ESR REVIEW

Economic and Social Rights in South Africa

Ensuring rights make real change

vol 8 no 3 October 2007

Editorial

This third issue of the *ESR Review* for 2007 covers recent developments in socio-economic rights in South Africa and abroad.

Scholars and commentators are increasingly paying attention to the relationship between private law (and private relationships) and socio-economic rights. Marius Pieterse examines the role and relevance of private law in realising these rights in South Africa. He argues for the infiltration of values implicit in socio-economic rights into private law so that private relationships are regulated in a manner that advances access to these rights by vulnerable groups.

On 21 August 2007, the much-anticipated report of the parliamentary *Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions* was released. In the monitoring review section, we feature an article on the implications of the findings and recommendations of the report for the monitoring of socio-economic rights in South Africa. While it raises some misgivings about the recommended merger of certain human rights institutions, it generally supports the idea. It argues that if the merger is effectively implemented, it has a great potential to improve the monitoring of socio-economic rights.

The eviction of poor people from dilapidated buildings has attracted a lot of international and national spotlight. Christopher Mbazira reports on the Constitutional Court hearing of *Rand Properties and others v Johannesburg and others*.

Claud Cahn and Savelina Danova Russinova then analyse the recent decision of the European Committee of Social Rights in the matter regarding the enforcement of the rights of Roma to adequate housing in Bulgaria.

We also provide an update on recent international developments relating to socio-economic rights.

Rebecca Amollo reviews a book edited by Fons Coomans entitled *Justiciability of economic, social and cultural rights: Experiences from domestic systems* (2006), published by Oxford Intersentia, Antwerp.

We trust that you will find this issue as interesting, stimulating and valuable as you may have found our

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previous ones. Many thanks to our contributors.

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In this issue, we also congratulate a member of the Socio-Economic Rights Project, Christopher Mbazira, on completing his PhD. Christopher graduated in September 2007 at the University of the Western Cape.

In his thesis entitled *Enforcing the economic, social and cultural rights in the South African Constitution as justiciable rights: The role of judicial remedies*, Christopher makes a significant contribution to the discussion on how to enforce socio-economic rights in way that makes a real difference to the lives of the vulnerable and marginalised groups and communities in South Africa.

He analyses the issue of judicial remedies from two theoretical perspectives. Firstly, from a corrective justice perspective – whether the judicial enforcement of rights is intended to put the victim in the same position he or she would been in had the violation not occurred. Second, from a distributive justice perspective – whether it is intended to also benefit individuals that are similarly positioned and to consider other legitimate interests implicated by the case.

Christopher prefers distributive justice because of its holistic approach and ability to enforce socio-economic rights subject to the context in which the Constitution is enforced. It is on this basis that he discusses the appropriateness of the different constitutional remedies and demonstrates how each could be used to promote the aims of distributive justice. He also sets out norms and principles that could be used in determining whether a structural interdict is 'appropriate, just and equitable'.

According to his supervisor, Prof Pierre de Vos, the thesis is a groundbreaking study that will influence the way lawyers and judges think about remedies in socio-economic rights cases.

The Project and the CLC are proud of Christopher's achievement. We wish him all the best and the strength in his final stretch to get his thesis published into a book by the Pretoria University Law Press (PULP).

Sibonile Khoza is the Editor of the *ESR Review*

Socio-economic rights and private law

The next frontier

Marius Pieterse

When we think about enforcing socio-economic rights, our focus tends, justifiably, to be on the state. After all, according to South Africa's Constitution of 1996 (the Constitution), it is the state that must "respect, protect, promote and fulfil" socio-economic rights (section 7(2)) and "take reasonable legislative and other measures", within available resources, to achieve their progressive realisation (sections 26(2) and 27(2)).

Accordingly, lawyers, researchers and activists tend to concentrate on state policies and programmes on basic goods and services as the objects of socio-economic rights.

But we often overlook the fact that access to basic goods and services also depends on the acts of private individuals or entities.

If we recognise that access to socio-economic rights is also facilitated through private relationships, it follows that the quality and quantity of such access also depends on the nature of such relationships and the power dynamics involved.

Structures of power, responsibility and dependency within such relationships have an impact not only on the extent to which individual members of society can access socio-economic rights, but also on the extent to which they can share socio-economic benefits.

It is therefore important that we deepen our understanding of socio-economic rights by appreciating the significance of private relationships to, and their role in the realisation of, these rights.

This must involve paying closer attention to the manner in which the law recognises and regulates these relationships and how the constitutional inclusion and enforcement of socio-economic rights can and should impact on such recognition and regulation.

In other words, in order for the constitutional promise of socio-economic rights to be realised, we need to look beyond the public law paradigm of rights-enforcement and also contemplate the vindication of socio-economic rights in private law.

Significant "private" relationships and their relevance for socio-economic rights

Individuals are involved in many contractual relationships with non-state entities that determine or enhance their access to socio-economic rights. For instance, access to health care services may depend on a contract with a medical aid scheme, a private health care institution or individual doctors or pharmacists. Access to housing may similarly depend on a mortgage contract, a tenancy, an employment contract or a contract with an educational institution.

Thus, the statutory or common-law regulation of these contractual relationships has an impact on the accessibility of socio-economic rights.

However, many people lack meaningful access to socio-economic rights because they are not in a position, financially or otherwise, to enter into contractual relations such as those mentioned above. For these people, access to socio-economic rights depends on informal and unregulated family or interpersonal relationships such as a marriage or a parent-child relationship. These relationships are largely unregulated by law and rather governed by extra-legal factors (such as the means of the parties to these relationships and their willingness to comply with any obligation arising from them).

Moreover, dependency relationships (such as those between children and caretakers and between cohabitants) lack legal recognition, meaning that the dependent parties to such relationships are left without legal protection and are thus vulnerable to abuse.

Within both "formal" contractual relationships and "informal" relationships, internal power dynamics determine, or at least have an impact on, access to relevant socio-economic rights. As private law prescribes, mediates or valorises exercises of power within these relationships, it thus plays an important role in shaping access to socio-economic rights. It is therefore important that private law be informed by the constitutional provisions on socio-economic rights and guarantee the protection of the rights and interests of vulnerable members of society in their private relations.

The application of socio-economic rights to private relationships and private law

The obligation to "protect" the rights in the Bill of Rights is typically understood to imply that the state must protect individual members of society against infringements of their rights by third parties and must ensure that they have adequate legal remedies when any infringements of rights occur. In relation to socio-economic rights, this duty would require the state to regulate the conduct of private actors involved in the realisation of these rights.

According to section 8(1) of the Constitution, the Bill of Rights applies to "all law", which can be interpreted to mean both "private" and "public" law. Section 8(2) further stipulates that a provision of the Bill of Rights may bind natural and juristic persons where this is feasible in light of the nature of the right and the nature of the obligations imposed by the right. Given that the realisation of socio-economic rights sometimes depends on the power dynamics within private relationships, it is probably fair to suggest that these rights should be

considered when resolving disputes arising from such relationships.

Section 8(3) of the Constitution goes on to state that, when applying a provision in the Bill of Rights to a natural or juristic person, courts have the obligation to apply or, if necessary, develop the common law where legislation fails to give effect to that right, in order to either give effect to the right or to limit it. Moreover, section 39(2) of the Constitution enjoins courts to promote the spirit, purport and objects of the Bill of Rights when developing the common law or customary law, both of which predominantly regulate private relationships.

While it does not rule out the possibility of socio-economic rights being directly applied in private disputes, the Constitution envisages the elaboration and enforcement of private human rights obligations mainly through a case-by-case development of the common law in line with the spirit, purport and objects of the Bill of Rights.

Giving effect to socio-economic rights through the common law

The common law presents a useful means for the private vindication of socio-economic rights mainly because, as I have argued above, private relationships are crucial to the realisation of socio-economic rights. As it was designed to regulate private rights, the current body of the common law is to a large extent consistent with the spirit, purport and objects of the Bill of Rights.

The common law offers a wide array of remedial options, ranging from interdicts, mandatory orders and specific performance to compensation. These may prove particularly useful to individuals asserting socio-economic rights within private relationships, not least because they are more tangible remedies than the declaratory relief or orders requiring policy modification commonly associated with public-law jurisprudence on socio-economic rights.

Furthermore, while the direct judicial enforcement of socio-economic rights (in both the public and private spheres) poses significant institutional challenges to the judiciary, our courts have for many years been engaged in the principled and value-based development of the common law. This means that indirect horizontal enforcement of socio-economic rights through the common law would not be pushing South African judges, who are accustomed to the law-making and remedial aspects of common-law development, into completely unfamiliar adjudication.

There are various ways in which the common law may be applied or developed to give better effect to socio-economic rights.

There are various ways in which the common law may be applied or developed to give better effect to socio-economic rights. This article identifies three of them.

The first relates to the common law governing the legal recognition of and regulating dependency-producing relationships. These relationships are currently largely unregulated by the law. Vulnerable parties in cohabitation relationships, third-party parenting arrangements and other similar relationships would benefit significantly if the common-law duties of support currently associated with marriage relationships and parent-child relationships were extended to apply also to dependency-producing relationships. This would not only have the effect of formalising the primary structures through which parties to these relationships access social goods, but also ensure that parties to these relationships are treated with dignity and guaranteed equal protection of the law.

Secondly, socio-economic rights and the rights to dignity and equality would be protected in the private sphere if the common law were developed to address or ameliorate the effects of inequalities and associated power discrepancies within both contractual and familial relationships. In relation to "formal" contractual relationships, for example, courts could require that private actors adhere to the principle of non-discrimination in all contracts that impact on access to socio-economic rights.

More far-reaching developments could, for instance, involve outlawing contractual clauses which amount to a waiver of private-law remedies for violations of socio-economic rights. For example, in *Afrox Healthcare v Strydom* (2002), a health service provider unsuccessfully contended that a recipient of negligent or substandard medical care had waived his rights by signing a private hospital admission contract. Courts could also try to scale down the powers of dominant parties to socio-economic contracts. This was partially achieved in relation to the eviction powers of landlords in *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

In family relationships, the common law could be developed to improve the position of vulnerable family members by acknowledging that they have a say in decisions over the expenditure of family resources. This

could be done by, for example, relaxing rules relating to parental consent for the medical treatment of competent minors and recognising the rights of parties to customary marriages to matrimonial property.

Finally, the common law may in certain circumstances be developed in order to reflect, create or enforce private socio-economic obligations. For example, I have argued elsewhere for the reversal of the starting point of the common-law inquiry into the reasonableness of a refusal by a health care practitioner to render medical treatment to a specific patient and for an overhaul of the common-law presumption against the existence of a duty on health care professionals to render emergency medical assistance to strangers (Pieterse, 2007a: 171–74; 2007b: 85–9). The effect of both these suggested developments would be that an obligation to render medical treatment is presumed to exist and that a refusal to treat in accordance with such an obligation may lead to delictual liability unless it is shown to have been reasonable in the circumstances.

The examples provided here present but some of the many possibilities open to courts regarding the protection of socio-economic rights through private law. Courts can make a significant contribution to enhancing socio-economic justice in the private sphere, without any radical departure from their current institutional role.

However, some obstacles remain. Many of the rules of the common law (especially in relation to contract) reflect a liberal-individualist perspective (in line with their classical-liberal foundations), which is sometimes inimical to the spirit of socio-economic rights. Especially in relation to inequalities between parties to private relationships, the successful vindication of socio-economic rights will depend on the ability of courts to transcend the confines of this perspective and to appreciate the realities of human interdependence that shape access to socio-economic goods and services.

Furthermore, the enforcement of socio-economic rights in private law will be hindered by a rigid private-public dichotomy. As long as courts remain hesitant to interfere with the internal organisation of private relationships by enforcing "subjective" obligations within them, vulnerable parties to such relationships will remain unable to improve their access to socio-economic rights.

Finally, both the *Brisley* and *Afrox* decisions contain indications of judicial resistance to change in line with "subjective" constitutional values (see especially *Brisley* para 37), since the court stated that such value-based development threatened the certainty, predictability and stability associated with the unfettered operation of existing common-law rules. Such "common-law purism" not only threatens the enjoyment of socio-economic rights but may also rob the common law of much of its inherent flexibility, adaptability and fairness. It is both unnecessary and untenable in light of sections 8(3) and 39(2) of the Constitution.

The Court is unlikely in future to devote much attention to whether a state interference with property is a deprivation or not.

Conclusion: Infusion, not insulation

This article has argued for the infiltration of values implicit in socio-economic rights into private law so that the private relationships are regulated in a manner that advances access to these rights by vulnerable groups. Since access to socio-economic rights also depends on the extent to which socio-economic claims are asserted and heeded within private relationships, the practical significance of socio-economic rights and obligations may be greatly enhanced if we extend our focus beyond their public-law vindication to consider also their elaboration and enforcement in the private sphere.

However, this article should not be understood to argue for the confinement of socio-economic rights enforcement to the private realm. Due to a lack of means to enter into formal relationships, the lack of legal recognition of informal relationships or the limited capacity of certain parties to private relationships, individuals are often unable to realise their socio-economic needs in the private sphere. Many therefore remain reliant on the state for the satisfaction of these needs.

Moreover, the protection of socio-economic rights in private law satisfies but one of the state's several constitutional obligations in terms of socio-economic rights. We should therefore strongly guard against the "privatisation" of socio-economic rights through the limitation or denial of public responsibility for their actualisation (such as is evident from the Constitutional Court's denial of public responsibility in relation to the socio-economic rights of children in the care of their parents in *Government of the RSA v Grootboom* (2001) para 71–8).

It is hoped that the account of "relational enforcement" of socio-economic rights presented in this article illustrates the need for judicial responses to socio-economic deprivation to transcend the dichotomy between the private and public spheres. By heeding their constitutional obligation to develop the common law in accordance with the spirit, purport and object of the Bill of Rights, courts have an important role to play in ensuring that the socio-economic rights in the Bill of Rights are relevant to private relations.

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Strengthening the institutional mechanisms for monitoring socio-economic rights

The *ad hoc* Committee report

Sibonile Khoza

The appointment of an *ad hoc* Committee by Parliament to review a wide range of constitutional and statutory institutions late last year raised huge public debate. There was much speculation about the motive of the review and the future of some institutions. However, the tabling of the *Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions* on 21 August 2007 ended the speculation.

The report makes interesting findings and recommendations that aim to improve the institutional capacity to promote, protect and monitor the realisation of all rights in the Bill of Rights, including socio-economic rights, in the second decade of South Africa's constitutional democracy.

The report is yet to be debated in, and approved by, Parliament.

Institutions reviewed

The Committee was appointed by the National Assembly following its resolution on 21 September 2006 to undertake an in-depth review of institutions supporting constitutional democracy which had been established in terms of Chapter 9 of the South African Constitution of 1996 (the Constitution) and other associated bodies. The Chapter 9 institutions reviewed were the Public Protector, the South African Human Rights Commission (SAHRC), the Commission for Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission on Gender Equality (CGE), the Auditor-General and the Electoral Commission.

In addition, the Committee reviewed other independent bodies whose work is closely related to that of the Chapter 9 institutions. These are the Public Service Commission (constituted in terms of Chapter 10 of the Constitution), the Pan South African Language Board (Chapter 1 of the Constitution), the Financial and Fiscal Commission (Chapter 13 of the Constitution), the Independent Communications Authority of South Africa (also covered in Chapter 9 of

the Constitution) and the National Youth Commission (NYC) (a statutory body).

The Committee decided to review all 11 institutions because of the interrelated and mutually supporting nature of their roles and functions. The SAHRC has an explicit constitutional mandate to assess and monitor progress made by the government in realising socio-economic rights (section 184 of the Constitution). The CGE has a duty to monitor progress in achieving substantive equality by periodically examining the positive measures adopted by the government to promote access to socio-economic rights (section 187 of the Constitution).

Background to and purpose of the review

More than ten years into democracy, the government (executive) and Parliament decided that it was time to assess whether these institutions were effective and relevant and whether they had made the necessary impact on the lives of the ordinary people in South Africa.

The decision to review the institutions came as no surprise. Firstly, South Africa has developed a practice of reviewing institutions every ten years. Institutions established after the end of the apartheid regime have individually reflected on how they operated and executed their constitutional and legal mandate in the first decade of democracy. It was expected that Parliament, as an institution to which these bodies account, would assess the role that they were playing in consolidating constitutional democracy and transforming South Africa's society.

Second, and perhaps most importantly, there has been heated public debate about the rationale for having so many human rights institutions. Those against the proliferation of these institutions have contended that it means unnecessary duplication of work and a waste of resources. These critics have specifically advocated the merger of the CGE, the SAHRC and the Commission for the Protection and Promotion of the Rights of Cultural, Religious and Linguistic Communities.

Third, some civil society organisations have raised concerns over the manner in which certain institutions operate. For example, they have raised serious concerns about the secrecy with which the SAHRC treats public information obtained from the government on progress made in implementing socio-economic rights; the lack of involvement of the public in the SAHRC's reporting process; and the ineffectiveness and invisibility of the CGE (see, eg, Community Law Centre, 2007).

The Committee adopted a participatory, inclusive and open approach to the review and engaged extensively with a wide range of stakeholders.

It was decided by both Parliament and the Cabinet that since these institutions are independent and accountable to the National Assembly, it would be appropriate for Parliament (rather than the executive) to conduct the assessment. The National Assembly consequently appointed a multiparty, 12-member *ad hoc* Committee, chaired by Prof Kader Asmal, to conduct the assessment. According to its terms of reference, the Committee was set up with the following objects, amongst others:

- to assess whether the current and intended constitutional and legal mandates of these institutions were suitable for the South African environment, whether the consumption of resources by them was justified in relation to their outputs and contribution to democracy and whether a rationalisation of function, role or organisation was desirable or would diminish the focus on important areas;
- to improve the coordination of work between the institutions covered in the review, as well as improve coordination and cooperation with government and civil society; and
- to recognise the need for a more structured oversight role by Parliament in the context of the independence of these institutions.

The Committee's approach

Commendably, the Committee adopted a participatory, inclusive and open approach to the review. It engaged extensively with a wide range of stakeholders, including representatives of the institutions under review, civil society organisations, relevant government departments and members of parliamentary committees. These stakeholders were allowed to make written and oral submissions to the Committee, which also had extensive meetings with representatives of the institutions under review.

In addition, the Committee commissioned a public opinion survey on the general public awareness of the institutions. These processes ensured that it took into account the views of a wide spectrum of the public.

As the Committee's primary aim was to assess the effectiveness of these institutions, its recommendations placed the emphasis on strengthening them. It also assessed each institution on the basis of its independence and accountability. The Committee also considered whether having many institutions with specialised mandates monitoring human rights was conducive to the promotion and protection of human rights, considering that human rights are indivisible, interdependent and interrelated.

Findings and recommendations

The report made many useful and persuasive findings and recommendations. These are discussed below.

Financial and budget matters

The report found that different institutions follow different funding processes and budget allocations. As a result some enjoy more independence than others. All except the Public Service Commission receive funding not directly from Parliament, but from various national government departments. For example, the SAHRC, the CGE and the Public Protector – although they submit their budgets to the National Treasury – are funded through the Department of Justice and Constitutional Development.

All of the constitutionally created bodies should receive funding directly from Parliament since these bodies are accountable to it.

The report confirms that financial independence is an important indicator of institutional independence and that the difference in funding processes impacts negatively on the independence of these institutions. As stated by the Committee, it "creates a false impression that the institutions are accountable to the respective government departments" on how they spend the money. The report concludes that the funding process should be revised to achieve "a greater degree of standardisation and to promote and protect the independence of the institutions". The report specifically recommends that all of the constitutionally constituted bodies should receive funding directly from Parliament since these bodies are accountable to it.

This recommendation is reasonable and justifiable. It is hoped that Parliament will allocate adequate funds to these institutions to enable them perform their functions effectively and efficiently.

Appointment procedures

The report observes that the appointment procedure of commissioners and members of the bodies under review differs from one institution to another and it expresses concern at the lack of representation of rural people in the commissions. The report notes that Parliament needs to ensure that both matters are rectified.

According to the report, the Committee rejected the view that individuals with a high political profile should be disqualified from appointment to these institutions. It took the view that such a move would "disqualify many prominent and worthy candidates from possible appointment". The report makes two recommendations in this regard. First, a person who holds a "high-level" position in a political party must resign from the post before accepting an appointment to serve on one of these institutions.

However, it is not clear how a person holding a low-level political position differs from one holding a high-level position, as any political position could compromise independence.

Second, the report says any member of the institution who becomes a candidate for a position in a political party must resign from the institution immediately.

Furthermore, the report notes that there is no uniformity regarding who appoints the commissioners. In some cases it is the President, while in others it is Ministers.

It states that the President has no discretion in the appointment of commissioners recommended by Parliament in accordance with all relevant procedures. However, it notes that the President has, on certain occasions, not made the appointments recommended by Parliament. For example, he appointed five commissioners to the SAHRC instead of the 11 recommended by Parliament. He also appointed commissioners to the CGE long after Parliament had made its recommendation. According to the Committee, such delays have had a negative impact on the work of the institutions under review.

The report also raises concerns about the role of ministers in the appointment of commissioners. It states that appointments by ministers affect the independence of the institutions and recommends that ministers should not play any role in such appointment procedures.

For purposes of continuity and institutional memory, the report recommends that the terms of all mem-

bers of a particular commission should not end at the same time.

The report notes that public involvement in the appointment process of commissioners is at the discretion of Parliament, and civil society organisations are only involved in the nomination process. It recommends that Parliament devise mechanisms to enhance public participation in the appointment of commissioners. It suggests that this could be achieved by publishing the names of short-listed candidates before preferred candidates are recommeded to Parliament. It also recommends that uniform rules be developed to govern the appointment and dismissal of all commissioners of the institutions under review.

These recommendations are practical and useful. It may be added that, for these institutions to function better, the right number of commissioners must be appointed. It would also be useful for these institutions to develop the practice of entrusting specific themes to specific commissioners. For example, a commissioner could be responsible for monitoring the implementation of socio-economic rights, the right to information or the rights of a specific vulnerable group (eg children, women or the disabled). This would ensure improved and strong leadership in the promotion and protection of specific rights and the rights of specific groups.

Relationship with Parliament

The report notes that, despite the fact that reports submitted by the institutions to Parliament are essential for monitoring their performance, conduct and effectiveness, parliamentary portfolio committees have engaged minimally with them. It notes that the SAHRC's reports on socio-economic rights are an important means by which Parliament can monitor the performance of government departments.

According to the report, the major shortfall in the parliamentary accountability mechanism is the lack of coordination and the absence of systems to monitor reports and track the terms of office of commissioners.

The major shortfall in the paraliamentary accountability mechanism is the lack of coordination and the absence of systems to monitor reports and the terms of office of commissioners.

The report makes four recommendations to improve parliamentary oversight over these institutions. Firstly, it calls for the immediate establishment of a unit on constitutional institutions and other statutory bodies in the office of the Speaker to coordinate all interactions between Parliament and these institutions. The unit would:

- receive correspondence from such bodies and direct it to the appropriate structures of Parliament;
- highlight issues emanating from the reports to Parliament;
- ensure that Parliament discharges its obligations in respect of these institutions in a systematic, coherent, comprehensive and efficient manner;
- ensure the timely communication of recommendations contained in the report adopted by Parliament to the relevant ministers, where appropriate;
- monitor and track the implementation of recommendations communicated to ministers and other appropriate bodies; and
- act as a clearing house and repository of information and documentation received from the institutions.

Secondly, the report advocates strengthening parliamentary portfolio committees by enhancing their capacity through the appointment of specialist researchers and report-writers. It also recommends the establishment of sub-committees within committees to focus on specific matters emanating from the reports of the institutions.

Thirdly, the report recommends that Parliament arrange biannual joint meetings of the portfolio committees dealing with socio-economic rights. Fourthly, the report expresses concern about the inadequacy of guidelines on how to hold the bodies accountable while simultaneously respecting their independence. According to the report, the Committee agrees with the 1999 parliamentary recommendation regarding the adoption of an Accountability and Independence of Constitutional Institutions Act. However, it cautions that such a law should be enacted after extensive consultations with the relevant and affected institutions.

Accessibility

The report observes that the institutions are based in the urban areas. Yet the majority of the population – often poor and lacking transport and formal education – live in rural areas.

The report recommends that the institutions address this problem by opening provincial offices. However, it questions the viability of this approach, pointing out that it uses a

sizeable proportion of the budget, while creating tensions between the provincial and national offices over lines of authority and posing the danger of duplication of work. It recommends that provincial offices be established only where the need has been demonstrated.

The report emphasises the need for the institutions to be innovative in their use of resources to ensure that they are accessible to the public, especially in rural areas. They should make use of creative public outreach and awareness mechanisms.

This recommendation requires serious consideration, as provincial offices were established to bring the institutions closer to the people.

Although this may not have worked out perfectly, the need for decentralisation still exists. It is inconceivable that a national office could provide better services to communities that are far away from them if provincial offices are believed not to be able to do so.

The report emphasises the need for the institutions to be innovative in their use of resources to ensure they are accessible to the public, especially in rural areas.

What is needed is to improve the effectiveness of the provincial offices and develop clear divisions of roles and responsibilities between national and provincial offices. The institutions must find innovative ways of making the provincial offices reach out to the marginalised groups, particularly those living in rural areas.

International treaty monitoring

The report rightly commends the SAHRC for establishing a treaty monitoring unit to monitor South Africa's compliance with its international obligations.

Serious concerns are being raised about South Africa's attitude towards international law. In particular, it has – bizarrely – not ratified the premier international instrument on socio-economic rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR), despite having an internationally renowned progressive Constitution that guarantees these rights.

It is hoped that the treaty monitoring unit of the SAHRC will focus on three main points, amongst others. First, it must advocate for the speedy ratification of the ICESCR. Second, it must encourage the government to honour its international reporting obligations in relation to the other ratified human rights instruments. Third, it must monitor the government's compliance with its international obligations and commitments (eg the Millennium Development Goals, declarations and plans of action).

The reports of the unit relating to socio-economic rights should form part of the socio-economic rights reports of the SAHRC.

A single human rights body

The report's primary concern is about the multiplicity of human rights institutions. It argues that having too many of them detracts from their effectiveness and efficiency. Principally, the report recommends the establishment of a single human rights body to be called the "South African Commission on Human Rights and Equality". This body would be a merger of the SAHRC, the CGE, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (including the Pan South African Language Board) and the NYC.

According to the report, the single body would bring the following benefits:

- It would be a strong and authoritative champion for equality and human rights and would be better equipped to respond to human rights issues.
- It would be better placed to tackle barriers and inequalities affecting several groups, and to identify and promote strategic solutions to endemic human rights abuses.
- It would provide a single point of contact, thereby becoming more accessible to individuals seeking advice and support on cross-cutting human rights and discrimination issues.
- It would be able to develop and implement policies and approaches that would better address the systemic discrimination and disadvantages suffered by certain groups in society.
- It would be more effective in promoting improvements in the delivery of public services by guiding and supporting human rights good practice and compliance.
- It would provide opportunities for a more coherent implementation of the Promotion of Equality and Prevention of Unfair Discrimination Act.
- It would be better equipped to interact and work with civil society organisations on human rights issues.

This single body would have designated commissioners responsible for

the following specific issues: gender equality, youth and children, disability and access to information.

The report recommends that a task team be set up to explore the modalities of such a single body, which must report to Parliament within 12 months of the date on which Parliament adopts the *ad hoc* Committee's report.

Concerns with the proposed single human rights body

The recommendation for the establishment of a single human rights body was expected. As noted, there have been calls for the merger of certain key human rights institutions, particularly the CGE and the SAHRC.

However, the recommendation to merge five of these institutions raises concerns and potential challenges. The first relates to the inclusion of the NYC in the merger. The NYC was established specifically to address general socio-economic development and transformation issues, not human rights ones, pertaining to the youth. It is thus not clear whether the proposal means that the single human rights body would address both the human rights and the development issues of the youth, particularly those development issues that the NYC has been focusing on.

It would be ill-advised to extend the already broad mandate of the proposed single body to include the general development mandate of the NYC. Broadening the mandate would not only overwhelm and confuse the new body, but would also make its mandate amorphous and unfocused. The single body should only deal with the human rights issues of the youth. Another body would have to be created, if the NYC were disbanded, to address matters relating to the socio-economic development of the youth.

The second concern is that the merger might diminish the effectiveness of some institutions such as the SAHRC. Given the size of the proposed single body and the wide-ranging interests it would protect, it is likely that it would be hampered by bureaucracy and ideological differences among the merging institutions.

Besides these concerns, the proposed merger and the reasons for it are sound and fundamental. The merger might help address some of the existing loopholes in the current system for monitoring human rights, especially the fact that there is no institution monitoring whether the state is taking positive measures to address substantive equality.

To succeed, the merger would require progressive-minded and transformation-driven leadership, as well as great sensitivity to the historical autonomy and ideological positions that these institutions have had. As the Committee points out, the merger would also require extensive consultations with and involvement of a wide range of stakeholders.

Concluding remarks

The findings of the *ad hoc* Committee provide a profound insight into the successes and challenges, as well as the strengths and weaknesses, of the reviewed institutions in monitoring the implementation of human rights.

Most of the recommendations are well considered and provide practical solutions to some of the challenges experienced by the institutions and to their weaknesses. If implemented effectively, these recommendations, including the proposed human rights single body, will go a long way in improving the monitoring of human rights, including socio-economic rights. These recommendations are also critical to the improvement of the lives of the poor and the marginalised groups in South Africa.

However, I foresee problems with the inclusion of the NYC in the proposed merger, as it fulfils an entirely different mandate from those of the other institutions. The merger must not detract from the effectiveness and exceptional performance of some of these institutions.

The public must engage rigorously with the recommendations of the Committee because, if implemented, they will radically reshape – for better or worse – the monitoring mechanisms for human rights in general and socio-economic rights in particular.

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An overview of the Constitutional Court hearing of the inner-city evictions case

***Rand Properties and others v City of Johannesburg and others* (CCT 24/07)**

Christopher Mbazira

On 28 August 2007, the Constitutional Court heard an appeal against the decision of the Supreme Court of Appeal (SCA) in the *Rand Properties* case. This case concerns the eviction of poor people from dilapidated buildings in the inner city of Johannesburg. Acting in terms of section 12 of the National Building Regulations and Building Standards Act of 1977 (NBRA), the City of Johannesburg (the City) had issued eviction notices on the basis that these buildings were hazardous and not suitable for human habitation. It therefore brought an application to the High Court to enforce these notices.

This case has been discussed in two articles in previous issues of *ESR Review*: Stuart (2006) gave a general review of the High Court judgment and Quinot (2007) focused on the administrative perspective of the case. See also Chenwi (2006).

The High Court found that the City's housing programme failed to comply with the Constitution by not attending to the housing needs of those "in a crisis situation or otherwise in desperate need of accommodation". It directed the City "to devise and implement within its available resources a comprehensive ... programme to progressively realise the right to adequate housing to people living in the inner city". The City was thus interdicted from "evicting or seeking to evict the ... respondents" until it complied with its constitutional obligations. The City appealed against the High Court judgment to the SCA.

The Supreme Court of Appeal

The main argument of the City in the SCA was that the High Court had misinterpreted the City's obligation under the NBRA to prevent unsafe conditions in light of the City's constitutional obligation to provide access to adequate housing.

On the other hand, the respondents cross-appealed against the High Court's failure to hold that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998 (PIE) was applicable to the evictions in issue and that section 12 of the NBRA was inconsistent with section 26 of the Constitution.

In what appeared to be turning the clock back in socio-economic rights jurisprudence, the SCA criticised the High Court for ordering the adoption and implementation of a housing programme. According to the SCA:

> [T]he High Court had insufficient regard to the division of power. It is for the democratically elected government of the City to determine what its vision of the inner city is. Courts are not equipped or entitled to second-guess this type of policy decision. The Court also failed to have regard to the constitutional limitation on the right of access to adequate housing. In particular it took no account of the uncontradicted evidence of the City that it did not have the means to provide the respondents with inner city accommodation.

According to the SCA, it is not correct to state that persons in desperate situations may not be evicted unless alternative or adequate housing is provided. "The corollary would be that to deny someone poisoned food is to deny that person food" (para 46).

However, the SCA held that an eviction, at the very least, triggers an obligation on the City to provide emergency and basic shelter. Nevertheless, the SCA found that the obligation on the occupiers to comply with the order arising from the NBRA

notice was not dependent upon their being provided with alternative accommodation "even if the effect of complying with the order will be that they are left without access to adequate housing" (para 68).

It rejected the submission that section 12 of the NBRA has to be read subject to PIE, holding that PIE does not apply to evictions arising from a section 12 notice. Once such notice is issued, the SCA reasoned, the continued occupation of the property becomes an offence and a court is not entitled to uphold such unlawful act. In the SCA's opinion, PIE cannot be used to prevent illegal conduct: "PIE must be seen in light of its history and purpose, which is to resolve a clash between proprietary rights and the plight of the poor" (para 58).

The SCA noted that the respondents did not fit the description of "unlawful occupier" in PIE, which is someone who occupies property without the "express or tacit consent of the owner or without any right in law".

According to the SCA, the buildings in issue had been abandoned by their rightful owners. This conduct amounted to tacit consent to anybody to occupy the buildings.

The SCA recognised the potential overlap between PIE and the NBRA, arising from section 6 of PIE, which permits an organ of state to apply for an eviction "where it is in the public interest", which includes health and safety objectives. It noted, however, that section 6 differed from section 4 of PIE to the extent that section 6 did not contain the qualification "notwithstanding anything to the contrary contained in any law or the common law". According to the SCA, "[t]his means that section 6 recognises that PIE is not the exclusive statutory mechanism in terms of which persons may be evicted at the behest of organs of state" (para 60).

The SCA noted, though, that the NBRA was not without constraints: the notice must be based on necessity on the ground of the safety of persons and the decision to issue the notice must be rational. Thus, according to the SCA, if reasonable alternatives are available, they have to be explored and adopted. However, it noted that, in this case, the buildings could not be made safe (para 52).

It also declined to review the section 12 notice on the ground that the respondents had not been heard in accordance with the provisions of the Promotion of Administrative Justice Act of 2000 (PAJA). It held that PAJA was not applicable. (For a fuller discussion on the findings of the SCA decision and their implications for administrative law, see Quinot, 2007)

The SCA also dismissed the request for a structural interdict to ensure that the poor were provided with adequate housing in the inner city.

It held that "the City is not obliged to provide housing for the poor in the inner city specifically". It added that "[w]here housing is to be provided for any particular economic group is a matter that lies within the province of the policy-making functions of the City" (para 75).

The buildings in issue had been abandoned by their rightful owners which amounted to tacit consent to anybody to occupy them.

Notwithstanding this holding, the SCA held that the City had an obligation towards those who might be left without any shelter as a result of the eviction and who had no resources to get any such shelter. Such persons had to be provided, at least, with temporary shelter "to alleviate the desperate plight in which they will find themselves" (para 76).

Consequent to this finding, the SCA upheld the City's appeal. The respondents were interdicted from occupying the property concerned and were given one month to vacate, failing which the sheriff was authorised to remove them from the property. Conversely, the City was ordered to relocate those respondents who were to be evicted and rendered desperately in need of housing assistance to a temporary settlement area in accordance with the National Housing Code.

In addition, the City was ordered to open, within seven days, a register of persons who qualified for such relocation and to file, within four months, a compliance affidavit, which had to be served on the respondents' attorneys and *amici* (ie the Centre on Housing Rights and Evictions and the Community Law Centre at the University of the Western Cape) as well.

The Constitutional Court

The occupiers (applicants) appealed against the decision of the SCA to the Constitutional Court. I will deal with the grounds of appeal and arguments thereof as presented by the applicants collectively with the arguments of the *amici*.

Arguments of the applicants

The applicants' grounds of appeal opposed both factual and legal findings of the SCA. On factual findings, they contended that the SCA had erred in finding that they (the appli-

cants) demanded less than accommodation in the inner city and that the buildings in issue were filled with waste and sewer water, as well as faeces and refuse. They also challenged the finding that the City had given incontrovertible evidence that it did not have the means to provide the respondents with accommodation in the inner city.

On legal findings, the applicants contended that the SCA had erred in finding that the issue of the constitutional duty of organs of state towards those who have been evicted from their homes in desperate conditions was peripheral to the main issue in this case. They argued that, instead, the SCA should have found that to deprive a person of unsafe housing where such person has nowhere safer to go violated such a person's constitutional right of access to adequate housing. Thus, evicting such persons in terms of section 12 of the NBRA violated the constitutional protection against arbitrary eviction and the right to human dignity.

The applicants also argued that the NBRA notice violated section 26(3) of the Constitution since the notice could be issued without a lawful order. According to the applicants, PIE should apply after the notice has been issued and the applicants refuse to vacate the property (in which case they become illegal occupiers). Furthermore, the absence of a criterion guiding the issuance of such notice renders the NBRA arbitrary and in violation of section 26(3) of the Constitution.

It was also argued that the City had the obligation to afford all affected persons a hearing before issuing the notice and to consider the option of making the buildings safer whilst being occupied.

The City argued that the right of access to adequate housing is only realisablle progressively as a collective and not individual right.

Arguments of the City

In response to the arguments of the applicants, the City contended, amongst other things, that it had a duty and the powers to reduce and eradicate known instances of dangerous living conditions. The exercise of these powers, the City opined, was not conditional on the fulfilment of its obligations in section 26 of the Constitution. It also argued that, even if section 26(3) was applicable, the consideration of relevant circumstances contemplated by the section could include whether the buildings from which the people will be evicted were unsafe as demanded by the NBRA.

The City also sought to confirm the findings of the SCA that PIE was not applicable to NBRA-based evictions. It claimed that "[t]he question is whether an owner who abandons his or her property to the world ... should meaningfully be said to give 'tacit consent' to whoever happens to possess such property" (Heads of argument, para 87).

It also maintained that PIE was not applicable to the matter because the eviction at hand was an emergency one intended to avert a health danger to the occupants and the vicinity. It argued: "It simply cannot be the law that the provisions of the health and safety laws apply to those who occupy property lawfully but not to those who are in occupation against the wishes of the owner" (para 102).

While the City conceded that the exercise of the powers under the NBRA constituted administrative action within the meaning of PAJA, the implementation of a programme to realise the right of access to adequate housing was not. According to the City, conduct of this nature "moves more closely on the legislative and executive than the administrative sphere" (para 67).

From a more normative perspective of the right of access to adequate housing, the City argued that this right is only realisable progressively as a collective and not individual right. It cannot be used by an individual to assert immunity against a specific exercise of state power.

Contentions of the *amici*

While canvassing some of the arguments of the applicants, the *amici* stressed the fact that the case concerned a systemic problem. They argued: "The case should be seen in the context of the pervasive problems of poverty and homelessness" (Heads of argument, para 2).

The *amici* recognised the City's duty to ensure that conditions of accommodation did not constitute a threat to safety. However, they contended that the City should carry out those duties in a manner that did not violate the Constitution (para 7). They argued that section 26 of the Constitution obliged the state "both to refrain from taking action which impairs access to housing, and to take positive measures to assist people in securing adequate housing" (para 18).

In the opinion of the *amici*, if the evictions in terms of the NRBA ren-

dered persons homeless, such homelessness was a consequence of the City's failure to carry out its constitutional obligations (para 33). Like the applicants, the *amici* argued that the SCA should have found that this matter was a clear case in which an interdict against eviction and structural relief were appropriate. According to the *amici*, at the very least, the Constitutional Court should require the City to publish in the media its progress in finding solutions to the problem (paras 174–80).

Additional evidence from the City

In a dramatic turn of events, on the eve of the Constitutional Court hearing, the City filed additional evidence describing an ongoing process to adopt an Inner City Regeneration Charter (the Charter). It pleaded that the City, in conjunction with several partners and stakeholders, was developing an inner-city housing plan that would ensure that at least 50 000 (and ideally 75 000) new units were constructed in or near the inner city by 2015. It projected that 20 000 of these units would be affordable to households in lower income bands, such as the evictees in this case.

The additional evidence also averred that the City was committed to developing a housing plan that provided a wide range of options, including shelter for the homeless and other special groups in need; emergency accommodation; transitional accommodation; affordable rental or social housing at various income levels; inclusionary housing done on the basis of creative partnerships between the public and private sector; and continued delivery of both medium- and high-income rental and ownership options.

The City also stated that it would make at least 500 beds and other decent facilities available for emergency accommodation and use in the inner city by 2007. Indeed, at the hearing, the City indicated that this accommodation was already available. It also informed the Court of seven buildings being prepared for emergency accommodation within the inner city.

The additional evidence was also led to demonstrate that funds had been allocated to provide housing. According to the City, 6% of the current year's operating budget was allocated to housing.

The additional evidence marks a dramatic shift by the City from being indifferent towards the applicants and similarly situated people to recognising that there is a housing problem within the City that needs attention. In spite of this shift, the process of adopting a housing plan is only prospective. A lot still has to be done, not only to finalise the adoption of the plan, but also to ensure its effective implementation.

The hearing

At the hearing, both the applicants and *amici* welcomed the new developments and the City's change of attitude. Nevertheless, some concerns were raised regarding the proposed plan as well as the current position of the applicants. The additional evidence did not adequately illustrate the budgetary allocation and its applicability to housing. It was, for instance, pointed out that the additional evidence did not account for approximately R800 million allocated to housing.

The additional evidence did not adequately illustrate the budgetary allocation and its applicability to housing.

During the hearing, the Court also grappled with the issue of whether the applicants were entitled to some form of interim relief pending its decision, given that the City had discontinued such services as water and refuse collection and nothing had been done to make the properties less hazardous and more hygienic.

The interim order

At the end of the hearing, the Court reserved judgment. However, two days after the hearing, the Court issued an interim order in which it directed the parties to consider resolving the matter amicably, in order to alleviate the plight of the applicants by making the buildings as safe and as conducive to health as reasonably practicable.

However, the order was disappointing in that it did not expressly direct the respondents to restore the basic services discontinued by the City and improve the hygiene of the properties.

Conclusion

One can deduce from the interim order that the Court was more comfortable dealing with the wider implications of the case in a way that benefited all persons in the applicants' position. The Court has always been cautious in resolving socio-economic rights claims involving specific individuals. On many occassions, it has avoided granting individual remedies to the litigants before it.

In the *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), for instance, the case between the parties was settled through

an interlocutory process, and the final judgment of the Court defined the general obligations of the state and not those towards respondents who were living in desperate conditions. It appears, therefore, as if the Court adopted the same approach in the present case.

It is, however, too early to determine whether the settlement proposed by the Court will be concluded to the satisfaction of all the parties.

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The justiciability of the right to adequate housing

***European Roma Rights Centre v Bulgaria*, Collective Complaint 31/2005**

Claud Cahn and Savelina Danova-Russinova

On 30 November 2006, in the abovementioned case, the European Committee of Social Rights (the Committee) found Bulgaria to be in violation of article 16 (right to family protection) read together with article E (non-discrimination clause) of the Revised European Social Charter of 1996 (the Revised Charter). It held that Bulgaria had failed to secure the right of the Roma, a minority group in the country, to adequate housing.

The decision has a number of far-reaching implications for policy and law in Bulgaria, and for the development of the right to adequate housing and anti-discrimination law.

The facts

Article 31 of the Revised Charter guarantees a "right to housing". However, Bulgaria has not accepted this provision. It has, however, accepted article 16, which recognises the right to economic, legal and social protection of the family, including provision of family housing.

In previous decisions, the Committee, which monitors the implementation of the European Social Charter (the Charter), accepted arguments that the right to family protection in article 16 of the original Charter incorporated the right to adequate housing guaranteed in article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (see *European Roma Rights Centre v Greece*, 2005).

In April 2005, the European Roma Rights Centre (ERRC) brought a collective complaint against Bulgaria, alleging a wide range of systemic violations of the right to adequate housing by the state. Several Bulgarian NGOs were also involved in the complaint, including the Bulgarian Helsinki Committee, the Human Rights Project, the Romani Baxt Foundation and the Equal Opportunities Initiative Association.

The complaint alleged that tens of thousands of Roma people were dwelling in substandard slum settlements, in most cases residing without adequate security of tenure and, therefore, under permanent threat of forced eviction. Despite ample evi-

dence of the housing crisis for the Roma, successive Bulgarian governments, it was alleged, had wantonly neglected to resolve the problem. As detailed in the collective complaint:

- Large numbers of Roma, in particular Roma individuals residing in informal settlements, were precluded from registering their housing to seek legal protection of tenure. The Roma, as an ethnic group, were compelled to reside or left in situations in which, as a group, they faced no reasonable alternatives to residing in housing lacking legal security.
- The housing of the Roma population was, in the main, of significantly poorer quality than that inhabited by ethnic Bulgarians and other ethnic groups. Roma settlements frequently lacked access to basic services and infrastructure.
- Bulgarian authorities had forcibly evicted the Roma from their areas of residence on numerous occasions without providing adequate alternative accommodation, sufficient compensation or adequate redress for demolishing their homes.
- Many Roma settlements were under permanent threat of wholesale or partial destruction as a result of urban plans. The Roma were excluded from, and left uninformed about, decisions affecting their housing situation.
- Despite adopting policies to improve Roma housing, Bulgarian authorities failed to implement them.
- Bulgaria had not adopted domestic law adequately recognising a right to adequate housing.

The ERRC substantiated the complaint with examples showing specific patterns of abuse, as well as with statistical data from reliable sources. It also called attention to a number of provisions of domestic law which, it noted, were inconsistent with Bulgaria's obligations under the Charter. The ERRC also led evidence establishing that the Bulgarian government was engaging in forced emergency evictions of the Roma.

The government of Bulgaria denied that it was involved in any discriminatory practices concerning the housing of the Roma in Bulgaria.

The complaint alleged that, taken together, these violations were being committed on a large scale and were systemic in nature. It was therefore argued that Bulgaria was in violation of the right to family protection ensured in article 16 of the Revised Charter. It was also argued that the policies of Bulgaria violated the equal treatment guarantees in article E of the Revised Charter and constituted racial segregation in violation of international law, particularly article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination.

Admissibility

During admissibility hearings, the Bulgarian government argued that the complainants had not exhausted domestic remedies. However, the Charter's collective complaints procedure does not require the exhaustion of domestic remedies. A second objection concerned the fact that Bulgaria had explicitly not accepted the article 31, which recognises the right to housing, when it ratified the Revised Charter.

In response, the ERRC argued, amongst other things, that the Committee's decision in *European Roma Rights Centre v Greece* 15/2003 had already recognised that the right to family protection in article 16 of the Charter impliedly included the right to adequate housing. It further noted that the Committee had already stated that article 16 "must be seen in conjunction with a number of other provisions in the Charter" and requires the modern state to "create the living conditions necessary to give the family its full scope" (Conclusions I: 75).

The Committee accepted the arguments of the ERRC and declared the complaint admissible.

Merits of the complaint

The Bulgarian government presented several arguments concerning the merits of the complainants' case. It explicitly acknowledged that the Constitution of Bulgaria (the Constitution) lacked an explicit provision recognising the right to adequate housing. It argued, however, that article 33 of the Constitution, on the inviolability of the home, provided sufficient guarantees analogous to those contained in article 16 of the Revised Charter and other international treaties.

However, it described the content of the right in article 33 of its Constitution as comprising in substance that "[n]o one may enter or remain in it [the home] without the consent of its inhabitant, except in cases specifically provided for by the law". This provision, the government argued, fell far short of the right to adequate housing as provided for in article 31 of the Revised Charter and international law.

Secondly, the government denied that it was involved in any discrimi-

natory practices concerning the housing of the Roma in Bulgaria. It argued that the poor living and housing conditions affected the Bulgarian population as a whole, and not the Roma population alone. It rejected the existence of residential segregation in Bulgaria.

However, the government's argument was at odds with its earlier statements contained in the National Programme for Improvement in the Housing Conditions of Roma in Bulgaria for the 2005–2015 Period (national programme), adopted by the Bulgarian government on 22 March 2006, a week before it commented on the merits of the collective complaint at issue. In the national programme, the government concedes that "a stable tendency of increasing difference in the conditions of life in the Roma groups and the living conditions of the majority of the rest of the population is noticeable". The national programme goes on to note:

> During the last 15 years the housing conditions of the majority of Roma in Bulgaria have been stably deteriorating. The greatest part of the buildings is constructed with makeshift materials, illegally [...], the street and utility networks are in bad conditions and this turns the Roma neighborhoods into ghettos. The overpopulated houses and the overall increase in the density of inhabitance strain the servicing systems, which are anyway insufficient and service merely 46% of the population in the Roma neighborhoods, the consequences being bad hygienic conditions and health risks for the population, as well as social stress. There is a great difference between the provision of community services in the Roma housing and the housing in the country as a whole.

Thirdly, the government went on to make the untenable claim that the demolition of illegal housing was part of its policy to improve the living conditions of the Roma population. However, no evidence was led to establish that the housing situation of the Roma was actually improving. On the contrary, the housing conditions for these people were worsening steadily. The expansion of, and deterioration of the living conditions in, the slums was evident throughout the country.

The government was seemingly ignorant of existing prejudices and stereotypes against Roma.

Fourthly, the government presented the view that any "more efficient protection of the rights of [the Roma] group ... would constitute discrimination against the rest of the population". To counter this argument, the ERRC relied on *Thlimmenos v Greece* (2000), in which the European Court of Human Rights held:

> The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification ... However, the Court considers that ... [t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different (para 44).

The ERRC also recalled the views of the Committee in *European Roma Rights Centre v Italy* (2004), in which the Committee elaborated the Charter's non-discrimination requirements thus:

> [E]qual treatment requires a ban on all forms of indirect discrimination, which can arise "by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all".

Finally, the government also argued that the claim that there was ethnically based segregation in Bulgaria was untenable because "it would surely have resulted in discrimination not only against the Roma. It would have affected representatives of other ethnic groups in the country as well."

This statement revealed the inability of the government to grasp what was at issue in this case. The government was seemingly ignorant of the existing prejudices and stereotypes against Roma, which influenced the manner in which the Roma people were treated by both the administration and other people in the country.

It is clear from the arguments of the government that it was intransigent and not prepared to address the needs and concerns of the Roma people.

The decision

Decisions by the Committee are communicated in the form of confidential reports to the Council of Europe Committee of Ministers (the Council). This particular decision was forwarded to the Council on 30 November 2006.

The Committee found two distinct violations of article 16 taken together with article E of the Revised Charter. It ruled, first of all, that the situation concerning the inadequate housing and the lack of proper amenities for Roma families in Bulgaria constituted a violation of these articles. It found

that Roma families were disproportionately affected by the lack of legislation protecting people living in illegal dwellings. According to the Committee, the evictions carried out did not satisfy the conditions required by the Charter, in particular that of ensuring that persons evicted are not rendered homeless.

As regards the adequacy of the measures taken by the government with respect to the housing situation of Roma people in Bulgaria, the Committee noted that "notwithstanding the clear political will expressed by the government to improve the housing situation of Roma families", a number of government programmes and implementing measures produced in the period 1999–2005 had not yet "yielded the expected results" and that "a period of six years ... should have been enough to realise significant improvements".

With regard to discrimination, the Committee stressed that "Article E not only prohibits direct discrimination but also all forms of indirect discrimination". The Committee further stated that "indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all".

The Committee held that "in the case of Roma families, the simple guarantee of equal treatment as the means of protection against any discrimination does not suffice" and that "for the integration of an ethnic minority as Roma into mainstream society measures of positive action are needed".

Conclusion

The ruling requiring the integration of ethnic minorities into mainstream society is particularly important. Recognising the right to positive action for the Roma population in Europe has been extremely difficult, particularly in the light of views such as those of the Bulgarian government set out above.

Despite the poor living conditions of the Roma, many authorities have clung to a rigid vision of the non-discrimination right as meaning "no special treatment" for any person or group, no matter what. The Committee's finding in the present complaint refutes that view.

The decision is also important for the protection of social and economic rights in Europe. Due to the dominance in European regional protection of civil and political rights, social and economic rights have been neglected.

This case demonstrates that the collective complaints mechanism of the Charter presents a real opportunity of challenging systemic violations of rights and addressing the social exclusion of minorities and other vulnerable groups.

The collective complaint mechanism – taken together with the reporting mechanism under the Charter – provides a strong tool of influence for policy change. Resolutions issued by the Council on each collective complaint contain recommendations for specific action to the state concerned to bring its policies in line with the Charter. Under the reporting mechanism, states parties submit yearly reports indicating how they are implementing the Charter in law and in practice.

The reporting state must set out the measures it has taken or contemplates taking in order to implement the relevant rights in the Charter and, where appropriate, provide a timetable for achieving compliance. Where a state is found to be non-compliant with the Charter, the Council may address a recommendation to the state concerned calling on it to take appropriate measures to remedy the situation.

It is hoped that the Council will vigorously supervise the implementation of the Committee's recommendation in this particular case.

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Basic Principles and Guidelines on Development-Based Evictions and Displacement

In 1997, the Comprehensive Human Rights Guidelines on Development-Based Displacement were adopted by participants in the Expert Seminar on the Practice of Forced Evictions, held in Geneva from 11 to 13 June (UN doc. E/CN.4/Sub.2/1997/7, 2 July 1997). These guidelines include obligations on states to secure by all appropriate means, including the provision of security of tenure, the maximum degree of effective protection against forced evictions; to prevent homelessness; and to explore all possible alternatives to forced evictions.

In an effort to strengthen and simplify the guidelines, the United Nations Special Rapporteur on adequate housing recently developed the Basic Principles and Guidelines on Development-Based Evictions and Displacement (Principles and Guidelines) (contained in UN doc. A/HRC/4/18, 5 February 2007). These Principles and Guidelines were the result of an International Workshop on Forced Evictions organised by the Special Rapporteur in collaboration with the German Federal Foreign Office and the German Institute for Human Rights in Berlin in June 2005. They are based on experiences gathered worldwide since 1997, and are aimed at assisting states and the international community in developing policies and legislation to address (and reduce) forced evictions.

The Principles and Guidelines:

a) define the practice of forced evictions;

b) lay down stringent criteria under which displacement can occur in "exceptional circumstances", with "full justification" and procedural guarantees;

c) enumerate detailed steps to be taken by states to protect human rights before, during and after evictions;

d) call for comprehensive "eviction-impact assessments" to be carried out before displacement;

e) call for the provision of compensation, restitution and adequate rehabilitation consistent with human rights standards;

f) provide useful guidance on factors that lead to displacement, such as disasters;

g) recognise the right of displaced communities living in adverse conditions to resettlement in accordance with the right to adequate housing;

h) call on states, in pursuance of an "immediate obligation", to guarantee security of tenure to all those currently lacking titles to home and land;

i) provide a strong gender perspective, including protection and entitlements to women; and

j) call for states to take intervening measures to ensure that market forces do not increase the vulnerability of low-income and marginalised groups to forced eviction.

States have an obligation to ensure that evictions only occur in exceptional circumstances and must adopt legislative and policy measures prohibiting the execution of evictions that are not in conformity with their international human rights obligations (paras 21 and 22).

Prior to any decision to initiate an eviction, states also have an obligation to demonstrate that the eviction is unavoidable and consistent with international human rights (para 40).

The procedural requirements that must be followed before evictions include (para 37):

a) appropriate notice to all potentially affected persons of any impending eviction being considered and of any public hearings on the proposed plans and alternatives;

b) effective dissemination by the authorities of relevant information in advance, including land records and proposed comprehensive resettlement plans specifically addressing efforts to protect vulnerable groups;

c) a reasonable period for public review of, comment on, and/or objections to the proposed plan;

d) opportunities and efforts to facilitate the provision of legal, technical and other advice to affected

persons about their rights and options; and

e) holding one or more public hearings providing affected persons and their advocates with opportunities to challenge the eviction and/or to present alternative proposals and to articulate their demands and development priorities.

States are further required to ensure that evictions do not result in individuals being rendered homeless or vulnerable to other human rights violations.

States must adopt all appropriate measures, to the maximum of their available resources, especially for those who are unable to provide for themselves, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available and provided. Notably, alternative housing should be situated as close as possible to the original place of residence and source of livelihood of those evicted (para 43).

During evictions, the procedural requirements for ensuring respect for human rights standards include (paras 45-51):

a) Government officials or their representatives must be on site during evictions, and must identify themselves to the persons being evicted and present formal authorisation for the eviction action.

b) Neutral observers, including regional and international observers, must be allowed access, upon request, to ensure transparency and compliance with international human rights during any eviction.

c) Evictions shall not be carried out in a manner that violates the dignity and the rights to life and security of those affected.

d) States must also take steps to ensure that no one, especially women and children, is subjected to direct or indiscriminate attacks or other acts of violence in the course of evictions.

e) Any legal use of force must respect the principles of necessity and proportionality, as well as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and any national or local code of conduct consistent with international law enforcement and human rights standards.

f) Evictions must not take place in inclement weather, at night, during festivals or religious holidays, before elections, or during or just before school examinations.

g) Those evicted should not be required or forced to demolish their own dwellings or other structures

In any eviction, the state or the parties responsible for it have an immediate obligation for providing just compensation and sufficient alternative accommodation or restitution when feasible (para 52). At a minimum, regardless of the circumstances and without discrimination, they must ensure that evicted persons or groups, especially those who are unable to provide for themselves, have safe and secure access to the following (para 52):

a) essential food, potable water and sanitation;

b) basic shelter and housing;

c) appropriate clothing;

d) essential medical services;

e) sources of livelihood;

f) fodder for livestock and access to common property resources previously depended upon; and

g) education for children and childcare facilities.

Further, states must ensure that members of the same extended family or community are not separated as a result of evictions (para 52). Identified relocation sites must fulfil the criteria for adequate housing according to international human rights law (para 55).

The Principles and Guidelines also recognise the right of access to timely remedies of all persons threatened with or subjected to forced evictions. This right includes the right to a fair hearing, access to legal counsel, legal aid, return, restitution, resettlement, rehabilitation and compensation (para 59).

To promote the development of best practices and problem-solving experiences based on lessons learned, states are required to actively monitor and carry out quantitative and qualitative evaluations to determine the number, type and long-term consequences of evictions, including forced evictions, that occur within their jurisdiction and territory of effective control. Monitoring reports and findings should be made available to the public and concerned international parties (para 69).

The task of monitoring and investigating forced evictions and state compliance with these Principles and Guidelines and international human rights law should be entrusted to an independent national body, such as a national human rights institution (para 70).

The Special Rapporteur on adequate housing has urged states to incorporate the Principles and Guidelines into national laws and policies.

Resolution on the rectification of the legal status of the Committee on Economic, Social and Cultural Rights

During its fourth session, the United Nations Human Rights Council adopted a resolution on the rectification of the legal status of the Committee on Economic, Social and Cultural Rights (CESCR) (UN doc. A/HRC/4/L.17, 28 March 2007).

This resolution was introduced by South Africa. The main basis for the resolution was the need to achieve parity between the CESCR and all other treaty-monitoring bodies. This was a timely initiative, given that the optional protocol to the International Covenant on Economic, Social and Cultural Rights is currently being elaborated.

In the resolution, the Human Rights Council decided as follows:

a) to initiate a process to rectify, in accordance with international law, in particular the law of international treaties, the legal status of the CESCR with the aim of placing it on a par with all other treaty monitoring bodies;
b) to request the CESCR to present a report outlining views, proposals and recommendations that would assist in achieving the above aim to the last session of the Human Rights Council in 2007;
c) to request the Office of the High Commissioner for Human Rights to seek the views of states, the Office of Legal Affairs and other stakeholders, and to prepare a report containing these views for submission to the last session of the Human Rights Council in 2007; and
d) to convene at the same session, where this issue will be considered, an interactive dialogue highlighting the importance of the principles of universality and indivisibility and the primacy of equal treatment of all human rights.

UPDATES

41st Session of the African Commission on Human and Peoples' Rights

16–30 May 2007, Accra, Ghana

The 41st Session of the African Commission on Human and Peoples' Rights took place from 16 to 30 May 2007.

At this session, the Commission adopted a *Resolution on the rights of older persons in Africa* and a *Resolution on the health and reproductive rights of women in Africa*. These resolutions, if effectively implemented, will go a long in way in solving the socio-economic problems of older persons and addressing the health needs of women.

Very significantly, the session was held in Accra, soon after the Republic of Ghana celebrated the 50th anniversary of its independence.

For further information on the African Commission see http://www.achpr.org/.

Rebecca Amollo

Fons Coomans (ed) 2006. *Justiciability of economic, social and cultural rights: Experiences from domestic systems.* Antwerp-Oxford: Intersentia.

This book explores the topic of the justiciability of socio-economic rights in a new fashion by giving the reader a flavour of the experience of different jurisdictions. It comes at a time when the debate on the nature of state obligations pertaining to socio-economic rights is regaining currency, mainly because of the revival of efforts to adopt an optional protocol to the International Covenant on Economic, Social and Cultural Rights providing for a complaints procedure. The contributions address the topic from various angles, which gives the book a comparative outlook.

The main theme is the justiciability of socio-economic rights. Coomans begins by citing court decisions in Argentina and the Netherlands on the provision of vaccines (right to health) and the right to education respectively, which reached different conclusions. The juxtaposition of the two cases aptly highlights the diversity that exists in approaches to understanding the nature of the obligation to fulfil socio-economic rights.

In the second chapter, Koch argues that, although Denmark is an affluent state with a quality welfare system, the Danish constitution does not give adequate protection to socio-economic rights. However, the author is optimistic that the Danish judiciary will soon be given a mandate to adjudicate socio-economic rights disputes, as the country has now embarked on a review of its constitution and legislation to bring them into compliance with international human rights.

The third chapter focuses on the implementation of socio-economic rights in the Netherlands and makes the point that the Dutch government does not live up to its pledges. It argues that the government's persistent refusal to consider economic, social and cultural rights as true rights amounts to a deprivation of the safeguards created by the United Nations to which Dutch citizens are entitled..

In the fourth chapter, Anón and Pisarello examine the protection of social rights under the Spanish constitution. Social rights are protected in this constitution merely as principles of economic and social policy. However, it illustrates that courts have found a way of protecting social rights either directly, through determining the minimum content of a right, or indirectly, through other rights that are justiciable. Despite such innovative approaches, the chapter concludes that the protection of many social rights in Spain is inadequate.

In the fifth chapter, Uitz and Sajó examine the protection of socio-economic rights under the Hungarian constitution. They observe that the Hungarian Constitutional Court has accepted the minimum core obligations concept in relation to some social rights; it has tended to use the right to property and human dignity to protect other socio-economic rights; it has adopted standards of reviewing compliance with obligations relating to socio-economic rights that accord deference to political branches in shaping the institutions of social welfare. The chapter argues that the enforcement of social welfare rights depends not so much on the language of constitutional rights as on the willingness of the constitutional judiciary to review the constitutionality of legal rules related to welfare rights.

The sixth chapter focuses on the unwritten constitution of the United Kingdom and its newly adopted Human Rights Act (HRA). It argues that the HRA has created an opportunity to hold the government accountable for limitations or gaps in the legislative protection of socio-economic rights. The chapter illustrates that the domestication of international law can make a difference in the realisation or adjudication of socio-economic rights.

Wiseman, in the seventh chapter, highlights the fact that Canada

is one of the wealthiest countries in the world and consistently ranks highly in comparative measures of quality of life, and yet not all Canadians are free from social and economic deprivation. It examines the jurisprudence of Canadian courts, which have interpreted the provisions of the Canadian Charter of Fundamental Rights restrictively to exclude most socio-economic rights claims.

In chapter eight, Brand examines the protection of socio-economic rights in South Africa. He demonstrates that the Constitutional Court of South Africa has managed, through adopting a flexible standard of review in socio-economic rights cases, to balance the need to ensure that the state implements its obligations in relation to these rights with the need for political branches of the state to have sufficient discretion to take appropriate measures to give effect to these rights. Furthermore, he commends the Court's willingness to pay attention to the specific circumstances in deciding socio-economic rights cases instead of relying on a rigid benchmark.

In chapter nine, Muralidhar discusses the role that the Indian judiciary has played in enforcing socio-economic rights. The author highlights the importance of non-legal measures, including informal dispute resolution mechanisms, to the protection and realisation of socio-economic rights, especially for people who live in rural areas.

Chapter ten focuses on the Philippines. It shows that these rights are still viewed as largely programmatic goals that can hardly be enforced in the absence of implementing legislation. However, it demonstrates the importance of protecting these rights as justiciable rights and of integrating them in non-legal and non-state mechanisms.

The 11th chapter examines the jurisprudence of Argentine courts on the judicial enforceability of socio-economic rights. While noting that there is a lack of a judicial tradition of enforcing these rights, it demonstrates that judges in Argentina are generally receptive to injunctive and precautionary procedures in urgent socio-economic rights cases.

In the Philipppines, socio-economic rights are still viewed as largely programmatic goals that can hardly be enforced in the absence of implementing legislation.

In chapter 12, Yepes looks at the problem of the justiciability of socio-economic rights in a manner that suspends abstract discussions about the convenience of justiciability and proceeds to analyse the concrete empirical developments of judicial enforcement in several countries. Yepes argues that this would enable one to see if the promises of the judicialisation of social rights have been fulfilled.

In the last chapter, Van der Mei examines the extent to which social rights within the European Union (EU) are justiciable. Van der Mei further notes that the inclusion of social rights in a written document makes them more visible and may enhance their role as tools for the interpretation of law.

In conclusion, this book makes yet another attempt at showing that socio-economic rights are justiciable, but that many hurdles have to be overcome to ensure that these rights are given full and effective protection. Different countries adopt different means of providing for socio-economic goods and services. The book also demonstrates the need to contextualise all cases.

One shortcoming of the book is that, although the contributions cover a wide range of countries, only one country from sub-Saharan Africa, a part of the world in dire need of social and economic empowerment, has been included. The book would have been more comprehensive if it had considered the protection of these rights in more African countries.

Nevertheless, coming at a time in history when governments are seeking to achieve democracy and the rule of law coupled with the principles of good governance and constitutionalism, the book is a "must read" for lawyers, socio-economic rights activists, academics, government departments and all who are inclined towards understanding the subject.

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