#1
Volume 19
2018

ESR Review

Economic & Social Rights Review in Africa

ENSURING **RIGHTS** MAKE REAL **CHANGE**

DULLAH OMAR INSTITUTE
FOR CONSTITUTIONAL LAW, GOVERNANCE AND HUMAN RIGHTS

A publication of the Dullah Omar Institute for Constitutional Law, Governance and Hu man Rights (formerly Community Law Centre) at the University of the Western Cape

ISSN: 1684-260X

A publication of the Dullah Omar Institute for Constitutional Law, Governance and Human Rights (formerly Community Law Centre) University of the Western Cape

Editor :
Dr Ebenezer Durojaye

Co-editor :
Gladys Mirugi-Mukundi

Contact:
Socio-Economic Rights Project
Dullah Omar Institute for Constitutional Law.

Governance and Human Rights
University of the Western Cape
New Social Sciences Building
Private Bag X17,
Bellville, 7535

Tel:
(021) 959 2950

Fax:
(021) 959 2411

Email:
serp@uwc.ac.za

Website:
www.dulahomarinstitute.org.za

ESR Review online
http://dulahomarinstitute.org.za/our-focus/socioeconomic-rights/esr-review

ESR Review
The ESR Review is produced by the Socio-Economic Rights Project of the Dullah Omar Institute for Constitutional Law, Governance and Human Rights, with the financial assistance of the Ford Foundation. The contents of the ESR Review are the sole responsibility of the Socio-Economic Rights Project and can under no circumstances be regarded as reflecting the position of the Ford Foundation.

Production:
Page Arts

> I also believe that citizens should understand the contents of these rights and should hold their governments accountable for their implementation. It is only quite recently that a lot of human rights non-governmental organisations are undertaking advocacy and monitoring on these rights.

Honourable Commissioner Jamesina Essie L. King

Contents:

Features

Case Law

Interview

Updates

From the editor:

Welcome to the first issue of the ESR Review for 2018, which features three articles engaging with economic, social and cultural rights.

In the first, Sinethemba Memela and Tatenda Muranda argue that although the South African state has taken steps to provide housing to vulnerable groups, particularly the aged and people with physical disabilities, a range of other persons who require special-needs housing struggle to access state assistance. Among them are those with intellectual and psychiatric disabilities, victims of domestic abuse, orphans, the homeless, persons undergoing substance rehabilitation, and parolees, ex-offenders and juvenile offenders. The challenges these groups face are well illustrated by the Life Esidimeni tragedy, in which 94 mental health-care patients died at 16 non-governmental organisations and three hospitals from non-psychiatric conditions such as dehydration.

The second article, by Amar Roopanand Mahadew, reflects on how the model of the welfare state has been successfully applied in Mauritius, bringing 'a plethora of social and economic benefits' to citizens. Mahadew makes the case, however, that socio-economic rights should now be included in the country's bill of rights, which celebrates its fiftieth anniversary this year. At the moment, the constitution provides only for civil and political rights, so it is high time – as the Committee on Economic, Social and Cultural Rights has urged repeatedly – for it to include second-generation rights.

With the anniversary having prompted a great deal of constitutional debate, the article looks at how socio-economic rights could be introduced either as directive principles of state policies or as fully-fledged rights enforceable and justiciable in the South African style.

The third article, by Bright Nkrumah, reviews a constitutional court case in South Africa brought by the Black Sash Trust in the public interest and the interest of social grant beneficiaries. The crux of the case is that it questions whether the South African Social Security Agency (SASSA) is able to pay some 17 million grant recipients in a lawful manner in line with constitutional rights and values. SASSA had previously outsourced grant disbursements to Cash Paymaster Services, but intended to take over payment again of social grants on 1 April 2017, at which point the Constitutional Court's supervisory obligations would lapse. However, the Black Sash wanted the Court's oversight role reinstated to ensure that SASSA complies with its constitutional obligations.

In this issue, the ESR Review interviews the Honourable Commissioner Jamesina Essie L. King, Chairperson of the Working Group on Economic, Social and Cultural Rights, at the African Commission on Human and People Rights (ACHPR). The Working Group is tasked, among other things, with the mandate to undertake research on economic, social and cultural rights. The ESR Review also highlights some of the developments at the United Nations Committee on Economic, Social and Cultural Rights and the ACHPR.

We hope you enjoy this issue.

Gladys Mirugi-Mukundi
Co-Editor

1 Creating an Enabling Environment for the Right to Adequate Housing for Persons with Special Needs: Expediting the Special Housing Needs Policy and Programme (SHNP, 2015)

Sinethemba Memela and Tatenda Muranda

Introduction

In October 2015, the MEC for Health in Gauteng, Qedani Mahlangu, announced the termination of the contract between the Department of Health and Life Esidimeni. Some 1,300 people who were receiving highly specialised chronic psychiatric care were to be moved out of Life Esidimeni to families, non-governmental organisations (NGOs) and psychiatric hospitals providing acute care. This was part of what the MEC termed 'deinstitutionalisation'. But between March and December 2016, 94 mental health-care patients died under the auspices of 16 NGOs and three hospitals. The Minister of Health requested that the Health Ombud which is located in the Office of Health Standards Compliance investigate '[t]he circumstances surrounding the deaths of mentally ill patients in the Gauteng Province' and advise on the way forward.

Among the many disconcerting findings was that the NGOs concerned were inadequate to the task of providing for the special needs of persons with mental disabilities because they were 'unstructured, unpredictable [and] sub-standard' (Office of the Health Ombud 2007). The Health Ombud found that of the 27 validly licensed NGOs to which patients were transferred, most of them lacked appropriate infrastructure; some were in the process of renovating buildings as patients were being transferred to them, while others discontinued building or renovating their facilities, even though such renovations were a prerequisite for patients to be transferred into those facilities (Office of the Health Ombud 2007).

A recurring issue in the Health Ombuds's report was the insufficiency of the funding the Gauteng Provincial Department of Health allocated to NGOs for delivering housing that caters to the special needs of patients and for subsidising the operational costs of running facilities of this kind effectively (Office of the Health Ombud 2007).

Challenges in accessing state-assisted housing for persons with special needs arise mainly because the national housing policy and other relevant policies do not make provision for capital funding of special needs housing. Because of this lack of provisioning, NGOs and non-profit organisations (NPO) that respond primarily to the demand for special needs housing are severely hamstrung by a lack of financial resources and unable to access state assistance or capital funding to build new infrastructure.

In an attempt to fill this policy gap, the Department of Human Settlements had developed, prior to the Esidimeni tragedy, a policy on special needs housing the Special Housing Needs Policy and Programme of June 2015 (SHNP 2015). However, despite the desperate need for a policy that provides clear direction on the provision of housing to special needs persons, the SHNP has yet to be finalised and implemented.

Special needs housing in context

The SHNP defines special housing needs as housing opportunities for persons who for a variety of reasons are unable to live independently in normal housing or require assistance in terms of a safe, supportive and protected living environment and who therefore need some level of care or protection, be it on a permanent or temporary basis.

'Special needs housing' is thus any form of housing for individuals, who due to their specific vulnerabilities, require adjustments to their housing or are unable to live independently and require care in state-funded or state-assisted housing.

Although the government has made various commitments to prioritise the needs of vulnerable people in housing delivery, vulnerable persons and those with special needs – including women, people living with HIV/AIDS, the elderly, children, people with disabilities, and poor people – still face numerous obstacles in accessing housing (Special Rapporteur on Adequate Housing 2008).

Statistics South Africa (StatsSA), in its report entitled Social profile of vulnerable groups in South Africa, 2002–2011, assessed the situation of children, the youth, the elderly, and women over time, finding that, in 2012, 11 per cent of child-headed households 9 per cent of children, 23.5 per cent of youth-headed

Sinethemba Memela is a researcher at the South African Human Rights Commission and Tatenda Muranda is an independent researcher.
This article is a summary of a South African Human Rights Commission's report titled 'Creating an Enabling Environment for the Realisation of the Right to Adequate Housing for Persons with Special Needs: Expediting the Special Needs Housing Policy and Programme'.

households, 11.2 per cent of youth, 11 per cent of female-headed households, 9.1 per cent of females, 4.3 per cent of elderly-headed households and 3.3 per cent of the elderly lived in informal dwellings.

Evidently, then, the current national housing framework is failing to meet the demand of these vulnerable groups as identified by StatsSA – let alone the special needs of a range of other vulnerable persons who are excluded from being considered residents of informal dwellings and, consequently, the situational analysis conducted by StatsSA.

Special needs housing takes different forms and a distinction is made between individual housing and group housing. The former is housing for individuals with special needs who are poor and can indeed live independently; in this case, adaptations need to be made to the houses of, for instance, the aged and persons with disabilities. The latter refers housing for persons with special needs who are poor and have vulnerabilities that render them unable to live independently; such persons require group care provided by registered and approved NGOs.

9 per cent of children, 23.5 per cent of youth-headed households, 11.2 per cent of youth, 11 per cent of female-headed households, 9.1 per cent of females, 4.3 per cent of elderly-headed households and 3.3 per cent of the elderly lived in informal dwellings.

Evidently, then, the current national housing framework is failing to meet the demand of these vulnerable groups as identified by StatsSA – let alone the special needs of a range of other vulnerable persons who are excluded from being considered residents of informal dwellings and, consequently, the situational analysis conducted by StatsSA.

Special needs housing takes different forms and a distinction is made between individual housing and group housing. The former is housing for individuals with special needs who are poor and can indeed live independently; in this case, adaptations need to be made to the houses of, for instance, the aged and persons with disabilities. The latter refers housing for persons with special needs who are poor and have vulnerabilities that render them unable to live independently; such persons require group care provided by registered and approved NGOs.

The international and national legal framework

The right to adequate housing is well recognised in international human rights instruments. Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) establishes protections for the right of everyone to an adequate standard of living and the right to housing. In General Comment 4, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) elaborates on the meaning of article 11(1) in relation to the right to housing, while General Comment 7 of the CESCR deals with the question of forced evictions.

General Comment 4 provides among its entitlements that the special needs of vulnerable groups should be taken into account in policy making and implementation.

In the same Comment, the CESCR notes the importance of the term 'adequacy' in relation to housing, and identifies various factors that have to be in place for housing to be considered 'adequate'. Among them are legal security of tenure; accessibility; affordability; habitability; location; availability of services, materials, facilities and infrastructure; and, finally, cultural adequacy. The fact that it was necessary to refer to such a wide range of factors demonstrates how hard it is to define what exactly constitutes 'adequate housing'.

In addition, article 28 of the Convention on the Rights of Persons with Disabilities (CRPD) recognises the rights of persons with disabilities to housing. Similarly, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) recognises the right of rural women to adequate living conditions in relation to housing and other rights; in the same vein, CEDAW General Recommendation 27 concerns the protection of rights of older women and requires states to ensure access to adequate housing for this group.

The national regulatory framework

Section 26 of the Constitution of South Africa provides that the state must take reasonable legislative and other measures to progressively provide everyone with access to adequate housing. Other sections relevant to special needs housing include section 28(1) (the right to shelter for children), section 9 (the right to equality), and section 10 (human dignity). Section 26 refers to everyone and implies that the state is duty-bound to adopt an approach to housing that addresses special needs as well. Consequently, it is a constitutional obligation to create a national comprehensive special-needs housing policy, as failure to do so would mean a deviation from the principles set out in constitutional jurisprudence on housing rights.

The Housing Act 107 of 1997 requires that all spheres of government provide for the special needs of vulnerable groups in all housing policies and programmes. The Housing Act states that '[n]ational, provincial and local spheres of government must … promote the meeting of special housing needs, including, but not limited to, the needs of the disabled'. Section 2(1)(a) of the Housing Act establishes the 'general principles applicable to housing development' and creates an obligation on the government 'to give priority to the needs of the poor in respect of housing development'; to 'promote the meeting of special housing needs, including but not limited to, the needs of the disabled'; and to promote 'the housing needs of marginalised

women and other groups disadvantaged by unfair discrimination'.

In addition, the Social Housing Act 16 of 2008 prescribes that priority must be given to low- and medium-income households in social housing development. It obliges the government and social housing institutions to ensure that their 'respective housing programmes are responsive to local housing demands and that special priority must be given to the needs of women, children, child-headed households, persons with disabilities and the elderly'.

In the case of Government of the Republic of South Africa and Others v Grootboom & Others 2001, the Constitutional Court held that the state's positive obligation under section 26 of the Constitution is primarily to adopt and implement a reasonable policy, within its available resources, that ensures access to adequate housing over time.

Existing housing policy and programmes

The national housing policy framework does not currently make provision for capital grant funding to NGOs that provide housing to persons with special needs. However, the National Housing Code, 2009, makes provision for an institutional subsidy. Selected provinces have used a variation of this to access capital funding for the provision of special needs housing.

However, the objective of the Institutional Housing Subsidy Programme is to provide capital grants to social housing institutions that construct and manage affordable rental units. Three provincial Human Settlements departments (Kwazulu-Natal, Eastern Cape and Gauteng) have special-needs housing policies in place, and the NGO sector has used these successfully to access funding for infrastructure.

The remaining provinces, however, do not have similar policies or programmes, thus unfairly limiting access to special needs housing in these provinces. In other words, this lack of uniformity in the application of housing policy across provinces negatively impacts on the right to equality of persons with special needs in provinces where there is no policy on special needs housing. Due to the way in which the relevant provincial Human Settlements departments interpret the national housing policy, individuals in provinces that do not have a policy on capital funding for special needs housing may be unable to access state-assisted housing to the same extent as their counterparts in KwaZulu-Natal, Gauteng and the Eastern Cape. In addition, there is uncertainty about how appropriate it is to use the institutional subsidy mechanism as a means to access state funding to build infrastructure for special needs housing.

The SHNP

Civil society organisations have been advocating since as long ago as 1995 for a national policy framework that makes provision for capital funding to NPOs for special needs housing. The SHNP recognises that NGOs that in the main provide 'accommodation/housing' and related services to special needs persons require a source of capital funding to be able to provide facilities. However, at the moment there is no national housing programme through which NGOs can access capital funding for special needs housing.

The SHNP aims to fill this vacuum in the government's national housing programme. Its main objective is to provide capital grants to approved and registered NGOs 'for the acquisition/ development of new and/or the extension of and/or upgrading/ refurbishment of existing special housing needs facilities for persons/households with special housing needs'.

To date, the SHNP has not been approved by cabinet and is hence not yet in the implementation phase.

A rights-based assessment of the SHNP

In the Grootboom judgment, the Constitutional Court took note of the many and varied circumstances of individuals and households, as well as the importance of location, and acknowledged the near-impossibility of defining what, in normative terms, constitutes 'adequate housing'. The Court nonetheless held that the state has an obligation to develop and implement a 'reasonable policy' and went on to outline the components of such a policy.

In addition, it stipulated that, in developing such a policy and its programmes, the state has to take a human rights-based approach and keep the principles of transparency and public participation in mind.

In other words, according to the Court, a number of essential requirements had to be adhered to, including meaningful public participation; the inclusion of vulnerable persons in this process; transparent decision-making; enabling sufficient access to information; accountability; continuous monitoring; appropriate complaints or grievance mechanisms; and non-discrimination.

As such, the discussion below looks at the extent to which the SHNP meets the requirements of a human-rights based approach and can be considered a reasonable policy measure.

The Grootboom judgment requires that a reasonable policy prioritise the needs of the poorest and most vulnerable – specifically, that it responds with care and concern to the needs of the most

desperate, and that the government adequately considers the social economic and historical context of widespread deprivation. At its most fundamental level, the SHNP seeks to respond to the housing needs of vulnerable and marginalised persons; however, in certain respects, it does not respond adequately to the realities on the ground. For instance, in relation to housing for persons with disabilities and orphans, insecurity of tenure remains a concern.

An important objective of the SHNP is to target persons who are historically disadvantaged. In an interview with the South African Human Rights Commission, a representative of the national Department of Social Development (DSD) explained that existing facilities tend predominantly to be in former 'white areas'; in response to this deficiency, the SHNP will provide funding to emerging NGOs to establish facilities in predominantly 'black areas' in order to meet the special housing needs of people who are previously disadvantaged and still experience deprivation. In relation to its oversight function, the DSD intends to be more engaged and 'hands-on' in how it supports emerging NGOs.

The SHNP articulates the roles and responsibilities of the DSD, Department of Human Settlements (DHS), Department of Health, Department of Child Services and corresponding provincial departments and regional offices, as well as those of NGOs and other entities, such as traditional leaders, Transnet and the departments of Rural Development and Land Reform and Public Works (DPW).

In a study conducted by the South African Human Rights Commission (South African Human Rights Commission 2018) on the reasons for the SHNP's delayed implementation, the majority of the NGOs that were interviewed said that, given the cross-cutting nature of special needs and different vulnerabilities, effective intergovernmental cooperation will be an important factor in the successful implementation of the SHNP. The study noted, though, that while the SHNP recognises this need and makes sufficient provision for it, there were concerns around intergovernmental cooperation among different government departments and levels of government with the implementing departments.

In terms of the SHNP, the DHS and DSD will cooperate at provincial level, but whereas the provincial DHS can grant final approval of funding applications, the provincial DSD must refer the application to the national DSD for such approval. This allocation of responsibilities may present an institutional stumbling block. NGOs contend that that the SHNP is overly complicated because it requires to ensure its effective implementation, the SHNP makes it incumbent on the DHS and oversight departments to provide information and guidance to provincial departments and municipalities, and to train officials on the policy. The division of functions, roles and responsibilities between government levels is critical in the light of the Esidimeni tragedy and the need to avert such occurrences in the future.

Lessons must be learnt from this tragedy, particularly in view of the ultimate objective of the SHNP. to make provision for housing of people with special needs who are unable to live independently and meet their own needs. Consequently, it can be argued that although they may come across as bureaucratic and onerous, the institutional arrangements described in the SHNP are indeed coherent and reflect an awareness of interdepartmental capabilities at different government levels of government in relation to correct policy interpretation and decision-making.

The SHNP was developed on the premise that the primary responsibility to deliver special needs housing lies within the mandate of the DHS. Presently, these departments have policies and norms and standards in place that relate specifically to the operational aspects and long-term oversight of facilities. What is required, though, is a strengthening of the oversight mechanisms that national departments utilise to monitor policy interpretation and implementation by provincial departments. The DHS should have primary responsibility for the implementation of the SHNP, with oversight departments providing implementation support, as outlined in the SHNP. Although the DSD provides funding to build residential facilities, it does not currently have the large-scale budget allocation or capacity to implement a policy of this nature. Evidence for this observation is found in a DSD report on its audit of residential facilities for older persons (DSD 2010).

Indeed, the report recommends that assistance to provide funding to NGOs for basic infrastructure could be sourced from the DHS or the DPW. The implication is that it would be very difficult to implement the SHNP if the DSD is given the responsibility do this without having sufficient budget allocation from the National Treasury or the additional capacity to implement the SHNP.

To help NGOs access funding in the short term, the national DHS will be required to issue a directive to provincial DHSs enabling them to use the institutional subsidy for the provision of special needs housing without fear of reproach from the national DHS or adverse findings from the Auditor-General on the use of this mechanism. In the medium term, the department identified as the mandate-holder for special needs housing should put the necessary institutional mechanisms in place, and if necessary, conduct pilot projects and, on the basis of their outcomes, revise its implementation plans in the interests of making implementation more effective in the long term.

Conclusion

The provision of special needs housing falls primarily to the NGO sector, which presents two problems. First, there is no standardisation of norms for NGOs that will provide special needs housing. Secondly, no specific government department has taken ownership of the policy, and therefore the chain of accountability remains broken, which makes matters especially difficult for the implementing government departments.

Although the concerns that have been raised about the SHNP are valid, the unfortunate result of the delay in finalising and implementing the policy is that scores of people with special needs are unable to access housing. The government department primarily responsible for the delivery of special needs housing, the DHS, needs to take ownership of implementing this policy and outline a clear set of norms, informed by a human rights-based approach, for providers of special needs housing.

Reference

Committee on Economic, Social and Cultural Rights., 1994, General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), E/1992/23.

Department of Social Development., 2010, Audit of Residential Facilities, https://social.un.org/ageing-working-group/documents/FINAL%20REPORT%20DSD%20Audit%20of%20Residential%20Facilities%20April2010.pdf.

Office of the Health Ombud., 2017, The Report into the Circumstances Surrounding the Deaths of Mentally ill Patients: Gauteng Province, The Office of Health Standards Compliance, South Africa.

Special Rapporteur on Adequate Housing., 2008, 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context,' Miloon Kothari: Addendum: Mission to South Africa, UN Doc A/HRC/7/16/Add.3.

South African Human Rights Commission., 2017, Creating an Enabling Environment for the Realisation of the Right to Adequate Housing for Persons with Special Needs: Expediting theSpecial Needs Housing Policy and Programme, https://www.sahrc.org.za/home/21/.

2 Economic and Social Rights as Constitutional Guarantees, Compared to Privileges under the Welfare State System: An Assessment of the Case of Mauritius

Amar Roopanand Mahadew

Introduction

Mauritius celebrated 50 years of independence on 12 March 2018, a date which coincided with the fiftieth anniversary of its Constitution. At the time of this writing, a number of celebratory events were under way to commemorate these milestones, but there has been debate, too, about the status of economic and social rights (hereafter, socio-economic rights) in the country. Their complete absence in the Mauritian Constitution has raised several critical questions from different quarters about the effectiveness of their protection.

These questions become all the more pertinent when one considers that Mauritius is one of the strongest welfare states in Africa and provides citizens with a plethora of social and economic benefits without there being constitutional guarantees of socio-economic rights. Is there hence any real need to enshrine the rights in the Constitution when the country is faring relatively well as it is? Would constitutional protection of socio-economic rights genuinely improve the social and economic conditions of Mauritians?

This article addresses these questions in the light of the wide-ranging discussion currently taking place in Mauritius on the possible review and amendment of the Constitution. After providing an overview of the history of the Constitution, the article assesses the Bill of Rights contained in it and demonstrates the absence of socio-economic rights in the Constitution; it is the case instead that Mauritius has relied on the concept of the welfare state to ensure and enhance its citizens' social and economic conditions.

It is argued, however, that while welfare statism has both necessary and succesful in Mauritius, the picture remains incomplete without the constitutional entrenchment of socio-economic rights. Socio-economic privileges conferred by the welfare state remain volatile and subject to the risk of being taken away from the citizens.

An overview of the Mauritian Constitution

The Constitution was granted by the representatives.

Amar Roopanand Mahadew is a senior lecturer in the Department of Law at the Faculty of Law and Management, University of Mauritius.

United Kingdom and did not emanate from the people of Mauritius or their elected Meetarbhan argues as such that it does not necessarily reflect the will of the people, albeit that the British government held consultations with political parties from Mauritius during the constitutional talks at Lancaster House in London (Meetarbhan 2017: 1). The Constitution was published as the Mauritius Independence Order 1968, Government Notice 54 of 1968.

Chapter 2 of the Constitution is referred to as the Bill of Rights. It provides for civil and political rights only, and, as noted in the case of Lincoln v Governor General (1973 MR 290), draws inspiration from the European Convention on Human Rights. The civil and political rights protected in the Bill of Rights are as follows: right to life (section 4); right to personal liberty (section 5); protection from slavery and forced labour (section 6); protection from inhuman treatment (section 7); protection from deprivation of property (section 8); protection of the privacy of home and other property (section 9); provisions to secure protection of the law (section 10); protection of freedom of conscience (section 11); protection of freedom of expression (section 12); protection of freedom of assembly and association (section 13); protection of freedom to establish schools (section 14); protection of freedom of movement (section 15); and protection from discrimination (section 16).

It is clear from the above that the Constitution has not entrenched any socio-economic rights in its Bill of Rights; it has not provided for them either in the form of Directive Principles of State Policy, as is the case with the Indian Constitution (De Villiers 1992: 29). The reason for this omission has not been documented, as is evident in the lack of information about this subject in general legal literature in Mauritius.

However, Dr Chan Low, former Professor at the University of Mauritius argues that there was no need to include social rights as they were already taken care of by the system of the welfare state; as for economic rights, the danger of including them in the Constitution was that it would give rise to legal contestation and demands for equal economic rights with the white population of Mauritius, who are generally considered to be in control of the Mauritian economy (from discussions with Dr Low during a UNDP-organised seminar with a Ugandan Rule of Law and Constitutional Democracy delegation in November 2017 at the UNDP Headquarters in Port Louis Mauritius). In the interests of 'stability', it was therefore decided not to include socio-economic rights in the Constitution.

The National Human Rights Commission of Mauritius also took a position on the absence of economic rights in the Constitution – arguably, a disappointing one. It stated that

> Mauritius has adopted a consistent stand to the effect that there is no need to include economic, social and cultural rights in our Constitution since the perennity [meaning 'the state or quality of being perennial'] of the welfare state is guaranteed by other legislations such as the Education Act, the Social Aid Act, the National Pensions Act, the provision of free health services, the setting up of institutions and the subsidisation of Non-Governmental Organisations catering for the welfare of the deprived members of society (National Human Rights Commission 2002: 6).

While the argument about the perennity of the welfare state remains valid to some extent, the overall conclusion that there is no need for the inclusion of socio-economic rights in the Constitution is highly questionable, as will be shown later in the article. The matter has also been highlighted as a major issue by the United Nations Committee on Economic, Social and Cultural Rights (CESCR) in its Concluding Observations on Mauritius's state report of Mauritius in 2010, where it noted that

> [t]he Committee is concerned that economic, social and cultural rights are essentially not enshrined in the Constitution, although some individual rights proclaimed therein are relevant to this category of rights. The Committee is also concerned that the Covenant provisions have not been incorporated in the domestic law and cannot be directly invoked by individuals before national courts. It notes that this situation has a restrictive impact on the scope of the competencies of the institutional guarantees of human rights, including courts, the National Human Rights Commission, and the Office of the Ombudsman' (para 7).

The Committee is also concerned that the Covenant provisions have not been incorporated in the domestic law and cannot be directly invoked by individuals before national courts. It notes that this situation has a restrictive impact on the scope of the competencies of the institutional guarantees of human rights, including courts, the National Human Rights Commission, and the Office of the Ombudsman' (para 7).

While presenting the state report for Mauritius, the country's then ambassador and permanent representative to the United Nations, Shree Servansing, described Mauritius as a welfare state offering free education, free health services, universal old age pensions, social security and benefits for widows, orphans and persons with disabilities, free public transport for students and old-aged persons, and other financial assistance and schemes for the needy (Second, Third and Fourth Periodic Report 2010: 2). The argument that Mauritius is welfare state seems to be the favourite justification that officials offer to explain the absence of socio-economic rights in the Constitution and the reluctance to enshrine them by amending the Constitution. The next section thus examines the country's

welfare-state system more closely.

Mauritius as a welfare state

Entrenching socio-economic rights in a country's constitution does not necessarily entail that the country complies with these rights or respects, protects and promotes them. For instance, several African states, such as Ethiopia and Madagascar, have incorporated socio-economic rights in their constitutions yet without genuinely complying with these provisions. By contrast, Mauritius has been reasonably successful as a welfare state, ensuring the relative well-being of its citizens. For instance, despite not ratifying the Maputo Protocol (until June 2017), Mauritius was catering for women's socio-economic rights through the welfare state system. Such an approach has often been based on the argument that it is better to comply with treaty provisions without ratification rather than doing the contrary which is the case for many African states (Geset & Mahadew: 2016, 169).

A welfare state is a state which provides a wide range of social services for its citizens. Several philosophers have contributed to this concept. For example, John Stuart Mill's philosophy of utilitarianism and the laissez-faire economy paved the way for the theory of the welfare state. Green sought to add a moral dimension to liberalism in his contribution to the concept of welfare state (Holloway 1960: 389). The concept took shape in Germany with the development of social insurance under Bismarck (Sinn 1995: 495) and gained momentum after the Second World War when several European countries changed from a system of partial social services to one affording comprehensive social coverage to the population (Gough 2008: 39).

As stated above, Mauritius provides various kinds of social assistance and benefits, such as free primary, secondary and tertiary education (UNESCO 2006), free health services in public hospitals – which includes open-heart surgery and cancer-related treatments (Ministry of Health and Quality of Life 2002), old-age pensions to those above 60 years of age, retirement pensions and free transport to all students, including university students (Social Security Administration, 2011). It also covers a range of pension schemes related to invalidity and physical disabilities.

Phaahla (2014: 4) argues that Mauritius has succeeded in maintaining a consistently progressive welfare system, an attainment evident, for instance, in the fact that according to the Human Development Index of the United Nations Development Programme, quality of life and levels of equity in Mauritius rival those of the top countries of the industrialised world.

In this vein, the eminent economist Joseph Stiglitz has praised its welfare system, remarking that although Mauritius has few national resources and is not particularly rich, it has managed to ensure a decent quality of life and living standard for its citizens (The Guardian 2011).

The success of the system is due mainly to the legislative framework and the will of political parties to maintain this system. Legislative acts cater for the social assistance mentioned above and comprise a consistent and reliable legal framework for providing welfare services to citizens. Education is catered for by the Education Act 1957, and pensions-related services, by the Social Aid Act 1983 and National Pensions Act 1976. Health services are catered for by the Public Health Act 1925 and the Private Health Institutions Act 1989, while disability-related issues are provided for by the Training and Employment of Disabled Persons Act 1996 and the National Council for the Rehabilitation of Disabled Persons Act 1986. Employment-related matters are addressed by the Employment Rights Act 2009 and Employment Relations Act 2009. The institutional support for social and economic policies to maintain the welfare system is provided by the National Economic and Social Council Act 2002. Economic policies and welfare are regulated by the Small and Medium Enterprises Development Authority Act 2010 and the Small Planters Welfare Fund Act 2002.

There has also been strong political will to maintain the welfare state system since independence. This has been demonstrated by the political manifestos and programmes of all political parties running for elections and the ruling parties in power. Social assistance and benefits have been a priority of all governments since 1968, and all governments have maintained – if not significantly increased – social and economic benefits for the citizens.

Mauritius's success and praiseworthiness as a welfare state are precisely the things that are usually cited to resist the need to entrench socio-economic rights in the Constitution. Several governments have relied on admittedly very decent statistics and track records on social and economic benefits to counter any arguments in this regard. Against this backdrop, the next section considers the reasons why it remains crucial to include socio-economic rights in the Constitution despite Mauritius's relative success as a welfare state.

The need to include socio-economic rights in the Constitution

All the acts of Parliament mentioned above ensure that socio-economic benefits are administratively provided to citizens and that proper mechanisms are in place for delivering pensions, educational facilities and health services to the people of Mauritius.

It is crucial to stress, though, that none of these acts whatsoever provides for a right per se to health, education or social benefits. Arguably, there is a difference between a law providing for a right that is constitutionally guaranteed and an act of parliament administratively providing for such benefits.

The reason is that acts of parliament can be amended easily with a simple majority and are subject to changes in the economic situation locally and internationally. However, because education, housing, health and other social benefits are of key importance for any population, they should be provided mandatorily as rights and not merely as political privileges under a welfare-state system, where they are exposed to the risk of being can be retracted in part or in their entirety without any possibility of judicial control over such alterations.

The conservative nature of the Mauritian judiciary is another reason for why socio-economic rights should be entrenched in the Constitution. The Mauritian judiciary has never attempted to use the theory of implied rights or a purposive interpretation by, for instance, interpreting the right to life to include the right to health or education (see Olga Tellis v Bombay Municipal Corporation 1985 3 SCC 545). The extremely restrictive approach taken by the Supreme Court of Mauritius in Madhewoo v The State of Mauritius (2016 UKPC 30), relating to the right to privacy, lends ammunition to the argument that the Court is not ready for judicial activism. Importantly, the right to privacy is a right already enshrined in the Constitution. One can then easily guess the outcome of any socio-economic case brought before the Supreme Court relying on judicial activism or the application of implied-rights theory (Mahadew 2015: 170). Unless socio-economic rights are enshrined in the Constitution, their protection and promotion are open to challenge under the welfare-state system.

Another justification for the inclusion of second-generation rights in the Constitution lies in the incomplete application of the ICESCR, to which Mauritius is a state party. Given that the country is a dualist state, its domestication of international law takes place through a transposition of norms in an act of Parliament (Permal v Illois Trust Fund 1984 SCJ 173 at 7). Mauritius has not domesticated the ICESCR and thus the latter's provisions are hardly of any help in protecting and promoting socio-economic rights.

The United Nations Human Rights Committee recommended that citizens of Mauritius be able to enforce the Covenant's rights directly before the domestic courts. However, the required legal machinery is not yet in place (Meetarbhan 2015: 33). It is essential, therefore, that, because the highest court of the country is unlikely to demonstrate judicial activism, socio-economic rights should be included in the Constitution to ensure that the Supreme Court gives priority to the 'clear terms of our [the] Constitution' (Roman Catholic Diocese of Port Louis v Minister of Education 1991 MR 176).

Conclusion

Socio-economic benefits under the Mauritian welfare-state system exist only as political privileges, not as constitutional rights. Since 1968, all the country's political leaders and parties in power given priority to socio-economic benefits, but it can be plausibly argued they have been done so merely to gain the support of voters in elections – in the turbulence of the world economy, the winds of change blow regularly and could see socio-economic benefits being taken away from citizens.

An example is the Minister of Finance's invitation to people to reflect on whether basic retirement pensions and free health care should still be given to rich people (Le Defi Media: 2016). Without arguing that all socio-economic benefits must always be maintained or removed, this article has held that it is imperative to have the proper legal foundation to argue the legality and constitutionality of such matters. This is possible only by including socio-economic rights in the Constitution. Only then will the protection of human rights in Mauritius be complete and effective.

References

De Villiers B (1992) 'Directive principles of state policy and fundamental rights: The Indian experience.' South African Journal on Human Rights, 8(29).

Fakun N (6 July 2016) 'Basic retirement pension and free healthcare: Should the rich benefit from welfare state?' LeDefi Media. Available at http://defimedia.info/basic-retirement-pension-and-free-healthcare-should-rich-benefit-welfare-state-0.

Gough I, et al. (2008) Inclusive States: Social Policy and Structural Inequalities. Washington: World Bank Publications.

Holloway H (1960) 'Mill and Green on the modern welfare state.' The Western Political Quarterly, 13(389).

Mahadew R (2015) 'The right to health in Mauritius' in Durojaye E, Litigating the Right to Health in Africa. United Kingdom: Ashgate.

Mahadew R and Geset M (2016) 'The case of Mauritius' in Ayeni V, The impact of the African Charter and the Maputo Protocol in selected African State PULP.

Meetarbhan M (2017) Constitutional Law of Mauritius. Mauritius: Precigraph Limited.

Ministry of Health and Quality of Life (2002) White Paper on Health Sector Development and Reform. Republic of Mauritius.

National Human Rights Commission (2002) Second Annual Report of the National Human Rights Commission. Available at http://nhrc.govmu.org/English/Documents/Annual%20Report/2002/humanr2.pdf.

Phaahla E (2014) 'The welfare state of Mauritius: A critical appraisal.' Global Insight 107.

Sinn H (1995) 'A theory of the welfare state.' Scandinavian Journal of Economics, 97(495).

United Nations Committee on Economic, Social and Cultural Rights. 'Examination of the second, third and fourth periodic reports of the Implementation by Mauritius of the ICESCR'. Available at tbinternet.ohchr.org/Treaties/CESCR/.../INT_CESCR_STA_MUS_44_11147_E.pdf.

CASE REVIEW: Averting Looming Tragedy: A Review of The Black Sash Trust v Minister of Social Development and Others (2017)

Bright Nkrumah

Introduction

On 17 March 2017, the Constitutional Court handed down a ground-breaking judgment which, among other things, prevented an imminent crisis that threatened to disrupt monthly social grant payments to millions of poor and vulnerable South Africans. The outcome of the case at issue, The Black Sash Trust v Minister of Social Development and Others (CCT48/17) [2017] ZACC 8, has been hailed as a 'precedent-setting' landmark by human rights activists and the academic community as far as access to food (through payment of grants in a timely fashion) is concerned.

A brief background

In 2012, the South African Social Security Agency (SASSA) entered into a contract with Cash Paymaster Services (Pty) (CPS) to disburse social grants on its behalf. The Constitutional Court, on 29 September 2013, declared that the award of this contract was null and void (AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (AllPay 1)).

The Court, however, suspended the order of invalidity on condition that SASSA take over the duty of paying grants after the expiration of the contract on 31 March 2017 or award a five-year contract to a new service provider after a competitive tender process as set out under section 217 of the Constitution (AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (AllPay 2)).

The Court retained an oversight role over grant payments and ordered SASSA to submit a report to it on the tender process and its outcome. Against this backdrop, SASSA, on 5 November 2015, submitted a report to the Court, indicating that it intended to assume full responsibility for payment of grants (without awarding any new contract to CPS) when the suspension of invalidity lapsed on 1 April 2017. In the light of various reports from civil society organisations and opposition parties in Parliament, it became apparent though that SASSA was not well positioned to resume disbursement of the grants from 1 April 2017 and would continue to rely on the services of CPS without any competitive process.

The case

Given that SASSA failed to adhere to the order set out in AllPay 2, the Black Sash Trust (the applicant) petitioned the Court to reinstate its supervisory role over the disbursement of social grants. The applicant sought the following orders:

(i) that in order to ensure payment of social grants from 1 April 2017, SASSA submit a report on affidavit setting out how it intends to handle an interim contract with CPS;

(ii) a declaration that CPS has an obligation to act in a reasonable manner when negotiating the payment contract with SASSA;

(iii) that the contract must set out adequate protection to safeguard the autonomy, dignity and personal privacy of grant recipients;

(iv) that SASSA and the Minister of Social Development (Minister) report continually to the Court on the measures adopted or to be adopted to forestall disruption of grant payment from 1 April 2017; and

(v) a declaration that SASSA is legally obliged to ensure that the process of grant payment does not violate the autonomy, dignity and personal privacy of grant beneficiaries.

This application, submitted in the interest of the public (and grant beneficiaries in particular), generally sought to ensure that SASSA adhere to its legal obligation of paying grants to beneficiaries in a timely fashion.

An application for leave to intervene as a second applicant was lodged by an NGO called Freedom Under Law (FUL). The application by FUL aimed to seek relief from the Court to critically assess the proposed interim contractual arrangement between SASSA, the Minister and CPS. This application was heard simultaneously with that of the main application by the Black Sash. The applications lodged by these two organisations were not wholly opposed by CPS or the Minister.

On the one hand, whereas SASSA and/or the Minister opposed some aspects of the relief sought by FUL, they did not oppose the relief sought by the Black Sash. On the other hand, CPS acknowledged that it is constitutionally obligated to act reasonably, especially in the process of contracting with SASSA. It further supported the call for the reinstatement of the Court's oversight role and indicated its willingness to commit to the reporting mechanism recommended by the Black Sash. Two other entities, the South African Post Office (SAPO) and Corruption Watch, filed applications to be admitted as friends of the Court.

The judgment

The final decision was written by Froneman J and was concurred with by Zondo J, Pretorius AJ, Mojapelo AJ, Mhlantla J, Khampepe J, Jafta J, Cameron J,

Bright Nkrumah is a Postdoctoral Research Fellow of the NRF/British Academy Chair in Political Theory at the Department of Political Studies, University of the Witwatersrand.

Nkabinde ADCJ, and Mogoeng CJ. In it, the Court admitted both SAPO and Corruption Watch as friends of the Court, granted FUL's application for leave to intervene, and granted the Black Sash's application for direct access.

In delivering its judgment, the Court held that CPS and SASSA are obliged under section 27(1)(c) of the Constitution to ensure continuous disbursement of grants to recipients from 1 April 2017 until such time as an entity other than CPS is contracted for this purpose. It held, furthermore, that any failure on the part of CPS or SASSA to continue this process would be an infringement of recipients' right to social assistance.

Parting shot

To ensure payment of grants to recipients, the Court suspended its initial declaration of the contract as invalid for a period of 12 month, starting from 1 April 2017. Subject to further conditions, the Court ordered CPS and SASSA to continue disbursement of grant money to beneficiaries for a 12-month duration (commencing from 1 April 2017), based on similar terms as those set out in the current agreement between the two entities.

The reason for maintaining the terms and conditions of the contract (which was due to expire on 31 March 2017) was not only to ensure the protection of beneficiaries' personal data but to enhance transparency and accountability in the payment process. The Court order therefore makes provision for the involvement of the Auditor-General in reviewing the operationalisation of the interim contract.

The Court further directed SASSA and the Minister to submit, on a quarterly basis, reports in a form of affidavits indicating how they intend to ensure disbursement of the grants after the 12-month period expires; what measures they have adopted in that respect; what additional measures they intend to take; and when they will implement such measures. These timeframes, according to the Court, will ensure that the payment of social grants is not disrupted after the expiration of the 12-month period. The Court issued a non-binding order calling on the Minister to provide reasons why she should not, in her personal capacity, be ordered to pay the cost of the application.

Madlanga J, in a separate concurring judgment, acknowledged that the Court has an overarching remedial mandate to order SASSA and CPS to fulfil their constitutional duty of ensuring that beneficiaries receive their grants. He said that he found the judgment confusing nonetheless, especially the parts about the extension of an old invalid contract (due to expire on 31 March 2017) and the extension of the declaration of invalidity. Madlanga concluded, however, that in view of the Court's remedial powers, and in the interest of the grant beneficiaries in particular, he was satisfied that the resultant contract was undertaken on the same terms and conditions as those of the expiring one.

Aftermath of the case

Although the South African state administers a number of redistribution and poverty alleviation interventions (such as free water allocation and government housing provision), social grants are by far the largest of them. The outcome of the landmark decision in the case under review has thus played an enormous role in reducing poverty by enhancing timely redistribution of income to poor households in the form of grant payments.

The amounts paid, the significant number of grant recipients, and the extent of poverty and unemployment make social grants a fundamentally important intervention in South Africa. For the 2017/18 financial year, the total amount paid out in grants is likely to exceed R150 billion. Without the decision of the Court, the effect of non-payment of social grants to vulnerable and poor households would have been severe, affecting about 17 million South Africans in this period, more than 11 million of whom are younger than 18 (Mawson 2017; Dentlinger 2017). One additional seminal impact of the Court's decision worth citing is the transfer of grant payments from CPS affiliate, Grindrod Bank to commercial banks which to a greater extent might reduce cases of 'unlawful, illegal, immoral deductions happening off [Sassa beneficiaries'] bank accounts' (Hyman 2017). The marketing of products (insurance policy, loans, loan repayments, airtime and electricity) of the service provider's sister companies to the beneficiaries did not only compromise the personal data of beneficiaries, but also fostered exploitation.

Social grants – including the child support grant, the foster care grants, disability grants, old-age pensions and other forms of social assistance – support not only their direct beneficiaries but entire households. The number of social grant dependants therefore exceeds the number of beneficiaries by a substantial margin. Had the Constitutional Court not intervened, these households would have been left destitute and likely to face even worse food insecurity than usual, given that frequently they live from hand to mouth.

This is all the more the reason why the Department of Social Development and its Minister, Bathabile Dlamini, could be seen as having acted without due care by leaving the payment issue in limbo for a five-year period – crucially so after having been ordered in 2012 by no less than the Constitutional Court to adopt alternative measures. It is disconcerting that, prior to the case, both the Department and the Minister failed to admit that there was a pending crisis of national proportion and demonstrate any urgency in resolving the matter.

Conclusion

With approximately 30 per cent of South

Africans directly or indirectly dependent on social Africans directly or indirectly dependent on social assistance, grant distribution is a necessary instrument for addressing food insecurity. Thus, any interruption in it would have impacted heavily on millions of beneficiaries and their families.

Without the Court's timely intervention, the economies of rural communities – villages and small towns – would have been hit hard, given that numerous dwellers depend heavily on social assistance to access food, basic goods and services in local markets. An additional knock-on impact would have been felt by shop owners, who would have been unable to pay their staff since their income streams would have been strongly affected.

References

AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC).

AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC).

Dentlinger L. (22 February 2017) '#Budget2017: social grants to be increased' Eyewitness News .

Hyman A. (06 March 2017) 'Explosive Black Sash Trust claims involving favoured Sassa grants firm's owner' BusinessDay.

Mawson N. (22 February 2017) '#Budget2017: Inflationary increase for welfare grants' Independent Online.

The Black Sash Trust v Minister of Social Development and Others (CCT48/17) [2017] ZACC 8.

INTERVIEW
Honourable Commissioner Jamesina Essie L. King, Chairperson of the Working Group on Economic, Social and Cultural Rights, at the African Commission on Human and Peoples' Rights

Can you tell us briefly about your work before your election to the African Commission?

I was a Commissioner in the Human Rights Commission of Sierra Leone, a Commission established by law to protect and promote human rights in the country. The establishment of this Commission was recommended by the Lomé Peace Accord after the conflict as well as the Truth and Reconciliation Commission. I was the first Chairperson of that Commission.

Since your election, what would you regard as the Commission's major achievements and challenges?

The legislative measures that states take to give effect to the rights of the [African] Charter [on Human and Peoples' Rights], which they are required to do and report to the Commission every two years. You can actually see gradual and sustained steps by governments to give effect to the Charter. The participation by states, national human rights institutions and non-governmental organisations in the work of the Commission is also phenomenal.

Another achievement is the high volume of publications produced by the Commission in different thematic areas interpreting the Charter and aiding states in its implementation. The challenges are insufficient human and financial resources for effective and efficient operation of the Commission, and the non-implementation of the Commission's decisions and recommendations.

Reports indicate that poverty rates in Africa remain very high and inequality between the rich and the poor has widened. What is your take on this?

I believe that there has been progress in many respects in addressing poverty and inequality in Africa. There are many countries where high maternal and infant mortality rates have gone down. There is higher enrolment in schools, and there is more enjoyment of economic and social rights. In spite of this improvement, there are still challenges, particularly in rural areas. Political instability and the negative impacts of conflicts and climate change continue to halt progress and impede development in Africa.

As the Chairperson of the Working Group on Economic, Social and Cultural Rights, what you would consider as major challenges to the enjoyment of socioeconomic rights in Africa?

The notion that the economic, social and cultural rights are dependent on the whims and caprices of government and dependent on the availability of resources. This notion is misplaced and implies that economic and social rights are not on the same level as civil and political rights. Until states parties to the Charter, as well as those implementing economic, social and cultural rights within states, [recognise] that they have an obligation as parties to the Charter to give effect to these rights, individuals will not be able to fully realise these rights.

The uniqueness of the African Charter is that it guarantees both civil and political rights as well as economic, social and cultural rights. Its preamble states that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and [that] the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

I also believe that citizens should understand the contents of these rights and should hold their governments accountable for their implementation. It is only quite recently that a lot of human rights non-governmental organisations are undertaking advocacy and monitoring on these rights.

Since your appointment as the chairperson on economic, social and cultural rights, what steps have you taken to ensure that African governments are fulfilling their obligations to realise these rights?

I do engage with states during the constructive engagement with the Commission in respect of their periodic reports to the Commission on the implementation of economic and social rights.

In my intersession reports I have urged governments to implement economic and social rights in accordance with their obligations in the Charter as well as commitments they have agreed to, particularly in the area of devoting a specific percentage of their budgets to health and education.I also support effective mainstreaming of economic, social and cultural rights in all the other thematic areas of work of the Commission.

What would you consider to be the achievements of the Working on ESCR since you became the chairperson?

I became Chairperson of the Working Group in 2015 and since then, the Working Group has been working on the development of guidelines on the implementation of the right to water as well as the development of a draft protocol on the right to social protection and social security in Africa. Both documents are work in progress and as such

I cannot say they are achievements. I believe that mainstreaming economic, social and cultural rights in the Commission's work has been an achievement. Documents developed by the Commission in interpreting other charter rights have made the link to the enjoyment of economic, social and cultural rights, which is an achievement.

Despite the recognition of socioeconomic rights in various human rights instruments and national constitutions in Africa, the enjoyment of these rights remains far from a reality for millions of Africans. What do you think is responsible for this?

I believe that only few constitutions in Africarecognise the justiciability of economic, social and cultural rights and [that] these are very recently reviewed constitutions. Most constitutions make reference to these rights as fundamental principles of state policy, and it is unfortunate that they are not taken seriously by law- and policy-makers.

Would you want to say or two things about the draft Protocol on Social Protection and Social Security in Africa?

It would give an understanding of the content of the right to social protection and social security, particularly to policy-makers and human rights practitioners. When it is finalised and adopted by the African Union, the needs and priorities of the most vulnerable members of our communities will be better addressed through a human rights perspective.

What are the major constraints facing the Working Groups and the African Commission?

Limited human and financial resources to effectively and efficiently carry out the work of the Commission and Working Group on Economic Social and Cultural Rights. Economic, social and cultural rights are very wide and diverse, and require particular expertise, and it is quite difficult to have accurate and reliable monitoring reports on these rights.

What has been your experience of working with civil society groups and states in Africa?

Promotion work is extremely difficult without the collaboration of partners who work at a national level. In the area of economic, social and cultural rights, partners are very few and there are limited resources to support the promotion of these rights.

Limited human and financial resources to effectively and efficiently carry out the work of the Commission and Working Group on Economic Social and Cultural Rights. Economic, social and cultural rights are very wide and diverse, and require particular expertise, and it is quite difficult to have accurate and reliable monitoring reports on these rights.

What has been your experience of working with civil society groups and states in Africa?

Promotion work is extremely difficult without the collaboration of partners who work at a national level. In the area of economic, social and cultural rights, partners are very few and there are limited resources to support the promotion of these rights.

At the end of your tenure as the Chairperson of the Working Group on ESCR, what would like to be remembered for?

That there was a marked increase in the visibility and commitment to implementing and monitoring economic, social and cultural rights in Africa by both states and NGOs. This should in turn lead to increased enjoyment of these rights in Africa.

UPDATES: African Human Rights System

HIV, the law and human rights in the African human rights system: A Report by the African Commission on Human and Peoples' Rights

On 27 January 2018, during the 30th Session of the African Union in Addis Abba, Ethiopia, the African Commission on Human and Peoples' Rights (the African Commission) launched a ground-breaking report, HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-Based Responses.

The report addresses key human rights challenges in the response to HIV, including inequality and discrimination against people living with HIV; access to treatment and restrictive intellectual property regimes; conflict and migration; coercive HIV testing and counselling; restrictions on civil society; and the criminalisation of people living with HIV. The report was mandated by the African Commission with the adoption of Resolution 290 on 'the Need to Conduct a Study on HIV, the Law and Human Rights'. About five public consultations were held, and opportunities were given to other stakeholders to comment on the draft report via online submissions.

As the first-ever comprehensive report on HIV and human rights on the continent, it examines various aspects of the human rights challenges relating to the epidemic. While commending the progress made so far in addressing HIV in the region, the report raises concerns about the difficulties facing key populations such as young women and girls, prisoners, sex workers, men who have sex with men, transgender people, and people who use drugs. It makes radical recommendations, and highlights good practices from across the continent in responding to challenges, including law and policy reform, progressive court decisions, and programmes to advance human rights protection and access to HIV and health services.

The development of the report is the result of three years of work that involved inputs from stakeholders such as people living with and affected by HIV, civil society, and members of key populations.

A launch event of the African Union was attended by the First Lady of Ethiopia in her capacity as Chairperson of the Organisation of African First Ladies against HIV/AIDS. Also in attendance were the Vice-President of Botswana, the Chairperson and Vice-Chairperson of the African Commission, and the Executive Director of UNAIDS. Participants welcomed the report and pledged their commitment to supporting the implementation of its recommendations for advancing human rights and social justice in the response to HIV in Africa.

The report is available at www.achpr.org/files/news/2017/12/d317/africancommission_hiv_report_full_eng.pdf.

UPDATES: United Nations

The impact of civil and political rights violations on the poor: Report of the United Nations Special Rapporteur on extreme poverty and human rights

According to a report submitted to the United Nations in October 2017 by the Special Rapporteur on extreme poverty and human rights, Philip Alston, when human rights frameworks are developed and implemented, the civil and political rights of people living in poverty are either completely ignored and explicitly excluded from the analysis, or mentioned only in passing.

The report highlights the disproportionate and distinctive impact of civil and political rights violations on the poor, maintaining that the fundamental principle of the indivisibility of all human rights is undermined by those who neglect civil and political rights in the context of poverty. Noting that states have gathered little data on the socio-economic status of victims of civil and political rights violations, the report outlines some of the ways in which the civil and political rights of those living in poverty are denied, restricted or deprived of real significance; the violations include torture, abuse of police power, and violence against women and children.

Referring to the way that the poor are criminalised, the Special Rapporteur observes that 'poverty and the death penalty are almost always inextricably bound together'.

The report draws attention to The State v T. Makwanyane and M. Mchunu, (Case No. CCT/3/94, Judgment of 6 June 1995), in which the Constitutional Court of South Africa noted that 'poverty, race and chance play roles in the outcome of capital cases'. The Court went on to say that whether or not the death penalty is imposed depended not on the predictable application of objective criteria but on a vast network of variable factors. These factors include 'the poverty or affluence of the accused and his ability to afford experienced and skilful counsel and expert testimony' and 'his resources in pursuing potential avenues of investigation, tracing and procuring witnesses'.

The report emphasises that, in terms of enjoying their right of access to justice, the poor face multiple barriers to the realisation of their right to legal assistance. In lower- and middle-income countries, poorer people are less likely to be able to afford bail and so are more likely to be in pre-trial detention; because they lack the resources for an adequate defence, they are also more likely than others to end up on death row. Formal court process not only tend to be expensive but are often alienating for the poor. The report refers a study in 2016 study by Muntingh and Redpath in which some African countries, the detention of poor migrant workers in urban centres cuts off financial flows to family members in rural areas, driving families deeper into poverty

by forcing them to sell off assets or borrow money.

In terms of the right of the poor to political participation, the report highlights that those living in poverty are disproportionately and differentially affected by practical and legal obstacles to the exercise of their right to political participation.

The poor, for instance, face barriers to voting in that they are often in precarious employment (making it harder to secure time to vote), have lower access to transportation (making it harder to reach polling stations), tend to be less educated (increasing the likelihood that they run into administrative issues in the voting process) and are often affected by health problems (making it less likely that they can show up to vote). A 2014 study by Leighley and Nagler found that 'the relationships among income, education, and voter turnout are quite strong: the probability of a highly educated or wealthy individual casting a ballot is much, much higher than the probability of a less-educated or poorer individual casting a ballot'.

With regard to the right to housing, the criminalisation of homelessness is increasingly well documented. The shortages of affordable housing and emergency shelter beds force people onto the streets, where they are then fined and imprisoned. As if being unable to afford shelter, decent food, a warm bath or even the use of a private toilet were not humiliating enough, homeless people can be, and often are, also stripped of their freedom of movement.

The report notes in conclusion that at a juncture when poverty and extreme poverty were being placed at the heart of the international agenda, there was widespread resistance among governments to references to the civil and political rights specifically of the poor and to the central concept of accountability. As a result, persons living in poverty are ignored as a vulnerable group, with the focus on discrimination and equality overlooking this 'protected group' and discrimination cases never relating to socioeconomic class.