ESR REVIEW

Economic and Social Rights in South Africa

Ensuring rights make real change

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Editorial

We are pleased to present the fourth and last issue of the *ESR Review* for 2007.

In this issue, Anashri Pillay engages in a debate about the effectiveness of the Constitutional Court's reasonableness review approach in enforcing socio-economic rights. Pillay argues that calls for the abandonment of this approach are mistaken: while it is overly cautious, the Court's reasonableness-centred approach may yet prove effective in furthering the project of social and economic transformation and enhancing democratic legitimacy. Reasonableness does not ignore engagement with context-specific minimum core obligations such as equality and dignity. While endorsing the view that the approach of the Court reflects a balance between the existence of a right and its limited input on the nature and extent of policy, Pillay criticises the Court's reluctance to explicitly endorse proportionality as a potential element of reasonableness.

Poverty reduction strategies are touted by the World Bank and International Monetary Fund as a panacea for poverty in developing countries. Lord Mawuko-Yavugah uses the case study of Ghana to examine the extent to which these strategies are really owned by the countries, including whether or not they have been adopted through a participatory process consistent with the notion of democracy. Ghana indicates that these financial institutions have merely appropriated the language of participation and consultation with civil society in order to extend their hegemony, thus violating the sovereignty of states and the right of people to participate in their development.

Siyambonga Heleba reviews, and reports on the hearing of, the Pretoria High Court case of *Christian Roberts v Minister for Social Development and Others*, in which the Socio-Economic Rights Project and the Centre for Applied Legal Studies are involved as *amici curiae*. The main issue is whether the age differentiation for accessing pensions for men and women unfairly discriminates against men, is unreasonable and is thus unconstitutional. Heleba also analyses the implications of comparative case law from the European Human Rights Court, on which the respondents relied to prove that the differentiation is justified.

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Teresa Yates reviews the recent Constitutional Court decision in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*. The Constitutional Court held that labour tenants who were dispossessed of land rights in 1969 are entitled to restitution. Such tenants had lost their land as a result of racially discriminatory laws or practices as contemplated by the Restitution Act. Yates views this decision as a victory for communities that have previously not benefited from the restitution of land process on account of the Land Claims Court's erroneous construction that the Restitution of Land Rights Act does not apply to labour tenants.

Lilian Chenwi tracks the process of adopting an optional protocol to allow for individual complaints under the International Covenant on Economic, Social and Cultural Rights (ICESCR). As a member of the Steering Committee of the NGO Coalition for an Optional Protocol to the ICESCR, she attended the fourth session of the Open-Ended Working Group on an optional protocol to the ICESCR in Geneva from 16 to 27 July 2007. She argues that the debate on this issue has now shifted from whether economic, social and cultural rights should be subject to a complaints procedure, to what the specific nature and modalities of such a procedure should be. Chenwi then provides feedback on the views of different states on the provisions of the draft optional protocol.

Lastly, David Bilchitz summarises his recently-published book titled *Poverty and fundamental rights: The justification and enforcement of socio-economic rights*. The book illustrates, among other things, the weaknesses of the reasonableness review approach of the Constitutional Court in enforcing socio-economic rights. The author argues that the approach limits the scope for the normative development of socio-economic rights.

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In this issue, we also pay tribute and bid farewell to a long-serving member of the Project, Dr Christopher Mbazira, who resumes his teaching and research duties in the Faculty of Law and the Human Rights and Peace Centre (HURIPEC) at Makerere University, Uganda, in early 2008.

Since joining the Project in January 2004, Dr Mbazira has made a significant contribution to the discourse on and advancement of socio-economic rights in South Africa and abroad. He has displayed passion, talent and brilliance in conducting cutting-edge research. His PhD thesis on the role of judicial remedies in enforcing socio-economic rights is regarded as a groundbreaking study that will influence the way lawyers and judges think about remedies in socio-economic rights cases. It will also contribute immensely to the discussion on how to enforce socio-economic rights in such a way that they make a real difference in the lives of poor and marginalised people (*ESR Review*, 8(3): 2).

Dr Mbazira has published extensively on socio-economic rights in general, and on water and children's rights in particular, in peer-reviewed journals and other publications. These include the *South African Law Journal*, the *African Human Rights Law Journal*, the *East African Journal of Peace and Human Rights*, the *Malawi Law Journal* and *Speculum Juris*. He has presented his research to several prestigious international and national conferences and seminars.

In addition to his mainly academic and scholarly writing skills, Dr

Mbazira has demonstrated an ability and talent for accessible and user-friendly writing as well. For example, he produced an in-house lay publication on the obligations of local government in realising socio-economic rights, giving municipalities guidelines on what socio-economic services to deliver to the communities they serve and how to deliver them. He has also written several short articles for the *ESR Review*, of which he has co-edited numerous issues.

Dr Mbazira has been involved in advocacy initiatives in Africa. Following his participation in the sessions of the African Commission on Human and Peoples' Rights, he single-handedly ensured that the CLC was granted the observer status that would enable it to participate under its own name in those sessions.

Dr Mbazira has undoubtedly become an asset to the Project in particular and the CLC in general over the years. His departure at the end of this year will leave a huge void in the organisation.

However, we are excited at the prospect of continuing to work very closely with him. The Project has developed a research project together with Dr Mbazira's future organisation, HURIPEC. Dr Mbazira was instrumental in developing this project and will be the key person in managing it. Funding is currently being sought.

On behalf of the Project and the CLC, I wish him all the best in his future endeavours. We hope that his return to his roots in Uganda will be most rewarding to him and his family.

Sibonile Khoza is the Editor of the ESR Review.

In defence of reasonableness

Giving effect to socio-economic rights

Anashri Pillay

There is general agreement in recent literature that the transformative potential of the socio-economic rights in sections 26 and 27 of the South African Constitution has remained largely unexploited. The failure to realise socio-economic rights is attributable in part to a conservative legal culture which imposes limitations on the extent to which courts may intervene in matters concerning the redistribution of public resources.

Symptoms of this cautiousness are reflected in the Constitutional Court's approach and attitude towards socio-economic rights, in particular its rejection of a minimum core concept; its failure to give clear content to the rights; and its adoption of an "administrative-law reasonableness model", which focuses more on procedure than on substance.

Several scholars have proposed various ways of making the constitutional guarantees more effective in the struggle to eradicate the deep inequalities in South African society. Some have suggested that the Court needs to engage with the concept of minimum core obligations developed by the Committee on Economic, Social and Cultural Rights (CESCR) (see, for example, Bilchitz, 2007). Others have recommended using the substantive notion of equality (Fredman, 2006) and the value of human dignity as the backdrop against which these rights must be interpreted (Liebenberg, 2005). The need for more robust remedies has also been highlighted (Pillay, 2002, & Davis, 2004).

These are valuable debates. However, they tend to include, as a necessary condition, the abandonment of the Court's preferred reasonableness approach. In my view, this is a mistake.

While the Court's approach has, thus far, been overly cautious, a reasonableness-centred approach may yet prove effective in furthering the project of social and economic transformation of our society, and enhancing democratic legitimacy.

The origins and evolution of the reasonableness approach

Soon after the Court's decision in *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169 (CC) (*Grootboom*), Cass Sunstein (2001: 13) expressed approval for "an administrative law model of social and economic rights" that struck a balance between placing obligations on the government

and, simultaneously, respecting decisions about priority-setting taken in terms of a democratically approved process. This understanding of the Court's decision has informed the subsequent debate.

In my view, the reasonableness approach does have its genesis in administrative law. The Court has, thus far, stuck quite closely to the elements of reasonableness review in administrative law: rationality (non-arbitrariness); a demand for reasons backed up by evidence (justification); and proportionality between means and end, between advantages and disadvantages in applying the rights. However, it must be pointed out that reasonableness in administrative law is an evolving concept whose full meaning remains uncertain.

Many administrative lawyers hoped that the enactment of section 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (PAJA) would put an end to the ideas of gross and symptomatic unreasonableness. In terms of this standard of unreasonableness, an administrative decision has to be either so serious as to lead one to believe that the decision-maker had taken leave of his or her senses, or so grossly unreasonable as to suggest that the decision was reviewable on another independent ground such as *mala fides* or ulterior motive.

According to section 6(2)(h) of PAJA, an administrative decision can be reviewed if it is "so unreasonable that no reasonable person could have so exercised the power or performed the function". This test of unreasonableness derives from the English case of *Associated Provincial Picture Houses, Limited v Wednesbury* [1947] 2 All ER 680; [1948] 1 KB 223.

In the case of *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) (*Bato Star*), the Court was critical of the *Wednesbury* standard. O'Regan J held that an inquiry into reasonableness depended on the circumstances of each case and that the intensity of review based on reasonableness was variable. Among the factors that could be considered in determining whether a decision was reasonable included:

> [T]he nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected (para 45).

Conceivably, these factors would lead one to an inquiry into proportionality. In particular, the latter two factors invite a weighing up of means and ends, of the advantages and relative detriment to the individual or group concerned.

In the case of *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)* 2006 (1) BCLR 1 (CC) (*New Clicks*), the Court approved this formulation. However, for different reasons, the Court did not apply this higher standard in either case (on *Bato Star*, see paras 53-4 of the judgment and De Ville, 2004: 580, 583-5).

A similar pattern may be identified in socio-economic rights cases. The explicit standard used in *Soobramoney v Minister of Health (KwaZulu Natal)* 1998 (1) SA 75 (CC) (*Soobramoney*) was rationality (para 29). Arguably, the Court's reasoning was more nuanced than this implies, as it took into account the Department of Health's considerable overspending on its annual budget and found that the hospital's policy would benefit the greatest number of patients (paras 24-5). However, the express adoption of rationality as the required threshold for section 27(2) of the Constitution and, by extension, the identically worded section 26(2) was unfortunate and did not offer much promise for potential litigants.

Fortunately, the Court did not simply endorse a rationality standard in *Grootboom*. However, it was far less explicit about what reasonableness, as a general standard, entailed. It stressed that its role was not to pronounce on the merits of state policy, and that many of the options available to the state in meeting its obligations could conceivably meet the reasonableness requirement.

It held that the question of reasonableness boiled down to "whether the measures that have been adopted are reasonable" (para 41). Having said that, the application of section 26(2) to the case was more satisfying, in that the Court set out the elements of a reasonable housing programme in some detail.

Although the term "proportionality" was never used in the judgment, the Court's concern with weighing the detrimental impact of the denial of the right leans in that direction (para 44). A concern with proportionality was more evident but, again, not explicitly mentioned, in *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (*TAC*). In

this case, the Court applied the reasonableness inquiry to determine whether the state's policy on the prevention of mother-to-child transmission of the HIV was in keeping with its constitutional obligations under section 27. The Court's rejection of each of the reasons that the government advanced for restricting the administration of nevirapine to selected pilot sites rested on various elements of reasonableness including the fact that there was a lack of evidence to support the government's claims and a lack of proportionality between means and ends:

> Although resistant strains of HIV might exist after a single dose of nevirapine, this mutation is likely to be transient. At most there is a possibility of such resistance persisting, and although this possibility cannot be excluded, *its weight is small in comparison with the potential benefit of providing a single tablet of nevirapine to the mother and a few drops to her baby at the time of birth. The prospects of the child surviving if infected are so slim and the nature of the suffering so grave that the risk of some resistance manifesting at some time in the future is well worth running* (para 59, emphasis added).

The case law on socio-economic rights and judicial review of administrative action reveals variability in the intensity of review, as well as a reluctance to explicitly adopt proportionality as an integral part of an inquiry into reasonableness (but see the separate concurring judgment of Sachs J in *New Clicks*, para 637). Most importantly, it reveals no clear justification for the adoption of a particular standard in a particular case, leaving potential litigants in a state of some uncertainty. So why should we continue to engage with 'reasonableness' at all?

Does 'reasonableness' leave no room for enforcing minimum core obligations?

One of the main attacks on reasonableness is that it is a nebulous concept. Cases appear to support, rather than detract from, this argument. However, there are two points to be made in this regard. First, attempting to give content to and define reasonableness is no more difficult than an inquiry into equality, dignity or minimum core obligations. Second, with any of these concepts, much depends on the principles rooted in legal culture and the willingness of judges to apply them.

Enforcement of socio-economic rights requires stakeholders to take into account the long-term effect of policies and decisions on society as a whole.

The approach of the Court to socio-economic rights has tended toward restraint, both in interpreting the rights and in granting remedies. If we accept that the shifting content of reasonableness employed by the Court in both judicial review of administrative action and socio-economic rights cases does not stem from unquestioning submissiveness but is, rather, a genuine attempt to find a "balance between the existence of a right and its limited input on the nature and extent of policy" (Davis, 2006: 323), then suggestions on how to develop or to change that approach must also attempt to reconcile the interest in rights-protection with respect for democratic priority-setting.

In many ways, an approach that uses administrative justice as its starting point is equal to this task. Enforcement of socio-economic rights requires that stakeholders (courts, civil society and government) take into account the long-term effect of policies and decisions on society as a whole. Administrative justice has always taken, as its central concern, the protection of individuals from actions that impact unfairly on their lives. At the same time, it aims to balance that protection with a societal interest that government should be at liberty to set priorities and implement policies efficiently.

Reasonableness does not exclude engagement with context-specific minimum core obligations, equality or dignity. For example, the Court, in effect, set out a minimum core obligation in *Grootboom* when it held that the housing policy was unconstitutional because it did not provide temporary relief for those with

> no access to land, no roof over their heads ... people who are living in intolerable conditions and ... people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition (para 52).

The judgment contains references to the "basic necessities of life" and the fact that "progressive realisation" does not mean that those whose needs are most urgent may be ignored. An analysis of both *Grootboom* and *TAC* indicates that the court has not completely turned its back on the idea of minimum core obligations but views them as relevant to a consideration of what is reasonable in the circumstances.

This potential is mirrored in com-

parative jurisprudence, which may prove valuable in developing our own approach. In the United Kingdom (UK), which has a system without justiciable socio-economic rights but with social security legislation, administrative law has for some time been a vehicle through which entitlements to social and economic goods have been indirectly protected with varying degrees of success. In *Regina v Secretary of State for Social Security ex parte. Joint Council for the Welfare of Immigrants; Regina v Secretary of State for Social Security ex parte. B* [1997] 1 W.L.R 275, the House of Lords reviewed regulations providing that those seeking asylum at any time after their point of entry into the UK and those whose claims for asylum had been turned down, and were in the country pending their appeals, would no longer be entitled to "urgent cases payments" (at 281). Simon Brown LJ, for the majority, pointed out that this presented many genuine asylum seekers with an unacceptable choice – remain in the UK with no financial support or return to the countries in which they had been persecuted (at 283-4). He held that the regulations were "so uncompromisingly draconian in effect that they must indeed be held *ultra vires*" (at 293) and objected to the fact that the regulations

> contemplate for some a life so destitute that to my mind no civilised nation can tolerate it. So basic are the human rights here at issue that it cannot be necessary to resort to the European Convention on Human Rights to take note of their violation (at 292).

Thus, Simon Brown LJ used both a standard of proportionality and, at least, the language of minimum obligations in this case.

In India, where the Constitution protects socio-economic rights as directive principles of state policy, the Supreme Court has used administrative law principles to give indirect effect to these directive principles. In the case of *Tellis and Others v Bombay Municipal Corporation and Others* [1987] LRC (Const) 351, the Supreme Court used article 39(a), requiring the state to "direct its policy" towards securing for all citizens "an adequate means of livelihood", to interpret the right to life (article 21) and held that the right included a right to livelihood (at 368-9). The Court explicitly moved from a consideration of procedure to a consideration of substance, stating that "unreasonableness vitiates law and procedure alike" (at 372).

> **The Court emphasised the notion of a variable of flexible standard, dependent on the circumstances of the case.**

As to what unreasonableness means, the Court stated that all exercises of executive power "must be informed with reason and should be free from arbitrariness" (at 373). However, this was only the "bare minimal requirement" of the rule of law. The Court emphasised the notion of a variable or flexible standard, dependent on the circumstances of the case.

In the later case of *Delhi Development Horticulture Employees' Union v Delhi Administration, Delhi and Others* [1993] 4 LRC 182, the Supreme Court upheld the impugned state policy on the ground that holding that the policy was unconstitutional would have done more harm than good. In *Saudan Singh and Others v New Delhi Municipal Committee and Others* [1993] 4 LRC 204, the Supreme Court upheld the government policy because it was not "unduly harsh". Again, as in the *Delhi Development* case, the Court's consideration of how restrictive the policy or law was entailed a proportionality analysis.

In *Bandhua Mukti Morcha v Union of India and Others* (1984) 3 SCC 161, the Supreme Court, using the directive principles to give content to the right to life, held that article 21 included certain minimum requirements required to enable a person to live with human dignity. These included the protection of the health and strength of workers, men and women; the protection of children against abuse; the provision of opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity; the provision of educational facilities; and just and humane conditions of work and maternity relief. The state was not permitted to take measures that would deprive a person of the minimum essential level of the right. Thus, the court upheld the notion of a minimum standard but limited the duty it imposed to a negative one.

Bolstering the reasonableness inquiry: Proportionality and variable intensity of review

It is tempting to argue for courts to apply the highest level of scrutiny whenever they are called upon to give effect to social and economic rights. However, in particular cases there may be solid reasons for judicial caution (relating to institutional and

constitutional capacity and competence, as well as the need to foster dialogue between various stakeholders. Varying the intensity of review is a useful tool in responding to these concerns.

However, what is worrying about the Constitutional Court's approach to date is not the variability of the reasonableness but its obvious preference for the low, rationality threshold in cases decided under sections 26 and 27 and its marked reluctance to explicitly endorse proportionality as a potential element of reasonableness.

In the context of administrative justice, arguments for variability in the intensity of judicial review are not new. But they gained momentum following the enactment of PAJA and Cora Hoexter's influential article on the future of judicial review in South Africa (2000: 484). Hoexter argued that we need to consider the constitutional role of the judiciary more intently, to develop a "theory of deference" and introduce some variability into the level at which state action is scrutinised. Drawing on Etienne Mureinik's arguments about a "culture of justification", she and others have pointed out that judicial action, whether restrained or interventionist, now requires justification in much the same way as any other exercise of public power.

The idea of variability has been expressly endorsed in many judgments discussed here, including *Bato Star* (para 45) and *New Clicks* (para 108). Thus, reasonableness may be interpreted as requiring anything from rationality to proportionality, depending on the case. Furthermore, although often considered to be the extreme end of the reasonableness scale, proportionality may itself be applied more or less intensely (Rivers, 2006: 174).

There is no consensus on exactly what an inquiry into proportionality entails. Paul Craig (2003: 622) has suggested that the factors to be considered are:

(1) Whether the measure was necessary to achieve the desired objective.
(2) Whether the measure was suitable for achieving the desired objective.
(3) Whether it nonetheless imposed excessive burdens on the individual.

Others reduce the inquiry to the question of necessity alone: the measures taken must be no more than are necessary to achieve the required result or, put differently, they must be the least drastic means through which to achieve the desired result (Wade & Forsyth, 2004: 366).

In the South African context, proportionality between aims and means, advantages and harm is one view of what is required (Hoexter, 2000: 511). The general limitation clause of the Constitution, section 36, involves a balancing exercise which often turns on the question of whether there are less restrictive means to achieve the purpose, a question that reveals another, narrower interpretation of what proportionality may require.

Arguments in favour of variability rest on the theory of judicial deference or, less controversially, restraint (Hoexter, 2000: 501). Accepting the need for variability and some level of restraint means that a strict standard of scrutiny need not be applied in every case. However, we need coherent guidelines explaining why a particular level of scrutiny was used.

As a starting point, cases both in South Africa and elsewhere indicate that, at the very least, courts are prepared to compel the government to be transparent and to adopt comprehensive programmes because these obligations flow from the Constitution and legislation directly and do not entail much conflict of powers between the courts and other branches of government.

Courts will, further, demand that such policies should not ignore a significant section of the population and should be flexible (*Grootboom* and *TAC*). All of these concerns relate to arbitrariness and are at the lower end of review.

However, courts have also demanded evidence supporting claims about the efficacy (*TAC*) of particular aspects of policy or legislation. If there is clear medical evidence against a particular government justification, courts may find it easier to apply a high level of scrutiny (*TAC*).

In both *Khosa and others v Minister of Social Development and others; Mahlaule and another v Minister of Social Development and Others* 2004 (6) SA 505 (CC) and *TAC*, the Court was influenced by the fact that their orders did not entail a huge increase in government spending.

Finally, if wider communal interests are at stake, the Court may opt for restraint. The concern with "queue-jumping" in both *Grootboom* and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) falls into this category. However, whilst this factor may have influenced the different approaches in these cases, the seriousness of the invasion of the right was weighed against it in both cases. The wider societal interest in preventing immigrants becoming a

burden on the state was considered in *Khosa* but this was found to be relevant at a stage before immigrants are allowed into the country. Once allowed into South Africa, such immigrants cannot be abandoned to a life of deprivation without any means of support (at paras 63-5).

Conclusion

Clarity on when a particular standard of review should be applied cannot yet be derived from the handful of cases decided by the courts. What we have are some emerging, and often only implicit, principles about the factors that are relevant in determining the intensity of review. It falls to legal practitioners and scholars to identify and build on the principles emerging from the cases.

We need to begin to tease out these guiding principles, to examine the relationship between them and to draw on comparative jurisprudence to develop the content of a reasonableness standard so that it is truly variable and more demanding on government in appropriate cases.

Primarily, we need to foster an ongoing dialogue between state institutions, civil society and the courts to both protect socio-economic rights and further the broad societal project of transformation.

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In the driver's seat?

Donors, civil society participation and country ownership of the poverty reduction strategy in Ghana

Lord Mawuko-Yavugah

The past few decades have witnessed the implementation of market-led neoliberal eco nomic policies in many developing countries. In Africa, these policies took the form of structural adjustment policies (SAPs). Their implementation worsened socio-economic conditions and increased poverty on the continent (Stein, 2003).

One of the key reasons for the failure of SAPs is that they lacked "country ownership". It has been argued that they were designed without the participation of either governments or civil society and were thus imposed on African countries by donors (Stewart & Wang, 2006).

In response to these criticisms, the International Monetary Fund (IMF) and the World Bank, also known as the Bretton Woods institutions (BWIs), have recently moved towards what Stiglitz calls "a post-Washington consensus" (Stiglitz, 1998). As part of this new approach, the BWIs in the mid 1990s launched an initiative to provide special debt relief from public creditors to more than 40 "heavily indebted poor countries" (HIPC). In 1999, this initiative was refined and widened in what has been called a "new" approach to development cooperation (Soederberg, 2004). As one of the conditions, the aid recipient country must produce a poverty reduction strategy paper (PRSP) outlining how it seeks to pursue the twin goals of sustainable growth and poverty reduction. This is meant to provide guarantees to donors that the budgetary resources freed by debt relief – as well as other traditional aid – will be put to good use (World Bank & IMF, 1999).

The PRSP must be produced in an open and participatory manner, involving civil society. Civil society is also supposed to be involved in the subsequent monitoring of the implementation of the strategy. The rationale seems to be that participation of civil society will increase ownership of the development strategy – not only by the government but also by large sections of the population. In other words, this new paradigm of development ostensibly allows developing countries to put forward their own poverty diagnosis and comprehensive plans determining how the funds saved through debt relief will be spent on development initiatives and poverty reduction.

This paper draws on Ghana's experience to explore how the claims of "country ownership" through "local participation" are conceptualised and the extent to which they are implemented under Ghana's poverty reduction process by analysing and evaluating the scope and depth of the participatory process.

International financial institutions and the PRSP process

This paper develops an analytical framework based on a neo-Gramscian understanding of international political economy. Neo-Gramscian scholars such as Robert Cox have described international financial institutions (IFIs) like the BWIs as hegemonic forces reinforcing the dominance of the neoliberal economic agenda (Cox, 1983). At the material level, the IFIs help developed countries to exercise control over developing countries. The articles of agreement of these institutions ensure that power remains with the dominant states through voting rights based on financial contribution. The IFIs also play a key ideological role by justifying policies that help to facilitate the expansion of the dominant transnational economic and social forces and legitimise ideologically the norms of the neoliberal world order.

International institutions have the function of co-opting elites from the periphery. In the PRSP process, the shift from SAPs to PRSPs could be seen as an attempt to co-opt local elites disenchanted with the results of earlier structural reforms, and to integrate civil society actors into the neoliberal development framework of the IFIs. This is necessary for these institutions to give broader legitimisation to the contested neoliberal policy reforms in the developing world.

Ghana's PRSP process

Ghana is an important case study for the implementation of the so-called

"new development architecture" in Africa simply because Ghana has had a very long association with the BWIs.

In 1957, Ghana became the first country in sub-Saharan Africa to gain its independence with a relatively strong economy boosted by a sizeable foreign reserve. With time, these reserves were depleted, partly as a result of the massive public-sector expansionary policies adopted by the first post-independence government of Kwame Nkrumah. In 1966, the Nkrumah government was toppled in a military coup d'état, setting the tone for an era of political instability and economic decay.

According to Boafo-Arthur (1999), "by the early 1980s, Ghana had reached abysmal levels in its socio-economic development. Only effective and sustainable measures could salvage the economy."

It was against this background that Ghana sought salvation from the BWIs (Jonah, 1989; Dzorgbo, 2001).

Under the guidance of the BWIs, an economic recovery programme was launched in 1983, culminating in the implementation of rigorous and comprehensive market-led reform policies. During the ensuing decade, the country earned much praise from the two financial institutions as well as Western donors for being "a good reformer and great economic performer" (Tsikata, 2001). But after two decades of faithful adherence to SAPs, the implementation of the SAPs failed to reduce poverty and facilitate long-term development. While the economic recovery programmes had positive macro-economic impacts, they failed to invigorate the productive sectors of the economy (Rothchild, 1991; Herbst, 1993; Tsikata, 2001). Ghana remains highly indebted and poor (Dzorgbo, 2001; Hutchful, 2002; Sachs, 2005: 272). In the mid 1990s, Ghana was ranked 133 on the Human Development Index. In 2006, it dropped to 136 after a marginal rise between 2002 and 2004.

Two decades of faithful adherence to SAPs in Ghana failed to reduce poverty and facilitate long-term development.

While the donor community led by the IFIs had agreed on debt relief for developing countries via the HIPC initiative, Ghana's then government, under Jerry Rawlings, chose not to apply for the initiative. This was based on an evaluation of the likely level of debt relief that would be available at that time, in comparison with the expected loss of external inflows, particularly from Japan. During the subsequent 18 months, as the country worked itself into an election frenzy, the local currency (cedi) underwent a major depreciation as Ghana's terms of trade deteriorated sharply, and a re-evaluation of the potential relief under HIPC was carried out in February 2001 based on the new HIPC rules. The depreciation and the revised HIPC framework more than tripled the amount of relief available to Ghana.

In early 2001, Ghana decided to seek debt relief under the HIPC initiative. This programme seeks to bring the debt position of poor countries that have performed well to a level that is affordable. The International Development Agency and IMF made a preliminary assessment of the country's eligibility in May 2001 and agreed to support Ghana under the enhanced HIPC initiative. Responsibility for the preparation of Ghana's PRSP, called the Ghana Poverty Reduction Strategy (GPRS), rested with a special task force established in the National Development Planning Commission (NDPC).

Five core teams were established with particular responsibilities for providing inputs into the crucial policy framework phase. They included macro-economics, gainful employment/production, human resource development/basic services, vulnerability and exclusion, and governance. These thematic areas were identified in a preliminary situation analysis. Each team comprised representatives of government ministries, departments and agencies (MDAs), non-governmental organisations (NGOs), civil society and donors. A consultant was appointed to serve each team. The teams were required to carry out their studies in consultation and collaboration with the relevant MDAs.

Concurrent with the commencement of the diagnostic studies, local-level community consultations were conducted in a sample of 36 communities. Consultations included participatory poverty analysis.

Consultation workshops were held in 12 districts and six administrative regions. On completion of draft reports by teams, a technical workshop attended by MDAs, NGOs, civil society and donors was held to harmonise and synthesise the teams' work into a framework of mutually supportive programme objectives.

The output of this technical work-

shop provided a basis for further study and elaboration of proposals by the Poverty Reduction Unit of the NDPC drafting team. The NDPC prepared a Poverty Reduction Policy Framework (PRPF) and its conclusions were reviewed, discussed and validated during a two-day National Economic Dialogue held in mid May 2001. A follow-up workshop was held for development partners in July 2001 and an instructional workshop for MDAs in the same month.

A final GPRS was adopted in February 2003. The GPRS provides a comprehensive understanding of poverty and its causal relationships. The strategy includes measures to ensure macro-economic stability and a framework for sustainable economic growth to support poverty reduction (GPRS, 2003: 1).

Under the GPRS, poverty is defined as "unacceptable physiological and social deprivation" caused by a combination of low (or lacking) human development indicators such as access to education and health care and macro-economic indices such as low inflation (GPRS, 2003: 3). Based on analysis of the determinants and linkages to poverty, the GPRS sets out five pillars for government action towards poverty reduction. These include macro-economic stability, production and employment, human resources development, special programmes for the vulnerable and excluded groups, and governance.

The language of the 'new' architecture

Words such as "local participation" and "country ownership" are used in relation to the PRSP paradigm. In endorsing the PRSP proposal, the World Bank and IMF's joint development committee emphasised that PRSPs should be country-driven and developed transparently with the broad participation of elected institutions including civil society (Development Committee, 1999, quoted in Thomas, 2004).

In view of the widespread perception that previous policy prescriptions under the structural adjustment framework were largely donor-imposed, many observers interpret the recent attempts to incorporate the element of country ownership as a significant shift in donor-aid recipient relationships.

According to Cheru (2006: 364), the emphasis on countrywide participation in the PRSP process "presents a paradigm shift from ineffective donor-led, conditionality-driven partnership to a system that puts the recipient country in the driving seat".

There was a consensus that, compared with the SAP process, the PRSP process was more participatory with a genuine attempt by government to involve the non-state sector.

It is also claimed that this seeming shift shows that the IFIs have admitted their past mistakes of imposing policies on aid-recipient countries.

In light of the above, it is very important to subject these claims to critical analysis by examining the actual implementation of this new policy framework. As Taylor (2004: 37) notes:

> Participatory development is based on the principle that recipient groups and poor communities are in a privileged position to know their own needs, allowing accurate information regarding the kind of micro-projects necessary to promote capitalist development to float upwards through the deliberation process.

In the estimation of the BWIs, broad-based participation of civil society in the adoption and monitoring of a PRSP tailored to country circumstances will enhance its sustained implementation.

Determining whether the emphasis on participation and ownership will lead to improved policy design and implementation requires, however, a critical evaluation of the participatory process. It is therefore necessary to unpack this new aid paradigm by subjecting its claims to strict scrutiny. How participatory was the process of formulating Ghana's paper?

During a field trip to Ghana in the summer of 2006 for a research project which this paper draws on, the writer interviewed officials representing three aggregate groups of stakeholders involved in the PRSP process in Ghana: the state, the donor community and non-state organisations. In response to questioning about participation in the PRSP process, there was a consensus among interviewees that, compared with the SAP process, the PRSP process was more participatory, with a genuine attempt by government to involve the non-state sector. But, as argued by Whitfield (2005), the methods adopted to facilitate public participation largely consisted of existing practices of participation and consultation, policy forums and dialogues.

The formulation and implementation of the PRSP process has been

characterised by a series of consultations and policy dialogues organised by donors – and, to a lesser extent, the government – with selected groups in society to elicit "stakeholder" input on their policies, programmes and projects. The general trend in these consultations has been to emphasise process over substance. They focus on the objective of consulting "civil society", rather than facilitating informed opinions and substantial discussion on the issues put forth in the consultations. In many cases, they serve more as a mechanism to validate decisions already taken and to contain demands for greater inclusion in policy-making processes than as a mechanism for allowing the public to influence policy.

The dominant method of participation has been the public hearings, at which the quality of discussion and debate of policy issues is poor or non-existent for various reasons (IDEG, 2006). The zeal of donors to involve "civil society" in policy discussions has produced a divide between consultative processes and constitutional representative processes, between formal and informal institutions.

In Ghana, this divide was reflected in the PRSP process in two ways. First, the local government institutions were not involved in gathering local input into the GPRS document. Rather, separate forums were created at the community and district level to which district assembly administrative staff and some assembly members were invited. This process constituted a serious setback to the decentralisation process, which aims at promoting increased grassroots involvement in decision-making processes. Second, Parliament as a representative institution was not involved in the development of Ghana's PRSP.

How should one conceive of participation in the PRSP process? It could be argued that by side-stepping formal democratic institutions of representation, the IFIs have shown that they are only using the language of "participation" as a public relations exercise. In order to make it seem as though the concerns of critics of their adjustment policies are being heard and taken seriously, they have sought through the PRSP process to absorb counter-hegemonic ideas and concepts. In a nutshell, there are serious issues regarding the involvement of the public in the process, and questions remain over whether there is a real difference between the processes through which SAPs and PRSPs are developed.

On one hand, there are clear limitations to ensuring independent consultations led by civil society and the development of alternative policies. On the other hand, the IFIs still maintain a great influence over the country's development process, leaving little room for the government and other stakeholders to make any real input. This raises concerns about national sovereignty and national ownership of the policy process.

As argued by Abugre (2000), the PRSP framework, like that of the SAPs, confers too much power on the IFIs and thereby threatens the sovereignty of Third World countries. The IFIs, he argues, have the sole authority to give the stamp of approval to an entire national development strategy, including its social and political aspects. According to Thomas (2004), while the sovereignty of national governments is undermined, the power of these institutions is enhanced, even though they are only lending money, or underwriting a very small part of that strategy.

It is further argued that the coordination of the entire spectrum of donor activity around a poverty reduction strategy endorsed by the IMF and World Bank gives the developing country little room for manoeuvre between different donors, constraining sovereignty even further. A further concern is the context in which the developing countries draw up their PRSPs and in which loans from the IMF's Poverty Reduction and Growth Facility and the World Bank's Poverty Reduction Support Credit are negotiated. Starved of investment resources and crippled with their debt burden, poor countries, especially in sub-Saharan Africa, are desperate for immediate debt reduction to free up resources to enable them to import essential items. Therefore they are under intense pressure to develop PRSPs quickly because, without these, they cannot receive debt relief under the enhanced HIPC initiative or new loans. The speed at which the newly elected government under John Kufuor moved to complete the country's PRSP process and reach the completion point under the HIPC initiative underscores this point (Whitfield, 2005).

Conclusion

The PRSP process in Ghana has contributed to the opening up of the policy-making terrain to non-state actors through consultations. However, it has not altered the foundation of this terrain, in which high-ranking officials in government and the BWIs control decisions on critical policy choices (Whitfield, 2005).

While the IFIs and other donors claim that poor countries are now in

the "driver's seat" in designing country-tailored, locally owned poverty reduction policies through a participatory approach, evidence on the ground from Ghana shows that the concept of participation is narrowly defined. Though donors have fostered the inclusion of non-governmental actors in decision-making arenas, their efforts have not significantly altered the dominance of government–donor policy discussions or resulted in extensive citizen penetration of these arenas.

The notion of "partnership" embodied in the term "development partners" idealises relations among government, donors and civil society or the private sector, and fails to acknowledge the power imbalances at play in their interactions. In reality, these actors appear to be competitors for influence in the policy-making terrain more than partners.

The PRSP process in Ghana seems to be shrouded in secrecy and lacks both transparency and the involvement of a broad spectrum of the Ghanaian public. It is the contention of this paper that the PRSP is an attempt by the IFIs to perpetuate their hegemonic status as agents of neoliberal capitalism in the developing world.

Through the PRSP process, the IFIs have absorbed counter-hegemonic ideas, such as civil society participation and country ownership of pro-poor growth, into the mainstream discourse and have integrated those local political elites and CSOs that have been critical of the structural adjustment policies into the development policy dialogue. NGOs have been frustrated by the experience of "consultation", and there is growing concern in the NGO community that their participation in the PRSP process has helped legitimise the neoliberal economic policies of the IMF and the World Bank (Panos Institute, cited by Abrahamsen, 2004).

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Towards equalising the age for accessing pensions

Siyambonga Heleba

***Christian Roberts v Minister for Social Development and Others*, Case No 32838/05 (TPD)**

On 11 and 12 September 2007, the case of *Christian Roberts v Minister for Social Development and Others* was heard in the Pretoria High Court. It concerns a constitutional challenge to section 10 of the Social Assistance Act of 2004 (the Act) and Regulation 2(1) (the Regulation) thereto, which set the age for accessing the old age grant at 60 for women and 65 for men. According to the applicants, the differentiation violates section 9(1) of the Constitution, which guarantees the right to equality, section 9(3), which prohibits unfair discrimination based on sex and age, and section 27(1)(c), which protects the right of access to social assistance.

The Community Centre Law, the Centre for Applied Legal Studies and the South African Human Rights Commission (SAHRC) were admitted as *amici* (friends of the court).

The present overview of the High Court hearing omits the submissions by the SAHRC for they dealt with neither section 27 nor section 9 of the Constitution in relation to the Act or the Regulation at issue. The SAHRC sought to argue that the discriminatory scheme in question disadvantaged gay men differently from straight men, but failed to establish the legal basis for this submission as neither the Act nor the regulations thereto distinguish between gay and straight men for the purposes of accessing the pension grant. This review also looks at comparative case law, in particular the jurisprudence of the European Court of Human Rights

(ECHR) on a similar issue, relied on by the respondents during the hearing. The purpose of the comparative case law exercise is to assess the compatibility of the ECHR's socio-economic rights jurisprudence with South Africa's, having regard to both the legal and social contexts within which the two systems operate.

Arguments by the applicants

The applicants founded their arguments solely on section 9(2) and (3) of the Constitution. They contended that section 9(2) permits a scheme which discriminates between different groups of people as long as it can be shown that there is a rational connection between the scheme and the purpose it seeks to achieve. The purpose of the age differentiation in the old age pension in this case must be shown to have affirmative action as its goal; short of this, the scheme may constitute unfair discrimination. In that case, it could only be saved from constitutional invalidity if it passed scrutiny under section 36 of the Constitution (the limitation clause).

The applicants argued that, although the age differentiation at issue was intended to benefit women to correct past disadvantage stemming from such factors as their exclusion in the labour market, role as care-givers and lack of formal education, the respondents had failed to prove that men in the past did not suffer from similar disadvantages.

The applicants contended that men were denied formal education and, consequently, relegated to poorly paid jobs as migrant workers on the mines. As a result, they have not been able to save adequately for their retirement. It was argued that men between 60 and 64 years of age are just as poor and deserving of social grants as women. Thus, if need or poverty is the criterion for accessing the old age grant, the applicants argued, there was no rational basis for the exclusion of men who, but for their gender, would have qualified for the grant.

According to the applicants, the age differentiation could not be saved by section 36, for it was not the kind of scheme envisaged by section 9(2). The scheme did not qualify as a section 9(2) measure for it excluded a group (black men) that had been disadvantaged by unfair discrimination in the past. The applicants asked the court for an order declaring the provisions in question invalid and one instructing the respondents to process the applicants' (those still under 65 years old) applications within three months from the date of judgment.

The respondents failed to prove that men in the past did not suffer from similar disadvantages to women.

Arguments by the respondents

At the hearing, the Minister of Social Development (first respondent) and director-general of the Department of Social Development (second respondent) opened their oral argument by pointing out that this was a simple section 9 case. Later, however, they also responded to the submissions of the *amici*, which rested on section 27 of the Constitution.

As regards section 9(2), the respondents dismissed the argument that the scheme in question was simply inherited from the 1930s. According to the respondents, the decision to target (deserving) women at 60 for social assistance was based on the fact that women suffered greater discrimination in comparison to men. According to the respondents, the age differentiation between women and men regarding access to old age grants was therefore fair and hence constitutionally defensible under section 9(2).

As regards section 27 of the Constitution, the respondents argued that, while men aged 60 to 64 have the right of access to social assistance, this right is subject to the availability of resources. They argued that there are many poor men aged below 60 who are also excluded from accessing social assistance. The government would fail to justify extending old age grants to poor men aged above 60 and not to equally poor men aged below 60. Essentially, the respondents' argument was that poverty and need alone were inadequate criteria for determining qualification for old age grants. The availability of resources was a key consideration. They maintained that the age differentiation between men and women in this case was also based on the fact women suffered greater discrimination in the past in comparison to men.

The respondents distinguished the facts in this case from those in the case of *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) (*Khosa*). They argued that the *Khosa* case turned on section 9 and not on section 27. In that case, provisions of the Social Assistance Act were held to be unconstitutional as they unfairly discriminated against permanent residents in accessing social assistance. The respondents noted that the decision in the *Khosa* case was

also influenced by the cost of extending social assistance to permanent residents, which was negligible in comparison to the cost envisaged in this case.

The respondents further argued that an appropriate relief in this case would be to dismiss the applicants' case. Alternatively, if the court were to make a finding against the respondents, it should make an order merely declaring constitutional invalidity without prescribing the age at which equalisation should be set.

Arguments by the *amici*

The *amici*'s submission was based on sections 9, 27 and 172(1) of the Constitution.

Section 27 submission

The *amici* argued that the respondents had an obligation under section 27(1)(c) of the Constitution to provide access to social assistance to those who were unable to provide for themselves. They relied on section 27(2), as defined in the *Grootboom* and *TAC* cases, which requires the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

The *amici* noted that the respondents had inherited an old scheme, adopted in the 1930s, which was based on the belief that men aged 60 to 64 were not only employable but could in fact find employment. They relied on expert evidence suggesting that there were over 370 000 unemployed men with no income who were dependant on others for survival. Were it not for their gender, these men would have qualified for the old age grants.

Furthermore, the *amici* contended that there was no evidence showing that the respondents had reviewed the scheme in question after the new Constitution had taken effect and decided to retain it based on conditions prevailing today. They argued that as there was no plan in place in relation to poor men aged 60 to 64, the age differentiation was unreasonable.

Furthermore, the *amici* argued that the respondents could not rely on a lack of resources as a justification of the differentiation. They led expert evidence which showed that extending the old age grants to men aged 60 to 64 would result in an increase of only about R1.9 billion to the current budget for old age grants. According to the *amici*, this increase could easily be accommodated as the Treasury had been getting revenue overruns of about R4.5 billion for the past few years.

Section 9 submission

The *amici* submitted that the scheme did not qualify as an affirmative measure under section 9(2). The *amici* advanced two reasons for excluding the scheme from the ambit of section 9(2).

The first relates to the nature of the scheme. Section 9(2) protects a scheme that, in order to promote the achievement of equality, is "*designed* to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination" (my emphasis).

The second reason relates to the test laid down in *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC). The Constitutional Court laid down three criteria for a protected measure:

(1) Does the measure target persons or categories of persons who have been disadvantaged by unfair discrimination?

(2) Is the measure designed to protect persons or categories of persons who have been disadvantaged by unfair discrimination?

(3) Does the measure promote the achievement of equality?

According to the *amici*, the first leg of the inquiry may be met by the respondents as it may be said that the age-based gender discrimination targets women who have been disadvantaged by unfair discrimination in the past.

However, the second leg was not met as the excluded group (men aged 60 to 64) was also a victim of past discrimination. Similarly, the third leg was not satisfied as the respondents could not show how excluding men from the grant at 60 and awarding the grant at 65 achieved gender equality. In essence, the *amici* asked: is gender equality achieved at 65?

Like the applicants, the *amici* prayed for an order declaring the provisions in question unconstitutional. In addition, they asked for an order compelling the state to reduce the qualification age for men to 60. The court reserved judgment.

Comparative case law

The respondents relied on the ECHR decision in *Stec and Others v United Kingdom* 2006 ECHR to justify the exclusion of deserving men aged 60 to 64 from social assistance. *Stec and Others* concerned a challenge to a piece of legislation in the United Kingdom (UK), the Social Security Contributions and Benefits Act of 1992, which sought to link the Re-

duced Earning Allowance (REA) scheme to the national pension age, 60 for women and 65 for men. The effect was that as soon as an individual reached pension age, REA was replaced with the Retirement Allowance (old age grant). REA served the purpose of compensating those out of work as a result of occupational injuries.

The applicants submitted that the provisions of the Act linking REA to the national pension age were discriminatory as the cut-off date for REA was not the same for men and women. According to the applicants, this was in violation of article 14 (prohibition of unequal treatment between men and women) of the European Convention on Human Rights (Convention). The ECHR rejected this contention on the following grounds:

(1) National governments were better placed to regulate their socio-economic programmes including social security,

(2) The UK government had a policy which sought to phase in an equal pension age for men and women from 2010 to 2020.

(3) The Court would not punish the UK government for not starting sooner with the age equalisation process.

(4) Therefore there was no violation of article 14 of the Convention.

The *Stec* case is distinguishable from the case at hand in two respects. The first concerns the legal regime, especially regarding the enforcement of socio-economic rights, in which the ECHR operates. While in all constitutional democracies there has to be some deference between courts, government and parliament, in order for the bounds of the separation of powers not to be overstepped, the ECHR is overly deferential to national governments when enforcing socio-economic rights. The ECHR shows deference to national governments by observing the so-called doctrine of "margin of appreciation" in line with article 20 of the European Social Charter of 1961, which prohibits discrimination but excludes social security arrangements from the prohibition, and the European Council Directive of 1978, which also prohibits unequal treatment but exempts social security from the prohibition. The Court in the *Stec* case explained the rationale for the margin of appreciation doctrine as follows:

> Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (para 52).

I contend that the ECHR is overly deferential to national governments in that it regards the area of social security as their exclusive preserve. In so doing it gives up an opportunity to interpret and develop the content of the right to social security, leading to a weak jurisprudence on the content of this right. It is therefore not surprising that European socio-economic rights jurisprudence is generally weak (Cahn and Danova-Russiva 2007), with a number of states still regarding these rights as not real rights (Amollo, 2007).

The ECHR is overly deferential to national governments in that it regards social security as their exclusive preserve.

In contrast, while the South African Constitutional Court has been deferential to the government, it has been so by refusing to prescribe to government the means to realise socio-economic rights, and arguably through its use of the reasonableness inquiry. While the Court has been accused of failing to give content to socio-economic rights, there is no evidence in its jurisprudence to suggest that it has left this to the state. Rather, the jurisprudence suggests that the Court has been trying to avoid getting into the intricacies of defining the minimum core of the rights.

It is also important to note that the European legal system differs from the South African system. The European system does not have the social transformation imperatives which permeate the South African Constitution. Furthermore, the social context in which the two systems of human rights operate differs. The UK has the following social indicators: poverty, 12.4 (HPI, 2007); unemployment, 2.9%; and life expectancy, 78.7 years (WFB, 2007). During the hearing of the *Stec* case, the UK adduced evidence before the ECHR that it had a policy which sought to phase in an equal pension age of 65 for men and women from 2010 to 2020. Thus the low levels of poverty and employment in the UK suggest that men of 60 to 64 are in a position to find jobs to sustain themselves, while the high life expectancy suggests that men live long enough to attain the age of 65 and enjoy their pension well beyond that age.

In sharp contrast, poverty in South Africa is estimated at 50%, unemployment at 25% and life expectancy at 42.45 years (WFB, 2007). These statistics suggest that a majority of men aged 60 to 64 are not only poor but have a very low chance of finding a job to sustain themselves. As life expectancy is very low, few men reach the age of 65 to get a pension grant. This suggests that, if the pension age were to be equalised at 60, the group of men to be accommodated will get smaller. Importantly, because not every man who turns 60 will automatically get the old age grant, but only those who qualify in terms of the means test, the numbers of those who eventually get the grant will be even smaller.

Conclusion

There is good reason to expect a judgment in favour of the applicants. Firstly, the applicants presented strong expert evidence proving that men aged 60 to 64 are as poor and have suffered as much discrimination as women of the same age.

Secondly, the applicants adduced expert evidence showing that the respondents could afford to extend access to social grants to men in the 60 to 64 age group.

Thirdly, regarding the reasonableness inquiry under section 27, the respondents' defence that the discriminatory scheme does not violate section 27 will probably fail because they did not prove that they have adopted a plan (an important consideration under section 27) addressing the plight of men aged 60 to 64.

Fourthly, as regards whether the discriminatory scheme is protected by section 9(2), the applicants and the *amici* showed that the age differentiation falls outside the ambit of section 9(2) as it excludes persons or categories of persons who have been disadvantaged by unfair discrimination. This fact alone suggests that the scheme was not "designed" as required by section 9(2), but simply inherited from the 1930s, when it served entirely different objectives.

Finally, one should be very wary of importing foreign judgments on socio-economic rights. In particular, we have to treat with caution judgments from legal regimes such as the ECHR in which judges interpret judicial deference (margin of appreciation) to mean that certain rights fall within the exclusive province of the government. Importantly, their very low levels of inequality and poverty suggest that legal systems as the European one lack the social transformation imperatives that feature prominently in our Constitution. As such they offer very little insight for our campaign to ensure that these rights transform the lives of the poor and marginalised, in which campaign our courts play a crucial role.

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Constitutional Court delivers a vision for land restitution

Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd, **CCT 69/06**

Teresa Yates

Thirteen years after the promulgation of the Restitution of Land Rights Act in 1994, the Constitutional Court has clearly outlined the purposive manner in which the Constitution and restitution legislation should be interpreted to give real meaning to land rights law. The Court recently held unanimously that labour tenants who were dispossessed of land rights in 1969 are entitled to restitution. In so doing, the Court has in the case of *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*, CCT 69/06 (*Popela community* case) affirmed the rights of the Popela community and thousands of other labour tenant communities to claim back their rights under the Restitution Act.

The apartheid state pushed through many policies and laws in its bid to completely dehumanise black South Africans and dispossess them of land and all claims to citizenship. As a result, more than a million black South Africans were evicted from farms between 1964 and 1984. The Popela community is but one of the many groups of people who were victims of such dispossession.

The Popela community's struggle for restitution

The Popela community lived in Moeketsi (in what is today Limpopo province) from the mid 1800s. The area is situated in a beautiful fertile valley between Polokwane, Duiwelskloof and Tzaneen. It is home to some of the largest tomato, avocado and mango plantations in South Africa. When their land was invaded by white settlers in 1889, the Popela community, like many others throughout South Africa, were forced to enter into labour tenancy contracts whereby they provided free labour for part of the year simply to be able to continue using the land.

Labour tenants are small-scale farmers who, in return for the right to cultivate crops and/or graze their livestock on land owned by others, provide labour for a period of the year, either for free or for an amount below that paid to wage workers.

The Court has affirmed the right of the Popela community and thousands of other labour tenant communities to claim back their rights under the Restitution Act.

This arrangement worked to the benefit of the white settlers and, relative to being forced into wage labour or dumped in the reserves, it had some advantage for the dispossessed black owners of the land. The white settlers had a steady supply of free labour to develop their portions of land and labour tenants were able to retain their homes and maintain their own agricultural production for part of the year.

By the 1960s, the apartheid government was acting to eliminate the labour tenant system throughout South Africa. The Prevention of Illegal Squatting Act of 1951 and the Bantu Laws Amendment Act of 1964 enabled the government and landowners to drive millions of urban and rural blacks from their land. By the end of the 1970s, labour tenant contracts were prohibited in the then Northern Transvaal, where the Popela community lived and farmed.

As a result, labour tenants were reduced to wage labourers with no right to engage in their own production. Many community members opted to leave the farms instead of subjecting themselves to the dehumanising labour conditions for the pittance paid by the whites. Dispossession, then, was not a single moment in time, but a gradual process through which black people's access and rights to land were eroded and whittled away, until they finally had no status and no rights over the land they once owned.

During the course of decades of diminishing land rights, the Popela community managed to maintain some sense of cohesiveness. They had a recognised induna (chief) who allocated land for ploughing and common grazing areas, they collectively gathered firewood and water, and they had a communal graveyard. Their graves remain on the disputed land to date.

In 1996 six extended families remained on the Popela land. A few were wage workers and the rest produced small quantities of fruits and vegetables for their own consumption and sale. These families approached Nkuzi Development Association, a land rights NGO based in Polokwane, when the current owners of the land threatened them with eviction. Despite discouraging advice from some staff of the Commission on Restitution of Land Rights, Nkuzi not only helped them to resist eviction, but also assisted them to file a claim for restitution of their lost labour tenancy rights with the Regional Land Claims Commission (Land Commission) – a claim that would extend to those who had been removed from the land entirely. In total 11 families formed part of the claim.

The community's claim was based on the fact that they had lost their land rights because of the racially discriminatory practices of the former government.

The decisions of the lower courts

Land Claims Court

The Popela claim was referred to the Land Claims Court (LCC) by the Land Commissioner for the Northern Province in May 2000 (*Popela Community v Department of Land Affairs and Goedgelegen Tropical Fruits (Pty) Ltd*, LCC 52/00.) The claim was based on the fact that this community had lost their land rights because of the racially discriminatory practices of the former government of South Africa.

The LCC had to determine whether the Popela community had an accepted tribal identity to make a community claim. It found no evidential basis to prove that. This conclusion was drawn despite the accepted history of occupation. The community had a system of administering the land before they were forced into labour tenancy.

Nevertheless, the LCC accepted that the claimants had a right in land as labour tenants and that their land rights had been dispossessed after 19 June 1913 (as required by the Restitution of Land Rights Act). The ploughing and grazing rights that the community had in terms of the labour tenant arrangements on the land were also terminated in 1969. Those members of the community that did not leave the land were then reduced to wage earners.

Furthermore, the LCC acknowledged that section 27 of the Bantu Laws Amendment Act (Act 42 of 1964), which provided the legal basis for terminating labour tenancies, and the manner in which it was implemented constituted racial discrimination. The Court, however, reasoned that there was no evidence that this law was responsible for the decisions of the landowners to abandon labour tenancies in favour of wage labour.

The LCC also found that there was no evidence to support the argument that landowners acted in anticipation of the Bantu Laws Amendment Act. It relied primarily on the evidence of landowners to conclude that the dispossession was "apolitical and their decision to oust the labour tenancy system was not influenced by any racially discriminatory law or policy of the then government", but by economic circumstances (para 73).

The claimants were granted leave to appeal to the Supreme Court of Appeal (SCA).

Supreme Court of Appeal

On 28 September 2006, the SCA upheld the decision of the LCC (*Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2006] SCA 124 (RSA)). Like the LCC, the SCA found that the Popela community's dispossession did not occur as a result of past racially discriminatory laws or practices. It found that, by the time the notice arising from the Bantu Laws Amendment Act was published, the community's labour tenant rights had already been terminated. In reaching this conclusion, it held that there was no need to decide on the issue of whether the Popela people were a community as contemplated by the Restitution Act.

The Constitutional Court

The decisions of the LCC and the SCA were overturned by the Constitutional Court on 6 June 2007.

The Court found that the Restitution Act should be "understood purposively because it is remedial legislation umbilically linked to the Constitution" (para 53). The Court found that although the Popela community had been dispossessed of many of their land rights before 1913, the loss of the land rights they held

through the labour tenancy system was the result of "a grid of integrated repressive laws that were aimed at furthering the government's policy of racial discrimination" (para 70).

The Court recognised that the existence of the system of labour tenancy was itself the product of racist laws and practices that denied black people ownership of land.

It also overturned the finding of the LCC and SCA that the community's dispossession was not "as a result of" apartheid laws and policies. The Court also rejected the notion that white farmers acted purely in their best economic interests in diminishing the land rights of the Popela people and other labour tenants.

It should be noted that South Africa was not a normal society at the time the Popela community were dispossessed of their land. The state did not function to protect the land rights of poor black citizens although it took concrete measures to advance the rights of white landowners. Thus, the Constitutional Court held that, although the Popela people lost their land at the hands of landowners and not through forced removal by the state, the dispossession was ultimately "tainted by the context that allowed and actively encouraged it to occur" (para 72).

The Court went further to point out that the state could not directly end the labour tenancies because of the private nature of the relationship that existed between the tenants and the farmers. The question then was "not whether the dispossession is effected by the state or a public functionary, but rather whether the dispossession was a consequence of laws or practices put in place by the state or other public functionary" (para 77). To interpret the legislation differently would, in the Court's opinion, be at odds with the manifest purpose of the legislation which is to grant restitution or equitable redress to dispossessed labour tenants.

The Court therefore concluded that the Popela community had been dispossessed of their rights in land after 19 June 1913 as a result of racially discriminatory laws or practices as contemplated by the Restitution Act.

Conclusion

Although judgment in the Popela case appears to have come after a very long period it is a victory worth celebrating. The Regional Land Claims Commissioner, as well as Nkuzi, must be commended for supporting the Popela community to the very end despite pressure on them not to do so and complaints, particularly by landowners who feared its implications.

The LCC is one of the key state institutions charged with overseeing the implementation of the Restitution Act as well as other land reform legislation. According to Theunis Roux, the LCC has played "no meaningful role in the land restitution process, and administers two other statutes that, at least in part because of the way they have been interpreted by the Court, are regarded as 'facilitating' a new wave of land dispossession" (Roux, 2004: 511) The LCC has been very formalistic in its interpretation of statutes, which has led the judges to disregard the discretion conferred upon them by the Restitution Act to fashion decisions that promote rather than obstruct transformation.

This case supports the criticism that the LCC has failed to deliver justice to those dispossessed of land. In contrast, the Constitutional Court shows a full understanding of the history of the country and how legislative measures were used over decades to strip black South Africans of their land rights and dignity.

This judgment was long overdue. It recognises the extent and nature of the land dispossession inflicted on the Popela community and millions of other farm dwellers in the apartheid era. It is a validation of their right to justice and their right to the land that was originally theirs. It furthermore delivers a clear vision of how the Restitution Act should be interpreted to deliver on the post-apartheid promise of transformation.

Once a vibrant community, living productively on their ancestoral land, the Popela community now consists of just a few elderly people eking out a living on state pensions and living on very small portions of land. The challenge now is to fashion a remedy that brings community members back to their land.

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First reading of the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights

Lilian Chenwi

In an earlier article in the *ESR Review* (Chenwi & Mbazira, 2006) we indicated that governments were about to decide on whether to proceed with the drafting of an optional protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which will provide for a complaints procedure. We also set out the historical background and the debate about the need for the optional protocol.

The debate on this issue has now shifted from whether economic, social and cultural (ESC) rights should be subject to a complaints procedure to what the specific nature and modalities of such a procedure should be. During its 21st meeting, the UN Human Rights Council (HRC) decided to extend the mandate of the Open-Ended Working Group on an optional protocol to the ICESCR (OEWG) for a period of two years in order to elaborate on an optional protocol (Resolution 1/3 of 29 June 2006, para 1). It requested the chairperson of the OEWG, Catarina de Albuquerque, to prepare a draft optional protocol to be used as a basis for future negotiations. It also requested the OEWG to meet for ten working days each year. It also directed that a representative of the Committee on Economic, Social and Cultural Rights (the Committee) should attend these meetings as a resource person.

Accordingly, a draft optional protocol was prepared by the chairperson (UN doc A/HRC/7/WG.4/2 of 23 April 2007) and considered at the fourth session of the OEWG held in Geneva from 16 to 27 July 2007. It was at this session that the first reading of the draft occurred and comments on it were received from states parties, non-governmental organisations (NGOs) and individual experts. This paper highlights some of the positions of the delegates on certain provisions of the draft optional protocol.

General remarks

In an opening address, the UN High Commissioner for Human Rights, Louise Arbour, noted that the adoption of an optional protocol would be an important step towards a greater recognition of the indivisibility and interrelatedness of all human rights. She emphasised the importance of strengthening the protection of ESC rights through the optional protocol.

The draft optional protocol was welcomed by most of the delegates, including African countries such as Egypt (on behalf of the African Group) and South Africa. Other states in support of the protocol included Azerbaijan and Chile.

However, the United States of America (USA) persisted with its argument that ESC rights are not as justiciable as civil and political rights, as the former cannot be adjudicated without interfering in the internal decisions of states. It added that, because ESC rights have to be realised progressively within available resources, these rights are not suitable for (quasi-)judicial adjudication. It maintained that the optional protocol would undermine the right of states to determine their own policy priorities.

Specific provisions

Scope (art 2)

At the meeting, one of the most controversial issues related to the rights under the ICESCR that should be subjected to the complaints procedure. Various approaches were proposed: a *comprehensive approach*, allowing for communications in respect of all rights in the ICESCR; a *limited approach*, limiting the procedure to Parts II and III of the ICESCR; and an *à la carte approach* (with *opt-out or reservation* provisions), allowing states to choose the rights or levels of obligations that they would like to be bound by.

A large number of states supported a comprehensive approach (Belgium, Bolivia, Brazil, Burkina Faso, Chile, Ecuador, Egypt, Ethiopia, Finland, France, Guatemala, Italy, Liechtenstein, Mexico, Nigeria, Norway, Peru, Portugal, Senegal, Slovenia, South Africa, Spain, Sweden, Uruguay and Venezuela).

France initially preferred an opt-out approach but was later persuaded to support the comprehensive approach. The NGO Coalition for an Optional Protocol to the ICESCR (the NGO Coalition) continued with its strong support for the comprehensive approach and argued that other approaches would undermine the indivisibility, interdependence and interrelatedness of all rights under the ICESCR.

The UK preferred an opt-out approach that would allow states to sighn on to more rights at a later stage.

Though generally in favour of a comprehensive approach, Egypt added that it would be able to accept the exclusion of Part I of the ICESCR from the optional protocol. In other words, Egypt is also open to the limited application of the complaints procedure. Australia, Greece, India, Morocco, Russia and the USA were also in favour of excluding Part I of the ICESCR from the optional protocol.

States that favoured an à la carte approach were Australia, China, Denmark, Germany, Japan, the Netherlands, New Zealand, Poland, the Republic of Korea, Russia, Switzerland, Turkey, the United Kingdom (UK) and the USA. They argued that this approach would elicit wide acceptance of the protocol.

The UK preferred an opt-out approach, arguing that it would allow states to sign on to more rights at a later stage while not preventing other states from subscribing to all rights under the ICESCR. Poland, also preferring an opt-out approach, proposed that a minimum number of articles should be established that all state parties would have to accept. The arguments for an opt-out clause related to the non-justiciability of ESC rights, the competence of the Committee and the difference in the situations of states. In other words, states where ESC rights have not yet been made justiciable would be able to freely determine which provisions and obligations arising from the ICESCR they were ready to assume.

However, those states that favoured a comprehensive approach had some objections to an opt-out or à la carte approach. These included the fact that it would establish a hierarchy among human rights, undermine the interrelatedness of all rights in the ICESCR and the interests of victims, foster inequality among review procedures within the human rights monitoring mechanisms and undermine the purpose of the optional protocol to strengthen the implementation of ESC rights (UN doc A/HRC/6/8 at para 33).

Standing (arts 2 & 3)

Article 2 of the draft optional protocol gives standing to individuals or group of individuals claiming to be victims of a violation. It also allows representative actions by NGOs or other actors who may submit a communication on behalf of victims, with their consent.

Article 3 deals with collective complaints, an issue that has not received much attention in the discussions of the OEWG. It grants standing to "international" NGOs with consultative status before the UN Economic and Social Council to submit communications alleging unsatisfactory implementation by any state of any right in the ICESCR (art 3(1)). National NGOs with particular competence in the matters covered by the ICESCR have standing only if, upon ratification or accession, the state party declares that it recognises the right of such NGOs to submit collective communications against it (art 3(2)).

It should be noted that there is some discrepancy between the English and Spanish versions of article 3(1). The English version uses the term "international", but the Spanish version does not, hence granting standing to all organisations with consultative status. The NGO Coalition found the English version to be particularly problematic, as it excludes domestic NGOs with consultative status. These NGOs may be better placed to lodge such communications because of their proximity to victims of violations within the states in which they operate.

The issue of having consultative status as a criterion for standing was the subject of concern by delegates from Belgium, Brazil, Ecuador, Ethiopia, Mexico and the NGO Coalition.

Since NGOs do have standing under article 2 when acting in a representative capacity for victims, there was substantial consensus that article 3 should be deleted. The states that called for its deletion were Algeria, Australia, Belarus, Burkina Faso, China, Colombia, Ecuador, Egypt, Greece, India, Japan, Morocco, Nigeria, Norway, the Republic of Korea, Russia, Senegal, Tanzania, the UK, Ukraine, the USA and Venezuela.

Another issue raised in relation to standing was that of consent. Some

states were of the view that individuals must be allowed to give prior "express" consent before communications can be brought on behalf of individuals or groups of individuals (Belarus, Burkina Faso, China, Egypt, Ethiopia, Morocco and Russia). However, Ecuador, Peru and the NGO Coalition opposed this submission, arguing that it might be difficult to obtain express consent in certain cases. As an alternative to requiring express consent, Brazil, Chile, Portugal and Uruguay proposed an exception to the consent requirement where the author of the communication can justify acting on behalf of the victim(s) without such consent. This view was also supported by the NGO Coalition.

Admissibility – exhaustion of domestic remedies (art 4(1))

In previous sessions of the OEWG, the need for clear admissibility criteria similar to those of other human rights instruments was highlighted. The draft incorporates such admissibility requirements.

Article 4(1) requires that all available domestic remedies should be exhausted except "where the application of such remedies is unreasonably prolonged or unlikely to bring effective relief". Some states found the draft text acceptable (Argentina, Belgium, Mexico, Slovenia and Switzerland). Ecuador proposed that the exhaustion of domestic remedies requirement should not be applicable when no such remedies have been established in national legislation.

In previous sessions of the OEWG, some states proposed the inclusion of the requirement that regional remedies must be exhausted first before a complaint can be lodged with the Committee. This position was restated during the fourth session by the UK. This proposal, though supported by some, did not receive universal support. States that opposed this submission argued that it would prevent victims from accessing the system (Portugal, Argentina, Azerbaijan, Belgium, Norway, Peru and the NGO Coalition).

Interim measures (art 5)

All communication procedures make provision for interim measures. The draft optional protocol accordingly includes a provision on interim measures so as "to avoid possible irreparable damage to the victim of the alleged violation". The risk of such damage has to be sufficiently substantiated.

Some states welcomed this provision (Argentina, Belgium, Brazil, Chile, Ecuador, Egypt, France, Finland, Liechtenstein, Mexico, Peru, Poland, Portugal, South Africa, Spain, Uruguay and Venezuela). Others proposed that it should be included in the rules of procedure (Germany, the Republic of Korea and Switzerland).

Some states suggested that interim measures should only be granted after a communication has been declared admissible (Ecuador, Italy, India, New Zealand and Russia). However, other delegates opposed this view on the ground that it could prevent victims from obtaining timely, immediate relief (the NGO Coalition, Argentina, Belgium, Chile, Peru and Portugal).

> **The NGO Coalition pointed out that in its current form, the optional protocol does not emphasise the urgency of interim relief.**

The NGO Coalition pointed out that, in its current form, the optional protocol does not emphasise the urgency of interim relief. It argued that interim measures should be considered with urgency in order to protect victims of violations, such as a mass forced eviction, for example, who should not have to await lengthy deliberative processes before remedial action can be taken. This view was also supported by Colombia and Uruguay.

Friendly settlement (art 7)

A number of states were in support of the inclusion of provisions encouraging friendly settlement of disputes (Argentina, Brazil, Colombia, Denmark, Ethiopia, Finland, France Mexico, South Africa, Spain, Switzerland and Venezuela).

Some suggested that friendly settlement should not be mandatorily required in every case (Argentina and Mexico) or that it should only apply in relation to interstate communications in line with other human rights instruments (China, India, Sweden and the USA).

Further, Australia, Ethiopia, France and the USA were in support of the position in the draft that a friendly settlement should automatically close consideration of a communication, meaning that the Committee would not proceed to consider the communication. However, Brazil and Switzerland warned that no communication should be closed before a friendly settlement had been fully implemented. This is a point that the NGO Coalition also emphasised. The coalition was of the view that the friendly settlement procedure must not prejudice consideration of the communication in the event that the agreement reached in a friendly

settlement fails. This is so because the success of a friendly settlement mechanism depends on its ability to protect the rights of victims whilst retaining the goodwill of the states parties towards the international system. The competence of the Committee to review friendly settlements was supported by Denmark, Finland and Spain, and opposed by Australia, China, the USA and Venezuela.

Mexico added that the Committee would need to follow up on the implementation of a friendly settlement.

Reasonableness standard (art 8(4))

Article 8(4) of the draft optional protocol makes reference to reasonableness as the standard that the Committee would use for measuring compliance by states with their obligations under the ICESCR. This provision was welcomed by some states at the fourth session of the OEWG (Belgium, Chile, Finland, Germany, Mexico, the Netherlands, Portugal, Norway and Russia). The UK stated that "reasonableness" actually reflects how states should implement ESC rights and is an appropriate standard of review.

The USA suggested a replacement of the term "reasonableness" with "unreasonableness" and the addition of a provision that expressly acknowledges that states have "the broad margin of appreciation" to determine how to use their resources optimally.

The "unreasonableness" proposal was supported by China, India, Japan, Norway, Poland and, surprisingly, the UK, which had found the "reasonableness" concept to be acceptable.

On the other hand, the NGO Coalition and some states found it rather restrictive (Egypt, Ethiopia, Portugal and Slovenia) and felt that it comes close to amending the ICESCR (Belgium, Ethiopia, Mexico, Portugal and Slovenia). This is because, the coalition argued, reasonableness is implicit in the provisions of the covenant as seen in the use of the phrase "appropriate means" in article 2(1).

The phrase "broad margin of appreciation" received support from Egypt, Norway, Poland and Sweden. However, some states pointed out that this notion is already implicitly recognised in the ICESCR. They argued that it is a flexible notion whose application varies depending on the specific context and the right in question (Mexico and the NGO Coalition). Russia, in an attempt to reach a compromise, proposed that the notion of "margin of appreciation" be included in the preamble instead.

Interstate communications (art 9)

Some states were opposed to including interstate communications procedure partly because states have rarely brought communications against each other. The same concern was raised at the fourth session. Other states wanted further clarity and information on this procedure from the Committee and other human rights treaty bodies.

Notwithstanding this scepticism, the NGO Coalition and some states supported retaining this procedure (Egypt, France, Mexico, the Netherlands, Portugal, South Africa and Spain). Egypt and Portugal proposed that the procedure should be made optional.

On the other hand, China submitted that this procedure would undermine the principle of autonomy and sovereignty of states. It therefore, together with Ecuador, Ethiopia, Japan, Norway and the UK, called for its exclusion.

Inquiry procedure (arts 10, 11 & 20)

The inquiry procedure is generally important as it allows supervisory bodies to respond in a timely fashion to grave or systematic violations. Articles 10 and 11 of the draft optional protocol make provision for such a procedure. Article 20 gives state parties the option to opt out of articles 10 and 11 at the time of signature or ratification.

The NGO Coalition and several states supported the inquiry procedure (Austria, Brazil, Chile, Costa Rica, Ecuador, Finland, Liechtenstein, Portugal, Senegal, South Africa and Sweden). The NGO Coalition noted that the procedure offers a means of addressing grave or systematic violations of human rights which may not be successfully resolved by individual complaints. It also may resolve issues that affect large numbers of people who, for various reasons, may not have access to the communications mechanism.

Other states were sceptical of the procedure and called for its exclusion (Australia, China, Egypt, India, Italy, R'ussia and the USA). They argued, amongst other things, that the procedure is not practicable, interferes with the sovereignty of states, and might overburden the optional protocol.

Protection of individuals (art 12)

Article 12 requires a state party to "take all appropriate steps to ensure that individuals subject to its jurisdiction are not subjected to ill-treatment or intimidation as a consequence of

communicating with the Committee". This provision is identical to article 11 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. It was a surprise inclusion as it had not been discussed in previous sessions of the OEWG.

This provision was supported by Chile, Egypt, France, Mexico, Portugal, South Africa, Switzerland and Amnesty International. In fact, many delegates argued for the inclusion of a provision that would obligate states to protect individuals from "any form of reprisal" or "victimization of any form" (UN doc A/HRC/6/8 at para 119).

International cooperation and assistance (art 13) and the fund (art 14)

Article 13 of the draft optional protocol requires the Committee, if it considers it appropriate, to convey to UN specialised agencies, funds, programmes and other competent bodies its view on communications or inquiries which require technical advice or assistance.

Article 14 proposes the establishment of a fund to support the implementation of recommendations of the Committee and to benefit victims of violations of the rights in the ICESCR. The fund would be financed through voluntary contributions made by governments, intergovernmental organisations, NGOs and other private or public entities (art 14(2)).

There was some support for article 13 (Argentina, Austria, Australia, Belgium, Finland, France, Germany, Italy, Japan, the Netherlands, New Zealand, Norway, Poland, Slovenia, Sweden, Switzerland and the UK). Although Argentina, Belarus, Germany, Slovenia and Ukraine supported the establishment of the fund, most developed states opposed the idea because it was not clear who its beneficiaries would be and what it would be used for. It was also argued that the idea was impractical and would duplicate existing efforts (Austria, Australia, Belgium, Denmark, France, Liechtenstein, New Zealand, Poland, Sweden, Switzerland, the Netherlands, New Zealand, the UK and the USA).

The African Group, together with China, Belarus, India, Nepal and Peru, wanted articles 13 and 14 to be merged and proposed the deletion of the words "special" and "voluntary" in those provisions. China and Egypt added that deleting the word "voluntary" did not mean that contributions to the fund would become mandatory. States that supported the proposal that the fund, if created, should be based on voluntary contributions included Argentina, Guatemala, Italy, Mexico, Slovenia and Ukraine.

The need to develop criteria for deciding which states could receive resources from the fund was highlighted by the Netherlands and Ukraine.

Reservations (art 21)

Article 21 of the draft optional protocol prohibits reservations.

Greece, Poland and Turkey were of the view that the protocol should be silent on reservations and leave the issue to be determined in accordance with the applicable principles of international law. Argentina, Belgium, Chile, Finland, Germany, Mexico, Portugal, South Africa, Venezuela and the NGO Coalition were against the possibility of reservations, arguing that reservations were incompatible with the complaints mechanism and have been excluded from recent human rights instruments.

Australia, Germany, Italy and the UK cautioned against the use of reservations to limit the scope of the optional protocol. Likewise, Egypt and China stated that reservations would not be used to limit the scope of the rights enforceable through the complaints procedure but only to clarify how a state would go about implementing its obligations under the protocol. Denmark added that more states would ratify the protocol if reservations were allowed.

Conclusion

The optional protocol is a valuable initiative as it will bolster the protection of and enhance the understanding of ESC rights. Once adopted, it will put an end to the unequal protection of human rights in international law. The protocol should therefore follow a comprehensive approach just like any other existing UN complaints mechanism, by widening its application to all the rights and duties enshrined in the ICESCR.

The debate held during the fourth session suggests that the à la carte or opt-out approaches could fall away with time. NGOs, policy-makers and other stakeholders have an important role to play to ensure that a comprehensive and effective protocol is adopted.

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Book summary

David Bilchitz, 2007. *Poverty and fundamental rights: The justification and enforcement of socio-economic rights.* Oxford University Press.

This book provides an analytical framework for determining the content of socio-economic rights. It transcends several disciplines including philosophy, jurisprudence, human rights and public policy.

The first part of the book considers the normative foundations of socio-economic rights. A philosophical theory of rights is developed that provides a common foundation for both civil-political rights and socio-economic rights. It argues that fundamental rights are grounded in the principle of equal importance, which requires protection for certain significant interests that creatures have. Among these central interests of individuals are two thresholds of urgency.

The first threshold is the interest that people have to be free from general threats to survival. The second is the interest that people have to live in an environment where they can fulfil their purposes and live well.

The book draws an important distinction between conditional rights rooted in the principle of equal importance and unconditional obligations that require an engagement with competing normative and pragmatic considerations. Determining the unconditional obligations of a society requires an "all-things-considered judgment" concerning the state of affairs that would best guarantee the equal importance of individuals. It thus becomes important to consider who makes these final, complex judgments. Though not the focus of the book, an argument is made as to why in certain circumstances it is justifiable in a democracy for the judiciary to make such decisions.

The second part of the book moves from a philosophical discussion to approaches to interpreting socio-economic rights. It identifies two current ways in which courts have approached these rights: the "reasonableness approach" and the "equality" approach.

The "reasonableness approach" was developed by the South African Constitutional Court. It requires the government to justify its actions according to the standard of "reasonableness". The book argues that this standard is defective for two reasons. Firstly, it limits the scope for the normative development of socio-economic rights. The distinctive role of rights is not simply to draw attention to the lack of a justification for government policy but to expose a particular type of failure: the failure to address adequately certain vital interests that people have. The focus on the abstract and procedural notion of "reasonableness" tends to obscure the vulnerabilities of individuals in particular cases and enables courts to abdicate their responsibility to give substantive meaning to socio-economic rights.

Secondly, the author argues that the reasonableness approach is in fact incoherent. It depends on evaluating the justifiability of the link between policies that are adopted and ends that are constitutionally endorsed. In so doing, it enables courts to test the constitutionality of state policies against broad and constitu-

tional objectives that are not specific to the particular context in which the applicants live. Thus this standard does not have clear consequences.

The "equality" approach offers an alternative understanding of socio-economic rights. It is based on the idea that a state should not exclude a significant section of society from social programmes. Socio-economic rights cases are thus likened to unfair discrimination cases. In deciding socio-economic rights cases, this approach asks whether a claimant group has an equal or better claim to inclusion in social programmes relative to other groups that have been catered for. This approach means that courts defer to the legislature on how to allocate resources and simply ascertain whether those resources have been distributed equally.

The book argues that the equality approach is not very helpful in resolving socio-economic rights claims. These rights are concerned primarily with what the state is required to do to realise them rather than with who is their beneficiary. The equality approach thus does not assist us in determining the content of these rights, as it is primarily concerned with the equal distribution of resources.

Having identified the inadequacies of the alternative approaches above, the author proceeds to propose a modified version of the minimum core approach as the best standard for enforcing socio-economic rights. This approach, initially proposed by the United Nations Committee on Economic, Social and Cultural Rights, is based on the idea that there are different levels of enjoyment of rights, some of which are more "essential" than others. The minimum core concept fits in well with the author's philosophical discussion on thresholds of urgency. As noted earlier, the author draws a distinction between the first threshold of provision, dealing with the survival interests of individuals, and the second threshold, dealing with a more extensive interest in the general conditions individuals need to be able to live well.

The minimum core approach imposes a "minimum core obligation" on states to realise the minimal needs of individuals as a matter of priority. It also requires the state to improve the quality and quantity of the right so as to meet the more extensive obligations implicit in the right.

The distinction between a minimal interest and a more extensive interest in socio-economic rights thus allows us to recognise that the former has urgent interest, which must be satisfied as a matter of priority. However, the implications of this recognition cannot be appreciated fully unless the notion of "priority" is clarified.

The author argues that socio-economic rights must be interpreted as imposing an obligation on the state to accord "weighted priority" to the satisfaction of minimum core needs. "Weighted priority" requires that priority should be given to the most valuable interests, which require strong countervailing considerations to outweigh them. It also requires that priority should be given to satisfying the needs of the people that are worst off in society. This view of priority does not accord absolute priority to the interests of the worst off but requires that their interests be given special consideration.

Thus this book means that socio-economic rights require the state to display special concern for the minimal interests of individuals. Whilst there could be valid reasons for not realising the minimum core, such reasons have to be of sufficient weight to override an individual's minimal interests. Where the government fails to meet these minimal interests, courts would be justified in requiring it to demonstrate how it aims to rectify the situation. States also have an obligation to adopt programmes to meet the more extensive interests of individuals and to explain their failure to meet these interests.

The modified minimum core approach has several attractions. First, it is rooted in a normative theory of rights that takes account of the relative urgency and priority that certain fundamental interests have. Secondly, it requires the state to demonstrate how it seeks or has sought to realise these needs. It requires a particularly strong justification for failure to meet the core obligations.

The minimum core approach proposed in this book is of great benefit to the poor. It also provides a theory of judicial review which strikes a proper balance between judicial abdication (the vague reasonableness approach tends towards this extreme) and judicial overreach (an approach that would have judges determine socio-economic policies and budgets) in relation to socio-economic rights.

Finally, the minimum core is rooted in a conception of rights that rejects the primacy of civil and political rights over socio-economic rights. The underlying objective of socio-economic rights is that no person must be left out in the cold or left to die on the streets due to hunger, lack of shelter or poverty.

This summary was prepared by the author, **David Bilchitz**, who is a senior researcher at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law.