ESR REVIEW
Economic and Social Rights in South Africa

Ensuring rights make real change

vol 10 no 4 November 2009

Editorial

This is the fourth issue of the *ESR Review* for 2009.

High mortality rates, tuberculosis and the prevalence of HIV and AIDS are some of the critical challenges facing South Africa today, which have the potential to undermine efforts to achieve a better life for South Africans. President Jacob Zuma acknowledged this crisis during his address to the National Council of Provinces on 29 October 2009. On the same day, in his address at the National Teaching Awards gala, the president repeated his call for renewed action in the fight against HIV and AIDS and emphasised the importance of education in dealing with the challenges of poverty and unemployment.

One of the many challenges facing South Africa is how to address the public health concerns surrounding sex work while safeguarding the rights of sex workers. In the first article in this issue, Marlise Richter looks at the rights of sex workers, focusing particularly on the factors that prevent them from enjoying socio-economic rights. She concludes that, unless sex work is decriminalised, sex workers may not be able to claim their basic entitlements under the South African Constitution.

Redson Edward Kapindu examines the role of international human rights law in the enforcement of labour and housing rights in South Africa. He argues that, while international human rights law has played a significant role in lawmaking and the development of these rights, in most instances courts have simply referred to a list of international law provisions, without further elaboration.

Lilian Chenwi provides an overview of the recent South African Constitutional Court's decision in which the Court found the KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Act 6 of 2007 to be unconstitutional. She observes that the decision is another 'wake-up call' for the government to ensure that its approach to the challenge of informal settlements or slum conditions is pro-poor and acknowledges peoples' existing circumstances.

Siyambonga Heleba considers another recent decision of the South African Constitutional Court

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ESR REVIEW
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ISSN: 1684-260X
A publication of the Community Law Centre (University of the Western Cape)

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ESR Review
ESR Review is produced by the Socio-Economic Rights Project, Community Law Centre, with financial support from the Norwegian Agency for Development Cooperation through the Norwegian Centre for Human Rights and with supplementary funding from the Ford Foundation. The views expressed herein do not necessarily represent the official views of NORAD/NCHR or the Ford Foundation.

Production
Design and layout: Page Arts cc
Printing: Tandym Print

COMMUNITY LAW CENTRE
University of the Western Cape

in which it found the City of Johannesburg's free basic water policy to be reasonable and its pre-paid water meters lawful. He notes the Court's reaffirmation that it was uncomfortable with specifying the minimum core of socio-economic rights.

Mónica Arango Olaya appraises a decision of the Colombian Constitutional Court on the right to health, which compelled authorities to modify regulations that cause structural problems within the health system. She notes that the decision places human dignity at the centre of the right to health, places the basic health needs of individuals before economic considerations, and prioritises the right to health in public policy.

In this issue, we also provide a summary of legal and policy updates on housing in South Africa; a recent report by the United Nations Independent Expert on the question of human rights and extreme poverty, particularly aspects pertaining to social protection; and a pocket book on key elements of social security.

Finally, Fleur van Leeuwen and Rebecca Amollo discuss the right to maternal health in international human rights law, highlighting the severity of maternal mortality especially in developing countries. They propose that a human rights-based approach to maternal healthcare should be adopted to achieve Millennium Development Goal 5, which is aimed at improving maternal health.

We acknowledge and thank all the guest contributors to this issue. We trust that readers will find it stimulating and useful in the advancement of socio-economic rights, especially the rights of the poor and the most vulnerable groups of society.

Lilian Chenwi is the editor of the *ESR Review*.

Are sex workers entitled to socio-economic rights?

Separating myth from reality

Marlise Richter

Socio-economic rights encompass the basic entitlements of all people in South Africa to social and economic goods and services and provide an important mechanism for the attainment of social justice. By virtue of their inherent human dignity, sex workers are entitled to all the socio-economic rights enshrined in the Constitution. Yet the realisation of these rights is compromised daily by police prosecution, social stigma and gender-based violence. In fact, sex workers' economic, social and physical vulnerability in South African society is created, sustained and exacerbated by outdated laws that criminalise 'sex for reward'.

This article describes the barriers that prevent sex workers from enjoying their rights, particularly socio-economic rights. It concludes that, unless sex work is decriminalised, sex workers may not be able to claim their basic entitlements under the South African Constitution. Available research has shown that sex workers live in dire conditions and that the lack of legal protection compounds vulnerability of sex workers to violence, ill health and exploitation. In this article, five areas of extreme concern for sex workers are considered: poverty, education, access to health services, HIV and AIDS and gender inequality.

Poverty

Many people who sell sex are already extremely vulnerable as a result of poverty. Often, women sell sex because they have limited options to earn enough money to feed, clothe and educate their dependants (SWEAT et al, 2002).

The Institute of Security Studies (ISS) and the Sex Worker Education and Advocacy Taskforce (SWEAT) conducted one of the biggest surveys of sex work in Cape Town, South Africa, in 2007 and 2008. They found that 76% of sex workers entered sex work for money (Gould and Fick, 2008). Most sex workers remain in the industry because they are able to earn more by selling sex than they could in other jobs. One respondent in the study noted:

> [Well, I worked for many years in a factory in the clothing industry, but then with all the difficulties in the industry, I was retrenched. I am the only person bringing in money in my family and I needed to make money. (Street-based sex worker) (Gould and Fick, 2008: 13).

Campbell conducted a study on sex workers near the Carletonville mining community in the North West province, South Africa. She uncovered four reasons why people took up sex work at the mine: first, the death of a parent or both parents; second, leaving school after becoming pregnant; third, running away from the hardships of home; and fourth, leaving an abusive man (Campbell, 2000). Sex workers in this study – as in many other places in South Africa - live in poverty.

The Reproductive Health and HIV Research Unit (RHRU) conducted another study on sex workers in Hillbrow in 1998 and their research revealed that 90.5% of respondents were single and never married, but that 65% of them had children (RHRU et al., 2002). Many women take up the work as a consequence of poverty caused, for example, by the lack of male support, single parenthood, divorce, rape or infertility. Sex work should be understood in light of high levels of female unemployment, limited education of women and the consequent lack of skills. Women's choices must also be understood in the context of a history of male migrant labour and urbanisation which took men to cities and caused a break-up of families (RHRU et al., 2002).

The criminality associated with sex work has adverse consequences for accessing social services. Many state-initiated programmes which assist people with social security and food might overlook sex workers. Because of the stigma attached to the sex work industry, sex workers may not feel entitled to claim social assistance such as the child support grant. In particular, because of a fear that children will be removed from their care if their identities are disclosed, access to disability and child support grants is inhibited. Also, sex workers fall outside the definition of 'employee' for the purposes of unemployment benefit legislation. Even though sex workers have specific needs – for example, in relation to their children – the criminalisation of sex work means that these needs cannot be met by the state. Targeted sex worker programmes would be necessary to realise progressively their constitutional rights to health, water, housing, food and social security.

Education

The following tables are drawn from the ISS/SWEAT study. They demonstrate that sex workers earn more from sex work than from other forms of employment:

Table 1: Education levels of sex workers in Cape Town (Gould and Fick, 2008)

	% with a tertiary education	% with some high school education	% that completed only primary school
Street-based sex workers	3	56	22
Hotel-based sex workers	13	54	unknown

Table 2: Education levels related to earnings for street-based sex workers (Gould and Fick, 2008)

Level of education (and training)	Average past earnings	Average current earnings	Differential
Tertiary	R4 000	R6 000	1.5 times more
Matric	R1 560	R2 700	1.7 times more
Other high school	R1 279	R3 587	2.8 times more
Primary school only	R1 693*	R3 771	4.4 times more

* Just under half had never done any other work

The study further notes that:

> It is clear from the table that the lower the level of education, the greater the difference is between what someone can earn in a 'normal' job and what they can earn in the sex industry. A person who has only a high school education is likely to earn on average R1 279 in a formal job but R3 587 in sex work – almost three times more. Economically speaking, a decision to forego domestic work in favour of sex work is therefore a rational choice, even if it creates difficulties in other respects. [...] The income differentials indicate that it would be very hard to eradicate sex work by offering women (and men) on the street alternative jobs that are commensurate with their level of skill and education (Gould and Fick, 2008).

It is clear that sex workers need targeted skills and education programmes in order to provide viable alternatives to sex work.

Access to health services

Access to health care services by sex workers is limited partly because of fear of being discriminated against and partly because of fear of the consequences of disclosing their identity. SWEAT has shown that health clinic staff fail to treat sexually transmitted infections (STIs) confidentially, have negative attitudes, refuse to dispense sufficient condoms and make unwarranted public accusations against sex workers that they are 'vectors' of disease. Furthermore, they threaten sex workers with revealing their identity and work to the Department of Social Services so that their children can be removed from their care.

According to the RHRU, sex workers mistrust health workers and live in constant fear that their communities and families will discover their work (Stadler and Delany, 2006; RHRU et al, 2002). This too reduces their chances of accessing health services. Because of these fears and mistrust, sex workers either do not seek help at all for sexual and reproductive health ailments or seek help in the private sector, which often results in exposure to quacks selling unsafe medication on the streets.

HIV and AIDS

Because sex workers have generally been overlooked in South Africa, research on HIV and AIDS and sex workers is limited. What is known makes it clear that sex workers are vulnerable to HIV. In studies done in 1998, HIV prevalence among sex workers was between 45% and 69% (Williams et al, 2003). It is most likely that HIV prevalence in this group is now much higher.

Sex workers' health is compromised by violence (perpetrated by clients as well as the police), stigma, the nature and danger of their work, economic difficulties, and the lack of access to services and support. The criminalisation of sex work itself increases sex workers' vulnerability to STIs, including HIV. There are two reasons for this: first, sex workers' access to health and welfare services is limited by criminalisation; and second, sex workers are less able to negotiate condom use because of their exposure to violence from clients. The violence that sex workers encounter is made worse by the criminal context in which sex work takes place.

Public health arguments for the decriminalisation of sex work highlight the following consequences of the criminalisation of sex work:

- It increases the vulnerability of sex workers to violence from clients, partners and police.
- It creates and sustains unsafe and oppressive working conditions;
- It increases the stigmatisation of sex workers.
- It restricts access to health, social, police, legal and financial services.
- It has a negative impact on safer sex practices.
- It adversely affects the ability of sex workers to find alternative employment (SWEAT et al, 2002).

All of these factors influence the ability of sex workers to protect themselves against HIV, to prevent HIV transmission to their sexual partners and clients, and to access HIV-testing, treatment and support. Indeed, South Africa's national AIDS policy has recognised

this, hence the HIV and AIDS and STI Strategic Plan for South Africa 2007-2011 explicitly recommends the decriminalisation of sex work.

Gender equality

It is clear that, as the vast majority of sex workers in South Africa are female, criminalisation of sex work has a disproportionate effect on women. At the same time, the gender inequality that surrounds the decision to become a sex worker should be taken into account. Although women have fewer economic choices, they do have agency within these constrained choices and deserve to have their choices respected. Even if choice is constrained, there remains room for agency.

The Constitution states that 'everyone' has inherent dignity, which requires that everyone is treated with respect (section 10). This means that the choices that people make about their own bodies, even if they are regarded as 'morally repugnant' by some, need to be respected. This is especially so when the choice is sometimes made because of the need to earn a living and provide for one's family. Many women choose sex work out of desperation and they work under exploitative conditions. Since economic, social and sexual inequality limits women's choices of profession, recognising the context in which women become sex workers in South Africa allows for the consideration of appropriate legal remedies to improve the conditions under which sex workers work and also to protect women from forced prostitution and trafficking.

Only an approach to sex work that recognises the agency of sex workers within their constrained choices and in the context of poverty is consistent with South Africa's Bill of Rights. Such an approach would never seek to criminalise sex workers, as such criminalisation further entrenches the disadvantage suffered by this group of vulnerable women. For these reasons, it is submitted that sex work should be decriminalised.

Conclusion

This article has argued that sex workers' economic, social and physical vulnerability in South African society is aggravated by the criminalisation of sex work. Not only do these laws have a direct effect on sex workers' dignity and freedom, they also create barriers for sex workers who wish to access their socio-economic rights guaranteed by the Constitution. These vulnerabilities must be urgently addressed. South Africa will not reach its Millennium Development Goals by 2015 unless it invests the necessary political will, resources, skills and energy in addressing the concerns, plight and needs of sex workers. In addition to implementing socio-economic programmes that target sex workers, sex work in South Africa should be decriminalised.

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This paper is based on a submission to the South African Human Rights Commission public hearings on the Millennium Development Goals and the realisation of economic and social rights in South Africa (7 February 2009).

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The influence of international human rights law on South African labour and housing law

Redson Edward Kapindu

International law has special significance in South African law, particularly within the framework of the 1996 Constitution of South Africa (the Constitution). The Constitution provides for mechanisms for the direct application (sections 231 and 232) and indirect application of international law (section 39(1)(b)). This paper explores the vital role of international human rights law in South Africa, focusing on labour and housing rights.

South Africa's constitutional architecture

The framers of the Constitution were strongly influenced by international law, particularly with respect to human rights. Liebenberg observes that the preparatory documents reveal a strong influence of international law on the drafting of the socio-economic rights provisions (Liebenberg, 2006: 33-4). Mbazira points out, with respect to socio-economic rights, that 'the differences between the Constitution and the [International Covenant on Economic, Social and Cultural Rights (ICESCR)] are at best nomenclatural as a closer scrutiny shows that the obligations engendered by the two instruments are similar in many respects' (Mbazira, 2006: 1). The ICESCR is the principal and most important international treaty in the area of socio-economic rights. Furthermore, in *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC) (*Grootboom*), the Constitutional Court observed that the term 'progressive realisation' under the Constitution 'is taken from international law and Article 2.1 of the Covenant in particular' (para 45).

Labour rights

Labour legislation

South Africa is a party to a number of International Labour Organization (ILO) conventions. The place of international law in two key pieces of labour legislation is explored here.

Section 23 of the Constitution guarantees the right of everyone to fair labour practices and various associational rights pertaining to participation in labour union activities. The Labour Relations Act 66 of 1995 (LRA) was enacted, among other reasons, to give effect to section 23 of the Constitution and the international law obligations of South Africa relating to labour relations.

Section 3(c) of the LRA provides that the Act must be interpreted in compliance with the country's international law obligations. This section is couched in a manner that makes it mandatory for courts to interpret the Act so that it is consistent with international law.

The Employment Equity Act 55 of 1998 (EEA) again makes similar references to the Constitution and international law. In section 3(d), however, the EEA goes further to specifically provide that the Act must be interpreted in compliance with international law and, in particular, ILO Convention 111 concerning Discrimination in Respect of Employment and Occupation of 1958.

Labour rights jurisprudence

International labour law has been highly influential in South Africa's labour jurisprudence. In *South African National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC), the Constitutional Court considered the ILO Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 and the ILO Convention on the Right to Organise and Collective Bargaining 98 of 1949 in arriving at a decision that soldiers had the right to form their own workers' union although they are not necessarily employees in the normal sense. This case provides a classic instance in which the reasoning of the Court was clearly influenced by international conventions on labour.

In *National Union of Metalworkers of South Africa*

and Others v Bader Bop (Pty) Ltd and Another 2003 (2) BCLR 182 (CC), the Constitutional Court, again having regard to the two ILO Conventions mentioned above, proceeded to emphasise the importance of the supervisory committees of the ILO: the Committee of Experts on the Application of Conventions and Recommendations and the Freedom of Association Committee. It stated that the work of these Committees engenders 'an authoritative development of the principles … contained in the ILO conventions' (para 30) and that the jurisprudence of these Committees is an important resource in developing the labour rights contained in the Constitution.

In *Discovery Health Limited v Commissioner for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 1480 (LC) (*Discovery Health*), the Labour Court of South Africa stated that 'the importance of international standards as both a substantive and an interpretational tool is underscored by sections 232 and 233 of the Constitution' (para 42). Furthermore, having regard to section 39(1)(b) of the Constitution, which requires a court, tribunal or forum to consider international law when interpreting the Bill of Rights, the Labour Court, in holding that undocumented migrants can bring claims for violations of labour rights before appropriate forums in South Africa, considered the International Convention on the Rights of all Migrant Workers and Members of their Families, 1990, even though South Africa has neither signed nor ratified the instrument (para 46). The Court also had recourse to ILO Convention 143 (Migrant Workers (Supplementary Provisions) of 1975 and ILO Convention 97 Migration for Employment Convention (Revised) 1949 (para 47), saying that 'the conventions and recommendations of the International Labour Organisation (the ILO), one of the oldest existing international organisations, are important resources for considering the meaning and scope of … section 23 of our Constitution' (para 42).

It is evident from the above examples that international human rights law has played a pivotal role in the interpretation and development of labour rights in South Africa.

Housing rights

Housing legislation

International law has also had a significant influence on the development of housing legislation in South Africa, though not as much as it has had on labour rights. Relevant legislation on housing includes the Rental Housing Act 50 of 1999 (RHA) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). Both these Acts were adopted to give effect to section 26 of the Constitution, which guarantees everyone the right to have access to adequate housing. The terms 'progressive realisation' as well as 'within available resources' used in this section were borrowed from the ICESCR. Thus, international law is useful in interpreting these terms (see *Grootboom*, paras 45 and 46).

The RHA explicitly provides that one of its aims is to curb extra-judicial evictions. It seeks to balance the rights of tenants and landlords, and to create mechanisms to protect both against unfair practices. Furthermore, it aims to provide adequate housing to South Africans through the creation of mechanisms that ensure the proper functioning of the rental housing market. Although the Act does not specifically refer to international law, international law, particularly general comments of the Committee on Economic, Social and Cultural Rights (CESCR), arguably influenced the aims and provisions of this Act. For instance, section 3 of the RHA makes provision for government rental subsidies and other assistance measures to stimulate the supply of rental housing property for low-income people. This provision mirrors the CESCR's General Comment 4 on the right to adequate housing (UN doc E/1992/23) where it is stated that 'States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs' (para 8(c)).

PIE offers protection to those who would otherwise face forced evictions. Some of the provisions of CESCR General Comment 7 on the right to adequate housing in the context of forced evictions (UN doc E/1998/22, annex IV) are mirrored in PIE. The CESCR has stated that there are instances where evictions may be justifiable, such as in the case of persistent non-payment of rent or damage to rented property without any reasonable cause (General Comment 7, para 11). However, in such instances, relevant legislation must specify in detail the precise circumstances in which evictions may be permitted (General Comment 7, para 14). The CESCR has further urged that evictions should not result in individuals being rendered homeless or vulnerable to

violations of their other human rights. It has stressed that where those affected are unable to provide for themselves, the state party concerned must take all appropriate measures to the maximum of its available resources to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available. The provisions of PIE reflect these principles, ideas and guidelines.

Housing rights jurisprudence

The most prominent case on the right to housing in South Africa is the *Grootboom* case. In that case, the Constitutional Court extensively considered international law, particularly the provisions of the ICESCR and general comments of the CESCR. It engaged with the concept of minimum core obligations as defined under CESCR General Comment 3 on the nature of states parties' obligations (UN doc E/1991/23) (see *Grootboom*, paras 26-33). The decision is renowned, however, in part for its refusal to adopt the concept in the South African context, and opting instead to adopt the reasonableness test for determining the compliance by the state with its socio-economic rights obligations.

Grootboom is significant for its affirmation of the important role of international human rights law in interpreting the Constitution's socio-economic provisions

Apart from its refusal to embrace the concept of the minimum core, the decision is significant for, among other things, its affirmation of the important role of international human rights law, particularly the ICESCR, in interpreting the socio-economic rights provisions of the Constitution. For example, in trying to explain the meaning of the term 'progressive realisation' under section 26(2) of the Constitution, the Court observed:

> The meaning ascribed to the phrase is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived (para 45).

In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2009 ZACC 16 (*Joe Slovo*), Ngcobo J said:

> General Comment No. 7 provides a useful guide to determining the obligations of government when it seeks to relocate people for the purposes of providing them with adequate housing .... In my view General Comment No. 7 must, as a general matter, be followed in relocations such as the ones involved in this case (para 237).

It is therefore clear that international human rights law, particularly the ICESCR and general comments of the CESCR, have played an important role in the development and interpretation of the right to housing.

Conclusion

This article has demonstrated that international law has played a significant role in law-making as well as in the development of socio-economic rights in South Africa. Acts such as the LRA, the EEA, the RHA and PIE incorporate the principles, concepts and ideas espoused and developed by international human rights law. Likewise, cases such as *Grootboom*, *Discovery Health* and *Joe Slovo* have all been enriched by international law. However, in most instances, courts have simply referred to a list of international law provisions that relate to a particular point they are considering, without further elaboration.

In the field of socio-economic rights, one of the major setbacks is that South Africa has not yet ratified the ICESCR and its Optional Protocol. This is so despite the country having a very progressive Constitution in this regard, and the courts having been equally vigilant in adjudicating these rights. Urgent ratification of these treaties is recommended.

Redson Kapindu is the deputy director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC).

For further reading on the subject, see *Research Series 6* of the Socio-Economic Rights Project (2009).

The *Discovery Health* case is available at http://www.erisa.co.za/docs/casebook/2008_ZALC_24.pdf

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Slums Act unconstitutional

Lilian Chenwi

Abahlali baseMjondolo Movement of South Africa and Another v Premier of the Province of KwaZulu-Natal and Others CCT 12/09 [2009] ZACC 31 (*Slums Act*)

The Constitution Court handed down judgment in the *Slums Act* case on 14 October 2009. The case was a direct appeal against a judgment of the KwaZulu-Natal High Court, Durban, in which the latter refused to strike down the KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Act 6 of 2007 (the Slums Act) (see *Abahlali baseMjondolo Movement SA and Another v Premier, KwaZulu-Natal and Others* 2009 (3) SA 245(D)).

The Slums Act aims to progressively eliminate slums, prevent the re-emergence of slums and upgrade and control existing slums. It also aims to improve the living conditions of communities (section 3).

The High Court case has been discussed in a previous issue of the *ESR Review* (Chenwi, 2009). This article provides an overview of the Constitutional Court's judgment.

The applicants in the case at the Constitutional Court level were Abahlali baseMjondolo, comprising tens of thousands of people occupying about 17 informal settlements in Durban and Pietermaritzburg in KwaZulu-Natal (first applicant) and the president of the Abahlali baseMjondolo (second applicant). The respondents were the Premier of KwaZulu-Natal, the Member of the Executive Council for Local Government, Housing and Traditional Affairs (the MEC) of the province of KwaZulu-Natal, the national Minister of Human Settlements and the national Minister of Rural Development and Land Reform (paras 2 and 3).

Issues before the Constitutional Court

The Constitutional Court dealt with two issues. The first was whether the provincial legislature had the competence to pass the Act. The applicants argued that the Act was not concerned with housing (which falls within the concurrent jurisdiction of both provincial and national legislatures) but with land tenure and access to land, which does not fall within provincial legislative competence (para 20).

The second issue was whether section 16 of the Act was consistent with section 26(2) of the South African Constitution (the Constitution) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), the national Housing Act 107 of

1997 (Housing Act) and the National Housing Code (paras 9 and 91). Section 26(1) of the Constitution guarantees the right to have access to adequate housing and subsection (2) imposes positive duties on the state to take *reasonable* measures to achieve the progressive realisation of this right. Section 16 of the Slums Act provides as follows:

> (1) An owner or person in charge of land or a building, which at the commencement of this Act is already occupied by unlawful occupiers must, within the period determined by the responsible Member of the Executive Council by notice in the *Gazette*, in a manner provided for in section 4 or 5 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, institute proceedings for the eviction of the unlawful occupiers concerned.
> (2) In the event that the owner or person in charge of land or a building fails to comply with the notice issued by the responsible Member of the Executive Council in terms of subsection (1), a municipality within whose area of jurisdiction the land or building falls, must invoke the provisions of section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.

At the core of the judgment is the finding that section 16 of the Act offends against section 26(2) of the Constitution and the rule of law

The applicants argued that the second provision above violated section 26(2) of the Constitution because it precluded meaningful engagement between municipalities and unlawful occupiers, violated the principle that evictions should be a measure of last resort and encouraged eviction proceedings (paras 42 and 102).

The decision

The Constitutional Court found that the province had the competence to pass the Act. It also found the Act to be unconstitutional and inconsistent with the Housing Code and the Housing Act, which were passed to give effect to section 26(2) of the Constitution.

The majority decision was written by Moseneke J with Yacoob J dissenting. Yacoob J, however, wrote the unanimous decision of the Court in relation to the finding that the Act is concerned with housing.

Provincial competence

The Court agreed that the Act related primarily to housing, as it was aimed at improving the housing conditions of the people living in slums (paras 40 and 97). It observed that the title of the Act and its preamble echoed the constitutional right to have access to adequate housing because the Act was concerned mainly with improving the circumstances under which people live (paras 29 and 98). The Act also placed responsibilities on municipalities and the MEC to progressively realise this right and provided for measures related to slums and informal settlements, which are places where people live and have their homes (paras 98, 100 and 101; see also paras 20-40). Accordingly, the Court held that the provincial government had the competence to pass the Act.

Unconstitutionality of the Act

At the core of the judgment is the finding that section 16 of the Act offends against section 26(2) of the Constitution and the rule of law (para 127). This section makes it obligatory for an owner or person in charge of land or a building to institute eviction proceedings against unlawful occupiers once the MEC in a notice requires so; failing which, the obligation shifts to the municipality. Though such proceedings have to be instituted in terms of the relevant provisions of PIE, the Slums Act is silent on whether the owners or municipality have the discretion not to institute eviction proceedings if, based on their evaluation, the eviction will not be justified under PIE. The Court found that it was not in the exclusive discretion of the owners or municipality to do so because 'owners and municipalities must evict when told to do so by the MEC in a notice' (paras 110-111). Moreover, as observed by the Court, PIE does not compel an owner or municipality to evict unlawful occupiers (para 112). The Court therefore found that section 16 was 'at odds with section 26(2) of the Constitution because it requires an owner or municipality to proceed with eviction of unlawful occupiers even if the PIE Act cannot be complied with' (para 111). Furthermore, it held that the compulsion

> erodes and considerably undermines the protections against arbitrary institution of eviction proceedings. It renders those who are unlawful occupiers and who are invariably found in slums and informal settlements liable to face eviction proceedings which, but for the provisions of section 16, would not have occurred (para 112).

The Court also found the power given to the MEC to issue a notice to be 'overbroad and irrational', and thus 'seriously invasive of the protections against arbitrary evictions' in section 26(2) of the Constitution read with PIE and national housing legislation (para 118).

This was so because the power applied to any unlawful occupier on any land or in any building, including those who did not live in slum conditions, and was thus not properly related to the purpose of the Act of eliminating and preventing the re-emergence of slums (para 116).

The Court further found that section 16 was not capable of an interpretation that promoted the elimination and prevention of slums and the provision of adequate and affordable housing (para 121). The section, especially due to its compulsory nature, was also inconsistent with the constitutional and legislative framework for the eviction of unlawful occupiers, which establishes that housing rights should not be violated without proper notice and the consideration of all alternatives (para 122).

The Constitutional Court's decision has prevented the eviction of many poor people who were targetted by the Slums Act

The Court therefore concluded that section 16 was inconsistent with the Constitution (para 128 and 129).

In a dissenting opinion, Yacoob J suggested that the invalidity of section 16 could be overcome by reading in the following six qualifications:

(a) the notice is issued in the process of slum elimination;

(b) it can only be issued in respect of property that perpetuates slum conditions and is a slum;

(c) the MEC must identify the property or properties to which the notice relates;

(d) it must be necessary to evict the unlawful occupiers from the property or properties concerned to achieve the objects of the Act;

(e) the owner is obliged to evict only if she has not consented to the occupation and only if, on the evidence available, the eviction is just and equitable;

(f) a municipality is obliged to evict consequent upon the notice only if it can establish that it is just and equitable and that it is in the public interest that the unlawful occupiers concerned be evicted (para 80).

However, the majority of the Court found such an interpretation to be 'intrusive' and offensive of the requirements of the rule of law and separation of powers (para 123). The rule of law requires that a law must be clear and ascertainable and the separation of powers doctrine requires that courts should not embark on an interpretative exercise that rewrites the law (para 125).

Slums and informal settlements: Are they the same?

An interesting issue, though not raised by the parties, was raised by Yacoob J in relation to the distinction between 'slums' and 'informal settlements'. Section 1 of the Act defines an informal settlement as 'an area of unplanned and unapproved settlement of predominantly indigent or poor persons with poor or non-existent infrastructure or sanitation'. A slum on the other hand is defined as 'overcrowded or squalid land or buildings occupied by predominantly indigent or poor persons, without security of tenure with poor or non-existent infrastructure or sanitation'.

Yacoob J points out three significant differences between slums and informal settlements as defined in the Act. He notes that 'the conditions under which people in slums live is worse than those who live in informal settlements' (para 46); slums dwellers 'have no security of tenure' (para 47); and 'slums consist of occupants of land or buildings while an informal settlement, as the name suggests, is a settlement of people' (para 47). He therefore held that 'slum' must be given a narrow meaning (para 48).

The majority of the Court, however, found the distinction to be untenable. It held that it would not be appropriate to give 'slum' a narrow meaning which places informal settlements beyond the scope of the Act, as the latter are also squalid and overcrowded, are not permanent until they are upgraded, and the residents live under constant threat of eviction and have little or no security of tenure (paras 104 and 105).

The Court observed that the distinction in the Act does not mean that section 16 is not applicable to informal settlements (para 104), especially as the section does not distinguish between unlawful occupiers in a slum or those in an informal settlement (para 106).

Conclusion

The Constitutional Court's decision has in fact prevented the eviction of many poor people who were targeted by the Slums Act. The implication of the ruling is that other provinces that were hoping to pass similar legislation will not be able to do so. The decision is another 'wake-up call' for the government to ensure that its approach to the challenge of informal settlements or slum conditions is pro-poor and acknowledges peoples' existing circumstances. The government must direct its efforts at improving the lives of those who live in slums and informal settlements rather than at 'eradicating' slums without providing alternative appropriate housing.

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The full judgment of the Constitutional Court is available at http://www.saflii.org/za/cases/ZACC/2009/31.pdf.

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The right of access to sufficient water and the Constitutional Court's judgment in *Mazibuko*

Siyambonga Heleba

Lindiwe Mazibuko and Others v City of Johannesburg and Others Case CCT 39/09 [2009] ZACC 28 (*Mazibuko*)

On 8 October 2009, the Constitutional Court handed down its judgment in the *Mazibuko* case. This case dealt with an appeal against the judgment of the Supreme Court of Appeal of 25 March 2009, regarding the constitutionality of the City of Johannesburg's free basic water policy and the lawfulness of the pre-paid water meters. The facts and decisions of the High Court and Supreme Court of Appeal have been discussed in previous issues of the *ESR Review* (Khalfan and Conteh, 2008; and Dugard and Liebenberg, 2009).

Issues before the Constitutional Court

The Constitutional Court considered two major issues. The first issue was whether the City's policy in relation to free basic water (FBW) and, particularly, its decision to supply six kilolitres of free water per month to every account-holder in the city (the FBW policy) was in conflict with section 27 of the Constitution or section 11 of the Water Services Act 108 of 1997 (WSA) (para 6). The second issue was whether the installation of pre-paid water meters by the first and second respondents (the City of Johannesburg and Johannesburg Water (Pty) Ltd, respectively) in Phiri was lawful (para 6).

The decision

The Constitutional Court held that the City's FBW policy was reasonable, as the City acted consistently with its constitutional obligation in terms of section 27(1)(b) read with section 27(2) of the Constitution. It also held that the use of pre-paid water meters in Phiri, Soweto was lawful. It thus set aside the orders of the High Court and Supreme Court of Appeal requiring the City to provide Phiri residents with 50 and 42 litres of free water per person per day, respectively.

The free basic water policy

In respect of the main issue concerning the FBW policy, the Court had to answer four subsidiary questions. The first question concerned the proper relationship between section 27(1)(b) (the right to sufficient food and water) and 27(2) (the obligation to take reasonable measures, within available resources, to progressively realise the right to water). This was necessary to determine the content of section 27(1)(b) and ultimately whether the six kilolitres provided by the City of Johannesburg (the City) was sufficient or should be replaced with 50 litres per person per day. The Court held that section 27(1)(b), read with section 27(2), 'does not require the state upon demand to provide every person without sufficient water with more; rather it requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources' (para 50). It stressed that section 27(1)(b) does not 'confer a right to … "sufficient water" … immediately' (para 57).

The applicants had argued (as did the High Court and Supreme Court of Appeal) that determining the content of section 27(1)(b) required the Court to quantify an amount of water sufficient for a dignified life. The Court saw this argument as requiring it to determine the minimum core of the right to sufficient water. The Court was unwilling to set the minimum core of the right to sufficient water, arguing that '[f]ixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context' (para 60). It also argued that it was

> institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights (para 61).

Mainly because of the above reasons the Court criticised the lower courts for fixing the amount of water in their attempt to give content to 'sufficient water' under section 27(1)(b) read with section 27(2) (para 68).

The second question was whether the amount of basic water prescribed in regulation 3(b) of the National Standards Regulations promulgated in terms of the WSA, which is 25 litres per person per day (six kilolitres per household per month), exhausted the state's obligations to provide sufficient water under section 27(1) of the Constitution. Employing a similar reasoning to that outlined above, the Court found that the state is free to set the targets it wishes to achieve in respect of socio-economic rights (para 70). Once the government has done so, the role of the courts in a legal challenge is confined to assessing the reasonableness of those targets (para 70).

The third question concerned the reasonableness of the City's allocation of six kilolitres of free water per stand per month within the meaning of section 27 of the Constitution and/or section 11 of the WSA. The Court held that 'the City is not under a constitutional obligation to provide any *particular* amount of free water to citizens per month' (para 85). It is under a duty to take reasonable measures progressively to realise the achievement of the right (para 85). Furthermore, it concluded that the City had adopted those measures and acted consistently with them. It therefore rejected the argument that the City's policy was based on a misconception as to its constitutional obligations (para 85).

The Court also rejected the argument that the allocated amount was unreasonable. It held that, because of the continuous movement of people in and out of the City and given the varied water and sanitary needs of different households, it would be administratively burdensome, if not practically impossible, for the City to be expected to meet everyone's needs in such a situation (para 84). For the same reasons, it rejected the applicants' argument that the allocated amount was unreasonable because it was provided per household and not per person in a household.

Considering the fact that the Indigent Persons policy adopted in 2005 made provision for an extra free 4 kilolitres of water per month to registered households, the Court held that the City's policy was flexible and continually being reconsidered to meet the needs of the poorer households. It could therefore not be said, it held, that the City's policy was unreasonable (paras 93-97).

The fourth and final question concerned the reasonableness of the Indigent Person policy (indigent registration policy). The applicants argued that the requirement of registration rendered the policy unreasonable because it was demeaning and

under-inclusive (paras 44 and 98). The Court was, however, persuaded by the City's testimony that, of the available options (the other being 'universal access') to the City, indigent registration – means-testing – was a practically feasible way of targeting the poor. It pointed out that means-testing was also used in the government's other programmes such as social security. The Court stated that 'to hold a means-tested policy to be constitutionally impermissible would deprive government of a key methodology for ensuring that government services target those most in need' (para 101).

Pre-paid water meters

With regard to the issue of pre-paid water meters, the first question raised before the Court was whether the installation of pre-paid meters had a legal basis. The applicants argued that it did not. The Court rejected this argument, holding that the authority to install pre-paid water meters emanated from section 3(3) of the City's Water Services By-laws (the By-laws), which 'creates a hybrid service level for Service Level 2 customers who default, by providing that they may have pre-paid meters installed' (para 109); section 95(i) of the Municipal Systems Act 32 of 2000, which 'expressly requires local government to provide accessible pay points for "settling accounts or for making pre-payments for services"' (para 110); and section 156(5) of the Constitution, which 'provides that municipalities have the right to exercise any power reasonably necessary for, or incidental to, the effective performance of their functions' (para 111).

The second question was whether pre-paid meters result in the unauthorised disconnection of water supply. The Court held that the by-laws dealing with limitation or discontinuation of water supply did not apply to pre-paid meters but to credit meters (para 116). According to it, when credit runs out of a pre-paid water connection, what results is a 'suspension' and not a 'disconnection' of water supply (paras 117, 120 and 121). The Court further held that the City could not be expected to provide reasonable notice and an opportunity to be heard to a pre-paid water customer each time the customer runs out of credit (paras 122, 123 and 124).

The Court rejected the argument that the installation of pre-paid water meters violated the government's 'duty to respect'

The final question concerned the manner in which pre-paid water meters were introduced. The applicants argued that pre-paid water meters were introduced by unlawful threats and an unfair process. They also argued that their introduction was inconsistent with the state's duty to take reasonable measures to achieve the right of access to sufficient water, the right to equality under section 9 of the Constitution which prohibits unfair differentiation or discrimination, and the right to fair administrative action under section 33 of the Constitution. With regard to unlawful threat, the Court stated that

> [a]ny resident of the City who wishes the City to provide them with a water service is limited to the options the City offers. As long as those options are lawful, it cannot be said that by limiting the options, the City is forcing the resident to make a choice against the background of an unlawful threat. If the options are unlawful, then the resident may challenge them. If they are lawful, the resident cannot complain that they are forced to accept them (para 126).

Regarding the issue of unfairness, the Court held that introducing pre-paid water meters did not constitute administrative action. That decision, in fact, fell within the executive and/or legislative function of the municipality (paras 130 and 131). The Court held that, in any event, the evidence before the Court showed that the City had carried out adequate public consultation before introducing pre-paid water meters (paras 133 and 134).

The Court also rejected the argument that the installation of pre-paid water meters violated the government's 'duty to respect', holding that '[t]he new system for the first time provided a free water allowance to all residents'. Because of this, it could not be said that it interfered with the right of access to sufficient water (para 136).

The Court was also not persuaded by the applicants' argument that the introduction of pre-paid water meters constituted an unreasonable measure in conflict with section 27(2) or section 11(1) of the WSA (para 140). On the strength of the evidence before it, the Court stated that pre-paid meter customers are charged lower tariffs (well below cost) and 'are cross-subsidised by the tariffs charged to heavier water users, and credit meter users are charged a

higher tariff across the board' (para 141). It held that the switch to the pre-paid metered system with a free allocation of six kilolitres per month did not constitute a retrogressive step (para 142).

The Court further rejected the applicants' contention that the introduction of pre-paid meters was inconsistent with section 9(1) of the Constitution. The Court held that even if it had a discriminatory impact, such discrimination was not unfair as it served a legitimate government purpose, namely, curbing wasted and unaccounted water in the area in question (paras 150-151). The Court also held that the introduction of pre-paid meters was not harmful to the residents of Phiri as it in fact treated them more favourably in comparison to credit meter customers (white suburb residents), in that, among other things, the pre-paid meter users were spared the severe penalties imposed on credit meter customers (paras 153-157).

Concluding remarks

The decision is clearly not a favourable decision for the poor involved. It, however, attempts to balance the lawfulness and reasonableness of the City's FBW policy and the introduction of pre-paid meters. In this regard, McKaizer (2009) has observed that 'O'Regan situated the court comfortably between the rock of passively deferring to government policy processes on the one hand and the hard place of subverting the government's right to make policy on the other.' Though De Vos is generally critical of the decision, he has argued that it:

> does add two interesting and welcome innovations to the jurisprudence on social and economic rights. First, it states that the government has a duty continually to review its policies to ensure the progressive realisation of social and economic rights – something the City of Johannesburg was willing to do in this case. Second, the judgment views social and economic rights adjudication as part of a broadening of democracy as it help (sic) to hold the government accountable for its actions (De Vos, 2009).

After reading the judgment, it is difficult to fault the Court on its findings in respect of the lawfulness and reasonableness of both the City's actions and the installation of the pre-paid water meters in Phiri. This is also true in respect of what the Court viewed as being its role in a constitutional democracy. Recalling its previous decisions in the cases of *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) and *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC), the Court reaffirmed that it was uncomfortable with specifying the minimum core of socio-economic rights. This is something it is neither properly equipped nor democratically mandated to do. Determining the minimum core would lead the Court to violate the separation of powers. Seen in this light, the Court correctly refused to quantify a minimum amount constituting sufficient water in terms of section 27(1)(b).

What is, however, disturbing is the holding that pre-paid water meter customers experience temporary stoppage, not a discontinuation, when their credit expires. This holding was based on a legalistic interpretation of the word 'discontinuation', ignoring the rationale of the WSA which is to accord procedural fairness to individuals before their water supply is discontinued and to provide relief to those who cannot afford water (see also De Vos, 2009).

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The full judgment of the Constitutional Court is available at http://www.saflii.org/za/cases/ZACC/2009/28.pdf

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The right to health as a fundamental and judicially enforceable right in Colombia

Mónica Arango Olaya

Colombian Constitutional Court Decision T-760 of 2008

Decision T-760 of July 2008 (T-760 case) issued by the Colombian Constitutional Court (the Court) represents a step forward in the judicial enforcement of human rights, particularly the right to health.

It addressed over 22 cases (*tutela* actions). Tutela refers to a writ under which any citizen may request a judge to protect his or her fundamental rights from violation by a state agent or the person's superior where no other legal action can be used effectively to prevent the violation.

These cases showed systematic violations of the right to health at different levels of the Colombian public health system, largely due to regulatory faults. The problems included uncertainty about the coverage of certain health procedures, restrictions on access to care, financing of essential procedures and medicines, and differentiation of coverage for individuals under the subsidised and contributory plans. The contributory plan was designed for those formally employed or earning more than twice the minimum wage, while the subsidised plan offered about half of the benefits in the contributory plan (Yamin and Parra-Vera, 2009: 1).

The decision

The question the Court addressed was whether these problems constituted a violation of the state's constitutional obligations to respect, protect and fulfil the right to health. It reaffirmed its previous jurisprudence that the right to health was enforceable through *tutela* actions by any person acting for a vulnerable group such as children, pregnant women or the elderly, when this right is linked to other fundamental rights such as the right to life and when the health service in question forms part of the national health policy, which defines the minimum core obligations of the state in relation to the right to health. It held further that the right to health was judicially enforceable when individuals are unable to access the health services they *require*. Consequently, denial of a health service would amount to a violation of this right. The Court ordered the restructuring of the Colombian health system to enhance access to health services. The state, including the Ministry of Social Protection and health supervision and regulation agencies, was ordered to modify regulations that caused structural problems within the health system.

The orders of the Court required the amendment and updating of the basic health coverage plan, through a participatory procedure; timely and adequate funding for essential treatments to prevent unnecessary litigation; the implementation of the public policies to realise universal coverage of the right to health by 2010; and the establishing of an adequate system of information about the rights of patients and for holding public health service providers accountable. The decision also included follow up mechanisms, setting out compliance deadlines.

The right to health as a fundamental right

The Court recognised the fundamental character of the right to health and its importance for the achievement of human dignity. Therefore, at the core of the right to health is human dignity, which the Court defined as

> the freedom to choose a concrete plan of life framed in the social conditions where the individual develops and in the real and effective possibility to enjoy certain goods and services that allow each human being to function in society according to its special conditions and qualities, under the logic of inclusion and the possibility to develop an active role in society (Colombian Constitutional Court Decision T-227 of 2003 per Justice Eduardo Cifuentes Muñoz).

The Court explained that the right to health contains both positive obligations, which require material and institutional resources, and negative obligations, which refer to the duty to abstain. The enforceability of positive obligations depended on their urgency and

the need to avoid an unjustified harm of irreparable character which may result in a failure to protect human dignity. The Court referred to this as the 'vital minimum' which was enforceable immediately. Other positive obligations which do not touch on the dignity of a person can be implemented progressively; but progressive realisation cannot be an excuse for the state to neglect undertaking all the appropriate and necessary steps to implement the right to health.

Incorporation of international standards

The Colombian Constitutional Court has developed the notion of the constitutionality block, which refers to principles which are not expressly provided for in the Constitution but have been held by the Court to form part of a body of laws, norms and principles, which may be considered when reviewing the constitutionality of laws and when interpreting fundamental rights. These principles are derived from international human rights treaties and, to some extent, interpretative documents issued by international human rights monitoring bodies. The Court's decision considered the principles set out by the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR) in General Comment 14 on the right to the highest attainable standard of health (UN doc E/C.12/2000/4).

General Comment 14 specifies state obligations in relation to this right as defined by the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to health comprises the right 'to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health' (para 9). States have a duty to take steps towards its full realisation. Further, this right has four essential elements – availability, accessibility, acceptability and quality – whose precise application 'will depend on the conditions prevailing in a particular State party' (para 12).

In paragraph 33, General Comment 14 identifies three different levels of state obligations in relation to the right to health: the duty to respect (States must 'refrain from interfering directly or indirectly with the enjoyment of the right to health'); the duty to protect (States must 'take measures that prevent third parties from interfering with article 12 guarantees'); the duty to fulfil (States must 'adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health').

In line with the CESCR's interpretation of the right to health, the Constitutional Court held that the right to health is of immediate application where the dignity of a person is at stake and depending on the urgency of the health service required. This type of obligation has immediate effect regardless of resource implications. The Court understood progressive realisation to mean 'that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization' (para 31). All these principles informed the general orders the Court made in relation to the restructuring of the Colombian health system. The Court also underscored the importance of the principles of accountability, transparency, access to information and public participation to the protection of the right to health (see also Yamin and Parra-Vera, 2009: 3; Gianella-Malca et al, 2009: 4).

Conclusion

The decision of the Colombian Constitutional Court places human dignity at the centre of the right to health. It also emphasises the state's duties to respect, protect, and fulfil social rights. The decision also embraces the notion of the minimum core obligations, places the basic health needs of individuals before economic considerations, and prioritises the right to health in public policy. It also holds policymakers to a higher standard of accountability in resource allocation and implementation. Finally, the consideration of international standards through constitutional interpretation illustrates the central role that constitutional courts can play in social change with regard to basic social needs.

With regard to the enforcement of the decision, ESCR-Net reports that the Ministry of Health and other government agencies have been slow to introduce the structural changes ordered by the Court (see http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=985449). It has also been reported that the process has not been truly participatory (Gianella-Malca et al, 2009).

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The full judgment is currently available only in Spanish at http://www.escr-net.org/usr_doc/Sentencia_CC_SALUD_T-760_2008.pdf.

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South Africa: Legal and policy updates on housing

In August 2009, the Department of Human Settlements (DHS or Department) held three key meetings (briefings) before the Standing Committee on Public Accounts (SCOPA or Committee) in Parliament, addressing issues on housing in South Africa. The first meeting focused on the N2 Gateway Project Special Audit Report (5 August 2009); the second was on the National Housing Code 2009 and Farm Residence Housing Programme (19 August 2009); and the third discussed social rental housing benefits (26 August 2009). Below is a summary of some of the issues raised in the meetings.

N2 Gateway Project Special Audit Report

Following an earlier meeting between the DHS and the Committee, this meeting sought to track progress on the N2 Gateway Project and its challenges. The DHS admitted that the project was introduced before a housing policy was in place and that a coherent business plan was developed only during the course of the project's implementation. The DHS reported that, although there was national funding for the project, funding contribution is also expected from the province.

The Committee asked whether surveys were done to determine who the ultimate beneficiaries of the project would be. The DHS clarified that the Joe Slovo phase (without specifying if it is Phase 1, 2 or 3) had been set aside for social housing, specifically rental housing. It was suggested that the Department should think about creating a national policy on beneficiaries. The Committee also raised concerns about the adequacy of community participation in the project. The DHS pointed out that communities change their leaders frequently, which makes it difficult to establish durable consensus on issues.

National Housing Code 2009 and Farm Residence Housing Programme

The DHS briefed the Committee on the new Housing Code that is currently being drafted by the Department pursuant to section 4 of the Housing Act No 107 of 1997. The first aspect of the briefing dealt with the background and policy context, while the second dealt with the technical guidelines and the details of the Code.

The Department also reported on the Farm Residence Housing Programme, which aims to provide a housing solution to poor farmers who reside on commercial farms. This programme is a collaborative effort between the Government and the Farm Workers Unions. The Committee sought clarity on who would buy the land from commercial farmers, the feasibility of the entire programme and the relationship between the Department of Rural *Development* and *Land Reform* and the DHS.

Social rental housing benefits

The Committee was also briefed by the Social Housing Foundation on social rental housing, its supply and demand, utilities and municipal charges,

backyard and informal rentals, and evictions. The Foundation presented a report on these issues produced in 2008, which compared the cost of social rental housing (SRH) and the Reconstruction and Development Programme (RDP). The report concluded that neither of them could be chosen to apply across the board, as each is effective in different circumstances. SRH is well suited to densification, but is not an option for the very poor, as it costs about R1 500 per month. It was highlighted that those occupying RDP houses do not see them as an asset, because the houses are not marketable for resale, there are restrictions on resale within a certain time, and the house owners cannot afford the maintenance. This is exacerbated by the poor quality of the houses.

The minutes of the meetings can be accessed at:

N2 Gateway Project Special Audit Report: http://www.pmg.org.za/report/20090805-n2-gateway-project-special-audit-report-departments-responses

National Housing Code 2009 and Farm Residence Housing Programme: http://www.pmg.org.za/report/20090819-national-housing-code-2009-farm-residence-housing-programme-departmen

Social rental housing benefits: http://www.pmg.org.za/report/20090826-social-rental-housing-benefits-research-study-briefing-social-housing

On 04 November 2009, the Department of Human Settlements briefed Parliament's Portfolio Committee on Human Settlements on the Beneficiary List Review Plan and the progress in the implementation of the Joe Slovo judgment. The minutes of the meeting and the progress report can be accessed at http://www.pmg.org.za/report/20091104-department-human-settlements-reviewed-plan-beneficiary-list-progress-

This summary was prepared by **Rebecca Amollo**, doctoral researcher in the Socio-Economic Rights Project.

Social protection: Report of the UN Independent Expert on the question of human rights and extreme poverty

In August 2009, the United Nations (UN) Independent Expert on the question of human rights and extreme poverty, Magdalena Sepúlveda, presented a report to the UN General Assembly addressing the impact of the global financial crisis on people living in extreme poverty and on the enjoyment of human rights (UN doc A/64/279). The report focuses on, among other things, the potential of social protection systems to tackle the effects of the financial crisis and reduce vulnerability. It notes the alarming impact of the current global economic and financial crisis on the poor, which requires the urgent establishment and expansion of social protection systems to protect those living in poverty and to prevent more people from being pushed into poverty (para 6). Eighty per cent of the world's population have little or no access to adequate social protection (para 7); and 20% live in extreme poverty (para 58). Below is a summary of what the report says about social protection.

Social protection

The report defines social protection, within the context of the report, as encompassing a wide range of policies aimed at addressing the risks and vulnerabilities of individuals and groups to enable them to overcome situations of poverty. The social protection instruments include safety nets, social assistance, social insurance, and mutual and informal risk management (para 15). If well designed, they may contribute to the achievement of several human rights such as the rights to health, education, social security and an adequate standard of living (para 16). The report states the main aims of social protection systems are:

> *(a) facilitating recovery from the crises that have led people to become poor; (b) contributing to the ability of chronically poor people to emerge from poverty and to challenge oppressive socio-economic relationships; (c) supporting the less active poor (such as the elderly, persons with disabilities and children) so that poverty will not be inherited by the next generation (para 17).*

It also notes that the International Covenant on Economic, Social and Cultural Rights (ICESCR) is

relevant to the establishment of social protection measures. They include the obligation to ensure the progressive realisation of all economic, social and cultural rights, and the obligation to ensure special protection for the most vulnerable individuals and groups (para 54). The report also emphasises the importance of international cooperation and assistance in overcoming resource, institutional and technical limitations faced by developing countries in providing social protection (para 55).

In supporting social protection as a response to the financial crisis, the report warns against the risk of states seeking 'short-term quick fixes to poverty and insecurity' (para 83). Although social protection measures may commence as an emergency response, the report urges states to reinforce and extend such protection in time to ensure the full realisation of the social security and other rights of the poor (para 84).

Human rights-based approach to social protection

The report further underscores the importance of a human rights-based approach to social protection systems (para 57) and discusses the following human rights that should be taken into account when choosing an appropriate social protection system (paras 58-78):

- recognising the state's obligation to provide social protection, affirmed in international human rights law (paras 58-63);
- respecting the principles of equality and non-discrimination, which also implies a preference for schemes that are universal as opposed to those that benefit only a specific category of persons (paras 64-68);
- ensuring progressive realisation of economic, social and cultural rights, including taking into account the long-term impacts of social protection measures in the expansion of social security coverage (paras 69-70);
- ensuring participation, transparency and accountability in the design, implementation and evaluation of all social protection policies (paras 71-74); and
- addressing specific concerns with regard to gender, age and disabilities, which also requires understanding social protection systems as policies that go beyond the provision of income (paras 75-78).

Social protection floor

The report also refers to the 'social protection floor' concept launched by the UN System Chief Executive Board for Coordination in response to the financial crisis (paras 97-103). It is similar to the existing notion of core obligations (para 100). The concept consists of two main elements:

> *(a) services to guarantee geographical and financial access to essential public services (such as water and sanitation, health and education); and (b) transfers in the form of basic essential social transfers, in cash and in kind, paid to the poor and vulnerable to provide minimum income security and access to essential services, including health (para 97).*

The social protection floor thus seeks to address the following policy issues: how a basic level of social protection for all can be designed and implemented at the national level; how it can be made compatible with the need to build long-term sustainable architecture of national social protection systems; and how the fiscal space for social transfers can be secured and increased (para 98). The report emphasises that the social protection floor should be understood 'as the minimal set of policies and measures upon which States can build and make available, higher standards of protection once national budgets capacities increase' (para 103). National social protection policies should therefore be built around the social protection floor.

Conclusion

The report concludes that social protection systems have the potential to tackle the effects of the financial crisis and reduce vulnerability. These systems are necessary to fulfil longstanding commitments to reduce poverty and protect, respect and fulfil human rights (paras 106 and 106). It ends with recommendations for strengthening social protection systems, including adopting a human rights-based approach, working towards universal coverage and prioritising the most vulnerable, promoting participation, accountability and transparency, addressing specific concerns on gender, age and disabilities, and strengthening international cooperation efforts (para 110).

This summary was prepared by **Lilian Chenwi**, senior researcher in, and coordinator of, the Socio-Economic Rights Project.

The report is available at:
http://daccessdds.un.org/doc/UNDOC/GEN/N09/452/76/PDF/N0945276.pdf?OpenElement

Resolution 8/11 is available at:
http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_11.pdf.

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A human rights-based approach to improving maternal health

Possibilities for realising Millennium Development Goal 5

Fleur van Leeuwen and Rebecca Amollo

It is estimated that everyday 1 500 women die from pregnancy- or childbirth-related complications. In 2005 there were an estimated 536 000 maternal deaths worldwide (World Health Organization (WHO), United Nations Children's Fund (UNICEF), United Nations Population Fund (UNFPA) and World Bank, 2007: 8). Ninety-nine per cent of these deaths occurred in developing countries.

The four major reasons for these maternal deaths are severe bleeding (mostly bleeding postpartum), infections (also mostly soon after delivery), hypertensive disorders in pregnancy (eclampsia), and obstructed labour. Research shows that an estimated 74% of maternal deaths could be averted if all women had access to the interventions for preventing or treating pregnancy and birth complications, in particular, emergency obstetric care (Wagstaff and Claeson, 2004). The WHO holds moreover that to reduce the number of maternal deaths, women should also have access to family planning services, antenatal care, and post-natal care (WHO, 2005: 41-48). The most poignant fact is that most maternal deaths are avoidable and preventable. The reason why these services are often not available is not simply lack of money, but rather discriminatory allocation of funds to maternal healthcare compared to other health services (Shiffman and Smith 2007: 1). Lack of information, weak health systems, lack of political commitment and cultural barriers are also contributing factors (Hunt and De Mesquita, 2007:4).

In 1993, 171 states at the World Conference on Human Rights called upon the monitoring bodies of United Nations (UN) human rights treaties to integrate human rights of women in their deliberations and

findings. Millennium Development Goal (MDG) 5, which aims to improve maternal health, represents another clear call from all UN member states to address this important issue.

However, the issue of improving maternal healthcare continues to be on the periphery of the global health agenda as compared to other critical health issues like HIV and AIDS (Shiffman and Smith, 2007: 1).

Drawing on the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), this paper argues for a human rights-based approach to maternal healthcare as a means towards achieving MDG 5. A human rights-based approach has several advantages: it builds upon already existing legal obligations for states; it incorporates the norms of non-discrimination and equality; and it is premised on existing accountability mechanisms (Alston: 2009; Dairiam: 2005).

Millennium Development Goal 5

A sign of hope to address maternal mortality worldwide was raised at the Millennium Summit. In September 2000, building upon a decade of major UN conferences and summits, the UN General Assembly adopted the UN Millennium Declaration, in which targets known as the MDGs were set to be met by 2015. These targets have come to play a defining role in international development efforts, notably in improving maternal health. Never before had this issue received such prominence.

MDG 5 codifies the target to improve maternal health. To realise this Goal, two targets must be met: (1) the global maternal mortality ratio – that is, the number of maternal deaths during a given time per 100 000 live births during the same time – must be reduced by three quarters; and (2) universal access to reproductive health must be attained.

To reach the first target by 2015, the maternal mortality ratio must show an annual decline of at least 5.5%. This target has so far not been met by a long way as the annual decline is less than 1% (UN, 2008: 27).

As regards the second target, the WHO reports that, although the use of contraception has improved impressively during the past two decades in many regions, targets for family planning remain unmet especially in low- and middle-income countries. For example, in sub-Saharan Africa 24% of women who want to delay or stop childbearing have no access to family planning. This figure varies between 10 and 15% in other world regions and also varies across population groups (WHO, 2008: 2).

Access to maternal health: Human rights obligations

The ICESCR and CEDAW explicitly provide for the right to health (article 12 of the ICESCR and article 12 of CEDAW). The bodies that monitor these treaties have acknowledged that this right includes the right to maternal healthcare.

The UN Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the ICESCR, in its General Comment 14 on the highest attainable standard of health (UN doc E/C.12/2000/4) highlighted the need for states to adopt measures to improve child and maternal health, sexual and reproductive health services. These include access to family planning, pre- and post-natal care, emergency obstetric services and access to information and to resources necessary to act on that information (para 14). This General Comment states that compliance with the right to health requires that functioning health-care facilities, goods and services be sufficiently available, accessible, and acceptable (para 12). The General Comment also emphasises the need to develop and implement a comprehensive national strategy for promoting women's right to health, with the goal of reducing, among other things, maternal mortality rates. Realisation of women's right to health, as the CESCR adds, 'requires the removal of all barriers interfering with access to health services ... including in the area of sexual and reproductive health' (para 21). One of the priority state obligations listed by the CESCR is to 'ensure reproductive, maternal (pre-natal as well as post-natal) and child health care' (para 44). Failure to take steps towards realisation of the right to health and to reduce maternal mortality rates would amount to a violation of the obligation to fulfil (para 52).

Likewise, the Committee on the Elimination of Discrimination against Women (CEDAW Committee), which monitors the implementation of the CEDAW, has issued a General Recommendation on women and health which explains that neglect of health care needed by women, such as maternity care,

constitutes sex discrimination (see, generally, General Recommendation 24, 1999). The Committee notes high maternal mortality rates and lack of access to contraception, among other things, as possible breaches of a state's duty to ensure women's access to health care (para 17). It further requires that state reports (submitted to the CEDAW Committee as per article 18 of CEDAW) should include measures that they have taken to ensure women's access to appropriate services in relation to pregnancy and post-natal care as well as information on the extent to which the measures have reduced maternal mortality (para 26). States are required to allocate the maximum extent of their available resources to safe motherhood and emergency obstetric services (para 27). The CEDAW Committee then recommended that states should

> [p]rioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and pre-natal assistance. When possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion (para 31).

The ICCPR, on the other hand, does not contain a specific provision on the right to health or reproductive and maternal health-related services. However, some of the rights guaranteed in it are directly or indirectly linked to the right to health (e.g. the right not to be subjected to medical or scientific experimentation without free consent in article 7 and the right to life in article 6). Furthermore, the UN Human Rights Committee (HRC), the body that monitors the implementation of the ICCPR, has not clearly formulated state obligations in relation to services such as access to safe abortion, antenatal care, high-quality pregnancy and delivery care, emergency obstetric care, and post-natal care. According to the WHO, these services are required to attain MDG 5 (WHO, 2005: 41-48; Leeuwen, 2009: 65, 88).

The HRC has, however, raised the issue of the lack of maternal health care services in its Concluding Observation on Mali in 2003 (UN doc CCPR/CO/77/MLI). The Committee observed, with reference to article 6 of the ICCPR on the right to life, that it:

> [r]emains concerned by the high maternal and infant mortality rate in Mali, due in particular to the relative inaccessibility of health and family planning services, the poor quality of health care provided, the low educational level and the practice of clandestine abortions (para 14).

It then made the following recommendation:

> So as to guarantee the right to life, the State party should strengthen its efforts in that regard, in particular in ensuring the accessibility of health services, including emergency obstetric care. The State party should ensure that its health workers receive adequate training. It should help women avoid unwanted pregnancies, including by strengthening its family planning and sex education programmes, and ensure that they are not forced to undergo clandestine abortions, which endanger their lives. In particular, attention should be given to the effect on women's health of the restrictive abortion law (para 14).

The HRC's observation indicates that maternal health care falls within the scope of the ICCPR and should be addressed. Also, it is noteworthy that in General Comment 28 on 'equality of rights between men and women' (UN doc CCPR/C/21/Rev.1/Add.10), the HRC referred to states' obligations in relation to the protection of health care for pregnant women deprived of their liberty, linking it to the right to humane treatment and respect for inherent dignity, women's reproductive health rights, the rights to privacy, life and humane treatment, and children's health care. On women deprived of their liberty, the Committee stated:

> [p]regnant women who are deprived of their liberty should receive humane treatment and respect for their inherent dignity at all times, and in particular during the birth and while caring for their newborn children; States parties should report on facilities to ensure this and on medical and health care for such mothers and their babies (para 15).

On women's reproductive right, the HRC observed:

> [a]nother area where States may fail to respect women's privacy relates to their reproductive functions, for example, where there is a requirement for the husband's authorization to make a decision in regard to sterilization; where general requirements are imposed for the sterilization of women, such as having a certain number of children or being of a certain age, or where States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion. In these instances, other rights in the Covenant, such as those of articles 6 and 7, might also be at stake .... States parties should report on any laws and public or private actions that interfere with the equal enjoyment by women of the rights under article 17, and on the measures taken to eliminate such interference and to afford women protection from any such interference (para 20).[eq]

With regard to children, the Committee stated that states' obligations to protect children should be carried out for boys and girls. It recommended that states should report on measures taken to ensure that boys and girls are treated equally in education, feeding and in health care, and to eradicate cultural

and religious practices that endanger the well-being of female children (para 28).

Despite the ICCPR's silence on the right to health or reproductive and maternal health-related services, the HRC has the potential to complement the work of other treaty bodies in formulating more clearly obligations on services that are required to attain MDG 5. The fact that improving maternal healthcare is one of the MDGs is illustrative of the global concern that the problem sparks and provides, besides the request to have women-inclusive human rights obligations, a basis for the HRC to pay attention to this issue (Leeuwen, 2009: 65, 88).

Conclusion

This article has highlighted the severity of maternal mortality, especially in developing countries, and how the international human rights system may help efforts to reduce such deaths. Through, for instance, the state reporting procedure, complaints mechanism and general comments, human rights treaty bodies can formulate and enforce the obligations of states in relation to reproductive and maternal health-related services. After considering a state report, a treaty body may indicate in its concluding observations how a state party should address its shortcomings in implementing maternal health care rights. The state reporting procedure also offers human rights organisations the opportunity to submit shadow reports, in which they present *their* picture of the human rights situation in the country concerned, The individual complaints procedure may also be used to raise issues pertaining to reproductive or maternal health-related services. Once their obligations in relation to providing maternal health care have been clarified, states will be in a better position to achieve MDG 5. The MDG 5 represents a global consensus that a comprehensive framework to achieve maternal health should be developed and implemented by UN member states. Matters relating to maternal health should therefore be placed on the states' list of priorities.

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