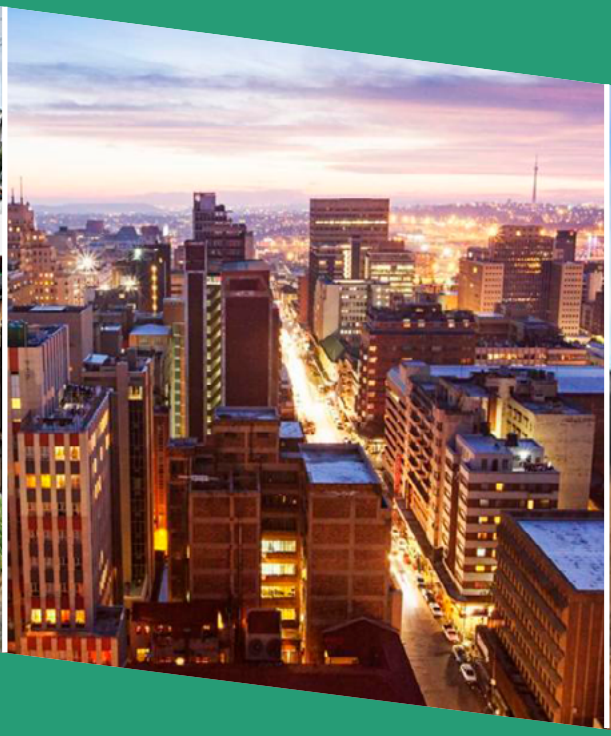

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ESR REVIEW

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

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Editorial

Welcome to the second issue of ESR Review for 2019.

Our first feature, by Stanley Ibe, reflects on 'Some recent developments on justiciability of economic, social and cultural rights', an article written by Eric Ayemere Okojie and Peace O. Folorunsho and published in ESR Review in 2017. Ibe believes that while Okojie and Folorunsho make worthy recommendations about the justiciability of economic, social and cultural rights, the realisation of these rights depends on more than securing their justiciability and encouraging judicial activism.

Our second feature, by Ehigie Marilyn Okojie, emphasises the importance of menstrual hygiene and draws attention to the failure of the South African government to provide free sanitary products as one of the ways of fulfilling women's rights to sexual reproductive health care. Using Kenya and Scotland as case studies, Okojie makes recommendations about what could be done to ensure that the goal of free sanitary pads is realised in South Africa.

In the third feature, Ari Tobi-Aiyemo highlights the injustices that persist in the Niger Delta of Nigeria despite incontrovertible evidence of the destructive impact of oil exploration on the region's human and environmental life.

The fourth feature, by Tinashe Kondo and Nyasha Noreen Kastenga, is a case review of Nkwane v Standard Bank and Others (2018), in which the Pretoria High Court dismissed a constitutional challenge on the ground of rules of court that allow the home of a debtor to be sold without a reserve price. At issue in the case is whether the sale of property without a reserve price constitutes arbitrary deprivation of property. The judgment has far-reaching implications in South Africa for the right to access to housing.

In our Updates section, Robert Doya Nanima discusses the 2018 report of Dainius Pūras, the United Nations special rapporteur on the right to health, on mental health and migration.

The Socio-Economic Rights Project (SERP) of the Dullah Omar Institute hosted two events in May 2019. Paula Knife gives an overview of the events: first, the Roundtable Discussion on Meaningful Engagement: Challenges in the Realisation of the Right to Adequate Housing in South Africa (27 May), and, secondly, the Community Leaders Training Workshop on the SDGs and Access to Justice (28–29 May).

We wish to extend special thanks to Prof. Christopher Mbazira (Makerere University) and Prof. Serges Djoyou Kamga (University of South Africa) for peer reviewing this issue, which we hope you enjoy.

Gladys Mirugi-Mukundi
Co-Editor

FEATURE

Some Recent Developments on Justiciability of Economic, Social and Cultural Rights

Stanley Ibe

I read with interest the thoughtful piece by Ayemere Okojie and Peace O. Folorunsho entitled, 'Some recent developments on justiciability of economic, social and cultural rights' in ESR Review (2017). It traces the origin and development of the concept of justiciability in the context of the seeming rivalry between civil and political rights (C&P rights) and economic, social and cultural rights (ESC rights). In the course of this, it cites various arguments against the justiciability of ESC rights, including that they are vague and framed as obligations rather than as rights. The article concludes, nonetheless, that these arguments apply equally to C&P rights and that ESC rights therefore ought to be justiciable to the extent that states have the capacity apply 'political will' across the two generations of rights.
It is not clear to me what applying 'political will' entails, but I can glean from the concluding remarks that the authors probably want states to 'enact laws that make ESCR justiciable'. They also recommend 'judicial activism' after the manner of South African and Indian courts. As important as these recommendations are, I suspect that, to enhance the standard of living of the poor, we need to do more than transform ESCR into justiciable rights and encourage judges to be activist.

Nigeria's UBE story

In an earlier article (Ibe 2007: 230), I referred to an illuminating discussion of justiciability by two great authors, Jill Cottrel and Yash Ghai, who in 2004 co-edited a collection of essays on ESC rights in practice. In one of the essays, they identify two aspects of the justiciability debate: first, the assumption that courts are inherently incapable of adjudicating because they lack the wherewithal to make decisions about implementation and often are unable to supervise their decisions to ensure compliance; and, secondly, the exclusion of the subject by policy-makers and constitutional drafters.

In the context of Nigeria – the focus of the article under review – it would appear that although the law-makers create a dichotomy between C&P and ESC rights by referring to the latter as 'fundamental objectives and directive principles of state policy' (1999 Constitution: chapter 2), they leave a door open for anyone who might be interested in incrementally realising ESC rights. Specifically, item 60(a) of the Exclusive Legislative List gives the federal parliament the powers to make laws for the promotion and observance of

ESC rights. Indeed, the Supreme Court of Nigeria affirmed these powers in ***Attorney General of Ondo State v Attorney General of the Federation***.

Okojie and Folorunsho point to how the Government of Nigeria took advantage of this door to give legislative effect to the right to education through the Universal Basic Education (UBE) Act of 2004. The same door was exploited to enact the Independent Corrupt Practices & Other Related Offences Commission Act of 2000 (Ibe 2010:202). It is ironic, however, that 14 years after the UBE Act, its objectives have yet to be fully realised.

The UBE story convinces me more than anything else that transforming ESC rights into justiciable rights in Nigeria will not necessarily deliver the goods. We need to do more.

The UBE and anti-corruption legislation were to an extent the products of a judicial decision – ***Archbishop Anthony Okogie & Others v Attorney General of Lagos*** (1981) – wherein the Court of Appeal resolved that the 'National Assembly has the duty to establish authorities which shall have the power to promote and enforce the observance of chapter two of this constitution'. In the light of this, I would like to think that advocacy groups can engage the parliament in a conversation about what other aspects of Chapter II containing ESC rights deserve similar treatment.

One idea worth exploring is providing a framework within which the executive could report to the legislature, and by extension Nigerians, on its progressive realisation of rights established under Chapter II. This could be framed as an annual reflection on the state of ESC rights in Nigeria.

Learning the lessons of the UBE Act

To return to the question of why the UBE Act has failed to deliver the goods, I suspect there are a number of reasons. Clearly, policy inconsistency is one huge challenge. Successive governments do not necessarily align their educational goals with policies they met on assumption of office.

> **One way to address the challenge is to examine the budgeting process**

This presents a serious problem when progress towards an identified goal ought to be measured periodically.

Nigeria's federal structure, and the dissimilarity in commitments and orientation towards education, is another challenge. As I demonstrate below, states respond in very different ways to their obligations to provide counterpart funding for the purpose of implementing the UBE.

While some prioritise making those contributions, others do not. Given that the states hold the key to the success of the programme, it is easy to see that the UBE Act will continue to underperform unless states take their obligations seriously. One of the most significant drawbacks to realising universal basic education is corruption (Bolaji 2014: 181) and its consequences, which include poor infrastructure, demotivated teachers, and escalating tensions between school management and policy-makers.

As much as states can argue about insufficient resources to provide the required access to education, I would like to think they can do more. One way to begin addressing the challenge is to examine the budgeting process – specifically resource allocation and prioritisation. States are mandated under the UBE law to provide counterpart funding to be able to access the resources provided by the federal government of Nigeria. Regrettably, most states have not done so.

In an April 2017 report, the International Centre for Investigative Reporting bemoaned the failure by 10 states – Abia, Benue, Cross River, Ekiti, Enugu, Nasarawa, Niger, Ogun, Osun and Oyo – to access the equivalent of USD 3.3 million each over five

years (2011–2016) because they did not provide counterpart funding.

This is unfortunate, given that schools in the states mentioned could fare better with improved infrastructure and personnel. It would seem that improved quality of education is not a priority. Sometimes, even the meagre resources earmarked for education are frittered away by unscrupulous individuals in and outside of government. I am not sure how justiciability could change this.

> **While the decision in SERAP provides a clear basis to challenge the myth of non-justiciability of ESC rights in Nigeria, it also demonstrates that the Courts may not always have the answers**

Perhaps citizens' demands for accountability and project monitoring will achieve more. The greater the attention citizens give to budget-tracking, the more likely they are to discover how government de-prioritises their interests and then to take appropriate action. As Vivek Ramkumah observes in his highly regarded ***Our Money, Our Responsibility*** (2008: 3), '[B]y tracking budgets throughout their implementation, civil society groups can hold public officials accountable by assessing whether public resources are being spent as they are supposed to be.' I should note that the process of taking action could in fact include litigation. However, litigation alone is inadequate to the task of transforming the lives of millions of disempowered citizens across Nigeria.

The famous case of ***Registered Trustees of Socio-Economic Rights & Accountability Project (SERAP) v Federal Republic of Nigeria & Universal Basic Education Commission*** (ECOWAS Court 2010) illustrates the role – and limits – of litigation in realising ESC rights.

The case arose out of an audit of funds allocated for basic education in the 36 states of Nigeria. Led by the Independent Corrupt Practices & Other Related Offences Commission (ICPC) in 2005/6, the audit identified cases of mismanagement in 10 states. SERAP contended that the audit report demonstrated a pattern of corruption and theft of public resources that was prevalent but largely unaddressed by the federal government. As a result of the mismanagement of resources and impunity with which it was treated, about 5 million Nigerian children could not access basic primary education. Among other measures of relief, SERAP sought an order directing the defendants (the Government of Nigeria and UBEC) to make 'adequate provisions for the compulsory and free education of every child forthwith'.

In its judgment, the Community Court of Justice of the Economic Community of West African States (ECOWAS Court) rejected the position that high-level corruption in the educational sector resulted in the denial of right to education; it suggested instead that the theft of state resources ought to be treated as a crime for which perpetrators should face the full wrath of the law. As to Nigeria's claim that while there was a right to free and compulsory primary education, its constitution made this right non-justiciable, the Court decided that the right was justiciable on the strength of the African Charter on Human and Peoples' Rights, which had been domesticated into Nigerian law.

While the decision in SERAP provides a clear basis to challenge the myth of non-justiciability of ESC rights in Nigeria, it also demonstrates that the Courts may not always have the answers. Seven years after the decision, UNICEF reported that Nigeria still had about 10.5 million children out of school – 60 per cent of them from northern Nigeria, the epicentre of the Boko

Haram insurgency) (UNICEF 2017). Sadly, the northeast of Nigeria dramatises how conflicts can roll back the very limited gains of UBE.

South Africa's Grootboom story

The second of Okogie and Folorunso's recommendations – judicial activism – is laudable, but this is almost always the product of demand. Citizens have to make demands of their government by every legal means possible; if these demands fail to be met with favourable responses, then the necessary follow-up action can be undertaken.

With the relaxation of the rules governing ***locus standi***, it is now easier to institute suits compelling government to perform a public function. The 2009 Fundamental Rights Enforcement Procedure Rules enjoin courts to 'encourage and welcome public interest litigation in the human rights field'. It also specifically declares that 'no human rights case may be dismissed or struck out for want of ***locus standi***'. Consequently, there is little obstacle to parties interested in instituting public interest litigation, but, as I suggested earlier, it is important to combine litigation with other interventions.

Unlike Okogie and Folorunso, I do not think that putting ESC rights on the same pedestal as C&P rights will necessarily change the current state of affairs. South Africa is a fine example of why transforming what Paul Farmer refers to as the 'rights of the poor' (ESC rights) into justiciable rights may not be enough.

In a piece I wrote for the State of the Union (SOTU) (Ibe 2016: 6), I referred to the housing crisis in Cape Town and how, in the ***Grootboom*** case, Justice Yacoob of South Africa's Constitutional Court admonished South Africa to look beyond justiciability and enforce the right to access to housing guaranteed under section 26 of the Constitution.

Regrettably, that admonition, along with subsequent decisions on specific ESC rights

> **Litigation for ESC rights ought to be accompanied by negotiation ... for a sound implementation plan**

– including ***Port Elizabeth Municipality v Various Occupiers*** (the right to housing, particularly the right not to be evicted from one's home without an order of court); ***Bon Vista Mansions v Southern Metropolitan Local Council*** (the right to water and health); and ***Minister of Health & Others v Treatment Action Campaign & Others*** (the right to health and food for HIV-positive citizens) – has not proven sufficient to translate justiciable ESC rights to better living standards for majority of South Africa's poor (Ibe 2016: 6 n20).

Self-evidently, translating good decisions on ESC rights into concrete outcomes requires the collaboration of the different arms of government (ICJ 2008:85) as well as civil society. That collaboration helps to establish the standards by which implementation can be measured, since there is no use in creating standards that end up being completely out of sync with current realities.

To this extent, litigation for ESC rights ought to be accompanied by negotiation with the relevant institutions of government and civil society for a sound implementation plan that makes specific demands of various institutions and creates an accountability mechanism that sets timelines for them to be met as well as raising red flags when they are not. In this respect, community mobilisation and legal empowerment are critical.

According to the United Nations Commission on the Legal Empowerment of the Poor, legal empowerment is 'the process through which the poor become protected and are enabled to use the law to advance their rights and their interests' (UN

2008: 26). In the context of the ESC rights debate, it is imperative for the poor to own their struggles and provide a blueprint for how their issues might be addressed. Even the UN Commission realises that identity and voice are critical elements in the quest for legal empowerment – so, getting the poor to self-organise for change is important.

Conclusion

As much as the movement towards transforming 'non-justiciable' ESC rights into justiciable ones is legitimate, I do not think it is necessarily a challenge for Nigeria: as I have demonstrated in this piece, there is scope for overcoming that hurdle. Nevertheless, many poor Nigerians do not enjoy the full benefit of rights recognised under the ESC rights regime. It is therefore fairly clear that transforming ESC rights into justiciable rights may not necessarily solve the problem.

The path to changing the status quo must necessarily include some of the steps identified earlier – strengthening the budgetary process through improved citizen participation; promoting demand for accountable leadership at all levels; and, crucially, ensuring legal empowerment of the poor so that they are in a position to make these demands and expect answers. These steps will take some time, but they are worthwhile and ought to be prioritised by all who care about the rights of the poor.

Stanley Ibe is a human rights lawyer from Nigeria. He has researched and written on the subject of ESC rights for about a decade.

References

Archbishop Anthony Okogie & Others v Attorney General of Lagos (1981) 1 Nigerian Constitutional Law Report (NCLR) 337

Attorney General of Ondo State v Attorney General of the Federation (2002) 9 NWLR Part 772, 222

Bolaji SD (2014) ***Intent to Action: Overcoming Barriers to Universal Basic Education Policy Implementation in Nigeria***. PhD dissertation submitted to Edith Cowen University, Australia

Bon Vista Mansions v Southern Metropolitan Local Council 2002 (6) BCLR

Ghai Y and Cottrel J (2004) ***Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights.*** London: Interights

Government of the Republic of South Africa & Others v Grootboom & Others 2000 11 BCLR 1169 (CC)

Ibe S (2007) 'Beyond justiciability: Realizing the promise of socio-economic rights in Nigeria.' ***African Human Rights Law Journal***, pp. 225–248. Available at https://bit.ly/2VmGvUN

Ibe S (2010) 'Implementing economic, social & cultural rights in Nigeria: Challenges and opportunities.' ***African Human Rights Law Journal***, pp. 197–211. Available at https://bit.ly/35cTxZz

Ibe S (2016, forthcoming) 'Promoting poverty reduction through effective implementation of socioeconomic rights in Africa.' Paper accepted for publication in ***Our Africa, Our Rights***, a publication of ***State of the Union***

Minister of Health & Ors v Treatment Action Campaign & Ors, South African Constitutional Court, Case CCT 8/02

Okojie A and Folorunsho PO (2017) 'Some recent developments on justiciability of economic, social and cultural rights.' ***ESR Review***, 18(3)

Port Elizabeth Municipality v Various Occupiers 2004 (12) BCLR 1268 (CC)

Ramkumar, V., 2008, 'Our Money, Our Responsibility: A Citizens' Guide to Monitoring Government Expenditures', International Budget Project, Washington DC

The Registered Trustees of Socio-Economic Rights & Accountability Project v Federal Republic of Nigeria & Universal Basic Education Commission (2010)

UNICEF (2017) ***The Situation.*** Available at www.unicef.org/nigeria/education.html

FEATURE

Why South Africa Should Provide Free Sanitary Pads for Its Women

Ehigie Marilyn Okojie

'No country can ever truly flourish if it stifles the potential of its women and deprives itself of the contribution of half of its citizens' ***– Michelle Obama***

'There is no tool for development more effective than the empowerment of women' ***– Kofi Annan***

Menstruation has been a taboo topic since time immemorial. One may ask why that is, given that it is a natural, inescapable biological process most if not all women inevitably experience. Menstrual blood is violence-free blood, yet for many it is offensive for the ear to hear of it and distasteful for the tongue to speak of it. How is it that we can indulge in conversation about someone murdering his family with an axe, but find it appalling even to mention a woman being on her period?

Free sanitary pads: A multifaceted right

Access to free sanitary pads falls within the scope of three rights guaranteed by South Africa's Constitution: the right to dignity, right to reproductive health care, and right to education. This article examines the meaning, content and scope of these rights and explains how free sanitary pads align with them.

The right to dignity

'Dignity' can be defined as the state or quality of being worthy, honoured or esteemed. It is the conceptual basis for the formulation and realisation of human rights, and is neither granted by society nor can it be legitimately granted by society. An imperative implication of human dignity is that every human being should be regarded as an invaluable member of society endowed with a right to life, including to bodily integrity (Chapman 2010). Many scholars argue that if a person is in a humiliating or compromising situation, this is a threat to his or her dignity. Humans deserve dignity not because of their achievements but by virtue of being human (TerMeulen, 2010).

Although the concept of human dignity has no set definition under South African law, the Constitutional Court has described the right to dignity as the most important of human rights and the source of all other personal rights entrenched in the Bill of Rights.

In ***S v Makwanyane***, O'Regan J stated, 'The importance of dignity as a founding value cannot be overemphasized. Recognizing the right to dignity is an acknowledgement of [the] intrinsic

worth of human beings: human beings are entitled to be treated as worthy of respect and concern.'

Similarly, in ***National Coalition for Gay and Lesbian Equality v Minister of Justice,*** Ackermann J recognised the difficulty in defining dignity with precision, but said, 'At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society.'

It is, as such, almost inconceivable that a woman could live a dignified life if she is unable to afford or have access to sanitary supplies, such as pads. The ability of young girls and women to practice good menstrual hygiene lies at the heart of dignity as well as gender equality. When, due to inadequate menstrual hygiene management, young women are secluded, made to feel insecure about their bodies, or teased and harassed, dignity is difficult to maintain. All citizens have the right to live in dignity, and having limited to no access to absorbent sanitary supplies, and nowhere to change sanitary materials or clean oneself in private, is clearly a breach of dignity.

Related to the right to dignity are the human rights to water, sanitation and health. There are innumerable documented examples of women in rural India using old cloths, ash and leaves to soak up their periods (Garg 2001). This lack of sanitation, of course, has a massive impact on a woman's health. One need not be a gynaecologist to know that using dirty, bacteria-ridden rags is going to cause an infection. The alarming fact is that hundreds upon thousands of women around the world are in this situation, yet only a handful of states are taking steps to make proper menstrual health and hygiene a reality for women.

The right to reproductive health

The Programme of Action of the 1994 International Conference on Population and Development defines 'sexual and reproductive health' as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes' (United Nations Population Fund 2014).

Menstruation, a key function of the reproductive system, is fundamental to sexual and reproductive health and rights. Menstrual hygiene management should be part of an expanded definition of sexual and reproductive health, since at its core menstruation is about reproduction: one cannot separate menstruation from reproductive health, as it plays an essential role in the female reproductive system (Wilson 2016).

It is, after all, the pre-eminent biological indicator that pregnancy has not occurred. When a woman gets her period or menstruates, it means that the egg that was released from her ovary was not successfully fertilised and implanted in the uterus and that the uterine lining is subsequently being shed from the body, thus resulting in bleeding.

Poor menstrual hygiene can adversely affect women's health. When women and girls cannot afford or access absorbent sanitary products, they might use improvised materials such as improperly cleaned or scavenged cloth, or other material, such as newspaper or even grass. As already suggested, this may cause reproductive tract infections, or RTIs, such as bacterial vaginosis or vulvovaginal candidiasis, which if left untreated, can increase susceptibility to HIV infection and other STIs (House 2012).

There are other menstrual disorders and menstrual-related symptoms that affect a woman's health and ability to engage in daily activities. For instance, anaemia, a major contributor to maternal morbidity, is associated with menorrhagia, or heavy periods. Having heavy periods without access to quality absorbent sanitary products is an emotional burden no woman should have to bear (Wilson 2016).

Additionally, there are direct links between family planning and menstruation. One of the most common side-effects of hormonal and intrauterine contraception are changes in menstrual-bleeding patterns. Some methods, like the hormonal IUD, may lead to reduced menstruation or even amenorrhea, a condition in which a woman has

no period. On the other hand, the copper IUD may increase monthly bleeding. The contraceptive implant and injectable DMPA disrupt bleeding patterns.

However, when women are counselled on and offered family-planning methods, health-care providers typically do not offer practical advice and resources to manage menstruation and menstrual changes related to contraceptive use.

The right to education

The right to education encounters a two-fold violation where menstruation is concerned. The first stems from the reality that girls who lack access to quality sanitary products will often miss school on days when they are on their period, and that women in the labour force who encounter a similar issue will miss work.

The second violation arises from the consequences young women face when they are not informed and educated about menstruation either in the school setting or in clinics and hospitals. As a result, they are unprepared for menarche, the onset of menstruation, and dealing with 'that time of the month'.

Puberty and menarche are a window of opportunity in which to teach adolescent girls and boys not only about the changes in their bodies but about fertility, contraception and other aspects of sexual and reproductive health. This type of programme can be an avenue for reducing early pregnancy, the risk of HIV and sexually transmitted infections, and for helping to keep girls in school.

An issue of equity

At the most basic level, menstrual health is an issue of equity for girls and women. The sexual and reproductive rights of girls and women are compromised when they have to alter their daily routines, face stigma and discrimination in their communities, schools and workplaces, and be at risk of poor sexual and reproductive health outcomes because they cannot manage menstruation with dignity.

> **Menstrual health is a cross-sectoral issue that requires a coordinated response and partnership between governments and stakeholders**

Governments, global-health development partners and the private sector must work together to ensure that girls and women in low-resource settings no longer face discrimination as a result of their basic biology (PATH 2016). Taking advantage of opportunities to address menstrual health through health and sexuality education, access to appropriate and affordable supplies and infrastructure, and improved collaboration across sectors could reduce disparities and contribute to the improved physical, mental and social well-being of girls and women.

Recommendations

Menstrual health is a cross-sectoral issue that requires a coordinated response and partnership between governments and stakeholders in health, WASH, education, and employment. Civil society, education, public health, and commercial actors can integrate menstrual health in their ongoing work in order to 1) provide both girls and boys with clear and accurate information about menstruation and reproductive physiology; 2) ensure that girls grow and develop in contexts where menstruation is seen as healthy and positive; and 3) ensure that girls and women are supported by their families and communities at the time of menarche and during menstruation (PATH 2016).

The following recommendations highlight the steps that can be taken to engage policy-makers on the issue of menstrual hygiene.

> **Women would no longer need to miss school or work because they are on their period ...**

Remove VAT from all sanitary pads

Commercial menstrual health supplies are made more expensive by import and sales taxes, ultimately taxing women for their physiology. In 2011, Kenya eliminated import taxes on menstrual products, reducing costs by about 18 per cent (Lukale 2014). These products may also be considered an unnecessary expense at the policy, community, or household level, particularly when finances are limited and/or controlled by men who lack understanding and empathy when it comes to menstruation.

The removal of VAT would be the first step towards lifting the financial burden of buying sanitary pads and allowing women across the country, both those economically privileged and disadvantaged, to have access to proper products in order to maintain a reasonable standard of menstrual hygiene.

Subsidise sanitary pads

Subsidies involve the government's paying part of the cost of a good to the firm: this reduces the price of the good and stands to encourage more consumption. Subsidies make sense when considering fairness or equity issues, or when considering markets for necessities such as sanitary supplies, where the limitation on willingness to pay is one of affordability rather than product attractiveness. Although microeconomics theory inform us that a subsidy results in a deadweight loss to society, this would likely not be the case if and when a subsidy is applied to the prices of sanitary pads.

For example, if a price floor were set in place for sanitary supplies like pads, the government would be forced to purchase the resulting surplus from the sanitary product suppliers and thereafter distribute that surplus of sanitary pads to clinics, schools and rural communities remote from clinics. However, while consumers would have to pay higher taxes for the government to purchase the surplus and achieve this goal, it should not be seen as a 'loss'.

The reason for this that, from a public economics point of view, as more people become educated about menstrual hygiene and come to the realisation that paying higher taxes is for the greater good of the women of the country, more people would become cognisant of the fact that free sanitary pads are a positive externality that results in a marginal social benefit to society.

Women would no longer need to miss school or work because they are on their period, but instead be able to go back to school and get an education, or go back to work and put food on the table. This would result in the advancement of women in society through education and employment simultaneously.

Although some taxation, such as income tax, may reduce incentives to work, an alternative, and efficient, way to raise revenue for subsidising positive externalities, such as sanitary pads, would be to tax goods with negative externalities, for example impose a greater tax percentage on alcohol or cigarettes and use the money to pay for sanitary pads.

Promote menstruation awareness

People are more inclined to be sensitive towards

a project or initiative if and when they are aware of it and or have sufficient information and understanding to take action and make a difference.

For example, thanks to campaigns throughout the country on HIV, people have taken it upon themselves to ensure they understand how HIV is transmitted and how to avoid being infected; for its part, the government has played an active role in preventing the transmission of HIV by providing free condoms and treating the disease by providing ARVs or Nevirapine to pregnant mothers to avoid mother-to-child transmission.

Nevertheless, the country has never quite stopped to wonder whether poor menstrual hygiene could be the reason why women tend to be at a higher risk than men of being infected with HIV.

The country has also 'oversexualised' the transmission of HIV and has, as a result, spent a large amount of time, energy and money to ensure that safe sex is top priority, forgetting that sex is a choice, just as the governmental condom brand-name declares, and something over which consenting adults have control, whereas menstruation is involuntary and inevitable.

In short, the country should include menstrual hygiene as a component in raising awareness for HIV and other sexually transmitted diseases by highlighting the sexual-health risks linked to poor menstrual hygiene. Furthermore, the curriculum for Life Orientation should cover menstruation and menstrual hygiene management extensively in order to prepare young girls for the onset of menstruation and inform young boys that, during that time of the month, they should treat their counterparts with the utmost respect and dignity.

These awareness mechanisms would dismantle the idea that menstruation is something to look down upon and further combat the stigma attached to menstruation. It would also result in the state's fulfilling its mandate to respect women's physiology, protect them from health risks linked to poor menstrual hygiene, promote menstruation awareness, and effectuate the right to free sanitary supplies, such as pads.

Ehigie Marilyn Okojie is a final-year BCom Law student at the University of the Western Cape who aspires to be a passionate human rights advocate and activist after she completes her studies.

References

Chapman AR (2010) 'Inconsistency of human rights approaches to human dignity with transhumanism.' ***American Journal of Bioethics***, 10(7), pp. 61–63

Garg S (2001) 'Socio-cultural aspects of menstruation in an urban slum in Delhi, India.' ***Reproductive Health Matters***, 9(17), pp. 16–25

House S (2012) ***Menstrual Hygiene Matters: A Resource for Improving Menstrual Hygiene around the World.*** New York: WaterAid

Locale N (2014) 'Stand up tall and break the taboo of menstruation.' ***Huffington Post***. Available at https://bit.ly/2OtKPA7

PATH (2016) 'Girls' and women's right to menstrual health: Evidence and opportunities.' ***PATH***. Available at www.path.org/publications/detail.php?i=2583

Vermeulen R (2010) 'Dignity, posthumanism, and the community of values.' ***American Journal of Bioethics***, 10(7), pp. 69–70

United Nations Population Fund (2014) ***Programme of Action: International Conference on Population and Development***. New York: UNFPA

Wilson LFS (2016) 'The importance of menstrual hygiene management for sexual and reproductive health.' Available at https://bit.ly/2y8nHv7

FEATURE

The Wealth and Pain of Nigeria's Niger Delta Region: Moving from Exploitation to Accountability

Ari Tobi-Aiyemo

'Despite fuelling much of Nigeria's economic growth, the Niger Delta is somewhat marginalized from Nigeria's national development. Essentially, there is a significant disconnect between the wealth the region generates for the Nigerian federation and the transnational oil companies extracting oil from the region, and the region's human development progress'
– Oviasuyi and Uwadiae (2010: 118)

The Niger Delta region of Nigeria is remarkable not only for its magnificent ecology as one of the world's largest wetlands but for its richness in natural resources, which include extensive oil deposits that make for over 90 per cent of the country's oil. It is also one of the most threatened and rapidly deteriorating natural habitats in the world.

More than four decades of resource-exploitation have created incredible wealth for transnational oil corporations and turned Nigeria into a petrol-dollar state; by the same token, they have left the local population deeply impoverished and devastated the environment. It is an unjust and inequitable situation that stems from, on the one hand, corporate greed and irresponsibility, and, on the other, governmental arbitrariness and indifference.

The result has been a tit-for-tat conflict between militants in the region and the Nigerian government. While the militant groups rightly or wrongly protest against human rights abuses through criminal activities, the government in turn unleashes military forces to 'curb' the violence. Hence, the conflict has spread like wildfire, threatenening the social, economic and political security of the region and the country at large.

The principal contention in this article is that conflict and abuses persist in the region chiefly because the Nigerian government and oil corporations fail to be accountable for the exploitation. After an overview of the Niger Delta's history, the article sets out the major economic, social and cultural rights violations that have occurred and examines the government's attempts at developing the region.

> **The discovery of oil in the 1950s raised great expectations about development, but this was short-lived.**

Historical overview

The Niger Delta area is one of the most diverse regions in the world and has a landmass of about 70,000 square kilometres. The exploration of its huge oil and gas deposits provides more than 95 per cent of Nigeria's foreign exchange earnings (Oviasuyi and Uwadiae 2010: 111). This region consists of the federated states of Bayelsa, Delta, Rivers, Abia, Akwa-Ibom, Cross River, Edo, Imo and Ondo, which are located in the country's South-South, South-East and South-West geo-political zones.

Prior to the discovery of oil, the local population, predominantly subsistent farmers and fisherfolk, depended entirely on farmlands and waters for their livelihood. The discovery of oil in the 1950s raised great expectations about the development of the region and its people, but this was short-lived. The dramatic increase both in the power of oil corporations and in the revenues that accrued to Nigeria was accompanied by economic depression and poverty, ecological degradation – including gas flaring, oil spills, the contamination of soil and water, and indiscriminate dumping of industrial and toxic waste – the political marginalisation and discontentment of local communities, and human rights atrocities.

In the 1990s, conflict erupted between militants, the government, oil corporations and communities and has escalated ever since, with the turbulence concentrated in Bayelsa, Delta and Rivers states, particularly so among the Ogoni and Ijaw communities. Activists such as Isaac Boro and Ken Saro-Wiwa sought justice, but the inhumane treatment they received stands as proof of the government's disregard for the rule of law.

Grievances led to the creation of armed groups, among them the Niger Delta People's Volunteer Force and the Niger Delta Vigilantes, which joined forces as Niger Delta militants. They adopted all manner of ways to protest against human rights abuses and oil exploration, including destroying oil rigs with explosives, kidnapping foreign workers, sabotaging facilities, and vandalising pipelines, deeds that led to serious environmental pollution and economic decline.

In 2009, the government granted the militants amnesty, with monthly stipends, cash incentives and training. This appeased them and reduced the violence for a while, but in recent years it intensified. In 2016 and 2017, a new group, the Niger Delta Avengers (NDA), set out to cripple Nigeria's economy, causing a shutdown of oil terminals that saw oil production decline to its lowest in 20 years (*The Economist* 2016). Subsequently, a coalition known as the Reformed Niger Delta Avengers (RNDA) emerged and has been waging a so-called 'operation no mercy' attack. The group is also threatening secession to enable the region to control its own resources (Daily Post 2017).

Economic, social and cultural rights violations

While oil revenues continue to account for more than 85 per cent of Nigeria's foreign exchange earnings, the host communities of this massive economic operation are deprived of the most basic social and economic infrastructure, such as roads, electricity, potable water, health-care facilities, schools, adequate housing, and employment – all of which are recognised as human rights in the Constitution of the Federal Republic of Nigeria of 1999, as amended (CFRN), the African Charter on Human and People's Rights, and the International Covenant on Economic, Social and Cultural Rights.

Oil exploration has caused severe ecological

> **Oil pollution violates the economic and cultural rights of the people of this region**

damage, primarily through spills that pollute the rivers which produce fish for trading and which are also a means of inter-communal transportation. It is estimated that about 45.8 billion kilowatts of heat are discharged into the atmosphere from flaring, along with 1.8 billion cubic feet of gas every day (Oviasuyi and Uwadiae 2010: 116). Amnesty International (2015) has confirmed that oil spills have a devastating impact on fields, forests and fisheries, which are basic sources of food and livelihoods.

Oil pollution violates the economic and cultural rights of the people of this region, as their means of livelihood are contaminated and their communities have become ecological wastelands. Many lack pipe-borne water points, as a result of which they have to get drinking water from their once pure but now contaminated river. Electricity supply is erratic in the few communities that have it, while fish festivals – once a colourful part of the cultural and commercial life of local communities – are also hard-hit by the reality of insufficient and contaminated produce.

The government's indifference to the region's basic needs and unregulated oil exploration activities has resulted in gross violation of the human rights of these communities, especially their right to life, right to dignity, right to family life, right to freedom of expression, right to health, right to a healthy and adequate environment, and right to a fair hearing.

Moreover, the government's deployment of military forces has compounded the infringement of these rights, making the region a theatre for some of the most gruesome human rights atrocities committed in Nigeria. In short, the government violently represses the communities' demands for attention to their welfare and for greater operational and social responsibility by the oil corporations.

'Accountability'? What accountability?

The government, oil corporations, militants and local communities blame one another for the deteriorating situation. Local communities say it is due to a conspiracy of greed between the government and multinationals, while the government blames it on the militants for committing crimes and fomenting conflict. In turn, the oil corporations attribute it to the ideological perspectives of the local communities.

For example, in an interview with Friends of the Earth International, Shell Development Petroleum accused them of being resistant to change (Oviasuyi and Uwadiae 2010: 114); meanwhile, observers from other countries – among them, governments, researchers and NGOs – contend that it is the oil corporations which, in cahoots with the government, are responsible for the violence and poverty.

Be that as it may, human rights violations persist – and remain the reason for the region's poverty and its violence of the past and present; if these violations had been nipped in the bud, matters may well not have escalated to their current extent.

In terms of section 14(2)(b) of the CFRN, the government has the sole responsibility to uphold the security and welfare of its citizens, but the Niger Delta region is the very last place in the country to benefit from this statutory obligation. Its inadequate, poorly managed infrastructure and amenities are out of kilter with the huge revenue it generates, and the government remains unable to justify this unfair exploitation.

Furthermore, security forces assigned to curb

violence in the region also perpetrate human rights abuses, such as arbitrary arrests and detention, forced disappearances, rape and extra-judicial killings, actions that commonly target outspoken community representatives (World Report 2017). The staged trial and execution of Ken Saro-Wiwa marked a high point in the crackdown on local communities.

The proliferation of harmful actions has not only denied communities any meaningful benefits of oil exploration, but prevented the government and corporations from being able to conduct operations under conditions of peace. This dilemma has spawned conflicts that in turn threaten the security and economic well-being of Nigeria as a whole.

The journey so far

Undoubtedly, various administrations in the past have made attempts to develop this region, but their efforts were unsuccessful. After the civil war, an omnibus body, the River Basic Development Agency, was established in this regard; subsequently, the Petroleum (Special) Trust Fund was established, as was the Oil Minerals Producing Areas Development Commission, which was charged with managing ecological problems associated with oil exploration and production. Unfortunately, abandoned and poorly implemented development projects dot the landscape of the region today, courtesy of these botched endeavours.

The failure of all these development intervention agencies (presumably due to greed and corruption) merely added to the region's economic woes and ecological degradation. So far, the present-day Niger Delta Development Commission, which faces similarly bleak challenges as its predecessors, has been unable to revitalise the devastated hopes of the people of this region.

The government also established a ministry to address development in the Niger Delta, but it was set back by lack of funds and the same old allegations of misappropriation. There was an unsuccessful policy, too, that aimed to achieve zero flaring by 2008 in compliance with millennium development goal 7 regarding environmental sustainability. More recently, an attempt to enact laws to revive the region and grant amnesty to militants was a fiasco. Although the amnesty programme whittled down the violence for a while, it did not eradicate human rights abuses or alleviate poverty. Hopefully, the current administration's commitment to end the insurgency by building infrastructure will succeed.

The government's efforts clearly need to extend beyond lofty rhetoric and initiatives that wind up being shelved whenever there is a change in administration. It has to adjust its ad hoc approach to critical issues and ensure that the rights of the region's inhabitants are not sacrificed on the altar of economic gain. Oviasuyi and Uwadiae (2010: 124) aptly note the irony that the God-given oil and gas with which the region is endowed has been not a blessing but a curse to its people.

To be or not to be: The question of the future

The government's neglect of this bounteous region raises the question: What is the use of immense wealth when the wealth-producing communities are ignored and their environments polluted to the detriment not only of their health and well-being but of national security?

Most of the government's paper visions have either not been pursued or pursued but achieved, for the reason that the government, the oil corporations, the militants and the communities are, one and all, chasing shadows and focusing on the wrong thing: on wealth rather than the pain of the region.

As well-intentioned as these policies may be, they will, even if vigorously pursued and achieved, be unable on their own to resolve the problems destroying this region. The incessant violence over the years now goes beyond issues of mere infrastructural development. Militant 'criminals' have been raised and trained over time; idle young minds have tasted the sweetness of easy money,

power and control; and even in the amnesty deals, it was they, not the people of the region, who enjoyed pride of place in terms of benefits. It will be a Herculean task to get to them to surrender in the face of vaunted infrastructural development that they or their families might not control.

The fact remains that this is a deprived region, notwithstanding the many intelligent recommendations that have been made in regard to transparency and independent monitoring of oil activities, inclusive or participatory policy-making and implementation, ceasing to resort to deploying security forces and committing human rights abuses in response to peaceful protests, and giving constitutional guarantee of the protection of economic and social rights.

So, the future does not look good for the ***modus operandi*** of the government: its use of tit-for-tat military force is not going end conflict, nor will it eradicate poverty and restore justice to this region.

The need for accountability has been cast aside thanks to greed, self-interest, negligence, nationalistic feeling and an acute lack of socio-political vision, taking us right back to where the violence all started – barring that no group leaders have been executed as yet. An amnesty programme is not the solution, merely a cosmetic measure that reduces unrest but which will fade as circumstances change.

As a democracy, Nigeria needs to stop playing the blame-game and fixating on unrealistic solutions. 'Change' is about more than paper-based policies, amnesty deals, military intervention or focusing on particular communities because they have international connections or stronger representation than others in government. Change, in this context, requires putting the horse before the cart.

What will save the country is a genuine accountability framework for justice, one framed without fear of losing economic power and without showing favours to foreign investors, because all other efforts taken without securing accountability have failed, and all those that attempt it in the future will simply be wild-goose chases. The future can only look good from a place where there is accountability by all stakeholders, especially by the Nigerian government. This is what should be our starting-point.

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References

Amnesty International (2011) 'True tragedy: Delays and failures in tackling oil spills in the Niger Delta.' Available at https://bit.ly/2oYljs7

Amnesty International (2017) 'A criminal enterprise? SHELL's involvement in human rights violations in the 1990s.' Available at https://bit.ly/2OEKtXB

Amnesty International (2017) ***Amnesty International Report 2016/17: The State of the World's Human Rights***. Available at https://bit.ly/2mmrS0S

DW (2018) 'Amnesty International Accuses Oil Giants of Negligence in Niger Delta.' ***DW***. Available at **https://bit.ly/2ntTt6D**

The Economist (1 July 2016) 'Who are the Niger Delta Avengers? Nigeria faces a second insurgency.' Available at https://econ.st/2N58wh3

Okonta I and Douglas O (2003) ***Where Vultures Feast: SHELL, Human Rights and Oil in the Niger Delta.*** London: Verso

Oviasuyi PA and Uwadiae J (2010) 'The dilemma of Niger-Delta region as oil-producing states in Nigeria.' ***Journal of Peace, Conflict and Development***, 1(16). Available at www.peacestudiesjournal.org.uk

Tobi A (2004) ***Exploring a Rights-Based Approach to Development and Poverty Alleviation in Delta State***. A report on SERAC'S Legislating for the Poor Summit

CASE REVIEW

Testing the limits of the South African Constitution: An analysis of *Nkwane v Standard Bank and Others* (2018)

Tinashe Kondo and Nyasha Noreen Kastenga

On 22 March 2018, the Pretoria High Court delivered the controversial judgment of Nkwane v Standard Bank and Others. The Court dismissed a constitutional challenge against rules of the court that allow the home of a debtor to be sold without a reserve price. The implication of the judgment is that a debtor's home can be sold for next to nothing, as was the case in this matter. The judgment has far-reaching ramifications for the right of access to housing. This review analyses the key issues and considers the question of whether the sale of a property without a reserve price constitutes an arbitrary deprivation of property.

Summary of the facts

This matter concerned an application brought by Nkwane against Standard Bank (the bank). Nkwane brought the application in order to challenge a sale in execution by the bank in which his property had been sold for less than 10 per cent of its value.

Prior to this sale, Nkwane and his former wife had applied for a loan of R380,000 from the bank to purchase their home. On 8 November 2011, a continual covering mortgage bond was registered over the property. However, Nkwane defaulted on his home loan in February 2012. Within the course of that year, he continued to default on his bond and made payments only intermittently.

The bank then launched an inquiry into Nkwane's matter. His response was that he was struggling to meet his debts as they fall due because of financial difficulties emanating from his divorce. Although he later tried to settle his debt, he was unable to cover all the money owed to the bank. Instalments for November and December of 2012 were also underpaid, and there were no payments for the first three months of 2013.

In January 2013, Nkwane applied for debt review. The application was unsuccessful, though. In March of the same year, he sought to be rehabilitated. This application was approved by the bank. In terms of the arrangement, Nkwane was now entitled to pay less than half of his normal instalments for a period of six months beginning in June 2013 and ending November 2013.

Nevertheless, Nkwane still defaulted on his payments. In June 2014, he informed the bank that, due to the two-year separation from his wife, he could not afford the instalments and wanted to sell the house. The bank then informed him that he had to make use of the bank's Easy Sell Department (Easy Sell), a department that assists distressed homeowners in marketing and selling their properties. It did not come to pass, however, because Nkwane's wife refused to sign the Easy Sell mandate.

On the heels of this failure, the bank then instituted legal proceedings against Nkwane. Pursuant to these proceedings, the bank acquired a warrant of execution against Nkwane's property. In terms of such a warrant, a debtor's property can be attached and sold at a sale in execution. The then rule 46(12) allowed for such execution

to take place without a reserve price being set. In 2015, Nkwane's property was attached and sold for R40,000, despite its valuation at R492,470.

Issue

In this matter, the Court had to deal primarily with the constitutionality of the pre-December 2017 High Court rules which allowed a creditor to attach and sell a property without a reserve price. Rule 46 of the Uniform Rules of the Court at the time read as follows: 'Subject to the provisions of subrule (5), the sale shall be without reserve and upon the conditions stipulated under subrule (8), and the property shall be sold to the highest bidder.' The rule was since amended during the proceedings to reflect that a reserve price can be set in certain situations. However, at least nine factors have to be taken into consideration.

In addressing the primary issue, the Court had four considerations to make: whether (1) a sale with a reserve price results in a higher purchase price; (2) a sale without a reserve price constitutes an arbitrary deprivation of property, contrary to section 25 of the Constitution; (3) the amendment of the rules rendered previous regulations defective; and (4) rule 46 infringed the right to adequate housing.

While all four questions were essential to the judgement, this review focuses on the second and fourth issues, which concern rights with an important bearing on the social conditions of these debtors.

The Court's analysis

The Court began by dispelling the idea that this was a case of the big, bad and powerful (Standard Bank) pitted against the small (Nkwane). It was of the view that, in analysing the matter, it had to be aware that Standard Bank had gone out of its way to assist Nkwane in course of recovering the debt. Among other things, it reduced Nkwane's payable instalments by half and offered to market and sell the property out of hand, outside of a sale in execution.

This offer had not been accepted, though, because Nkwane's wife refused to sign the mandate empowering this process. This deprived him a voluntary sale, which generally realises more money than a sale in execution. The Court noted that had the institution representing Nkwane assisted him instead in obtaining a court order compelling his wife to sign the mandate, the matter in all probability would not have resulted in court proceedings.

The Court also considered whether the loan to Nkwane was a case of reckless credit. It took the position that, when the loan was approved, he was able to service the debt. The defaults only began shortly after the loan was granted, which the Court attributed to Nkwane's separation and divorce.

The Court then turned to the question of whether selling a property valued at R470,000 for R40,000 – to realise a debt of R370,000 – is procedurally and substantively unconstitutional. It began by looking at whether rule 46(12) violated the right to housing. Here, the Court relied on two cases that dealt with the same issue: ***Mouton v Absa*** and ***Haylock v Absa***. In both instances, the Court came to the conclusion that rule 46(12) did not constitute an unjustifiable limitation on the right to housing. Further to this, it referred to ***Bartezsky v Standard Bank,*** where the Court found that 'neither rule 46 in general, nor sub-rule 46(12) in particular, permits arbitrary deprivation of property, whether substantially or procedurally'.

The Court also assessed a submission by the South African Human Rights Commission (SAHRC), which raised two main points. The first, in connection with socio-economic rights (SERs), contended that sales in execution, particularly those without a reserve price, threatened the right to access to housing. This submission was based on the Commission's understanding of international law. The SAHRC referred the Court to its obligation in section 39(1) of the Constitution to consider foreign international law. It cited ***Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others,*** where the court referred to the International Covenant on Economic, Social and Cultural Rights (ICESCR) which prioritises the right to housing and obliges member states to take measures to realise this right. Furthermore, the SAHRC made reference to the laws in South

Korea, France, Ghana and Germany which require property to be sold with a reserve price.

In regard to this first, the Court found there was no violation of section 26 of the Constitution. Its reasoning was that the SAHRC's presentation did not furnish any evidence proving that the absence of a reserve price violates the right to access to housing. The Court also said that the SAHRC failed to demonstrate that the lack of a reserve price is inherently unreasonable.

The second point argued by the SAHRC was that Rule 46 violated the right to property. This argument was also contained in the submission of the applicant. The understanding was that a sale in execution without a reserve price would lead to an arbitrary deprivation of the debtor's property, in violation of section 25 of the Constitution. Such a sale, in their view, violated the right to equity in the property. The finer point of this argument was that when a property is sold for less than its real value, such a forced value then triggers an arbitrary deprivation of property.

In response, the Court reasoned that the affidavits of the applicant did not demonstrate that a reserve price would lead to a higher price at a sale in execution. It noted that, by contrast, the affidavit of Standard Bank indicated that sales in execution with a reserve price reflected the very nature of a sale in execution – a forced sale. Furthermore, sales in execution are often shrouded in uncertainty because of last-minute cancelations or agreements between debtors and creditors. Moreover, buyers avoid sales in execution because they often entail that the buyer cover outstanding rates and taxes.

From this perspective, the Court saw no reason to accept these arguments, which were also accepted in the ***Mouton*** matter. It admitted the submission by Standard Bank that there was a general misconception that mandatory reserve prices attract higher prices. The accepted position was rather that sales in execution with a reserve price do not generate market interest and thus ultimately the property remains unsold; afterwards, problems like property depreciation start to creep in, as sale dates are usually months apart – this in turn decreases the price buyers are willing to pay in future. In the Court's analysis, it was clear that the premise that a reserve price attracts a higher-value sale was contradicted by factual evidence.

Finally, the Court noted that section 25 of the Constitution does not provide for a right to property; instead it guarantees a right against arbitrary deprivation. Whilst the sale with a reserve price led to a deprivation, such deprivation was not an arbitrary one –it was merely a method of sale.

Finding

On the basis of the analysis above, the Court found that it was improper to declare rule 46(12) unconstitutional. It reasoned that when declaring a rule unconstitutional, it had to consider the effect of such an order. In this case, the Court was of the view that a declaration of constitutional invalidity would have far-reaching consequences, as the order would affect not only banks' rights but those of third parties, who would lose their ownership of properties. Accordingly, it noted that the competing rights (the rights of the banks against the rights of the debtors) could not be balanced – and that a remedy was thus unavailable. The Court then dismissed the application without an order as to costs.

Significance

The decision of the Court is of great significance, as it has severe implications for the right to access to housing, especially so when the home in contention is the debtor's primary place of residence.

South Africa has one of the highest percentage of defaulters losing their homes per annum in the world. At least 120 default judgments are granted daily by the courts. If sales in execution are allowed to persist, all the more so when properties are sold for tiny fraction of their worth, this lands debtors in homelessness and a cycle of perpetual debt. The fact that the debtor is still liable to pay the balance of the debt after his or her property is sold for a meagre amount is a travesty of justice.

Although rule 46 has been amended to improve judicial oversight of the process and allow the

setting of a reserve price in certain instances, this amendment does not wholly solve the problem. A sale without a reserve price is still not the default position with regard to sales in execution. Furthermore, debtors whose property was attached before the amendment remain potentially subject to the pre-December 2017 rules. This means they could still be exposed to the kinds of judgements in ***Nkwane***, where homes vital to the socio-economic well-being of families are lost for irrational returns. Consequently, reserve prices should be mandated to prevent prejudice to the debtor and to safeguard the right to adequate housing of a debtor.

As Budaza (2016) argues, 'T]here is no rational connection between the purpose of the repossession of property, the subsequent sale thereof, and the outcome of the sales in execution.' This is the case in ***Nkwane***. It is a lacuna in the law that will continue to pervert justice and bring about absurd results for debtors – who are often the poor in society and in desperate need of shelter. An estimated 100,000 homes have been repossessed since 1994, with a suspected R60 billion in value being lost debtors in this process. Most of these owners have found themselves in townships, with no prospect of recovery.

The lack of justice and equity in these proceedings remains a cause of major concern. In another recent case, the Gauteng High Court, in a matter involving a debtor, Klaas Sibiya, overturned a sale in execution by Nedbank. Sibiya had fallen in arrears of his home loan of R593 000 with Nedbank for R4,000. Remarkably, the purchaser of the home was Nedbank itself. This case underlines the gravity of the injustice being perpetrated in sales in executions, notwithstanding the Court's claim in ***Nkwane*** that there are enough checks and balances when sales in execution are ordered. If the spirit of the Constitution is to be given full effect, such injustices ought not to take place.

Against this backdrop, it is suggested that no sale in execution should take place without a reserve price set by a court. While such a reserve price may not always lead to higher prices or generate interest in the sale, in a sense it balances competing interests by ensuring that properties of debtors are not sold for substantially less than what they are worth.

A base-value of 60 per cent of market value should be set as the lower threshold for sales in execution. This is important in South Africa, where sales in execution realise very little in proceeds, unlike many other jurisdictions where they recover at least 90 per cent of the property's worth. Sixty per cent is enough to generate some interest in the sale as well as meet the debtor's interest halfway in the sale.

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References

Ampofo-Anti OY (2018) 'Court rules that banks can sell your house for next to nothing.' ***GroundUp***. Available at https://bit.ly/2H5ltSw

Bartezky and Another v Standard Bank of South Africa Limited and Others [2017] ZAWCHC 9 of February 2017

Budaza M (2016) 'Lawyers look into repossessed homes.' ***KathorusMail.*** Available at https://bit.ly/2nqP58g

Haylock v Absa, Case no. 24820/2015

Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC)

Mouton v Absa and Haylock v Absa 17922/2014 and 24820/2015

Mouton v Absa, Case no. 17922/2014

Sibiya K (2017) 'The case against bank's abusive home repossession tactics.' ***Independent Online.*** Available at https://bit.ly/2Vnedtf

Venter Z (2018) 'Repossessed homeowners dealt a heavy blow.' ***Independent Online.*** Available at https://bit.ly/2nof4x4

UPDATES

Mental Health and Migration: Interim Report of the United Nations Special Rapporteur, Dainius Pūras, 27 July 2018

Robert Doya Nanima

At the seventy-third session of the General Assembly, held on 27 July 2018, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Special Rapporteur) addressed the General Assembly. This report formed item 74(b) of the provisional agenda covering issues relating to the promotion and protection of all human rights, human rights questions, and alternative approaches to the effective enjoyment of human rights and fundamental freedoms.

Thematic areas

This interim report addresses five thematic areas: the right to mental health and migration; terminology and the scope of the report; opportunities and obstacles in the global context; the right-to-mental-health framework; and people on the move.

The right to mental health and migration

In dealing with the right to health, the Special Rapporteur notes that earlier reports identified discrimination, intolerance and a selective approach to human rights as key indicators in the fight against full and effective realisation of the right to physical and mental health. The present report examines the link between migration and the right to mental health, with a focus on contemporary political, humanitarian and public health responses.

The Special Rapporteur proposes that grave violations of the rights of migrants and refugees require that the right to mental health be grounded within the context of a sustainable development agenda that seeks to realise that right for all people. As such, there is need for increased attention to the realisation of this right and the removal of barriers that impede this.

Terminology and scope of the report

Drawing insights from the Hague Process on Refugees and Migrants and the United Nations Educational, Scientific and Cultural Organization, the report defines a 'person on the move' as an individual who is moving across or has crossed an international border, or has moved from his or her habitual place of residence – a definition that applies regardless of legal status, whether the movement is voluntary or involuntary, the causes for the movement, or the length of the stay (UNESCO 2008).

Given this definition, the report emphasises that that being a person on the move should not be equated with a mental health issue in itself. Nevertheless, while migration is informed by political reasons, it also has implications for the mental health of an individual.

It is recognised that since biological, social and psychological factors affect mental health, a nuanced approach to the broader perspective of a person's political, social, cultural and economic life is useful in aiding State Parties' obligation to respect, protect and fulfil the right to mental health.

Global context: Opportunities and obstacles

The various global efforts to strengthen mental health systems represent an opportunity to consider how those systems advance the equal realisation of the right to mental health for all people, including people on the move (UN Human Rights Council 2018). The Special Rapporteur urges State Parties to learn from how other organs, such as the World Health Organization, deal with emergencies as opportunities for improving the enjoyment of the right to mental health of affected persons (UN Human Rights Council 2018).

> **Unequal power relations in socio-political, health-care and even humanitarian settings have implications for the right to health**

States Parties are encouraged to recognise the economic benefits that people on the move offer to their host economies in terms of their contribution to the labour workforce and their self-sufficiency in being self-employed in their own businesses.

Unequal power relations in socio-political, health-care and even humanitarian settings have implications for the right to health. These inequalities are made worse by conflict, violence and social economic disparities, resulting in discriminatory treatment of people on the move and the subsequent violation of their right to mental health.

People on the move and the right-to-mental-health framework

The normative framework of the International Covenant on Economic, Social and Cultural Rights is complemented by other international laws such as the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of Persons with Disabilities, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, the Convention Relating to the Status of Refugees, and the Convention on the Rights of the Child.

These obligate states to respect, protect and fulfil the right to physical and mental health in their national laws, policies, budgetary measures, programmes and other initiatives. There is a corresponding obligation on states to prohibit discrimination of any grounds of national origin, birth or legal status; there should be increased participation by, and access to information for, all persons, as this heightens the accountability of State Parties (UN Human Rights Council 2018).

Other matters the Special Rapporteur highlights are the social determinants of health, care and support in terms of their availability, accessibility, acceptability and quality.

Issues in focus

Special attention needs to be paid to the right to mental health of children and families on the move, given that migrant detention is a default strategy used globally to regulate mobility. It is recognised that, as a central focus of human development and immigration policies, the family is a foundation for children's mental health and well-being – this is something people recognise universally despite their ideological, geographic and cultural differences (UN Human Rights Council 2018).

The principle of the best interests of the child should apply to all children and adolescents on the move. This would affect issues such as education, social protection, health, safety and security, access to justice, freedom from torture, cruel, inhuman and degrading treatment, and non-discrimination. State Parties are called upon to harmonise their laws, policies and regulations with the Convention on the Rights of the Child (UN Human Rights Council 2018).

Furthermore, the Special Rapporteur notes that the arbitrary detention of persons with intellectual, cognitive and psychosocial disabilities also occurs in the context of migration and displacement. This practice violates the rights to personal liberty and to security, and may amount to a violation of the right to live free from torture and ill-treatment (UN Human Rights Council 2018).

The Special Rapporteur recommends that people in positions of power avoid xenophobic words and actions, which have a negative impact on the right to mental health.

The Working Group on Arbitrary Detention is applauded for supporting the gradual abolition of immigration detention. It is recommended that States Parties establish a legal presumption against immigration detention and bring all forms of it to an end. States are urged to prioritise the implementation of non-custodial, community-based alternatives to detention.

Conclusion and recommendations

The Special Rapporteur recommends that people in positions of power avoid xenophobic words and actions, which have a negative impact on the right to mental health. This would tone down the hostile emotional and psychosocial environments that arise due to mistrust, disrespect and intolerance.

States and stakeholders should strive to develop strong communities founded on good-quality human relations. It is noted that when enabling environments are not created or supported for the realisation of everybody's rights, the realisation of the right to mental health is an uphill battle.

> **State Parties are encouraged to ... prohibit the detention of children and other practices that are not in their best interests**

State Parties are encouraged to take legislative and policy steps that include the following:

- Repeal laws and policies that criminalise irregular migration based on immigration status, or impede the ability of people on the move to participate in or develop meaningful relationships in their host communities, work, obtain an education or have access to services, including mental health care and support.
- Prohibit the detention of children and other practices that are not in their best interests, including the detention of families, family separation, and frustration of family reunification. These prohibitions should extend to the detention of migrants with psychosocial, cognitive or intellectual disabilities. The prohibitions would ensure that decisions relating to the entry, stay, naturalisation and expulsion of people on the move cannot be made solely on the basis of health status, including mental health status.
- Work progressively to end all forms of immigration detention, except where exceptional circumstances exist. There should be procedural safeguards that are implemented, with monitoring by independent mechanisms to prevent torture, ill-treatment and violence. The prevention should extend to other interference that affects the realisation of the right to physical and mental health.
- Provide human rights education for service providers, mental health practitioners, and other stakeholders on how to deal with instances that may lead to the violation of the right to health. State Parties should ensure that detained migrants are held in conditions that satisfy health standards and where they can access essential health-care services, including mental health care and support services.

> **State Parties should ensure that detained migrants are held in conditions that satisfy health standards**

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References

Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health in relation to mental health and migration. UN Doc A/73/216. 27 July 2018

EVENT

Roundtable Discussion on Meaningful Engagement: Challenges in the Realisation of the Right to Adequate Housing in South Africa (27 May 2019)

Paula Knipe

Although South Africa's courts have accepted the basic need to shelter as judiciable since the ***Grootboom*** case, the right to adequate housing has been a contested issue. It has re-emerged into prominence thanks to public discussion about land redistribution and incidents of land-grabs.

The Dullah Omar Institute held a roundtable discussion entitled, 'Meaningful engagement: Challenges in the realisation of the right to adequate housing in South Africa' (27 May 2019) to delve into issues such as the concept of meaningful engagement and what the right to access to adequate housing entails. The roundtable also looked at the role of government and civil society in realising this right, as well as at challenges in the South African context. The roundtable brought together social justice activists, advocates, academics, community-based organisations, non-governmental organisations, policy-makers and other stakeholders.

Prof Sandy Liebenberg focused on the role and potential of meaningful engagement in relation to the right to housing. She began her presentation with two pertinent questions. First, what is the right to access to adequate housing in South Africa? Secondly, what is the gap between what the law says and the lived reality of South Africans? While the Constitution explicitly

> **While the Constitution guarantees the right to access to adequate housing in section 26, adequate housing is not defined**

guarantees the right to access to adequate housing in section 26, adequate housing is not defined in the Constitution. Prof Liebenberg looked to other domestic and international sources that give context to this right. She noted that the United Nations International Covenant on Social, Economic and Cultural Rights guidelines on 'adequate' housing are useful in assessing the adequacy of housing in various contexts.

While policy states that housing is to be progressively realised over time, jurisprudence indicates that a reasonable policy must include provision for meaningful engagement with those who are affected by housing decisions. What

> **Special-needs housing … is a programme venturing into new terrain, so meaningful engagement with the community and experts is necessary**

is meaningful engagement in relation to a housing decision? Its purpose is to find a solution to conflict between property rights and housing rights in the case of private evictions; and it can be useful tool for finding creative solutions and determining the special needs of a community. Some courts have also found it necessary during upgrades of informal settlements.

Prof Liebenberg considered what makes engagement meaningful. 'Meaningful engagement' entails a bottom-up approach; is structured; requires trained, expert capacity in all spheres of government; is transparent and accessible; is sensitive to different needs and circumstances; is open to civil society and social movement processes; and is continuous. This is the ideal situation, but the reality is different. Common complaints from community members have to do with lack of empowerment, inaccessibility, limited scope for change, and huge gaps between policies in theory and policies when implemented in practice.

In the next presentation, Ms Nonhlanhla Buthelezi introduced the legislative framework and policies on housing and 'human settlements' in South Africa. A 'human settlement', she said, is defined as housing that uses combined infrastructure and agriculture to support sustainable living. Ms Buthelezi called for a broader understanding of what 'adequate housing' means – not just a 'four-wall' approach but one in which the environment needs to be accessible and safe.

She examined the functions of the three spheres of government in relation to housing, given that it is a concurrent government responsibility, and provided insight into various kinds of housing developments, ranging from those under the old Reconstruction and Development Programme (RDP) to those of the recent Breaking New Ground Strategy (BNG).

Ms Buthelezi noted the forums where departments review policies and enter into meaningful engagement at national level. The Department of Human Settlements' current Medium-Term Strategy Framework indicates that the demand for housing is higher than what it is able to provide in terms of land acquisition, formal upgrading and creating human settlements.

While there is acknowledgment of demand for special-needs housing, large gaps remain in terms of policy development. Special-needs housing requires collaborative effort from various departments; however, it was decided that it is largely the responsibility of the Department of Human Settlements. This is a programme which is venturing into new terrain, so meaningful engagement with the community and experts on special-needs care and construction is necessary.

Commissioner I kd] i a` Ameermia introduced the constitutional mandate of the South African Human Rights Commission (SAHRC), which is to hold all spheres of government and organs of state accountable by monitoring and assessing the realisation of socio-economic rights. This includes the power to investigate and report on violations and to provide redress where necessary. Education and research are

other important functions of the Commission.

The Commissioner examined the apartheid system of spatial inequality and how its divisions continue into the present day. Apartheid sought to isolate people of colour from economic opportunities in the city, whereas post-1994 South Africa developed policies to undo this injustice. In keeping with this vision, the National Development Plan (NDP) aims to bring about development and spatial justice by dismantling privilege due to geographical location and ensuring that all human settlements are functional and equitable and provide access to amenities, infrastructure and economic opportunities.

Nonetheless, the SAHRC finds that policies and legislation largely fail to rectify inequalities. For instance, houses for the disadvantaged are still being built in peripheral areas far from opportunities, lacking in connectivity and hampered by poor transportation infrastructure. Post-1994 policies replicate the spatial injustices of apartheid and cement the disadvantages of the poor. Currently, the Commission is asking the government what its short- and long-term plans are to address these issues and why its actions are inconsistent with its goals.

In the final presentation, Dr Soraya Beukes looked at the link between corruption and housing in South Africa. She said corruption undermines the realisation of socio-economic rights. Realising the right to housing is directly dependent on economic resources, with funds having to be allocated for the construction of human settlements. However, these funds are being abused.

Dr Beukes noted that the government has not yet centralised its data on the housing crisis and instead civil society has conducted most of the research. As for the government's progress, it is clear that unrealistic goals have been set. Why, she asked, has it not been held accountable? There are bodies designed to monitor and assess the performance of government, but

“Realising the right to housing is directly dependent on economic resources, with funds having to be allocated for the construction of human settlements. However, these funds are being abused

they are ineffective and ignored.

Dr Beukes provided data as to how many officials have been accused of fraud, maladministration and corruption in recent years but not yet penalised. The majority are still in their positions, which enables corruption to continue.

Another major concern is the increasing size of the temporary or emergency housing 'transit camp' sites, where facilities are sub-standard facilities.

The discussion concluded with a number of recommendations. There is a need for an overarching national legislative framework relating to meaningful engagement, equitable spatial development and enhanced systems-efficiency. Human settlements also need to be understood differently as enablers of sustainable development where people can live in comfort and dignity.

EVENT

Community Leaders Training Workshop SDGs & Access to Justice (28–29 May 2019)

Paula Knipe

The Dullah Omar Institute hosted a community leaders training workshop (28–29 May 2019) on the Sustainable Development Goals 2030 (SDGs) and access to justice. The purpose of the event was to examine how the SDGs affect vulnerable and marginalised groups and how communities can use the SDGs to access their right to justice. It was an opportunity for social justice activists, advocates, academics, community-based organisations and non-governmental organisations to discuss the importance of the SDGs in the South African context.

Prof Diane Cooper explained the development of the initial Millennium Development Goals 2000 (MDGs). She asked probing questions: Were the MDGs successful? Has poverty been reduced? Could we say we have retrogressed and become a more unequal society? In 2015, the MDGs were redefined as the SDGs, placing stronger emphasis than before on global responsibility and with a target date of 2030.

Prof Cooper's presentation focused on SDG 3, aimed at ensuring good health and well-being. In the past, many diseases and illnesses were seen as the result of bad lifestyle choices, but over the years they have come to be understood as the outcome of environmental factors such as access to health facilities and nutritious food.

Dr =j pdkj u Diala's presentation looked the impact of SDG 5, namely gender equality, on women. He outlined the historical development and context of women's status today. It was noted that the colonisation of Africa and the myth of women's inferiority can be understood in three spheres.

First, economically speaking, women were stripped of the land and thus their means of agricultural production and main source of food and power. Secondly, colonisation brought with it a religion that explicitly depicted man as superior and woman as inferior, opposing the matriarchal ideology that existed on the African continent. Thirdly, in the political sphere, when Europeans encountered the indigenous people, the men were protectors and warriors – the Europeans viewed them as the heads of the household, superior to women. In addition, encounters between Europeans and the indigenous people were impeded by language barriers that led to misunderstanding of African customs.

> **Were the MDGs successful? Has poverty been reduced? Have we retrogressed and become a more unequal society?**

Due to a combination of these factors, women came to be regarded as inferior, a mode of thinking that is still in place today in spite of the strides made in attempting to change it.

Dr Diala said that women should be equalised with men not only because everybody has equal rights before the law, but because it would be unfair to continue treat women unequally when the social environment that shaped traditional relationships between men and women has changed irrevocably. Cultural and religious customs were socially constructed and thus can be deconstructed. However, many inegalitarian laws and practices still deny women their agency. Dr Diala called on community members to exercise their agency and act for positive change.

Dr Maria Assim looked at the SDGs in relation to vulnerable children. Children do not have the luxury of having their rights progressively realised over time: when they turn 18, they are no longer considered children and have no protection. Moreover, when they are surrounded by crime and abuse, they are likely to become dangerous adults. Intervention needs to happen while they are still impressionable and able to unlearn bad habits. Children are also marginalised when it comes to access to justice – this is often difficult for them as they are not empowered to engage with the system.

Dr Assim noted that an effective way to realise children's rights is to understand it as a collective, with all rights being interrelated. The challenge is for the government to understand the urgency and prioritisation of children's rights. Pressure needs to be put on the government to dedicate more time and physical resources to realising children's rights.

In a further presentation, a representative from ***Open Up*** said the relationship between landlord and tenants is often fraught with problems. A common issue is that there is no proper contract or lease agreement in place, with the result that tenants have little protection under the law. The representative

Children do not have the luxury of having their rights progressively realised over time: when they turn 18, they are no longer considered children and have no protection

provided some useful tips on how best to prepare when dealing with housing battles.

She noted, for example, that it is unlawful to evict somebody without a court order, so you should ensure one is presented to you. Also, while the legal system can be hard to understand, there are ways to make things easier. It is important to have a written contractual agreement or any documentation as such, including payslips, photographic evidence and affidavits. This information is necessary when presenting your case, as you do not want to be dismissed for making procedural errors.

Another tip concerned a useful but little-known forum, the Rental Housing Tribunal, where decisions are legally binding. However, you cannot have a matter being heard at the tribunal and at court.

Community members welcomed these tips, as many have faced or been involved in eviction cases. It was also the general consensus that many of them are unaware of their rights in relation to housing and evictions, and that this was a conversation that should be continued.

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