass Sunstein, who have also shown that enforcing negative rights also has budgetary implications.

Faranaaz Veriava and Fons Coomans, in chapter two, consider the right to education as an important pillar in reinforcing a culture of human rights. The nature of the state's obligation with regard to certain rights, such as the right to housing, is clearer as the courts have had the opportunity to interpret them. However, they note that the same cannot be said about the scope and content of the right to basic education and the extent and nature of the state's obligations in respect thereof. What is more, it is disturbing that certain policies of the government do not facilitate the full enjoyment of this right. Accordingly, they recommend that these policies be revised in order to ensure constitutional compliance.

The right to housing, which is one of the topical issues in South Africa at present, is analysed in chapter three. In discussing this right, Pierre de Vos also considers the constitutionality of evictions and the obligations of the state arising therefrom. This chapter is a significant contribution in the light of the recent increase in evictions in South Africa and the growing concerns about the procedure through which they are carried out and their impact on poor people.

On rights concerning health, examined in chapter four, Charles Ngwena and Rebecca Cook critique the approach of the Court in *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 12 BCLR 1696 (CC), 1998 (1) SA 765 (CC), where it held that the state could not be said to have failed in discharging its obligations when it declined to provide renal dialysis due to scarcity of resources, even if chronic renal failure constituted an emergency. The criticisms are levelled at the judicial reasoning and not the outcome of the case. The main critique is on the restrictive way in which the Court interpreted section 27(3), prohibiting the refusal of emergency treatment for anyone. They further make some

suggestions towards enhancing equality of opportunity and choice in healthcare, which include the need for South Africa to move towards horizontal equity in the provision of health care services that are accessible, affordable, available and effective; to secure a minimum content of health services for everyone; to give priority to disadvantaged and vulnerable groups; and to reduce the cost of medicine. They conclude by reiterating the duty of the state to rectify disparities in respect of access to health care and health status.

Chapter five focuses on the right to food. Danie Brand considers, against the backdrop of current nutritional conditions in South Africa, the extent to which the South African government's existing responses to the country's food security problems meet its constitutional duties in relation to this right. Although the government has instituted a range of measures to ensure access to food, he notes a significant gap in the current national strategy on the right to food. It fails to make any sustainable provision for the food needs of a substantial number of desperate people, as the current programmes available to such people provide only temporary relief. This falls short of the Court's "reasonableness test" that requires government policies to cater for those in desperate need.

Anton Kok and Malcolm Langford provide an international and comparative perspective on the right to water in chapter six. This chapter is important, as courts in South Africa are entitled to have regard to international law and comparative foreign case law when interpreting the provisions of the Constitution. It demonstrates that international human rights law is increasingly recognising this right as a self-standing right. Among other things, this chapter argues that the state would be in violation of the right of access to water if its water policy leads to a deliberate decline in the provision of water to South Africans.

The right to social security and assistance is analysed in chapter seven. Linda Jansen van Rensburg and Lucie Lamarche argue that the requirement of progressive realisation will not be met if the state fails in the future to develop (and implement) a more comprehensive and less categorised system of social security that caters for indigent people without disabilities between the ages of 15 and 60 or 65. In addition, although the Court has been reluctant to follow the minimum core obligations concept Van Rensburg and Lamarche suggest, with specific reference to the right to security and assistance, that it is essential for the government to identify minimum core content obligations having regard to the unique South African socio-economic circumstances.

Environmental rights are examined in the final chapter. The formulation of these rights, including whether they are group or individual rights, is a debatable issue at the international level and has been so for decades. However, the Constitution clearly formulates this right as an individual rather than a collective right. Although this is open to criticism, with regard to infringements of a collective nature, this chapter also addresses the question of whether the provision in the Constitution actually grants rights to groups. The observation made by Loretta Feris and Dire Tladi is that it can, directly or indirectly, depending on one's interpretation.

The authors are united in making a number of points, two of which should be highlighted. Firstly, most underscore the need for government policies to cater for those in desperate need, as this will accord with the requirement of reasonableness developed by the Court.

Secondly, all the authors unsurprisingly agree on the important role that international law has played in interpreting socio-economic rights in the Constitution. De Vos rightly contends that courts cannot completely disregard international law, except where they provide rational reasons for doing so.

Feris and Tladi go a step further by acknowledging the existence of the capacity for South Africa to develop strong environmental rights jurisprudence that could benefit the international community. This is, of course, correct. Other countries have and will definitely benefit from its progressive decisions on socio-economic rights and human rights in general. In fact, the jurisprudence of South African courts has become a source of inspiration for many African and other courts.

Overall, the book will no doubt be useful for all those involved in the promotion, protection, implementation and advancement of socio-economic rights internationally, since, as mentioned above, it examines critically the meaning of socio-economic rights and their implications for the state not only in the South African context but also internationally, drawing on both domestic and international expertise.

**Lilian Chenwi** is a researcher in the Socio-Economic Rights Project, Community Law Centre, UWC.