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Editorial

Sibonile Khoza, Lilian Chenwi, Christopher Mbazira

We are pleased to present the fourth and final issue of the *ESR Review* for 2005.

In this issue, we provide a feature article on needs, rights and transformation, three case reviews on the rights to health and housing and a conference review on farm dwellers' security of tenure.

Sandra Liebenberg explores the implications of Nancy Fraser's theory of social justice and transformation for South Africa's constitutional democracy. She examines the depoliticising effect of social rights adjudication and its transformative potential. She critiques the model of reasonableness as having a limiting effect on the effective enforcement of social rights.

She argues that the current social rights jurisprudence can advance transformation if the courts can give the reasonableness review a sufficiently substantive interpretation.

Bruce Porter analyses the implications of the Canadian Supreme Court's decision in *Chaoulli v Quebec* for the fulfilment of, and debate on, the right to health in Canada. He critiques the majority decision for its failure to set out manageable constitutional standards to guide the State to meet its obligations.

He highlights the experiences of advocates for social rights in Canada, especially in the context of the right to health and the *Chaoulli* case.

He concludes by calling on civil society to mobilise to ensure that this right is provided to everyone and is not "up for sale".

John Ryskamp reviews the United States Supreme Court's decision in *Kelo v City of New London*, which involves the use of the doctrine of eminent domain over

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housing (that is, government power to expropriate property in order to fulfil public policies). He highlights the public's negative reactions to the Court's decision of rejecting the application of strict scrutiny to the doctrine over housing rights and the effect the decision has had on legislative reform and policy development.

Christopher Mbazira reviews the decision of the African Commission on Human and Peoples' Rights in *Purohit v The Gambia*. He contends that the *Purohit* case is important because it not only interprets the right to health under the African Charter on Human and People's Rights, but also delineates more clearly the nature of the obligations of State parties in relation to socio-economic rights under the African Charter.

He argues that, while most African countries, due to severe economic constraints, cannot be expected to implement socio-economic rights immediately, the 'mourning' should not be prolonged indefinitely. Countries must, as the African Commission states, take concrete and targeted steps to realise socio-economic rights.

He observes, though, that there is no standard to measure the concreteness of the measures and contends that the same standards developed by the UN Committee on Economic, Social and Cultural Rights in relation to these rights should be applied.

Lilian Chenwi reflects on the conference, "Seeking security: Towards a new vision for tenure relations in farming areas," recently held in Johannesburg.

She provides an overview of the findings of the National Evictions Survey and their implications for the farming sector and land reform, as well as the input from government at the conference.

She concludes by highlighting some of the proposals made to address the problem of evictions of farm dwellers.

We are thankful to all the guest contributors to this issue. We trust that you will find the issue invigorating and inspiring in the effort to advance socio-economic rights.

We wish to take this opportunity to thank everyone who contributed to this publication and the feedback received from our readers during this year.

See our website at www.communitylawcentre.org.za/ser for a report on the Socio-Economic Rights Project's activities in 2005, undertaken with the ultimate goal of advancing socio-economic rights in South Africa and beyond.

This and previous issues of the *ESR Review* are available online at:
http://www.communitylawcentre.org.za/ser/esr_review.php

Needs, rights and transformation

Adjudicating social rights in South Africa

Sandra Liebenberg

The South African Constitution (Constitution) is widely described as a transformative constitution. Unlike many classic liberal constitutions, its primary concern is not to restrain State power, but to facilitate a fundamental change in unjust political, economic and social relations in South Africa.

The preamble of the Constitution proclaims that it was adopted "so as to...heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights". Thus, a commitment to social justice is central to the transformative goals of the Constitution and must inform the interpretation of the Bill of Rights.

Fraser's theory of social justice and transformation

This article explores the implications of a theory of social justice and transformation developed by Nancy Fraser, a feminist philosopher and political theorist. Her theory is based on the principle of participatory parity. This principle recognises the right of all to participate and interact with each other as peers in social life. At the same time, she develops specific criteria for assessing whether institutional arrangements recognise people as full partners in social interaction. Formal notions of equality are rejected as insufficient. Instead, her theory focuses on the substantive prerequisites of participatory parity.

Fraser identifies two major obstacles to overcoming institutional patterns of subordination that impede people's ability to participate equally in society. The first, which she terms 'misrecognition', involves the systemic devaluing and disadvantaging of certain groups on grounds such as race, gender and sexual orientation. Examples are marriage laws that exclude same-sex partnerships, social-welfare policies that stigmatise single mothers as sexually irresponsible scroungers and policing practices that associate black persons with criminality. The second major obstacle arises when some actors lack the necessary resources to interact with others as peers. This distributive dimension relates to the economic structure of society, in which property regimes and labour markets create different classes of people who are distinguished by their differential access to resources.

These forms of injustice, while analytically distinct, overlap and interact causally with each other. Thus, any concept of social justice must address both these dimensions and consider their interrelationship.

Fraser goes on to consider institutional reforms and strategies that can address both dimensions of injustice while at the same time minimising the mutual interferences that can arise when these two aims are pursued together. She draws a distinction between two broad strategies for remedying injustice: 'affirmation' and 'transformation'.

Affirmation aims to remedy the outcomes of unjust socio-economic arrangements while transformation aims to remedy the underlying structures that generate injustice.

The distinction between these remedies relates to the level at which distributional and recognition injustices are addressed. While affirmative strategies try to remedy the outcomes of unjust social and economic arrangements, transformative strategies seek to remedy the underlying structures that generate injustice.

In the context of distributive justice, the major example of an affirmative strategy is the liberal welfare State which aims to redress maladministration through income transfers.

In contrast, a transformative strategy would address the underlying causes of an unjust distribution, for example, changing the division of labour, the forms of ownership and

other deep structures of the economic system.

In the context of maldistribution, one of the key disadvantages of affirmative strategies such as social assistance programmes is that they tend to provoke "a recognition backlash". They can mark out the beneficiaries as "inherently deficient and insatiable, as always needing more and more". Their net effect, Fraser argues, can be "to add the insult of disrespect to the injury of deprivation". This is particularly illustrated by the many gendered stereotypes surrounding welfare programmes aimed at mothers and children. In the South African context, this is exemplified by popular perceptions that the child support grant encourages young women to become pregnant, and encourages 'dependency' on the state. In contrast, transformative strategies tend to promote universal social entitlements. In so doing, they promote solidarity and reduce inequality without creating "stigmatized classes of vulnerable people perceived as beneficiaries of special largesse".

However, transformative strategies also have their difficulties. Strategies to transform the underlying conditions of economic injustice may seem remote for those faced with the struggle to meet immediate daily needs. They stand to benefit much more directly from income transfers that put food on the table. It can thus be much more difficult to mobilise communities around issues of deeper economic transformation.

However, according to Fraser, affirmative and transformative strategies are not necessarily discrete and contradictory. Affirmative programmes can have transformative effects if they are consistently pursued. They can both meet people's needs within existing institutional frameworks and set in motion "a trajectory of change" in which deeper reforms become practical over time.

Fraser calls these interventions "non-reformist reforms". An example of a non-reformist reform in the South African context might be a universal basic income grant. Such a grant, together with other social programmes, assists people in their struggle to meet basic survival needs. At the same time, it creates the security and space needed both for greater participation in economic activities as well as popular mobilisation around deeper reforms. By providing women in poor communities with an independent source of income, it also expands the set of choices available to them and assists in challenging women's subordination within the family and community.

Affirmative programmes can have transformative effects if they are consistently pursued.

The adjudication of social rights

The argument from the perspective of participatory democracy is that the adjudication of social rights depoliticises questions concerning the definition and meeting of needs.

In order to understand the depoliticising effects of adjudicating social rights, it is necessary to examine more closely what Fraser refers to as "the politics of needs interpretation". She describes needs claims as "nested" in that they are "connected to one another in ramified chains of 'in order to' relations". Thus, it is relatively uncontroversial to argue that homeless people living in non-tropical climates need shelter 'in order to' survive (what Fraser calls "thin needs"). However, as soon as we descend to lesser levels of generality – to questions of precisely what form of shelter people need and what else is needed in order to sustain their homes – controversy grows.

Fraser describes the politics of needs as comprising "three moments that are analytically distinct but interrelated in practice". The first is the struggle to validate the need in question as a legitimate political concern. The second constitutes the struggle over the definition or interpretation of the need. The third moment is the struggle over the satisfaction of the need, "the struggle to secure or withhold provision".

In the South African context, the first moment corresponds to the successful struggle to include a range of social rights as justiciable rights in the 1996 Constitution. The meeting of these needs is constitutionally sanctioned as the ultimate responsibility of the State. This assists in countering arguments that seek to relegate the fulfilment of these needs solely to the family or the market.

The constitutional status of social rights does not avoid on-going contestation and the emergence of 'reprivatisation' discourses aimed at re-establishing the needs in question as matters for the family and/or market to meet. However, the constitutional status of social rights provides an important forum for asserting state responsibility for the

distributional prerequisites of participatory parity.

Subsequent judicial interpretations of these rights can serve to reinforce or minimise this responsibility and are thus also important in the second and third moments identified by Fraser. They can powerfully shape political discourse and administrative practice by authoritatively defining the extent of the State's obligations to meet the needs in question and by influencing their implementation.

As a significant actor in the three moments of the 'politics of needs', there are strategies available to the courts to minimise the depoliticising effects of their judgments. One such strategy is to attempt, as far as possible, to unravel the factors that give rise to the deprivations with which they are confronted in particular cases. Failure to do this can divert attention away from the underlying conditions that give rise to economic deprivations and serve to naturalise vastly unequal access to resources.

This is illustrated by the decision in *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC) (*Soobramoney*), in which the Court accepted without question that the budget of the KwaZulu-Natal provincial health department was the appropriate frame for analysing the applicant's claim for kidney dialysis treatment. Apart from commenting that it was "a hard and unpalatable fact" that Mr. Soobramoney could secure the treatment he needed to stay alive from the private health sector if he had the means, there is no analysis of the vastly unequal distribution of resources between the public and private healthcare sectors. The point is not necessarily that the outcome of Mr. Soobramoney's case should have been different, but that the Court could have done more to problematise the extreme inequality in access to health care services.

In contrast, Sachs J's judgment in *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) (*PE Municipality*) provides a careful analysis of the historical, socio-economic, political and legal factors that fuel occurrences such as the eviction of poor people from their homes. Judicial decisions of this nature help to counter their depoliticising tendencies by locating the 'thin need' in question within a much denser historical and social context.

If such strategies are adopted and social rights are reliably and effectively enforced by the courts, participatory democracy can be enhanced. The adjudication of social rights claims can infuse a substantive dimension into the interpretation of the Bill of Rights as a whole. This can help counter the development of a formalist jurisprudence in which the historical, social and economic context in which rights claims arise are ignored or discounted.

If social rights are reliably and effectively enforced by the courts, participatory democracy can be enhanced.

The Constitutional Court's social rights jurisprudence

The Constitutional Court (the Court) has rejected an interpretation of social rights that would entitle individuals to the provision of a basic level of goods and services from the State (a 'minimum core obligation'). This is despite the endorsement of this obligation under the major human rights treaty on social rights, the International Covenant on Economic, Social and Cultural Rights.

Instead, in the landmark decisions of *Government of the Republic of South Africa and Others v Grootboom* 2000 (11) BCLR 1169 (CC) (*Grootboom*) and *Minister of Health and Others v Treatment Action Campaign and Others* 2002 10 BCLR 1033 (*TAC*), it has adopted a model of 'reasonableness review' in which the key question is whether the State's failure to provide the service or goods in question is reasonable. This is evaluated according to a range of criteria such as comprehensiveness, inclusiveness, transparency, proper implementation and short-term provision for those whose needs are urgent. However, the Court has emphasised that a large measure of discretion will be allowed to the State in making particular policy choices within the parameters of reasonableness. Both these cases involved a challenge to government programmes that failed to make provision for people whose needs were urgent.

The second type of situation where the Court has been called upon to adjudicate the positive duties imposed by social rights is in relation to the enactment of exclusionary social benefit legislation. This is illustrated by the Constitutional Court's decision in *Khosa and Mahlauli v Minister of Social Development and Others* 2004 (6)

BCLR 569 (CC) (*Khosa*). The case entailed a challenge to the exclusion of permanent residents from social assistance legislation. The Court took a hard look at the State's resource and policy justifications for excluding permanent residents from social grants and found them wanting. The main factors underlying a rigorous review standard were the fact that government had already enacted social legislation that excluded a relatively small group and there was an overlap between the right to social security (section 27) and the right against unfair discrimination (section 9). The Court granted the relatively intrusive remedy of 'reading in' the excluded group.

The third type of social rights cases considered by the Court involves groups deprived of their existing access to socio-economic rights, such as housing. The enforcement of this negative obligation has occurred predominantly in the context of the eviction of people from their homes, reinforced by the explicit guarantee in section 26(3). This section prohibits evictions made without a court order in which all relevant circumstances are considered. Although the Court has not gone as far as to recognise an unqualified right to alternative accommodation in eviction cases, it has required, in cases such as *PE Municipality*, serious consideration of the impact of the eviction and the availability of feasible alternatives to avoid homelessness.

The current social rights jurisprudence can have a transformative potential if the courts give reasonableness review a sufficiently substantive interpretation.

The Court's decision in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2002 (10) BCLR 1033 (*Jaftha*) is a significant development in the Court's approach to the review of the obligations imposed by social rights. This case involved a challenge to the constitutionality of provisions of the Magistrates' Court Act that permitted the sale in execution of people's homes to satisfy (sometimes trifling) debts. The Constitutional Court characterised the provisions of the Act as authorising a negative violation of section 26(1), in that it permitted "a person to be deprived of existing access to adequate housing". This negative duty is not subject to the qualifications in subsection (2) relating to resource constraints and progressive realisation. Depriving people of existing access to housing (and, by implication, other socio-economic rights) constitutes a limitation of their rights, which falls to be justified in terms of the stringent requirements of the general limitations clause (section 36), including the requirement of law of general application and a stringent proportionality test. Finding no justification for the overbroad provisions of the Act, the Court read provisions into it requiring judicial oversight of executions against the immovable property of debtors taking into consideration "all relevant circumstances".

The transformative potential of the jurisprudence

The model of reasonableness review creates a number of difficulties for the effective enforcement of social rights by individuals and groups living in poverty. The courts' reluctance to recognise direct individual positive rights discourages social rights actions. Reasonableness review can easily come to represent a very deferential standard of review. Dennis Davis argues that the concept of reasonableness can be moulded by the courts "so that, on occasion, it resembles a test for rationality and ensures that the court can give a wide berth to any possible engagement with direct issues of socio-economic policy".

Conversely, reasonableness review has the advantage of being a flexible, context-sensitive model of review for socio-economic rights claims. In this sense, it avoids closure and creates the ongoing possibility of challenging socio-economic deprivations in the light of changing contexts.

Thus, reasonableness review can facilitate the creation of a participatory, dialogical space for considering social rights claims. This is exemplified by the way the Treatment Action Campaign has been able to use reasonableness review to win a major victory in the provision of appropriate medical treatment to reduce the risk of transmission of HIV from mother-to-child. This victory was a significant breakthrough in the broader transformative strategy of the Treatment Action Campaign to achieve a general anti-retroviral programme for people living with HIV/Aids.

It is possible for the courts' current social rights jurisprudence to have transformative potential. However, this depends on the courts giving reasonableness review a sufficiently substantive interpretation. There are three areas in which the courts'

interpretation of social rights can facilitate transformation.

First, basic needs claims should receive a stronger measure of protection within the structure of reasonableness review. This would entail the courts embarking on a rigorous proportionality analysis in circumstances where individuals and groups are deprived of, or lack access to, basic subsistence requirements. The context-sensitive dimensions of reasonableness review would be retained. However, the Court would focus more intensively on the position of the claimant in society, the nature and causes of the deprivation experienced and its impact on her and others in a similar situation. Close attention should be paid to the interaction of the obstacles to participatory parity identified by Fraser, namely the lack of access to economic and social resources, the social stigma and stereotypes associated with poverty and their interaction with other forms of recognition injustice, such as race, gender and sexual orientation. In this process, the courts are well positioned to highlight the impact of macro-injustices on particular claimants in concrete situations. Transformation is promoted by calling into question existing unjust resource distributions and affirming rights to social benefits where previously no such rights were recognised.

Second, the courts can contribute to transformation by the nature of their discourse in social rights judgments. This rhetorical role is important even where the courts feel constrained by institutional politics from making orders that will have an extensive impact on existing budgetary allocations. Thus, the courts can destabilise existing stereotypes and perceptions about the role of publicly provided benefits in society. This is illustrated by the manner in which Mokgoro J in *Khosa* subverts the normal discourse around social assistance creating dependency on the State by highlighting its role in relieving the burden on poor communities and fostering the dignity of permanent residents. The Court's discourse can also serve as a constant reminder that the redress of poverty and inequality are questions of political morality and a collective social responsibility. Through discourse of this nature, the courts contribute to countering the 'recognition backlash' associated with the provision of social benefits to the poor.

Third, as the cases relating to the evictions and homelessness illustrate, the enforcement of social rights can help deconstruct hierarchical and absolute notions of property rights. The interest of poor people in the protection of their homes and in avoiding homelessness is now a highly relevant factor in eviction cases and property is no longer the ultimate 'trump card'. In a market economy, common law rules play a vital role in structuring access to and distribution of resources. Social rights will not fulfil their transformative potential unless they start influencing the development of the common law in other areas.

Conclusion

An enduring tension between the depoliticising tendencies of social rights adjudication and its transformative potential is probable. As a result, one needs to be conscious of both tendencies and seek to minimise the former while maximising the prospects of realising the latter.

The winning of affirmative social benefits through litigation can create a favourable terrain for broader mobilisation around deeper reforms. A substantive jurisprudence on social rights can facilitate 'non-reformist reforms', and advance transformation in South Africa. However, we cannot take for granted that this transformative path will be found. Exploring the theoretical underpinnings of important concepts to our constitutional democracy, such as social justice and transformation, can help us in finding our way.

Sandra Liebenberg is the H.F. Oppenheimer Chair in Human Rights Law at Stellenbosch University. This article is an abridged version of her inaugural lecture delivered at Stellenbosch University on 4 October 2005.

Professor Nancy Fraser's theories are discussed in a wide range of published work. See, for example, N Fraser and A Honneth, 2003, ***Redistribution or Recognition? A Political-Philosophical Exchange***, Verso; N Fraser, 1997, ***Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition***, Routledge; N Fraser, 1989, ***Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory***, University of Minnesota Press and Polity Press.

A right to health care in Canada

Only if you can pay for it

Bruce Porter

Chaoulli v Quebec (Attorney General), 2005 SCC 35 [*Chaoulli* case]

Canada's Chief Justice Beverly McLachlin once wrote that the poor in Canada ought not to be "constitutional castaways". Yet, this is how they have been treated in the first judgment from the Supreme Court of Canada on the right to adequate health care under the Canadian Charter of Rights and Freedoms 1982 (Canadian Charter) and the Quebec Charter of Human Rights and Freedoms 1975 (Quebec Charter).

The Supreme Court of Canada (the Court) in the *Chaoulli* case considered, for the first time, whether the right to "life, liberty and security of the person" should be interpreted to include the right to health care and, if so, what role the courts might assume in overseeing compliance with this right.

The case is important for the preservation of the public health care system, which has been the subject of much political controversy and debate in recent years, and it has generated intense public debate on the right to health care in Canada.

Facts and decisions of the lower courts

The appellants in the case are Jacques Chaoulli, a self-represented doctor and long-time campaigner against public health care; and his patient, George Zeliotis, who objected to waiting times he had endured in the public health care system in Quebec. They challenged legislation prohibiting private health care insurance for services covered by public health care insurance.

The impugned legislation did not prevent access to private health care for those wanting to pay for it. Rather, it prevented large health insurance and health care firms, primarily based in the United States (US) , from creating a parallel system of health care for the more advantaged, one that would invariably benefit from the public financing of health care research, training and prevention in Canada and drain the public system of key personnel and resources.

The appellants asked the Court to find that, in the face of waiting times for health services in Quebec's public health system, legislation prohibiting private health insurance schemes, which would allow those who can pay for them to access faster service, violates the right to "life, liberty and security of the person" under the Canadian Charter and the right to "life, and to personal security, inviolability and freedom" under the Quebec Charter.

The application was first brought before the Quebec Superior Court and the Quebec Court of Appeal. The Superior Court dismissed the application, finding that the appellants had demonstrated a deprivation of the right to life, liberty and security of the person within the meaning of section 7 of the Canadian Charter, but that the legislative prohibition was justified because it was in accordance with principles of fundamental justice and did not conflict with the general values expressed in the Canadian or Quebec Charters. The Superior Court found that allowing private health insurance would harm the public medicare system upon which all rely (*Chaoulli v Quebec Procureure Generale* [2000] J.Q. No. 479 (C. S. Q.) para 263).

Similarly, the Court of Appeal dismissed the appeal, with the three judges putting forward different reasons. Delisle JA found that access to publicly funded health care was a fundamental right under section 7 of the Canadian Charter but that the right to purchase private health insurance was an economic claim and was not protected under section 7. Justice Forget agreed with the trial judge, finding that the right to health care was threatened, but that the province's decision to favour the

broader collective interest was in accordance with the principles of fundamental justice (para 63). Justice Brossard found that the evidence failed to show that the restrictions on private health care had in fact violated the plaintiff's right to life or health (para 66; [2002] J.Q. No. 759 (CAQ) (117-18)). The appellants then appealed to the Supreme Court of Canada.

The decision of the Supreme Court of Canada

Surprisingly, the Supreme Court did not reach a decision under the Canadian Charter. Three of the seven judges found that the legislative prohibition of private insurance violated section 7 of the Canadian Charter, another three found that it did not and one did not rule on the Canadian Charter. A majority decision was reached only under the Quebec Charter.

Where evidence is uncertain, courts could err on the side of maintaining protections, not of striking them down.

Since the Quebec Charter is the only human rights legislation in North America to include a section on social and economic rights (though not, unfortunately, a right to health), and it explicitly prohibits discrimination because of "social condition" (found by courts to include poverty), one might have expected a more progressive result for poor people under the Quebec Charter than under the Canadian Charter. However, applying the Quebec Charter, the Court reached a majority decision upholding the appellants' claim.

Four judges out of seven found that in the context of unreasonable wait times for services, Quebec's prohibition of private health insurance violated the right to life and personal security under the Quebec Charter. The Court further held that this violation was not justified under the limitations clause in the Quebec Charter as demonstrating "a proper regard for democratic values, public order and the general well-being of the citizens of Quebec".

Justice Deschamps, writing for the majority, did not proceed to consider whether the Canadian Charter had similarly been violated. Chief Justice McLachlin, writing also for Justices Major and Bastarache, agreed with the finding of a violation of the Quebec Charter, but also found a violation of the Canadian Charter, based on a similar reasoning.

A critique of the decision

In dismissing a challenge by more advantaged individuals to restrictions aimed at protecting the public health care system, the decisions of the lower courts in this case drew heavily on the central place accorded to equality rights and the protection of vulnerable groups in the Canadian Charter. An often-cited observation of Chief Justice Dickson in an early case under the Canadian Charter was that:

> the courts must be cautious to ensure that it [the Charter] does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons" (*R v Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 779.

That concern led the Supreme Court in previous cases to assert that governments should not be held to too rigorous an evidentiary standard in justifying protective measures for vulnerable groups. Where evidence is uncertain, courts could err on the side of maintaining protections, not of striking them down.

However, equality concerns of this sort, though strenuously asserted by the dissenting judges, are absent from the majority's analysis in the Supreme Court in this case. The majority largely ignores the rights of those who cannot benefit from private health care and focuses its analysis on whether the government can prove with certainty that permitting private health insurance for the more advantaged would damage the public system. In a surprisingly biased assessment of the evidence, entirely at odds with the assessments of the trial judge, the Court concludes that government cannot meet the evidentiary test.

Justice Deschamps is quite dismissive of Canadians' attachment to equality and to the idea of universally accessible and publicly administered health care that serves the rich and poor alike. She observes that "[t]he debate about the effectiveness of public health care has become an emotional one". She finds that the "tone" adopted by her colleagues (Binnie J and LeBel J):

> is indicative of this kind of emotional reaction. It leads them to characterise the de-bate as pitting the rich against the poor when the case is really about determining whether a specific measure is justified under either the Quebec Charter or the Canadian Charter (para 16).

She states that:

> the appellants do not contend that they have a constitutional right to private insurance. Rather, they contend that the waiting times violate their rights to life and security (para 14).

However, if waiting times in the public system violate the right to life and security, what about the plight of the many who cannot afford private insurance or who will not qualify for it because of illness? Are their rights to life and security also not in need of a remedy?

The majority simply ignores the plight of those who must, because of their circumstances, rely on publicly funded health care and seems to assume that the court can play no role in ensuring that the state remedy any failures to provide adequate and timely health care to those in need. Justice Deschamps insists on framing the case exactly as the more advantaged appellants and their many supporters among the private healthcare providers would have the Court frame it: as a challenge to government interference with the 'rights' of the more affluent to avoid waiting lists, rather than as a challenge to ensure that waiting lists do not violate the rights of those in need of care:

> The choice of waiting lists as a management tool falls within the authority of the state and not of the courts. The appellants do not claim to have a solution that will eliminate waiting lists. Rather, they submit that the delays resulting from waiting lists violate their rights (para 2).

Consequently, the Court did not engage in any meaningful assessment of what governments must do to comply with a right to life in the provision of health care. For example, Justice Deschamps states that the risk of dying of a cardiovascular ailment increases by 0.45% with every month of delay, so that "it is inevitable that some patients will die if they have to wait for an operation" (para 40). Of course, there is also some percentage chance that such patients may die waiting at a stoplight on the way to hospital as well. However, this does not warrant a finding of a violation of the right to life by the state.

She further states that:

> the demand for health care is potentially unlimited and that waiting lists are a more or less implicit form of rationing (para 39).

Thus, she finds that insofar as the government assumes the role of allocating health resources on the basis of need rather than of ability to pay, it almost inevitably violates the right to life and personal security. Rather than ensuring that the government performs its 'rationing' function consistently with the human rights of all, as have courts in other jurisdictions, the Court restricts its role to protecting the rights of the more affluent to avoid the implications of rationing based on need. By refusing to consider the possibility of effective constitutional review of the decisions undertaken by governments as to the allocation of limited resources in health care delivery, the majority restricts the court's role to one of guardian of the rights only of those who do not need the help of the state.

The court's role is restricted to one of guardian of the rights of those who do not need the State's help.

As noted by the dissenting judges, the majority decision lays down no manageable constitutional standards which the state might try to meet (para 165). What, then, are constitutionally required reasonable health services? What is treatment within a reasonable time? What are the benchmarks? How short a waiting list is short enough? The dissenting judges ask these questions rhetorically, but these are the very issues that a court must be prepared to consider – and to give governments direction on – in assuming their role of guardians of the constitutional rights of all, including those who rely on the state for access to necessary health care.

Socio-economic rights 'with a vengeance'?

Poor people and many other groups in Canada have been advocating for more than 20 years, since the adoption of the Canadian Charter, for an expansive interpretation of the right to "life, liberty and security of the person" and other open-ended rights in the Charter in order to include economic, social and cultural (ESC) rights recognised and affirmed by Canada in international law. The Charter Committee on Poverty Issues and other groups have emphasised that social and economic rights must be applied within a broad framework of equality, recognising the important role of courts in protecting the rights of vulnerable groups, particularly by requiring adequate social programmes and other positive measures.

The claims advanced by poor people in Canada under the Charter have received strong support from comments and concerns from the UN Committee on Economic, Social and Cultural Rights (CESCR) and most other UN treaty monitoring bodies, which have encouraged interpretations of the Charter that

would provide effective remedies to violations of ESC rights.

Accordingly, the Charter Committee on Poverty Issues and the Canadian Health Coalition intervened in the *Chaoulli* case to advocate for the recognition of an inclusive right to health under the Canadian Charter in accordance with international human rights law and with the Charter's equality guarantee. We argued that the courts have an important role to play in protecting the right to health, but that they must ensure that it is enjoyed without discrimination, regardless of ability to pay or ability to qualify for private health insurance. The right to health, we argued, should be applied to strengthen and uphold universal access to quality healthcare through a publicly funded system.

Some critics of the idea of using courts to promote social and economic justice will see the *Chaoulli* decision as our 'just deserts' for being foolish enough to encourage an increasingly neo-liberal Supreme Court, with little sympathy evidenced for the plight of the poor, to adjudicate rights in the field of complex issues such as health care delivery. However, this kind of response misunderstands the nature of advocacy for inclusion of justiciable ESC rights in the framework of constitutional interpretation and it misunderstands what is dangerous and wrong about the *Chaoulli* judgment.

The judgment of the majority in *Chaoulli* was not the result of a court stepping into the field of social rights, but rather, of a court refusing to do so. Its discriminatory abandonment in this case of the health care needs of disadvantaged groups is symptomatic of the McLachlin Court's increasing disavowal of the previously affirmed notion of 'substantive equality' and a growing refusal of the Supreme Court to play any role in ensuring that governments take positive measures to ensure fundamental rights.

Further, the decision is completely devoid of any reference to the right to health under international human rights law, or even to the non-derogable right to life under the International Covenant on Civil and Political Rights 1966 (ICCPR), which require positive measures by the state. The Court simply refuses to consider what positive measures the State must take to protect and ensure the rights to life or health in an inclusive and non-discriminatory manner, as required under international human rights law.

Had the Court considered the right to life and security of the person and principles of fundamental justice in this broader context of the right to health, the prohibition of private insurance would properly have been seen not as a violation of a right to life and personal security, but rather, as a positive legislative measure required for the non-discriminatory protection of that right.

Neither the majority nor the dissenting opinions in this case offer any positive vision of the role of Canadian courts in protecting the rights of disadvantaged groups in so critical an area as access to health care. Disappointingly, rather than following through on their insight that any alleged violation of rights in the public system must be assessed in the context of "manageable constitutional standards", the dissenting judges largely urge judicial deference to government's policy choices around health care. This may yield the desired result in a case such as this one, where advantaged interests challenge legislative restrictions on which vulnerable groups rely. However, what about other cases, where vulnerable groups rely on the courts to vindicate their rights?

We can only cringe at the dissenting judges' pessimistic appraisal of the ability of the courts to protect fundamental Canadian values linked to equality and social rights when Justices Binnie and LeBel, after documenting the exclusions of African Americans, Hispanics and the poor from health care in the US, state that it would be:

> open to Quebec to adopt a US style health care system. No one suggests that there is anything in our Constitution to prevent it. But to do so would be contrary to the policy of the Quebec National Assembly, and its policy in that respect is shared by the other provinces and the federal Parliament (para 176).

The inability of the dissenting judges to put forward a more positive vision of judicial oversight of health care rights ultimately leaves intact the negative rights paradigm adhered to by the majority – with all of its discriminatory consequences for the poor.

Conclusion

Though many have referred to the Court in *Chaoulli* 'striking down' the impugned legislation, this is not quite accurate. The Court simply declared that, in the context of unreasonable waiting times violating the right to life and security in the public system, prohibiting access to private insurance violates article 1 of the Quebec Charter. The Court made no remedial order based on this finding.

Subsequent to the Court's judgment, the Government of Quebec asked for a stay of the judgment in order to hold public consultations and to review and overhaul its health

care system in light of the ruling. The Court granted a stay of 12 months.

It is now up to the Government of Quebec, and other governments in Canada, to consider whether the appropriate remedy in light of the Court's finding is to ensure the protection of fundamental rights in the public system, or, instead, to provide a remedy of access to private insurance that can only be effective for advantaged groups.

Civil society will need to mobilise to ensure that governments in Canada recognise, in a way that the Supreme Court failed, that the right to health is a right of every Canadian and that it is not up for sale.

Bruce Porter is the Director of the Social Rights Advocacy Centre, Canada.

The decision is available at: www.lexum.umontreal.ca/csc-scc/en/rec/html/2005scc035.wpd.html>

Establishing a right to housing under the due process clause of the Fifth Amendment

John Ryskamp

Kelo et al. v City of New London et al. [No. 04-108] [*Kelo case*]

In the past, courts in the United States (US) were reluctant to exercise a high level of scrutiny over social or affirmative rights, including the right to housing (*Dandridge v Williams* 397 US 471 (1970); *Lindsey v Normet* 405 US 56 (1972); *San Antonio School District v Rodriguez* 411 US 1 (1973)). Thus, the doctrine of eminent domain in the US is currently subject only to 'minimum scrutiny'. The *Kelo* case involves the use of eminent domain over housing.

Eminent domain is the power of government to take property – with compensation at fair market value – in order to fulfil public policies. Scrutiny is the test imposed by the Constitution to see that those policies do not violate protected facts. The question is: which rights should get which levels of scrutiny? Housing, for example, may be taken by government by eminent domain, if the policy is rationally related to a legitimate government interest (minimum scrutiny). However, the government cannot limit the right to freedom of speech unless the limitation is narrowly tailored to achieve a compelling government purpose (strict scrutiny). In practice, government acts almost always pass the test of minimal scrutiny and almost never pass the test of strict scrutiny.

The homeowners in the *Kelo* case, which is analysed here under the New Bill of Rights (which is the author's formulation of five new rights: housing, liberty, maintenance, medical care and education), asked the Court to raise the level of scrutiny for eminent domain. In short, they asked the Court to hold that, if the government wished to exercise eminent domain over any property, the government had to show that the expropriation was narrowly tailored to achieve a compelling government purpose. The US Supreme Court handed down its decision on 23 June 2005. The Court upheld minimum scrutiny in the eminent domain context.

As Justice Sandra Day O'Connor notes in her dissenting judgment, the decision favours the most powerful and influential in society, leaving small property owners without much protection.

Facts and lower courts' decisions

In a standard use of the power of eminent domain, the City of New London (City), Connecticut, sought to

take (buy) housing with the aim of putting up a hotel and health club in order to raise city tax revenues.

Following the approval of an integrated development plan designed to revitalise its ailing economy, the City, through its development agent, purchased most of the property earmarked for the project from willing sellers. The City initiated condemnation proceedings when the homeowners of the rest of the property refused to sell. It proposed to turn over the property to a non-profit development corporation, which, in turn, would hand the land over to private developers.

The homeowners first brought an application in December 2000 in the New London Superior Court. The Superior Court granted a permanent restraining order prohibiting the taking of the properties located in parcel 4A, but denied relief in respect of the properties located in parcel 3, which included certain houses. Both sides (the City and the denied petitioners) then appealed to the Supreme Court of Connecticut, which had to determine two issues. The first was whether taking the particular properties at issue was 'reasonably necessary' to achieving the City's intended public use. The second was whether it was for 'reasonably foreseeable needs'. These are the state law equivalents of minimum scrutiny.

The Supreme Court of Connecticut upheld the lower court's determination that the takings were legally valid in terms of chapter 132 of the State's municipal development statute (Connecticut General Statute, section 8-186 *et seq*. 2005). This statute provides that land, including developed land, may be considered to have been taken for a public use or in the public interest where it is expropriated as part of an economic development project.

The Court also held that this position was consistent with both the Federal and State Constitutions. It further upheld the trial court's factual findings regarding properties located in parcel 3 that the parcels were necessary to the redevelopment plan. However, it reversed the trial court decision regarding properties in parcel 4A, holding that the intended use of the land was sufficiently definite and had been given 'reasonable attention' during the planning process. The restraining order was maintained pending the outcome of any appeal.

The homeowners appealed to the US Supreme Court (the Court), which had to determine whether a city's decision to take property for the purpose of economic development qualified as taking for 'public use' in terms of the Fifth Amendment. According to the Fifth Amendment, "private property [shall not] be taken for public use, without just compensation".

The homeowners argued that taking property from one private owner and transferring it to another private owner was not for 'public use' in terms of this provision. Accordingly, they asked the Court to raise the level of scrutiny to justify the taking of the property to require the State to show that it was substantially related to an important government interest (intermediate scrutiny) or narrowly tailored to achieve a compelling government interest (strict scrutiny).

The homeowners argued that expropriation of property for economic development must be allowed only where it is intended for the benefit of the public rather than a private party.

The US Supreme Court's decision

The homeowners did not rely on any rights to justify raising the level of scrutiny for eminent domain. In other words, they did not draw on the Court's jurisprudence in relation to such constitutional rights as freedom of speech or of religion. The Institute for Justice – the 'property rights' public interest law foundation which represented the homeowners – indicated no interest in arguing that the housing of people on the subject property justified an increase of the level of scrutiny. The tenor of their argument was anti-government, not pro-individual rights.

Consequently, the Court found that the terms of the homeowners' arguments provided no basis for raising the level of scrutiny for eminent domain. It held that 'economic development' was constitutional since it did not distinguish one kind of eminent domain from another sufficiently for it to be accorded a standard of review different from that applied to the overall concept of eminent domain. The Court further ruled that, assuming that 'economic development' could be defined successfully, almost all eminent domain actions would involve economic development. Likewise, the Court found that the notion of private benefit was not sufficiently defined to prompt raising the level of scrutiny for eminent domain. It found that most eminent domain actions benefit private parties, either directly or indirectly. It stated that if there was forbidden 'private use', such prohibition would be determined according to the

traditional standard: whether the eminent do-main was really a cover for criminal activity or violated other laws.

The problem with the homeowners' case was that they argued in generalities, even though elevated scrutiny is applicable to constitutional rights (such as legal equality, freedom of religion, and freedom of speech).

The aftermath of *Kelo*

The case has generated strong opposition and there are moves to restrict eminent domain in most states. Many of the proposals tend to mandate in legislation what the *Kelo* homeowners could not obtain through the Court.

Eminent domain, for example, is restricted to purposes, which do not involve 'economic development'. The property seized cannot be turned over to 'private parties'. These changes have been immediately attacked as meaningless or as invitations to creative evasion.

The debate may be developing in the direction of establishing what level of scrutiny housing should enjoy and with respect to which government actions (such as eminent domain).

The debate, however, may be made irrelevant by the informal eminent domain moratoria now going on in various parts of the US. Their implication is that it may not matter what legislatures do. The people of the US are in the process of giving strict scrutiny to housing simply by their actions. A test case may be underway following the notice of 12 September 2005 by City of New London, a party to the case under review, to the *Kelo* homeowners that they must leave their housing. The homeowners have indicated that they will not move. Several other states have formally – by legislative resolution – or through their governors, imposed a moratorium on eminent domain removals, although these have no legal effect.

The basic fear is that, since the anti-eminent domain is now so well organised, attempts to evict people from housing would meet popular resistance. It would not be difficult to have several thousand people surrounding houses from which people were to be removed. Even if the police succeed in evicting people, the odium attached to removals would ensure that no politician is willing to set the legal machinery in motion to do so. And yet the political system uses eminent domain extensively. There is strong pressure to do so and public opinion, though defensive of housing, is uncertain as to its housing rights.

The case has generated strong opposition and there are moves to restrict eminent domain in most states.

In several cases, the plans for the land – which involve gett-ing financing to-gether, among other things – have simply fallen through. This moratorium action is an extraordinary development without precedent in American history. Certainly it is without precedent in American law and its legal status is anything but clear.

However, it is certainly appropriate to say that, at least informally, government is now enforcing a higher level of scrutiny for housing, at least with respect to eminent domain. It is also worth noting that the government may also be enforcing a higher standard with respect to liberty. Once a 'condemnation order' is granted in eminent domain, the homeowner loses ownership of the home and immediately becomes a tenant.

As a further protest, however, no-one has paid the rent. Thus, these 'housed individuals' can be regarded as trespassers strictly speaking. The fact that they have not been arrested shows the government's reluctance to implement the Court's order.

Conclusion

The American public has reacted negatively to the Su-preme Court's decision rejecting the applicat-ion of strict scrutiny to the doctrine of eminent domain. This suggests popular support for recognition of the right to housing and the need to require the government, where it seeks to expropriate property, to show that expropriation is closely linked to fulfilling a compelling governmental purpose. It signifies the importance of the right to life and its close relationship with rights such as the rights to housing, liberty, maintenance, medical care and education. There are, and have been for decades, intellectual and legal movements investigating these rights and concluding, in short, that they should be subject to strict scrutiny.

John Ryskamp, Immigration for Professionals (US).

The decision is available at the US Supreme Court's website, <www.supremecourtus.gov>

The right to health and the nature of socio-economic rights obligations under the African Charter

The *Purohit case*

Purohit and Moore v The Gambia (Communication 241/2001) [Purohit case]

Christopher Mbazira

The African Charter on Human and Peoples' Rights (the African Charter) guarantees a broad range of economic, social and cultural rights (socio-economic rights) as well as civil and political rights.

Although some of the Charter's provisions mirror the International Covenant on Economic, Social and Cultural Rights (the ICESCR), there are significant differences between these instruments. While the ICESCR defines socio-economic rights with such qualifications as 'progressive realisation' and 'available resources', the African Charter does not.

Article 1 of the African Charter simply enjoins all States parties to adopt legislative and other measures to give effect to the rights protected under it. The socio-economic rights provisions themselves are defined in the same way as civil and political rights. For example, the provision on the right to health reads:

> (1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.
>
> (2) State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

This formulation has led some commentators, such as Chidi Odinkalu, to contend that the obligations to realise the socio-economic rights in the Charter are immediate rather than progressive.

Although the African Commission on Human and Peoples' Rights (the African Commission) has handed down a number of decisions on socio-economic rights, it interpreted these rights substantially for the first time in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (*SERAC* case). In this case, the African Commission found that Nigeria was in violation of a range of rights, including socio-economic rights, in connection with oil activities in Ogoniland. It also read into the African Charter and interpreted the rights to food and housing, which are not expressly recognised by it (see *ESR Review*; (3) 2002 and 5(1) 2004). The African Commission stated that all rights under the African Charter generate the duties to respect, protect, promote and fulfil on States parties.

All rights under the African Charter generate the duties to respect, protect, promote and fulfil on States parties.

However, what is missing in this case is a consideration of the standard for measuring compliance by States with their positive obligations in relation to socio-economic rights. In some passages, the African Commission made references to the obligation of the State to take 'reasonable steps' and to 'minimum core obligations'.

However, reading the case as a whole, it is unclear whether the Commission was endorsing the reasonableness test adopted by the South African Constitution, or the minimum core obligations concept adopted by the UN Committee on Economic, Social and Cultural Rights (CESCR) .

The *Purohit* case is significant not only because it interprets the right to health under the African Charter but also because it sheds more light on the nature of positive obligations of State parties in relation to socio-economic rights under the African Charter. While it does not

establish a standard for measuring state compliance with these obligations, it makes the vital point that we cannot turn a blind eye to the scarcity of resources in Africa when defining the socio-economic rights in the African Charter.

Facts of the case

This communication was brought by two mental health advocates, Ms H. Purohit and Mr P. Moore, on behalf of mental patients at a psychiatric unit in The Gambia, and existing and future mental patients detained under the Mental Health Acts of the Republic of The Gambia.

The complainants alleged that the provisions of the Lunatic Detention Act of The Gambia and the manner in which mental patients were being treated amounted to a violation of various provisions of the Charter, including the right to health. It was alleged that the Act failed to provide safeguards for patients who were (suspected of being) insane during their diagnosis, certification and detention. Among other things, it did not make provision for the review of, or appeal against, orders of detention, nor any remedy for erroneous detentions. No provision existed, it was argued, for the independent examination of the administration, management and living conditions within the unit itself.

Mental health patients deserve special treatment by virtue of their disability.

The decision

The Commission found The Gambia to be in violation of a range of Charter rights. It was held that the Lunatic Detention Act was discriminatory because the categories of people who would be detained under it were likely to be people picked up from the streets and people from poor backgrounds.

Secondly, it was held that the legislative scheme of the Lunatic Detention Act, its implementation and the conditions under which persons detained under it were held amounted to a violation of respect for human dignity. Among other things, the Act used such terms as "idiots" and "lunatics" to describe persons with mental illness. Such terminology, according to the African Commission, dehumanised them. The respondent State was also found to have violated the right to liberty and security of the person and the right to have one's cause heard for a number of reasons, including the lack of procedural provisions allowing for the review or appeal against detention under the Act. The exclusion of mentally ill persons from political participation was held to be a violation of the right to freely participate in one's own government.

The right to health

A finding of particular interest to this article relates to the right to health. The African Commission found The Gambia to be in violation of this right. It stated that the right to health includes "the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind". According to the African Commission, mental health patients deserve special treatment because of their condition and by virtue of their disability. Thus, it held that the Lunatic Detention Act was deficient in terms of therapeutic objectives and provision of matching resources and programmes for the treatment of persons with mental disabilities.

The Commission relies heavily on the United Nations Principles for the Protection of Persons with Mental Illness and Improvement of Mental Care as adopted by GA res. 46/119, December 1991 (the Principles). The Principles accord special treatment to mental health patients and stress that such patients are entitled to the highest standards of medical care at three levels: analysis and diagnosis, treatment and rehabilitation. The Commission takes note of the difference in standards between the Principles and the Charter. While article 16 uses "best attainable state of…mental health", the Principles use "highest attainable standards".

Resource scarcity and socio-economic rights

In interpreting the right to health, the Commission took note of the relevance of resources and the realities facing African countries in their efforts to realise this right. According to the Commission:

> …millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with problems of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full realisation of this right. Therefore, having regard to this depressing but real state of affairs, the African Commission would like to read into Article 16 the obligation on the part of States party to the African Charter to *take concrete and targeted steps, while taking full advantage of its available resources*, to ensure that the right to health is fully realised in all its aspects without discrimination [para 84, emphasis added].

This statement establishes that the availability of resources is a relevant factor when determining whether a State is in violation of the right to health, contrary to what has been suggested by some scholars. While this statement was made specifically in relation to the right to health, it has wider implications for other socio-economic rights. Based on this case, States can allege scarcity of resources as a defence to non-compliance with socio-economic rights. However, the case does not establish who shoulders the burden of proving availability or lack of resources.

The *Purohit* case suggests that the African Commission is leaning towards adopting an understanding of socio-economic rights that the CESCR has developed in its General Comments on the ICESCR, especially General Comment No. 3 on State parties' obligations. As noted earlier, socio-economic rights under the ICESCR are realisable progressively within available resources. The CESCR has interpreted this to mean that States parties must not take retrogressive measures that have a negative impact on existing access to socio-economic rights. It has also stated that States must comply with minimum essential levels of socio-economic rights.

The approach adopted by the African Commission is justifiable, given that the formulation of the rights in the African Charter is not substantially different from that of the ICESCR. In addition, the ICESCR has been interpreted by the CESCR in a manner that considers the position of poor countries. For example, it has held that States that are seeking exemption from liability for not meeting their socio-economic rights obligations on the ground of lack of resources must demonstrate that they have used the resources available to satisfy minimum essential levels of socio-economic rights as a matter of priority.

Since most African countries, including The Gambia, have ratified the ICESCR, it may not be wise to develop different standards under the African Charter as this would lead to confusion. What needs to be done is to marry the Charter with the international instruments that African countries have ratified. This requires that regional instruments be interpreted in a manner that realises consistency with the international instruments.

Marrying the Charter and the ICESCR

The question that still lingers is how international instruments should be applied at the regional level. This question becomes pertinent when considered from the perspective of the problem of permeability at the international level. International treaties have their monitoring bodies which have rendered interpretations to them. Inconsistent interpretations of such instruments from other treaty bodies would be fatal. This point is made more lucid by looking at the right to health as enshrined in article 16 of the Charter and article 12 of the ICESCR.

While article 16(1) of the Charter is at par with article 12(1) of the ICESCR, articles 16(2) of the Charter and 12(2) of the ICESCR are dissimilar. The latter is more elaborate. It lists the steps that the States parties are expected to take to preserve the right including reducing the stillbirth and infant mortality rates; improving all aspects of environmental and industrial hygiene; preventing, treating and controlling epidemic, endemic, occupational and other diseases; and creating conditions that would assure medical service and medical attention to all in the event of sickness.

The Charter restricts itself, parochially, to curative medical care at the expense of preventive medical care. As a result, some authors, such as Fatsha Ouguergouz, have argued that the right in the Charter is 'indicative' rather than 'binding' – meaning that it does not proclaim any binding standards but is rather instructive as a guide.

However, this is a very restrictive, literal and non-contextual interpretation of the Charter. This is especially so in light of article 60, which compels the Commission to seek inspiration from international human rights law. The importance of this requirement has been made even stronger in respect of the African Court on Human and Peoples' Rights (the African Court). The Protocol establishing the African Court empowers the Court to apply not only the Charter but also "any other relevant human rights instrument ratified by the State concerned". The use of the word 'apply' could be interpreted to mean that the African Court would have to apply such an international instrument as if it were a primary source of law. However, this would deepen the problem of permeability. Marrying the instruments would instead make it possible to apply the norms of the international instrument without making it a primary source of law.

It is this course that the Commission appears to have embarked on in this case, though not expressly. The Commission should have expressly made reference to article 2(1) of the ICESCR and General Comment No.

3 of the Committee in finding that resource constraints of countries must be considered. Though the Commission should be commended for having sought guidance from the principles, it could have still sought guidance from article 12(2) and General Comment No. 14 of the Committee to expand on the right to health in article 16 of the Charter.

Conclusion

Although the African Commission did not expressly rely on the ICESCR when deciding the *Purohit Case*, it can still be argued that it was greatly influenced by it. African countries are severely constrained economically. They can therefore not be expected to implement socio-economic rights fully and immediately. Even the most economically and technologically advanced States may not fully realise socio-economic rights in a short period of time. It would be turning a blind eye to the realities facing African countries if one were to insist that all socio-economic rights obligations must be complied with by States immediately.

At the same time, the 'mourning' should not be prolonged indefinitely. Countries should be required to take concrete and targeted steps and to take full advantage of the available resources as stated by the African Commission to realise these rights.

The question is, however, by what standard does the African Commission measure the concreteness of the steps undertaken and whether they are well targeted? The same standards developed by the CESCR in relation to the ICESCR should be applied. While I am not advocating a wholesale and uncritical adoption of the jurisprudence of the CESCR, consistency could be achieved if the instruments are married. This is especially important where the State has ratified both the Charter and the international instrument.

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The decision is contained in the 16th Annual Activity Report of the African Commission on Human and Peoples' Rights 2002-2003, available at www.achpr.org

Conference

"Seeking security: Towards a new vision for tenure relations in farming areas"

Lilian Chenwi

Nkuzi Development Association (NDA) in partnership with Social Surveys Africa (SSA) organised a conference on the tenure security of farm dwellers, which was held in Johannesburg from 25-27 October 2005.

In attendance were representatives from civil society, farm dweller communities, farm workers' unions, farm owners, academia and the State.

The conference aimed to discuss the transformation of the farming sector to one operating with the respect for human rights and dignity as envisaged in the South African Constitution. In particular, the organisers intended to share ideas on how to better address the issue of evictions from farms in South Africa.

The discussions during the conference centred on the National Eviction Survey and the implications of its findings; economic and legal issues arising from evictions from farms; education on farms; the situation of women on farms; the views of civil society organisations on evictions; and the government's perspective on the challenges and opportunities in addressing the problem of eviction.

The National Evictions Survey and its findings

As noted above, the conference provided a forum for discussing the findings of the National Evictions Survey and their implications for the farming sector and land reform.

The objective of the Survey,

produced by NDA and SSA, was to obtain accurate information on the extent, nature and impact of evictions from farms.

It revealed a very disturbing picture of the situation of farm dwellers. Specifically, it disclosed an increase in evictions in post-apartheid South Africa. The reasons given for the evictions include:

- the declining economic conditions of farm owners;
- disputes between farm dwellers and farm owners over child labour on farms – for example, where parents refused to allow their children to work on the farm;
- death or termination of employment of a primary occupier, which is usually a male household member;
- farms closing down or changes in land use;
- conflicts between farm dwellers and farm owners over access to services; and
- farmers simply not wanting people living on their farms any more.

Most of those evicted are black South Africans and long-term occupiers on the farms. Women and children make up 77% of the evictees (women making up 28% and children, 49%).

The vulnerability of women and children is made worse by the fact that their security of tenure is linked to the continued employment of their husband or a male member of the household. Farm owners have often used the death or termination of employment of a male household member (the primary occupier) as a reason for evicting the rest of the household.

Regrettably, the Land Claims Court (LCC) supports this position. In *Landbou Navorsingraad v Klaasen* LCC 83R/01 (2001), it ruled that an eviction order against a primary occupier can be used for evicting other household members.

Furthermore, the survey revealed that in the last 21 years, 1.7 million people have been evicted and 3.7 million people have been displaced from farms. Between 1984 and 1993, the number of people who were displaced amounted to 1,832,341 and 737,114 people were evicted from farms. Between 1994 and 2004 these figures increased to 2,351,086 people displaced and 942,303 people evicted.

The increase in evictions for some years have been attributed to:

- severe droughts in 1984 and 1992;
- political uncertainty, trade liberalisation and the passing of the Restitution of Land Rights Act in 1994;
- the passing of the Extension of Security of Tenure Act (ESTA) in 1997; and
- the coming into effect of the Basic Conditions of Employment Act in 2003.

Conversely, the Survey established that the coming into effect of the Labour Relations Act resulted in a drop in evictions from 7.4% in 1994 to 5.0% in 1995. An increase in farm employment in 1993 also resulted in a drastic drop in evictions – from 10.7% in 1992 to 0.4% in 1993.

The Survey shows that those evicted have low levels of education – 37% have no education and 76% have none beyond primary school. They are also extremely poor, with the men having an average wage of less than R530 per month while the women's is R332 per month.

As the Survey revealed, the evictions placed most of the evicted farm dwellers in a position that made them vulnerable to further eviction and violations of their human rights. This is because in most instances alternative accommodation or land is not available to them or, where it is, is in most cases so expensive for them that they fall into arrears, making them liable for eviction again.

While some evictees continue to live in deplorable conditions in new settlements, in the long run others find themselves in settlements with better services such as schools, tap water, shops and electricity. However, they are not necessarily able to access such services due to lack of financial resources.

Challenging the evictions is made impossible by the lack of legal representation for the farm dwellers at the State's expense. Although the LCC, in *Nkuzi Development Association v Government of The Republic of South Africa and Another* LCC 10/01 (2001), held that indigent farm dwellers whose tenure is under threat are entitled to legal representation at the State's expense, legal representation for farm dwellers is still a problem. For example, in the first four months of 2005, six of the seven eviction orders granted in the Worcester Magistrates Court and confirmed on review by the LCC were undefended.

Furthermore, the Survey reveals that the ability of the evicted farm dwellers to get help in relocating to new settlements is made impossible by their lack of awareness of their rights, their lack of resources and low education levels and limited work experience.

Government's perspective

Input on the government's perspective was put forward, ambiguously, by delegates from the Department

of Land Affairs (DLA). The Department of Housing – one of the key role players in addressing the eviction problem – was, surprisingly, not on the government perspective panel.

The DLA delegates admitted that it has failed to adequately address the land and eviction problem. Participants noted that the land reform programme has failed to ease the problem of evictions. They criticised the current legislation and policies as seriously inadequate and difficult to enforce, thus necessitating their review.

The DLA admitted it's failure to adequately address the land and eviction problem.

While agreeing that ESTA needs to be revised, the DLA delegates also acknowledged that legislative amendments alone would not solve the land and eviction problem.

On a positive note, the DLA is in the process of consolidating ESTA and the Land Reform (Labour Tenants) Act 3 of 1996.

However, it is disappointing that this process, which was started in 2001, has not yet been completed, mainly due, as stated by the DLA delegates, to lack of consensus within the Department as to how it should be done and what should be included in the consolidated legislation.

According to the DLA delegates, the DLA faces many challenges to its efforts to addressing the land and eviction problem satisfactorily. They include:

- time constraints;
- lack of capacity;
- inadequate support from other government departments;
- lack of provision of legal representation to farm dwellers; and
- the identification of hot-spots of eviction in order to move towards obtaining land.

Conclusion

The conference established that farm dwellers are marginalised or ignored in land reform programmes. Further, unremitting evictions have resulted in farming life becoming unattractive and have also led to a mushrooming of squatter settlements. It also revealed the shocking absence of the State in addressing the eviction problem.

Addressing this problem is crucial because, as evidenced from the discussions during the conference, evictions from farms will probably increase as some farm owners are hoping to convert farm dwellers' houses to cottages in preparation for 2010 World Cup. This has already resulted in evictions from farms in the Western Cape (Stellenbosch area).

Some of the proposals made at the conference to address the problem of evictions are that the government should:

- tighten up legislation on evictions by creating substantive rights in land for occupiers and balancing the rights of farm owners with those of farm dwellers;
- recognise and protect independent tenure rights and employment rights for women (the employment of women on farms is often tied to that of their husbands);
- implement a well resourced programme of information dissemination, support for farm dwellers and enforcement of their tenure rights;
- implement the recommendations of the Land Summit;
- document and maintain accurate statistics on evictions to help increase budgets;
- ensure legal representation for farm dwellers faced with eviction; and
- educate farm dwellers on their rights.

As noted by NDA and SSA, what is needed in the long run is the creation of a new dispensation in farming areas that accommodates both commercial farms and small farms and allows space for new and emerging farmers and new settlements for farm dwellers.

Such new settlements must give farm dwellers homes of their own and new economic and production opportunities.

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The findings of the National Evictions Survey will be released shortly in the form of a book, *Still searching for security: The reality of farm dwellers evictions in South Africa*, by Marc Wegerif, Bev Russell and Irma Grundling. It will be available for free on various websites and in printed form from NDA and SSA.