

Editorial

This is the first issue of a special two-issue edition of *Law, Democracy & Development* featuring the papers that formed part of a research project focusing on the implications of the socio-economic rights in the Constitution for social change in South Africa.

The Bill of Rights in South Africa's 1996 Constitution has been internationally lauded for its inclusion of an impressive array of justiciable socio-economic rights. 2002 was the fifth anniversary of the adoption of the Constitution. This event offered an important opportunity for reflection on the progress that has been made in realising these rights and the critical challenges that lie ahead.

As a contribution to this process, the Socio-Economic Rights Project of the Community Law Centre (UWC) initiated a research project in June 2001. This entailed inviting a team of researchers with acknowledged expertise in various aspects of socio-economic rights to conduct research and write papers on a range of themes pertaining to the realisation of socio-economic rights in South Africa.

The principles laid down by the Constitutional Court for the interpretation of socio-economic rights in the landmark decisions of *Grootboom* and *Minister of Health v Treatment Action Campaign* were used as a basis for assessing progress and obstacles in the implementation of these rights. In addition, the papers highlight key challenges for the more effective implementation and enforcement of socio-economic rights in South Africa.

These research papers were presented and discussed at a national colloquium organised by the Community Law Centre from 17–19 March 2002 at the Strand Beach Hotel, Cape. Entitled 'Realising Socio-Economic Rights in South Africa: Progress and Challenges', the colloquium was attended by approximately 140 delegates, representing a cross-section of government officials, parliamentarians, the South African Human Rights Commission, the judiciary, legal profession, academics and NGOs. In addition, three international guests attended and made presentations at the colloquium on international developments in the field of socio-economic rights. Judge Ariranga G. Pillay, Chief Justice of Mauritius and Member of the UN Committee on Economic, Social and Cultural Rights, focused on the International Covenant on Economic, Social and Cultural Rights. Mr Sam Amadi, Director of the Centre for Public Policy and Research in Lagos, Nigeria, spoke on the potential of the African Charter on Human and Peoples' Rights to advance the realisation of socio-economic rights in Africa. In her concluding address, Prof. Vivienne Taylor, Programme Co-ordinator (Development) of the UN Commission on Human Security highlighted the important linkages between the promotion of socio-economic rights and global human security.

The discussion and responses received from the colloquium delegates to the research papers were invaluable to the researchers in the papers' development and finalisation.

A special edition of the flagship publication of the Socio-Economic Rights Project, *ESR Review*, (vol 3(1), July 2002), was devoted to the research project and colloquium. It features the presentations of the international guests as well as a synthesis of the key themes and challenges for government and civil society emerging from the various research papers and the discussions at the colloquium. Entitled *Socio-Economic Rights and Transformation in South Africa*, the special edition can be accessed at www.communitylawcentre.org.za/ser/esr_previous.php

The research papers review laws, policies, programmes and their implementation in various sectors against the standard of reasonableness established by the Constitutional Court in the abovementioned socio-economic rights cases. There were rapid and often far-reaching changes in the legal and policy environment, and even the jurisprudence relevant to the various papers, in the period between the project's inception and the finalisation of the papers for publication. Many of the papers had to be updated after the colloquium in the light of the subsequent judgment of the Court in the *TAC* case and some had to be substantially revised in the light of changes in law and policy. The papers represent a snapshot of developments as at the end of October 2002. Despite the on-going evolution in social policy, the papers contain valuable insights into how the jurisprudence on socio-economic rights should guide the formulation and implementation of laws, policies and programmes aimed at realising these rights. In some instances, they highlight how the jurisprudence itself could be developed to provide clearer guidance to government on its constitutional obligations to realise socio-economic rights.

The project was fortunate to have a committed team of reference group members who are themselves leading figures in the promotion of socio-economic rights in South Africa (see box below). They gave advice on the general direction of the project and assisted the authors with information, materials and comments on earlier drafts of their papers. We particularly acknowledge the contribution of Prof. David Sanders in suggesting the inclusion of a specific research paper on the political economy of realising socio-economic rights in South Africa. Many of the anonymous referees also went beyond the call of duty in providing detailed comments and information to the authors.

On behalf of the Community Law Centre, I extend a special word of thanks to the Ford Foundation for funding this research project and colloquium. We particularly appreciate the support and encouragement of Alice Brown of the Ford Foundation.

We hope that this project's work will be useful to both public institutions and civil society in their efforts to build a better life for all.

Sandra Liebenberg
Editor

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Synopsis of articles

Sandra Liebenberg reviews the emerging jurisprudence of the Constitutional Court on socio-economic rights through the three leading cases on these rights: *Soobramoney*, *Grootboom*, and *Minister of Health v TAC*. She argues that the strategic importance of socio-economic rights as tools in anti-poverty initiatives will diminish if the courts fail to protect them as vigorously as they do the other rights in the Bill of Rights. In each case, the Court's jurisprudence is evaluated to determine to what extent it supports the struggle of ordinary individuals and civil society organisations against poverty. The paper also seeks to identify key areas where the jurisprudence can be developed to make it more responsive to the needs of the poor. She highlights the key elements of the reasonableness review in respect of programmes to realise socio-economic rights and identifies the opportunities and challenges created by this jurisprudence. However, she argues that the Court's rejection of the notion of minimum core obligations will make it very difficult for individuals living in extreme poverty to use litigation as a strategy to get immediate relief. There is also a danger that the state will fail to prioritise the basic socio-economic needs of vulnerable groups without the Court affirming this constitutional obligation. The only role envisaged by the Court for minimum core obligations is possibly as a factor in assessing the reasonableness of government measures. This does not relieve individuals of the formidable burden of establishing the unreasonableness of the state's social programmes, nor does it entitle them to direct individual relief. She concludes that while the Court has developed clear and useful criteria for a reasonable government programme to realise socio-economic rights, it is regrettable that it has unnecessarily limited the potential of these constitutional rights to contribute to a better quality of life for all.

Edgar Pieterse & Mirjam van Donk are chiefly concerned with the question of whether the post-apartheid South African state has the organisational and political ability to achieve a rupture with the past to ensure the progressive realisation of socio-economic rights, as provided for in the Constitution. However,

the issue of state capability to promote social development cannot be delinked from civil society activism to use, define and expand the political space to advance the fulfilment of socio-economic rights and pro-poor policies in general. The paper reviews state capability and civil society engagement in the context of specific historical and political-economic episodes of South Africa's transition. Given the inter-related nature of socio-economic rights, the concept of integrated development seems particularly useful to guide public sector involvement in the realisation of these rights. The paper concludes that there are serious limitations in state capability to, first, articulate a coherent policy agenda on integrated development and, second, translate such an agenda into a practical programme of implementation. Similarly, after reviewing examples of civil society activism, the paper argues that few recent civil society campaigns have been able to combine effective social mobilisation with the promotion of location-specific delivery on socio-economic rights. The paper concludes by identifying a set of fundamental questions that are central to the continuing dialogue on the realisation of socio economic rights.

Kam Chetty examines the public finance implications of the socio-economic rights contained in the South African Constitution and the evolving jurisprudence on these rights. With reference to the three main Constitutional Court judgments on socio-economic rights, he analyses the obligations placed on the government and highlights five key public finance issues that influence the realisation of socio-economic rights. The first acknowledges the difficulty of addressing socio-economic rights in the post-apartheid context, particularly the difficulty of addressing the deeply rooted social and economic inequality and massive public service backlogs in the context of significant institutional and resource constraints. The second explores the significance of the two types of constitutional obligations imposed by the socio-economic rights provisions in the Constitution: those rights qualified by resource constraints and the unqualified rights, such as children's socio-economic rights. The third provides a brief overview of the key economic factors that underpin resource availability and the approach taken by the courts in reviewing resource questions. Fourth, he derives a framework for assessing the reasonableness of policy from the three judgments. This includes examining intergovernmental fiscal relations, the robustness of government programmes and their accompanying financial plans, and their potential to exclude vulnerable groups, for example, children and people living in desperate need. Finally, the paper analyses the trends in public expenditure, providing a framework for assessing whether public expenditure cuts can be justified or described as retrogressive measures.

In conclusion, he argues that an approach that relies exclusively on litigation is inadequate to foster the realisation of socio-economic rights. Of critical importance is the need to develop effective monitoring mechanisms for the public finance dimensions of socio-economic rights.

Kameshni Pillay argues that, despite the *Grootboom* judgment being hailed as a milestone victory for the poor and landless people of South Africa, it has not (at

the date of writing) resulted in the state implementing a comprehensive national programme that provides accelerated access to land for people in desperate and crisis situations. This inaction on the part of the state can be at least partially attributed to the fact that the order handed down by the Constitutional Court in *Grootboom* stopped short of compelling the state to take steps to rectify the unconstitutionality inherent in its housing programme. *Grootboom* demonstrates clearly that if the judiciary does not adopt a robust approach by compelling the other branches of the state to act to meet its constitutional obligations, court orders will be ineffective in addressing the unconstitutionality identified. The judiciary will therefore run the risk of failing in its constitutional obligation to respect, protect, promote and fulfill the rights enshrined in the bill of rights. The mandatory orders handed down in *Minister of Health v Treatment Action Campaign* are an improvement in the remedial jurisprudence of the Constitutional Court on socio-economic rights. However, the Court declined to include a structural interdict because it found that there was no reason to believe that the government would not respect and execute its orders. The author argues that this stance was unjustified given the facts of the case and the questionable implementation of *Grootboom*.

Edward Lahiff and Sam Rugege assess South African land reform policy in the light of the *Grootboom* and *Treatment Action Campaign* judgments. Particular emphasis is placed on the land redistribution programme, which seeks to give effect to section 25(5) of the South African Constitution. The authors commence by analysing the constitutional, legislative and policy framework for redistribution in both urban and rural areas. Taking their lead from the *Grootboom* judgment, they pose the question 'is the land redistribution programme reasonable?' They seek to answer this question through examining key aspects of the programme, the targets set by government and the resources allocated to it. Thereafter they proceed to explore the specific provisions made for landless people in desperate need and those living in intolerable conditions. Their key findings are that current land redistribution policy is not adequate to effect a fundamental transformation of racial inequality in land holding and that no specific provision has been made for people in desperate need. In order to achieve these objectives, the authors argue, a more interventionist approach is required by the state to pro-actively acquire land in areas of high demand. In addition, new mechanisms will be required to make land available more rapidly to historically disadvantaged individuals and groups both for large- and small-scale agriculture, as well as for residential purposes.