

TABLE OF CONTENTS:

Editorial

Features:

Economic and Social Rights in the International Arena
From Pariah to Global Model

Policy and Legislation:

The White Paper on Health
Social Security and Human Rights

Monitoring Institutions:

Update on the SA Human Rights Commission

Case Review:

Hard Cases

Letters and Book Reviews:

Overview

Editorial

by Sandy Liebenberg

This is the second edition of *ESR REVIEW*. The first edition has received a positive response from a wide variety of quarters. This edition focuses on a number of exciting developments in the area of economic and social rights. The first is the impending ratification by South Africa of the International Covenant on Economic, Social and Cultural Rights, 1966. This was announced by the Minister of Water Affairs and Forestry, Prof. Kader Asmal at a workshop on socio-economic rights co-hosted by the Portfolio Committee on Welfare (National Assembly), the Community Law Centre (UWC) and the Centre for Human Rights (University of Pretoria) at Parliament on 23 February 1998. Two contributions in this edition focus on the significance of this Covenant as the leading global instrument protecting economic, social and cultural rights. The first is by Prof. Philip Alston, the Chairperson of the UN Committee on Economic, Social and Cultural Rights which supervises States parties' compliance with their obligations under the Covenant. We are very pleased to be able to publish this feature article by Prof. Alston based on the presentation he gave at the workshop. The second discussion of the Covenant is contained in the article by Danie Brand and Frans Viljoen of the Centre for Human Rights. They also examine South Africa's obligations under other international and regional human rights treaties that protect socio-economic rights.

We are also very pleased to include another feature by an international writer, Scott Leckie who is director of the Centre for Housing Rights and Evictions based in Geneva. This article reviews recent legislation in South Africa that gives effect to the right against arbitrary evictions, and argues for a more active role by South Africa in global efforts to combat the practice of arbitrary forced evictions.

As the South African Human Rights Commission prepares its report on socio-economic rights for tabling in Parliament, Christof Heyns reviews the process and raises concerns regarding the limited role given to NGO's in the monitoring procedure designed to give effect to section 184(3) of the Constitution. The extent to which the White Paper on Health provides a solid policy framework for realising the constitutional right of everyone to have access to health care services is examined by Karrisha Pillay in the regular section reviewing relevant legislation and policy.

The Poverty Hearings - *Speak Out on Poverty* - a joint initiative by SANGOCO (South African National NGO Coalition), the Commission for Gender Equality and

the SA Human Rights Commission are drawing to a close. It is expected that the report of the hearings will be available in July. The outcome of these hearings are of direct relevance to socio-economic rights as they have provided an opportunity for poor people to identify, in their own words, the barriers and problems they experience in gaining access to their rights - decent housing, health care, food, water and social security. So often the experiences of poor people are mediated through third parties - government departments, NGO's, the media etc. These hearings have highlighted, in a way that no research report or poverty statistics could ever do, the impact of poverty on the lives of ordinary people. This edition examines current issues relating to social security in South Africa based on the themes emerging from the Poverty Hearings which took place in the Eastern Cape from 18 to 23 May 1998.

For further information on the Poverty Hearings, contact Jacqui Boule of SANGOCO at (011) 403 7746.

All readers are invited to advertise forthcoming events or publications relating to economic and social rights in *ESR REVIEW*. We also welcome ideas and suggestions regarding the content of this publication. Please contact our project administrator, Ms. Sonya Le Grange with the relevant information (tel: 021 - 959 3708).

Economic And Social Rights In The International Arena

by Professor Philip Alston

A key principle of international human rights law is that all human rights - civil and political, as well as economic, social and cultural rights - are closely interrelated and of equal status. Practical experience has shown that it is erroneous to assume that if one set of rights is implemented, the other will follow automatically. For example, in the US the protection of civil and political rights has not automatically led to the realisation of economic and social rights. Other governments have in the past insisted that economic and social rights must be implemented first (for example, Russia), but this has also not resulted in any automatic protection of civil and political rights.

This year is the 50th anniversary of the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948. At the time, South Africa was one of eight states that abstained from voting for the Declaration (there were no votes against). The Universal Declaration of Human Rights endorses the philosophical perspective discussed above by incorporating both sets of rights. Although it is not legally binding in its own right, it represents "a common standard of achievement for all peoples and all nations." It is also the foundation of international efforts to protect human rights. These efforts are based on the following three principles:

i. Recognition of the dignity of the human being

This value is given concrete expression through the recognition and protection of a range of fundamental human rights. For example, every person has the right to be free from torture, and every child has a right to primary education. Any country that attempts, for example, to exclude girl children from enjoying the right to education - not only violates their right to equal human dignity, but also their specific right to education as guaranteed in the International Covenant on Economic, Social and Cultural Rights, 1966. In South Africa the full and equal

enjoyment of all human rights without discrimination on grounds of race, sex, gender as well as the right to basic education are expressly guaranteed in the Constitution.

ii. The primary responsibility of governments for protecting human rights

International efforts are primarily aimed at encouraging appropriate national measures to implement human rights. The UN does not prescribe any particular political, social or economic system. It is left up to governments to ensure that their internal policies and laws are in harmony with international human rights norms.

iii. International accountability

In terms of this principle, a government is given every opportunity to ensure that its domestic house is in order in relation to the protection of human rights. However, if it fails to do so, it must be subject to appropriate forms of international scrutiny and oversight. No government likes this scrutiny - being told by the international community that they have got it wrong and that their policies need to be changed. At the same time, there are dramatic limits to what the UN-system can do to force governments to respect human rights. It generally has to rely on the moral authority of its pronouncements and the political pressure of international condemnation. The main non-treaty body concerned with human rights is the UN Commission on Human Rights which was chaired this year by a South African, Mr. Jackie Selebi. The experience of South Africans' long struggle against violations of civil, political, economic, social and cultural rights under apartheid make it an important international figure in the field of human rights.

International trends affecting economic and social rights

Economic and social rights have suffered from the following international developments:

1. The Cold War which polarised countries around the two sets of rights. The West generally tended to support civil and political rights, while marginalising the importance of economic and social rights. The Communist bloc tended to emphasise economic and social rights and downplay civil and political rights. It should, however, be noted that many communist countries did not really see economic and social rights as individual rights that could be enforced against the government.
2. The pressures of globalisation which has undermined the commitment of certain countries to protecting economic and social rights. The argument has been that the particular country cannot afford economic and social rights if it is to be competitive and attract international investments. Alternatively, that the protection of economic and social rights will automatically flow from the achievement of higher economic growth. Again international experience does not bear this out. It is possible to achieve high growth rates while at the same time there is increasing inequality and poverty in the society. Various Latin American countries exemplify this trend.

The International Covenant on Economic, Social and Cultural Rights

The major international treaty protecting economic and social rights is the International Covenant on Economic, Social and Cultural Rights (the ICESCR) adopted in 1966. It is the sister-Covenant of the International Covenant on Civil

and Political Rights (the ICCPR) which was adopted in the same year. To date there are over 130 States parties to the ICESCR. South Africa has not yet ratified the International Covenant on Economic, Social and Cultural Rights although it has indicated that it will soon do so. The US has not ratified the ICESCR as it has a strong chauvinistic objection to international accountability in general, and an ideological aversion to social and economic rights in particular.

Despite this powerful foe, international efforts to strengthen the protection of economic and social rights have gone ahead. China has recently given notice of its intention to ratify the Covenant, and has promised to submit the periodic reports required of States parties under the Covenant on the measures adopted and the progress made in achieving the observance of the rights recognised therein. The latest international initiative is the drafting of an Optional Protocol to the ICESCR which will allow individuals and groups to lodge complaints at an international level that their government is not fulfilling its obligations under the Covenant. A similar procedure has been in force since 1976 in relation to the civil and political rights recognised in the ICCPR. This draft Optional Protocol to the ICESCR has not yet been adopted. It will be a key test of the international community's commitment to giving real teeth to the enforcement of economic and social rights.

The UN Committee on Economic, Social and Cultural Rights

The UN Committee on Economic, Social and Cultural Rights consists of eighteen independent experts elected every four years by States parties to the Covenant, and representing all the major geographical regions of the world. It is the body responsible for reviewing States parties' reports under the ICESCR, and assessing to what extent they are complying with their obligations. The Committee considers these reports in bi-annual sessions in Geneva, Switzerland.

The initial expectation was that the Committee would be very general in commenting on how States were meeting their obligations under the Covenant. Initially, the Committee was at pains to display a non-threatening approach in reviewing State reports by permitting governments to control the terms of the debate. However, as the Committee has gained in experience and confidence, it has become more vigorous in its questioning of the representatives of the state party presenting its report. It requires specific answers from these representatives, and has also been prepared to conclude in appropriate cases that the State is in breach of its obligations under the Covenant. For example, during its fifth session while considering the report of the Dominican Republic, it received credible information from an NGO regarding the eviction of some 15 000 families from their homes. It found that the facts before it were sufficiently serious to conclude that the right to adequate housing in article 11 of the Covenant had not been respected. In many cases the Government has concluded that government policies and even legislation in relation to women are discriminatory and constitute clear violations of the Covenant.

The role of NGO's

The main function of the Committee is to assess the situation in the reporting country in the light of obligations imposed by the ICESCR. To do so accurately, it needs information on the situation "on the ground" in that country. Initially, only the official government report was admissible, but for some years now the Committee has agreed to consider information from both national and international NGO's. Those groups do not need to have any official status with the

UN and can submit information in any form they wish. On the first day of each session an entire meeting is set aside to enable them to make oral presentations to the Committee. The most effective contributions by NGO's come in the form of detailed "alternative reports" and specific questions which are targeted at areas where the government's performance is weak. Such contributions enable the Committee to go to the heart of issues and compel a frank discussion with the government.

The Committee then play the role of arbiters - they try to reach an accurate and fair assessment of the situation in the country and the government's conduct from all the information available. Well-researched NGO-input is an indispensable part of the reporting process as it can assist the Committee in gaining a deeper insight into the impact of government policies on the economic and social rights of ordinary people in the country concerned.

In principle, it is difficult for the Committee to initiate a dialogue, even when there are major problems which would warrant it, in the absence of a country report. This is because the system is based upon reporting. Nevertheless, on a number of occasions, the Committee has responded to detailed and persuasive allegations of violations made against particular governments (usually by NGO's) by asking the government to expedite its report and to make sure to address specific issues identified by the Committee on the basis of the allegations received. This procedure should be used sparingly, but it has been very productive in relation to countries as diverse as the Dominican Republic, Canada, the Philippines and Israel.

The Committee's assessment of a state report is summarised in "concluding observations". These concluding observations and a summary record of the proceedings of the Committee are forwarded to the UN Commission on Human Rights and the General Assembly. This enables the Committee to make an important input into the broader international process of scrutinising the human rights performance of governments. But it is at the domestic level that the greatest use can be made of the Committee's observations. The media, human rights groups, interest groups within government, parliamentarians and others can all make appropriate and effective use of carefully reasoned and accurate analysis by the Committee.

Apart from considering state reports, the Committee is also an important forum for discussing the interpretation of economic and social rights, and ways of improving their implementation. These days of discussion form the basis of "General Comments" which the Committee periodically adopts on a number of topics related to the Covenant. These General Comments are authoritative statements by the Committee on the meaning of the rights in the Covenant, and the nature of the obligations they impose on States parties. The Committee has thus far adopted General Comments on the following topics: reporting by states parties, international technical assistance measures, the nature of States parties' obligations, the right to adequate housing, the economic, social and cultural rights of elderly persons and of persons with disabilities, forced evictions, and the relationship between economic and social rights and economic sanctions.

Minimum core duties

In its General Comment No. 3 on the nature of States parties obligations, the Committee has said that although States are generally permitted to realise the rights in the Covenant "progressively" and "to the maximum of their available

resources" (art. 2), there is a core minimum duty on governments to ensure that everyone at least has access to essential levels of economic and social rights such as food, shelter, primary health care, and basic education. The government is under a duty to prioritise its resources so to meet these minimum duties, particularly in relation to vulnerable and disadvantaged groups. Only when the government can convincingly show that resources are "demonstrably inadequate" can its failure to fulfil these duties be justified. However, the Committee has also emphasised that even when resources are scarce, "the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant right under the prevailing circumstances." It also has an on-going duty to monitor the extent to which people have, or lack, access to economic and social rights and to devise strategies and programmes for improving the situation. These comments of the Committee are particularly relevant to the development of the South African jurisprudence on economic and social rights as the relevant sections in the Bill of Rights are very similar to the provisions in the ICESCR.

Conclusion

Economic, social and cultural rights have for too long been the poor and neglected cousins of civil and political rights. This state of neglect is changing. The pressures of globalisation and economic competitiveness have promoted a logic which, if permitted to remain unchecked, will inexorably reduce the living standards of the poorest groups in our society. Such an approach is neither economically sustainable nor morally acceptable. Human rights are presented by some as a means to facilitate the triumph of market forces. This involves an emphasis upon freedom of information, the right to property, the right to effective remedies in commercial matters, and the right to individual freedom and initiative. These rights are all important. But we must insist that the only legitimate justification for the free market, as well as the extensive governmental regulation that protects and sustains it, is to ensure the triumph of human rights. That means that economic policies must ultimately be judged solely on the basis of their capacity to contribute to the dignity and well-being of every individual and not just of entrepreneurs and those allied to them.

** Professor Philip Alston is Chairperson, UN Committee on Economic, Social and Cultural Rights*

From Pariah To Global Model

South Africa And Forced Evictions

by Scott Leckie

Few practices better captured what was wrong with pre-democratic South Africa than the massive forced evictions, demolitions and relocations that plagued the country during apartheid. Looking at South Africa from abroad, the violent evictions and mass forced removals of people from their land and homes provided graphic evidence of the impact of apartheid on the lives of the South African majority. For decades, year after year, the UN General Assembly and a range of other UN bodies adopted stringent resolutions against the forced removals of apartheid. The international community was outraged by the discriminatory nature of these evictions and the manner in which they were used to socially engineer a country where race determined where and how people would live. Indeed, forced evictions and removals were an essential part of the arsenal of repression under apartheid.

While South Africa was rebuked repeatedly for apartheid-era evictions, comparatively scant attention was paid by the international community to the overall practice of forced evictions. Instead the emphasis was placed on conflict-related displacement and refugee flows. In recent years, both the international human rights movement and democratic South Africa have given increasing attention to the need to protect people from the inhumanity of arbitrary evictions.

While forced evictions have not been eliminated from the social landscape of the new South Africa (COHRE continues to receive periodic information on squatter evictions in Durban, Cape Town and elsewhere), the country's approach to practices resulting in the loss of people's homes is markedly different now than a few short years ago. As in so many other areas linked to the transition to democracy, South Africa has now possesses the capacity for leading global efforts to eradicate the human rights violations so commonly linked to forced evictions.

A Human Rights Perspective on Eviction

In terms of law, South Africa has few parallels when it comes to regulating the practice of evictions. Not only have evictions been explicitly addressed in section 26(3) of the Constitution, but legislation given effect to the right against arbitrary evictions has been enacted. The main pieces of legislation are the *Extension of Security of Tenure Act* No. 62 of 1997 and the *Prevention of Illegal Evictions From and Unlawful Occupation of Land Act* No. 19 of 1998. The latter statute repeals the notorious *Prevention of Illegal Squatting Act*, 1951.

Article 26(3) of the Constitution states that:

"No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

Because forced evictions are rarely addressed within national constitutional frameworks, it is all the more admirable that this provision finds such clear recognition in the supreme law of the country. Apart from South Africa and the 1986 Philippines Constitution, there are few national constitutions that treat forced evictions as a discreet human rights issue.

The *Extension of Security of Tenure Act*, 1997 represents an innovative effort by South African legislators to extend basic security of tenure rights to rural dwellers in South Africa. International legal standards on housing rights have repeatedly urged governments to accord all dwellers with security of tenure which is sufficiently strong to protect them from evictions. The UN Committee on Economic, Social and Cultural Rights in a General Comment adopted on the right to adequate housing has urged States to "take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection" (General Comment No. 4, 1991). This view has been echoed by bodies such as the UN Commission on Human Rights when it implored States to "confer legal security of tenure on all persons currently threatened with forced eviction and to adopt all necessary measures giving full protection against forced eviction" (Res. 1993/77).

In a welcome departure from traditional housing law in many countries, the *Extension of Security of Tenure Act*, establishes the duty of the Minister of Land Affairs to grant subsidies to "enable occupiers, former occupiers and other persons who need long-term security of tenure to acquire land or rights in land." (sec. 4). The Act also explicitly outlines the rights and duties of occupiers and

owners, emphasizing in section 5 that these groups have the right to human dignity, freedom and security of the person, privacy, freedom of religion, belief and opinion and of expression, freedom of association and freedom of movement. Section 6 gives occupiers the right to security of tenure, as well as a number of other specific rights tied to their occupancy of the land, including the right to family life and not to be denied or deprived of access to water or to educational or health services. The Act also stipulates the conditions under which an occupier's right of residence may be terminated. Such terminations must be just and equitable, having regard to a number of relevant factors. Evictions may occur only pursuant to a court order, and must be subject to fair procedures such as the giving of not less than two calendar months' written notice of the intention to obtain an order for eviction. The power of courts to grant eviction orders may only be exercised when it is just and equitable to do so. In deciding whether it is just and equitable, the court must have regard to the following factors: the period of occupation, the fairness of the terms of any agreement between the parties, whether suitable alternative accommodation is available to the occupier, the reason for the proposed eviction, and the balance of interests between all affecting parties, including the remaining occupiers on the land (section 11).

Although the *Prevention of Illegal Evictions From and Unlawful Occupation of Land Act*, 1998 has been the subject of much controversy within South Africa, in many respects this law also provides a positive model for other countries in relation to the regulation of evictions. The Act does not prohibit forced evictions outright (to do so would be impossible in any country). However, it does clearly prohibit *unlawful evictions* and provides for a range of criteria based on "*just and equitable*" criteria prior to any lawful eviction being carried out. A distinction is made between persons who have occupied land for less than six months and those who have occupied land for longer than six months. Those who have occupied the land for longer than six months are entitled to have the availability of alternative accommodation considered as one of the relevant circumstances which a court must consider in deciding whether it is just and equitable to issue an eviction order. Regardless of the period of the occupation, the court must consider the rights and needs of the elderly, children, disabled person and households headed by women before granting an eviction order. In the case of an eviction order being sought by an organ of state (e.g. a municipality), the court must consider the circumstances of the occupation, the period of residence on the land, and the availability of suitable alternative accommodation. The Act also prescribes fair procedures (e.g. notice provisions), for evictions, and lays down the circumstances in which urgent proceedings for evictions may occur. These provisions are in marked contrast to the *Prevention of Illegal Squatting Act*, 1951 which permitted the summary eviction and demolition of informal settlements without a court order. Finally, the law prohibits anyone from encouraging the unlawful occupation of land. While these provisions are certainly a great improvement on earlier laws, the courts should also exercise their discretion to protect short-term occupiers from homelessness caused by evictions.

In a world where 'illegal squatters' are commonly characterized as criminals and where homeless persons face criminal sanctions (as in the United States), these two pieces of legislation not only give effect to the Constitution, but provide a positive example to the international community. Tenure insecurity is born of poverty, and private property driven housing markets usually fail miserably to provide access to legal affordable housing to low-income groups

International legal developments

South Africa's domestic attention to regulating the practice of forced evictions in a manner consistent with human rights, has been accompanied by recent international legal developments addressing the same themes. The international human rights community has largely ignored forced evictions as a key human rights issue. During the Cold War period, the international community was able to adopt a common approach to States such as South Africa that were clearly racially motivated and already outcasts in the community of nations. However, little attention was paid between the adoption of the Universal Declaration of Human Rights in 1948 and 1990 to the general global phenomenon of forced eviction, even though these state-sponsored policies resulted in millions of persons losing their homes each year. Leading human rights scholar Prof. Theo van Boven has said that "the issue of forced removals and forced evictions has in recent years reached the international human rights agenda because it is considered a practice that does grave and disastrous harm to the basic civil, political, economic, social and cultural rights of large numbers of people, both individual persons and collectivities".

During the 1990's forced evictions have gone from being viewed as a human rights issue almost entirely synonymous with apartheid-era South Africa (but largely neglected elsewhere), to a practice that has received previously unparalleled attention. Evictions have been the subject of a range of international standard-setting initiatives, and forced evictions carried out or planned by governments have been widely condemned. In the past few years, governments ranging from the Dominican Republic, Panama, Philippines, South Korea, Turkey, Sudan and others have been singled out for their poor eviction records and criticised accordingly by UN and European Human Rights bodies.

Just one year ago, the UN Committee on Economic, Social and Cultural Rights adopted the most far-reaching statement on forced evictions in its General Comment No. 7. (an interpretative statement relating to article 11 of the International Covenant on Economic, Social and Cultural Rights). The May 1997 text significantly expands international legal protection against arbitrary forced evictions. It was described by Committee Chairperson, Prof. Philip Alston, as "a major statement by the Committee in response to one of the most significant problems we have to confront. We hope this is the start of a fundamental rethinking by governments of their frequent and ill-advised resort to forced evictions to deal with broader social problems".

In addition to reaffirming that forced evictions are a clear violation of the housing rights provisions of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 7 breaks new ground by declaring that "evictions should not result in rendering individuals homeless or vulnerable to the violation of other human rights". General Comment No. 7, which came about through NGO-driven efforts at the Committee, reiterated the important contents of the Committee's General Comment No. 4 (adopted in 1991) on the right to adequate housing. This General Comment observed that all persons should possess "a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats." In addition to these measures, nearly a dozen resolutions of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities and the UN Commission on Human Rights have considered forced evictions since 1991. South African courts adjudicating eviction orders should consider these international human rights provisions which are directly relevant to the exercise of their discretion under the new legislation.

SA's role in global efforts against arbitrary evictions

In view of these developments, it would seem both logical and reasonable to merge South Africa's many positive initiatives on evictions with the recent global efforts to redress decades of non-action on forced evictions by international law-making bodies. In spite of the advances of the past several years, the worldwide scale of eviction remains as massive as ever. In Lagos, Nigeria, despite pressure from the UN and elsewhere, 1.2 million people are under threat of eviction as a consequence of a World Bank financed drainage scheme. In China, more than a million people continue to face pending eviction due to the construction of the Three Gorges Dam project. The Centre on Housing Rights and Evictions estimates in a recent report, *Global Survey on Forced Evictions No. 7(1998)*, that as of May 1998, more than 13 million people are currently under threat of losing their homes due to planned evictions.

South Africa has radically changed its approach towards forced evictions and its initiatives need to be shared more widely with the outside world. The government of South Africa is ideally placed to take the lead in global efforts against forced evictions and other coerced movements of people whether it be in the context of Bosnia-style ethnic cleansing, Rwandan genocide and resulting land grabs, or Burmese village destruction. The human rights history books are full of evidence that if a single government feels compelled to secure the recognition and protection of a particular human right, this can certainly be achieved.

Some may be concerned that efforts towards even more comprehensive attention to forced evictions would come to naught and thus risk political embarrassment for the government that championed this cause. There is also the real issue of being overburdened, given the leadership role in many spheres that South Africa is expected to play. At the very least, even presuming South Africa is not currently prepared to lead such efforts, concerted action against forced evictions could form an increasingly important profile within South Africa's foreign policy. The government can raise concerns directly with governments which today carry out evictions almost as if they were taught by the apartheid rulers of the 1970s or 1980s, just as other governments raised such matters with the apartheid government when it went about callously evicting South Africans from their homes in the past.

In the legal sphere, the progressive manner in which evictions have been legislatively addressed in South Africa, makes the country well-placed to be at the forefront of further international standard-setting on forced evictions. In June 1997, a UN Expert Seminar comprised of various legal experts on the practice of forced evictions adopted the "*Comprehensive Human Rights Guidelines on Development-Based Displacement*".

COHRE is an independent human rights organization dedicated to ensuring the full enjoyment of the human right to adequate housing for everyone. COHRE pursues this objective through reliance upon the full spectrum of civil, cultural, economic, political and social rights. COHRE is committed to local and national capacity-building in the area of economic, social and cultural rights and places particular emphasis on securing the housing rights of traditionally disadvantaged groups, including women, children and ethnic or other minorities.

COHRE also focuses extensively upon monitoring and campaigning against all types of forced evictions wherever they occur or are planned, and releases regular reports on evictions throughout the world. It campaigns directly against large-scale planned evictions and has, in several instances, assisted in preventing planned massive evictions from being carried out.

COHRE is in the process of establishing COHRE Africa which will focus on forced evictions and related themes throughout the continent. NGOs, community-based organizations, human rights advocates or others requiring assistance in pursuing international legal remedies or procedures, in directly accessing the UN's human rights bodies, or in applying international law locally are encouraged to contact COHRE. Likewise, groups engaged in efforts against planned forced evictions or those seeking redress for past evictions can also get in touch with COHRE, as can NGOs and CBOs interested in COHRE's housing rights training programmes.

The International Secretariat of COHRE can be contacted at: 83 Rue de Montbrillant, 1202 Geneva, Switzerland, tel/fax: 41.22.7341028, E-mail: sleckie@ibm.net. COHRE's Women and Housing Rights Programme can be reached at: 5/43 Broadway, Elwood (Melbourne), 3184 Australia, tel/fax: 61.3. 95312773, E-mail: farwise@ibm.net.

These detailed guidelines should be adopted by the UN General Assembly and, were South Africa to lead this effort, the chances of success would surely rise.

South Africa has announced that it will shortly ratify the International Covenant on Economic, Social and Cultural Rights. Once it does so, the government could use this occasion to assist in raising the stature of this invaluable treaty, and lend support to the rapidly growing movement to reinvigorate economic, social and cultural rights. A surge of support for renewed action on economic, social and cultural rights has been evident in recent months at the international level. Again, South Africa's progressive Constitution, which includes justiciable economic, social and cultural rights, is a powerful source of inspiration in these efforts.

Making up for decades of indifference, the UN human rights programme, now led by former Irish President, Mary Robinson, has at last begun treating all human rights equally. A well-conceived and constructive policy has been adopted based (for the first time) on the indivisibility of rights. As the UN High Commissioner for Human Rights, Mary Robinson rarely, if ever, makes a public statement without an explicit mention of the fundamental importance of economic, social and cultural rights. The recent session of the UN Commission on Human Rights (which ended in late April) went further than ever before in affirming and establishing concrete mechanisms on this group of rights. The Commission, chaired by Mr. Selebi of South Africa, appointed a Special Rapporteur on the right to primary education, an independent expert on human rights and extreme poverty, and an independent expert on the right to development.

The efforts by South Africa to regulate the practice of forced evictions are a clear indication that the government will not tolerate the eviction-related abuses that were a feature of the apartheid era. It is hoped that the Truth and Reconciliation Commission will also address the human rights violations which occurred in the context of the violent relocations and forced removals of apartheid. Equally, the South African Human Rights Commission should play a central role in monitoring evictions in the country to ensure that they take place only in accordance with the new laws. Through its constitutional mandate to monitor socio-economic rights, the Commission has a unique opportunity to provide a positive role-model for other national human rights bodies on how to redress violations of economic, social and cultural rights.

The new South African government has been called upon by many groups, movements and nations throughout the world to lend assistance and support to concerns ranging from human rights, social justice and the protection of the most vulnerable and disadvantaged. It is recognised that the government simply cannot accede to all such requests. However, were the South African government to consciously and very publicly promote economic, social and cultural rights issues, including the proper regulation of forced evictions, in the international arena, there can be little doubt that meaningful and permanent progress will occur. Conversely, if South Africa only looks inwards, a unique opportunity for global leadership against violations of economic, social and cultural rights will sadly be lost.

** Scott Leckie is Director of the Centre on Housing Rights and Evictions (COHRE) which is based in Geneva, Switzerland.*

Health And Human Rights

Focus On The White Paper On Health

by Karrisha Pillay

While the South African Constitution recognises the right of access to health care services, inadequate access to basic health care services still plagues the lives of the majority of people in South Africa. The legacy of apartheid has resulted in a fragmented and discriminatory health system which poses a significant challenge for the first democratic government.

The Constitution places a duty on the State to take reasonable legislative and other measures, within its available resources, to progressively realise the right to health. Like the other rights in the Bill of Rights, the State must respect, protect, promote and fulfil this right. The White Paper on Health is the primary policy framework through which the Ministry and Department of Health seek to give effect to this constitutional right.

The White Paper on Health was released in April last year. This paper will examine certain critical aspects of the White Paper from the perspective of the constitutional right to health.

Accessibility, affordability and equity

Through the White Paper, the Department of Health undertakes to promote and monitor access to health care services in an effective, equitable and holistic way through the primary health care approach. Its overall goal is to provide basic health care for all South Africans within 10 years. In order to attain this goal, first priority is given to the development of the district health system which consists of integrated primary health care and district hospital services. To achieve the progressive realisation of the right, it provides for an increase in the average number of public primary health care consultations with priority being accorded to under-serviced areas.

Although the primary health care approach is the key mechanism through which health care services are to be provided to the people of South Africa, the White Paper fails to provide a comprehensive definition of exactly what is meant by the "primary health care approach". The primary health care approach is described in the Declaration of Alma Ata which was adopted by the World Health Organisation (WHO) in 1978. The essential aspects of this Declaration are:

- an emphasis on preventative health measures (such as immunisation and family planning) rather than on curative measures;
- the importance of participation of individuals and groups in the planning and implementation of health care;
- an emphasis on maternal and child health care;
- the importance of education on health problems;
- giving high priority to the provision of health care to vulnerable and high risk groups, such as women, children and underprivileged elements of society; and
- equal access of individuals and families to health care at a cost the community can afford.

It is accordingly evident that the primary health care approach places extensive emphasis on prevention, participation, education, affordability and equality with a special concern for vulnerable and disadvantaged groups. Although the White Paper on Health provides no comprehensive definition of primary health care, many of these principles are reflected throughout the White Paper.

One of the goals of the White Paper on Health is to unify fragmented health services at all levels into a comprehensive and integrated national health system in order to ensure equitable and accessible health care services to all. Certain responsibilities for health services are devolved to the provincial and municipal levels. A key aspect of the primary health care approach is to facilitate a shift from an over-emphasis on hospital-based care towards the prevention of ill health by making health services available at the community level. The White Paper seeks to restructure the organisation of health services to achieve this goal. In so doing, it gives distinct functions to the national department, the provinces, and the districts and municipalities.

At national level, the White Paper describes the functions, powers and duties of the different directorates within the Department of Health.

In dealing with the provincial health departments, the White Paper provides that provincial health departments must, within the framework of national policies, strategies and guidelines, promote and monitor the health of people in the province, and develop and support a caring and effective provincial health system. It aims to attain this goal through the establishment of a province-wide district health system based on the principles of the primary health care approach. Provincial departments will perform the functions of the district health authorities until the latter are established.

A national committee, representing national and provincial health departments, was established to develop the district health system. Thus far, it has unanimously agreed on the following principles being of paramount importance in developing the district health system: overcoming fragmentation, equity, comprehensive services, effectiveness, efficiency, quality, access to services, local accountability, community participation, decentralisation, development, an insectorial approach and sustainability. The envisaged role of the district is to undertake the planning and management of all local health services for persons within a particular district. Teams within the district health system must arrange for the delivery of a comprehensive primary health care package and district hospital services within national and provincial policies and guidelines. The ultimate aim is to ensure that the district health system covers all communities and offers an essential package of care. The district health systems are also responsible for ensuring effective referral networks and systems to secondary and tertiary levels through co-operation with other health districts. In short, the system is aimed at improving access to comprehensive and affordable health services through the district health system.

Emergency medical treatment

Section 27(3) of the Constitution clearly provides that no one may be refused emergency medical treatment. The right to emergency medical treatment is significant in the sense that it is not subject to the internal qualifiers of "access", "progressive realisation" or "within its available resources". This means that it is likely to be more stringently enforced by the Courts. Clarity is required through legislation and policy on the scope of "emergency medical treatment" and the duties of various organs of state in relation to this right. The recent Constitutional Court decision in the dialysis case highlighted this need (*Soobramoney v Minister of Health, KwaZulu-Natal* 1997(12) BCLR 1696 (CC)). However, surprisingly, the White Paper on Health devotes little attention to this right.

Equity and special measures

In accordance with the primary health care approach, the White Paper seeks to promote equity by increasing access to integrated health care services for all South Africans. Particular attention is given to the rural, peri-urban and urban poor, the aged, as well as women and children with an emphasis on vulnerable groups the Constitution and the primary health care approach encourages. It further aims to establish health care financing policies to promote greater equity between different sectors of the community.

However, while the White Paper's commitment to focusing on vulnerable and disadvantaged groups is laudable, it has certain limitations in relation to the concrete strategies and measures through which these interests are going to be addressed in the provision of health services. For example, the fact that women are much more susceptible to the transmission of HIV/AIDS and sexually transmitted diseases than men are, or that rural women are disproportionately affected by cervical cancer, call for special measures in addressing these issues, which the White Paper on Health fails to spell out.

Health education

The development of health promotion activities is another important goal of the White Paper on Health. The aim of health promotion is to "improve the health of all South Africans through creating a social, political, economic and physical environment which helps individuals to make healthy choices easy." (Ch. 18, p. 178). In developing health promotion activities, the White Paper adopts the principles that underpin the World Health Organisation Movement which include the principles of equity, empowerment, respect, participation, intersectoral activity and the highest standards of practice. It further acknowledges that traditionally health promotion activities have been targeted at literate, urban based audiences. This limited focus is inadequate to meet the needs of the majority of people in the country. The White Paper makes a renewed commitment to foster health promotion activities that are targeted at the most underserved, vulnerable and disadvantaged groups in society.

Community participation

A fundamental aspect of the primary health care approach is to ensure community participation in the provision of health care services. This is reflected in the White Paper by seeking to involve communities in various aspects of the planning and provision of health services, to establish mechanisms to promote public accountability and dialogue between the public and health providers, as well as to encourage communities to take greater responsibility for their own health needs.

Improving public sector health monitoring and planning

The Department of Health aims to develop a national health information system that will facilitate the monitoring and measurement of health services in the country. Proper information systems are a vital element in achieving the progressive realisation of socio-economic rights such as the right to health. A further policy aim of the White Paper is to build capacity at the provincial, district, local and community levels to develop plans based on priority issues and to ensure appropriate and cost effective interventions.

Conclusion

The constitutional recognition of the right of access to health care services marked an initial victory for millions of South Africans. As has been noted, the White Paper on Health seeks to make health services accessible, affordable and equitable with particular attention being accorded to disadvantaged and vulnerable groups. It further seeks to educate the public on issues of health, to foster community participation in the provision of health services as well as to facilitate the monitoring of health services. It accordingly represents an impressive policy framework within which access to health care services will be provided. The challenge is to ensure that subsequent legislation is enacted which provides mechanisms for the effective and efficient implementation of these policy commitments.

A solid, rights-based policy foundation has been laid for advancing access to health care services for the majority of people in this country. However, without adequate resources to implement these policies, the right will never become a reality.

On 18th March 1998, the Economic and Social Rights Project at the Community Law Centre together with the ANC Women's Caucus made a submission at the public hearings convened by the Portfolio Committee on Health on the Health White Paper. This submission focused on the human rights dimensions of the White Paper with a particular emphasis on women's health issues. A comprehensive written submission has been prepared on the White Paper. Copies of this submission are available on request from our project administrator, Sonja Le Grange (tel: 021-9593708) subject to a reasonable fee to cover copying and postage charges.

Human Rights And Social Security

Current Issues In South Africa

by *Sandy Liebenberg*

Underlying the notion of human rights is the idea that each individual should be the subject of value and concern by society. People should not be treated as means to an end, nor should their suffering be a matter of indifference to society. Arguments that the well-being of individuals can be sacrificed in the interests of long-term growth and development are inconsistent with a commitment to human rights. The rising tide of economic growth may eventually raise the overall economic well-being of the society, but in the meantime people's needs cannot be ignored. Society has an on-going duty to see that its most vulnerable and disadvantaged members are not washed up on the shores of destitution.

By giving effect to human rights through constitutional provisions and ratification of international human rights treaties, the State accepts that it can be held accountable through legal mechanisms for the way it treats those under its power. As Judge Chaskalson observed in the recent case of *Soobramoney v Minister of Health, KwaZulu-Natal* 1997(12) BCLR 1696 (CC), the transformation of the conditions of poverty and inequality in our society "lies at the heart of our new constitutional order." This commitment is reflected in a number of provisions in our Bill of Rights, "but in particular in sections 26 and 27 which deal with housing, health care, food, water and social security." (at paras. 8 and 9).

Section 27 gives everyone the right "to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance". The State is under a duty to take "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of this right. When South Africa ratifies the International Covenant on Economic, Social and Cultural Rights (1966), it will be bound under international law to give effect to the right of everyone to social security (article 9) and to an adequate standard of living (article 11).

Social security has a vital role to play in poverty alleviation and ensuring that everyone has a minimum income to meet their basic needs. In the South African context of deep poverty and inequality inherited from the past, social grants in the form of old age pensions, disability grants and maintenance grants represent a vital lifeline to millions of poor people until the effects of longer term development strategies can be felt. A policy commitment to ensuring "comprehensive social assistance to those without other means of support" has been made in the *White Paper for Welfare* which affirms that no-one "should have to live below minimum acceptable standards." (Ch. 7, paras. 26 and 27).

How are those departments responsible for welfare at national and provincial levels doing in giving effect to these political and human rights commitments? There have undoubtedly been significant achievements in rectifying the fragmented, inequitable and fraud-ridden welfare system inherited from the apartheid government. However, recent developments also point to certain shortcomings in giving effect to human rights principles in welfare policy and legislation.

The new child support grant

On 1 April 1998, the new child support grant came into effect, entitling the primary care-givers of children under the age of 7 years to a grant of R100 per month per child. It replaces the old system of state maintenance grants which will be phased-out over a three-year period though annual reductions in the amounts payable to the beneficiaries. There are many positive features of the new grant, particularly the fact that it is payable to the primary care-giver of children thus breaking with nuclear models of the family which are inappropriate in the South African context.

A central goal of the new grant is to ensure that it is more equitably distributed among a much larger number of children than were reached by the state maintenance grant. The target of the child support grant is 3 million children over a five-year period as compared to the approximately 203 000 children who received the state maintenance grants. If this goal is to be reached the following conditions must be met:

- the grant must be adequately budgeted for at national and provincial levels;
- it must be administered fairly, efficiently and transparently; and
- it must be accessible to poor women who, in most instances, will be the primary care-givers of children.

Given that social grants are administered by the provinces, a critical issue is whether sufficient funds will be transferred to the provinces to pay all primary care-givers who qualify for the grant in terms of the regulations. However, the increase from the 1998/1999 overall welfare budget of R19 billion to the 2000/01

budget of R21 billion in the medium-term expenditure framework only keeps pace with predicted inflation rates. It is difficult to see how this budget will accommodate the additional expenditure on the child support grant if the promised 3 million children are to be reached. What if, as happened in the Eastern Cape pensions crisis, certain provinces run out of money for the child support grant? Will needy children and their care-givers be turned away? Without proper budgeting for the grant at national level, the goal of achieving equitable access to the grant throughout South Africa will be frustrated.

Another cause for concern is the two-tier means test for determining who is eligible for the grant under the regulations. In terms of this test, a primary care giver will qualify for the grant if the "*household income*" of the household of which he or she is a member is below R9 600 per annum or, if the child and the primary care-giver either live in a rural area or in an informal dwelling, R13 200 per annum. Household income is defined to mean "any contribution in the form of money, food, or other household necessities to the household and any contribution to the cost of the accommodation of the household." The South African National NGO Coalition (SANGOCO) has repeatedly called for a simple means test based on the income of the primary care-giver (as opposed to household income) which is transparent and easy to administer. This is particularly important in view of the fact that the child support grant requires a doubling of the capacity of the welfare system to process grants. The present system is already over-burdened with huge back-logs in poverty-stricken areas. The current means test is unnecessarily complex, and will disadvantage those primary care-givers who live in large households which is also where the poorest children in South Africa live.

In addition, the regulations impose a number of conditions on primary care-givers seeking to qualify for the grant. These include making showing proof of "efforts to secure maintenance" for the child from the parent/s of the child and of immunisation of the child where these services are available. The primary care-giver can only qualify for the grant if he or she does not "without good reason" refuse to accept employment or participate in any development programme. This excessive conditionality vests a large degree of subjective discretion in administrative officials and paves the way for inequities and abuse. For example, what will be regarded as "a good reason" for refusing to take up employment or to participate in a development programme? What if the primary care-giver refuses for the very reason that she is the only person who can take care of her young child during the day? The other danger of these conditions is that they will deter primary care-givers from seeking assistance on behalf of the children in their care, and will place barriers in the way of poor people seeking to access the grant. Similar conditions are not imposed on old age pensioners.

A critical challenge facing the Ministry and Department of Welfare is to work towards the progressive improvement of this basic grant. Future goals should include extending the grant to poor children over the age of 7 years old, and raising the level of the grant so to make a more substantial contribution to the costs of supporting impoverished children. At the very least, the grant should be adjusted on an annual basis to keep pace with inflation.

The elimination of "ghosts"

Attending the Poverty Hearings organised by SANGOCO, the Commission for Gender Equality and the SA Human Rights Commission in the Eastern Cape, one is struck by the depth of hardship and suffering resulting from the way certain

provinces have handled the process of re-registering grant beneficiaries. This process is part of a national initiative to combat fraud in the welfare system by, amongst other measures, eliminating so-called "ghost-beneficiaries".

Many of the elderly, disabled and poor families who testified at the hearings are teetering precariously on the breadline. They are saved from falling into utter destitution by the grants they receive monthly from the provincial welfare department. Many beneficiaries of these grants found themselves in desperate straits when their grants were suspended late last year in the re-registration drive. Rent, electricity, burial policy payments and food needs could not be met, and the debt burden of these families increased as they struggled for survival. Many have not yet had their grants reinstated.

Many people claimed that they were not warned about the cut-off, nor told of the reasons why their grant payments were suddenly stopped. Some even claimed to have been mocked by indifferent officials in the face of their desperate enquiries. Others do not understand how to go about re-registering for their grants while the chronically disabled, bed-ridden elderly persons, and those that cannot afford transport costs are simply unable to do what is required to get their grants reinstated (e.g. get the necessary doctor's certificates, proof of income etc). The chairman of the Standing Committee on Welfare in the Eastern Cape, Mr. Serache informed the poverty commission in East London that some welfare officials are suspected of having placed the "ghost beneficiaries" on the system and of pocketing grant payments. In the re-registration process, it is possible that they are eliminating genuine beneficiaries, and keeping the lucrative "ghosts" on the system.

Efforts to eliminate fraud are not only laudable, but essential to achieve universal access to a sustainable social security system. However, to conduct the process of re-registration in the manner just described is contrary to all human rights standards. A blanket suspension of grants violates the right of access to social security as well as the right to just administrative action. Grants should be reviewed individually, and only suspended when it is reliably ascertained that the beneficiary does not meet the legal requirements for eligibility. The national Department of Welfare should play a central role in ensuring that this unacceptable process which occurred in certain provinces is not repeated, and that needy beneficiaries are reinstated as a matter of urgency.

Regressing on social security rights

The government has said on a number of occasions that old age pensions constitute one of its most powerful tools in poverty alleviation. Old age pensions are the largest portion of the social security budget, and are paid to about 1.7 million beneficiaries, most of whom live in rural areas.

It is well-known that owing to administrative shortcomings many pensioners and other social grant recipients wait for long periods for their grant applications to be processed, and for the much-needed payments to arrive. Until 1 April 1998 the legal position was that a social grant accrued from the date that the applicant attested his or her application for the grant. This meant that if a pensioner waited a year from the date of her application for her pension to be paid (not an uncommon situation), she would receive back-pay for the whole period from the date of application.

In terms of the new regulations which came into effect on 1 April 1998, the right of social grant recipients to back-pay is severely restricted. In terms of these regulations, a grant accrues on the date that it is approved by the Director-General, and the maximum period for which back-pay may accumulate is 3 months from the date of approval of the grant. The limitation of back-pay to three-months will affect pensioners, disability and child support grant recipients. In a press release issued by the Minister of Welfare on 15 April 1998, this measure was justified on the basis that it would improve administrative efficiency in processing grant applications. The Minister states that "it was unacceptable that South Africans living in poverty should have to wait for longer than three months for their applications to be finalised and payment to begin."

While we wholeheartedly endorse this statement, it is hard to see how the new measure will encourage a more efficient bureaucracy as the Minister claims it was designed to do. In fact, just the opposite result is likely: the longer it takes to process grant applications, the less money will have to be spent from welfare budgets. The net effect of this measure will be to drastically reduce the amount first-time grant recipients receive from the State.

In the light of the fact that a person becomes entitled to receive a social grant upon approval of their application by the Director-General, the legal basis for restricting back-pay to three months when there is a long delay between approval and payment is highly dubious. This cut-back represents a retrogressive measure in relation to social security rights, and is likely to be challenged in court in the near future. We urge the Minister to reconsider this measure, and to devise alternative strategies of improving administrative efficiency without penalising the most vulnerable members of our society.

A background paper on social security was prepared by Alison Tilley of the Black Sash, and Sandy Liebenberg of the Community Law Centre for the Poverty Hearings held in the Eastern Cape from 18 to 23 May 1998. Copies of this paper are obtainable through our project administrator, Sonya Le Grange (tel: 021 - 959 3708) or from SANGOCO (tel: Laura Maxwell-Stuart at 011 - 403 7746).

Update On The SA Human Rights Commission

Switching On The NGO Monitor Screens

by Christof Heyns

The South African Human Rights Commission has decided to make the realisation of socio-economic rights one of its three primary focal areas during 1998-99, the others being equality and the administration of justice.

The Human Rights Commission has a general constitutional mandate to monitor the realisation of all human rights, but it also has a special mandate in relation to socio-economic rights. Section 184(3) provides that, each year, the Human Rights Commission must require the relevant organs of state to provide it with information on the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment. In terms of section 184(1) the Human Rights Commission must "*monitor and*

assess" the observance of human rights in South Africa. This duty obviously includes socio-economic rights.

According to Louisa Zondo, Chief Executive Officer of the Human Rights Commission, the Commission will monitor the progressive realisation of socio-economic rights in terms of these sections. She has said that the programme of the Human Rights Commission will involve improving the system for monitoring socio-economic rights, and conducting workshops on socio-economic rights with the relevant organs of state.

As was reported in the previous edition of *ESR REVIEW*, requests for information were sent out by the Human Rights Commission to the relevant organs of state in December 1997, together with guidelines on how to report. The requests were directed to relevant organs of state in the national and provincial spheres of government, and to some extent, also the local sphere. The information received is being analysed by the Commission, with the assistance of a special research team that has been set up for this purpose.

The Human Rights Commission has resolved that an analysis of the information provided by the relevant organs of state, the information emerging from the Poverty Hearings (being organised jointly by SANGOCO, the Human Rights Commission and the Commission for Gender Equality), as well as the outcome of focus groups on socio-economic rights being conducted by the Community Agency for Social Enquiry (CASE), will form the basis of a composite report on socio-economic rights. This report will be tabled in Parliament by the Commission.

A central issue is the role of non-governmental organisations, and providing a meaningful opportunity for them to make inputs in the process describe above. It is a well known fact that the role of NGO's has been vital in ensuring the success of international reporting mechanisms. For example, Phillip Alston, the chairperson of the UN Committee on Economic, Social and Cultural Rights, who recently visited South Africa has advocated greater NGO participation in the deliberations of UN human rights bodies in the following terms:

"Experience in all the various UN human rights organs clearly demonstrates the critical need for supervisory bodies to have access to alternative sources of information when examining and evaluating the reports received from governments."

In the South African context organisations such as COSATU have called for access to the information provided to the Human Rights Commission by the organs of state, and for public hearings where comments can be made on this information. According to Kenneth Creamer of COSATU's parliamentary office:

"In addition to arguing for better interpretations by the courts, the Human Rights Commission's reporting mechanism offers an extremely important vehicle for progressive engagement with socio-economic rights in that it constitutes an institutionalised annual review of the extent of socio-economic rights' delivery. To ensure that appropriate information is gathered it is important that public hearings are arranged to allow space for critical intervention and to allow for comment on information provided by government departments."

Similarly, the Black Sash has also called on the Human Rights Commission to make the reports submitted by government departments available to NGO's for comment.

Jacqui Boule, the Programmes Director of SANGOCO, comments as follows:

"The [socio-economic] rights in the Constitution are new, uncharted rights that can only be defined by a process of struggle and engagement. As such, it is critical that as many voices are heard as possible in the process of defining the meaning of the new rights and the responsibilities they place on government. We therefore feel it is critical that NGO's are given a chance to engage with government's responses before they are finalised. The first definition is often the lasting one and should therefore be as inclusive as possible."

What role then does the Human Rights Commission envisage in the present process? The approach adopted by the Human Rights Commission is that civil society will not be provided with the information received by the Commission from government departments until such time that the provisional composite report (referred to above) has been prepared. NGO's are naturally at liberty, according to the Commission, to request the information directly from the relevant government departments. Once the provisional report is compiled, there will be a consultation process with NGO's on the report. It is at this stage that NGO's will be provided with the "raw" information provided by government departments, and will have an opportunity to give inputs.

The above procedure places the monitoring of socio-economic rights by the Commission on track, but it will be important to reassess the manner in which NGO's are involved in the process in future years. The participation of NGO's in a process that is widely perceived to be open and transparent right from the start is vital to the long-term success of this monitoring mechanism.

Granting NGO's access to the information provided as soon as it has been received will tie in with the sentiments expressed by the Chairperson of the Human Rights Commission, Dr Barney Pitso, that *"the implementation of social and economic rights requires democratic participation by society at all levels: an informed civil society, a democratic government and all state institutions which monitor and inspire human rights action."*

In commenting on the monitoring role of the Human Rights Commission in relation to socio-economic rights, Shirley Mabusela, Deputy Chairperson of the Commission, said the following during a recent Constitutional Week celebration:

"People on the ground need to be able to tell the Human Rights Commission and government what the situation is on the ground. Government must be told by people you wrote this in the report, but this is how we live, this is what our material conditions are. Members of the public need to engage in this process. The Human Rights Commission cannot be the only watchdog."

It is consequently suggested that in future years the public at large and NGO's in particular should have access to the information provided by the organs of state soon after it has been submitted to the Commission. NGO's and individuals should then be given time to submit "shadow" or alternative reports. In compiling a report assessing the progress made in the realisation of socio-economic rights in South Africa, the Commission should consider both the information provided by government, and alternative information submitted by NGO's, CBO's, trade unions etc. This will approximate more closely what happens at the international level. If a more inclusive procedure is followed from the start, it will not be necessary for the Commission to submit its draft report to the public before it is tabled in Parliament.

This approach will not only promote a more balanced assessment, but will also place a wealth of resources and experience at the disposal of the Human Rights Commission, free of charge. Expensive focus groups on socio-economic rights serve a limited purpose and, in the long run, cannot be sustained. Sustainable sources of information must be tapped in order to measure the progressive realisation of socio-economic rights over time. There are many highly specialised and experienced NGO's in the country who, over the years, can make an indispensable contribution to the development of this important and exciting mechanism aimed at promoting socio-economic justice in South Africa.

Hard Cases

A Review Of Recent Cases And International Developments

by Danie Brand and Frans Viljoen

In the previous issue, we reviewed reported cases dealing with economic and social rights. No new relevant cases have been reported since the last edition. The review in this issue consequently only gives a brief and general overview of cases pending before South Africa courts. The main focus will be on South Africa's duties under international law in relation to economic and social rights.

A. Case Review

A large number of cases dealing with economic and social rights are currently pending in the High Courts or have recently been decided in these courts. These cases mostly concern the right of access to social security and assistance (section 27(1)(a) of the Constitution), the right of access to sufficient water (section 27(1)(b)), and the right of access to adequate housing (section 26).

Cases dealing with social security and assistance were generally prompted by extreme cases of administrative delay in dealing with applications for social security benefits, or by maladministration in the paying out of existing social security entitlements. A large number of these cases are currently in the pipeline in the Eastern Cape Province, and are in the process of being heard in KwaZulu-Natal.

Cases relating to the right of access to sufficient water in general deal with situations in which people's water supplies have been cut off due to non-payment of rates. These cases take the form of applications for an order for a "trickle supply" of water to be provided. A number of such cases have been decided or are pending in the Eastern Cape and the Western Cape Province.

Cases dealing with the right to housing have focused on section 26(3), alleging unlawful evictions.

Practitioners have employed divergent strategies in dealing with cases that have to do with economic and social rights. In only a few cases is direct reliance placed on the economic and social rights in the Constitution. Rather, practitioners have shown a tendency to rely on existing common law or legislative remedies to obtain redress. For instance, a number of applications for a "trickle supply" of water have been based on spoliation rather than the right of access to water. Social security cases are commonly brought on administrative law grounds, with

the right of access to social security generally employed only as a back-up strategy.

This tendency is worrying, although it may be understandable in the context of conservative approaches adopted by magistrates and judges. If economic and social rights are to have a meaningful impact on our society as they were intended to have, practitioners will have to be open to innovative new strategies. New thinking is required to develop the application and interpretation of these rights. Only by raising arguments based on the socio-economic rights in the Constitution will the frontiers of jurisprudence in relation to these rights be expanded.

B. International law developments

International human rights instruments that include socio-economic rights have been adopted at the global and regional levels.

At the global level, these instruments have been adopted under the auspices of the United Nations (UN). The most important of these are the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination, 1966 (CERD), the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW), and the Convention on the Rights of the Child, 1989 (CRC).

The African Charter on Human and Peoples' Rights, 1981 (the African Charter) was adopted under the auspices of the Organisation of African Unity (OAU).

South Africa has, as at the date of writing, ratified all of these treaties with the exception of the ICESCR and CERD. However, it will become a party to the latter two treaties shortly. These instruments impose a reporting obligation on States parties in terms of which they must report periodically to the relevant treaty monitoring bodies on the measures that they have adopted and the progress made in achieving the observance of the rights recognised in the particular treaty. The reports that the government prepares in fulfilment of this obligation, and the analysis and evaluation of the reports by the treaty monitoring bodies are potentially valuable sources of information on the realisation of economic and social rights in the country concerned, as well as on the interpretation and normative content of these rights.

The multiplicity of instruments dealing with similar substantive issues could lead to duplication in reporting. Planning and co-ordination therefore becomes imperative. The South African government co-ordinates all its reporting obligations through the Office of the Deputy President, as part of the National Plan of Action on human rights. Reports are prepared in co-operation with relevant governmental departments and the Department of Foreign Affairs.

This review will focus on the reporting obligations imposed by each of the instruments and on the status of the government's fulfilment of its obligations.

ICESCR

The political decision to ratify this major international treaty was announced by the Minister of Water Affairs and Forestry, Kader Asmal, at a seminar jointly organised by the Portfolio Committee on Welfare (National Assembly), the Community Law Centre and the Centre for Human Rights in Cape Town, on 23

February 1998. The formal deposit of our instrument of ratification is expected before the end of the year. The impending ratification of the ICESCR is an important indication of the commitment that exists in South Africa to attain social and economic justice through the implementation of economic and social rights.

The ICESCR is the premier international human rights instrument that deals with economic and social rights. Together with the International Covenant on Civil and Political Rights, 1966 (ICCPR), the ICESCR is the legally binding embodiment of the human rights norms enshrined fifty years ago in the Universal Declaration of Human Rights, 1948.

The ICESCR requires states parties to submit reports to the UN Economic and Social Council (ECOSOC) about the measures they have adopted to give effect to the rights in the ICESCR. However, the instrument itself does not provide for a supervisory body to monitor compliance, and does not indicate how frequently reports have to be submitted.

In 1985 ECOSOC created the Committee on Economic, Social and Cultural Rights (CESCR) to monitor the implementation of the ICESCR. The eighteen members of the ESCR Committee are elected by ECOSOC and serve in their personal capacities. In 1988 ECOSOC adopted a resolution which sets out the periodicity of state reports. States parties must submit an initial report to the ESCR Committee within two years of ratification of or accession to the Covenant. Thereafter, periodic reports are required every five years.

States parties to the ICESCR have to report on a wide array of socio-economic rights set out in the Covenant. These rights include the right to work, the right to form trade unions, the right to social security, to an adequate standard of living, to the "highest attainable" standard of physical and mental health, the right to education, and cultural rights. The general duty of States Parties is to "achieve progressively the full realisation" of these rights "to the maximum of its available resources".

In general, the governmental obligations under the ICESCR are similar to those under the South African Constitution. In relation to the rights to housing, health care, food, water and social security, the duty of the state in South Africa is to take reasonable measures within its available resources to achieve the progressive realisation of these rights. The South African Constitution guarantees the right to basic education, including adult basic education (s 29(1)(a)). The Covenant stipulates that "primary education shall be compulsory and available free to all." (art. 13(2)(a)). In both the ICESCR and the South African Constitution the provision of further education is qualified by the general requirement that it must be realised progressively.

CEDAW

South Africa ratified the CEDAW on 15 December 1995.

A number of provisions of CEDAW deal directly or indirectly with the economic and social rights of women. The most important of these are articles 1, 2, 3, 4, 5, 11, 12, 13 and 14. In CEDAW, generally recognised social and economic rights are given a specific content in the context of sex and gender equality. In respect of education, for example, states parties are not only required to ensure equal access, but must also eliminate gender stereotyping in school curricula and must

organise programmes for girls or women who have left school prematurely (art. 10)

Article 18 determines that an initial report in terms of CEDAW has to be submitted by States parties to the Committee on the Elimination on Discrimination Against Women (the CEDAW Committee) within one year after the entry into force of CEDAW for that specific country (entry into force follows thirty days after ratification). South Africa's initial report was therefore due on 14 January 1997. The report, a sixty page document available from the Department of Foreign Affairs, was however submitted in an initial form only at the end of 1997.

Although it has already been submitted, the report has not yet been considered by the CEDAW Committee. A delegation from the government is expected to formally present the report in June 1998.

CRC

The Convention on the Rights of the Child (CRC) adopted in 1989 deals with the human rights of children, including both civil and political as well as economic, social, and cultural rights.

South Africa signed the CRC in 1993, before the first democratic elections. Ratification followed on 16 June 1995. In terms of the Convention, every ratifying State has to submit an initial report within two years of the entry into force of the Convention for that State. Thereafter, the state has to submit a report every five years. These reports are considered by the treaty monitoring body, the Committee on the Rights of the Child (CRC Committee).

Numerous aspects covered in the Convention relate to the socio-economic situation of children and the obligations of states parties in relation thereto. Children in States that have ratified the Convention are entitled to "the best attainable standard of health" (art. 24(1)). The specific measures that the state must take to achieve this standard are spelt out: For example, States must take appropriate steps to reduce rates of infant mortality, to develop primary health care, to combat disease and malnutrition, and to develop preventive health care.

The inclusion of the right to benefit from social security is a progressive movement. This aspect is contained in article 26, which requires States parties to recognise the right of every child the right to benefit from social security, including social insurance.

The right to education is recognised, and the relevant article sets free and compulsory primary education as a minimum requirement (art. 28). Article 31 requires that States parties "recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts".

South Africa's first report to the CRC Committee was due on 16 July 1997, and was submitted in November 1997.

The African Charter

At the African level, regional human rights standards are contained in the African Charter. South Africa ratified the African Charter on Human and Peoples' Rights (African Charter) on 9 July 1996.

The African Charter has been described as one of the first attempts in international human rights law at including socio-economic alongside civil and political rights in a single instrument, and subjecting the two groups of rights to the same method of enforcement. There are three main ways of enforcing the Charter provisions: state reporting, inter-state complaints (involving allegations by one State party to the Charter that another State party has violated the provisions of the Charter), and individual complaints.

States parties have to submit bi-annual reports to the African Commission on Human and Peoples' Rights, an eleven-member body elected by the Assembly of Heads of State and Government of the OAU from a list of persons nominated by the States parties to the Charter. In their reports States must describe the "legislative and other measures" they have taken to give effect to all the rights in the Charter.

The African Commission issued "*Guidelines for National Periodic Reports*", in which the reporting obligations of states are set out in great detail. Part II of these guidelines deals with economic and social rights. It stipulates, for example, that States must report on measures taken to achieve the full realisation of the right to compulsory and free primary education, and on steps taken to make secondary education "generally available and accessible to everyone".

The right to health necessitates information on measures taken to reduce infant mortality, to prevent epidemic and other diseases. The guidelines require of States to keep statistical records, covering a range of information, particularly on infant mortality, the number of doctors per inhabitant and the number of hospital beds.

The second method of implementation is through individual complaints. An individual may direct a communication against a State party on the basis that any right in the Charter (including an economic or social right) has been violated.

Socio-economic rights are contained in articles 15, 16 and 17 of the Charter. Article 15 provides for the right to work "under equitable and satisfactory conditions", and for "equal pay for equal work". Article 16 guarantees the right to "the best attainable state of mental and physical health". Article 17 states that every individual "shall have the right to education".

Most of these rights require the State to adopt appropriate policies and legislation to give effect to the rights. The central question is whether the State has taken reasonable steps to give effect to these rights. It is unlikely that the rights will be interpreted to impose a direct duty on the State to provide a job, health care etc. to an individual. In a communication decided at its 19th session (in April 1996), the African Commission gave a generous interpretation to the right to health, holding that it placed a duty on the government of Zaire to "provide basic services such as safe drinking water and electricity", besides the more obvious requirement to supply adequate medicine (*World Organisation against Torture, Lawyers' Committee for Human Rights and others v Zaire*, communication 25/89; 47/90; 56/92; 100/93 (joined)).

The right to education is framed in a way that makes it more directly enforceable against the State. This does not mean that the right is unqualified although there is no qualifying phrase such as "basic" or "primary" education. Still, "education" has no fixed content and has to be interpreted. The job of determining appropriate limits to the scope of the right falls on the African Commission.

South Africa's first report to the African Commission is due by 9 October 1998. So far no individual or inter-state complaints have been lodged against South Africa with the African Commission. It will be interesting to see to what extent South African NGO's make use of the complaints procedure in the future. However, it should be noted that individual complaints may only be considered by the Commission if national legal remedies have been exhausted unless it is obvious that these procedures are unduly prolonged. Given the extensive domestic legal remedies available for violations of economic and social rights in South Africa, it is unlikely that many cases will find their way to the African Commission. However, this option remains a possibility when other avenues have been exhausted.

Events And Publications

by Karrisha Pillay

Book Review

Ripple in Still Water: Reflections by Activists on Local- and National-Level Work on Economic, Social and Cultural Rights (International Human Rights Internship Program, 1997)

The International Human Rights Internship Programme (IHRIP) has initiated a project to enhance understanding of local- and national-level activism on economic, social and cultural (ESC) rights issues. As part of this project, IHRIP held a workshop in July 1996 in Thailand to which it invited a diverse group of activists from different regions who are working with local and national level organisations on economic, social and cultural rights. Vincent Saldanha of the Legal Resources Centre (Cape Town) attended this workshop. The content of *Ripple in Still Water* is largely based on this workshop.

This resource book is a digest of information and experiences that are particularly relevant and useful to NGO's that are seeking to use ESC rights as tools in their work. It is not intended to be a "blueprint" on how to go about ESC rights activism. Instead, it shares experiences of using a human rights approach to developmental issues as well as the thinking processes and organisational strategies applied to this area. It also encourages those active or interested in ESC rights work by illustrating some of the tools and strategies that can be employed.

The book begins by presenting reflections on applying a human rights framework to economic, social and cultural issues, and outlining certain guiding principles to be used in this regard. It goes on to discuss international human rights standards relating to ESC rights, and how they can contribute to developing our understanding of these rights. This section is very useful as it provides clarity on certain basic human rights concepts such as minimum core content, state obligations and human rights indicators. It also suggests certain strategies that can be used to develop the content and definitions of specific ESC rights in national contexts.

The second section of the book concentrates on various advocacy strategies and tools for ESC rights activism at local and national levels. It discusses the reasons organisations choose to tackle work in this area in a particular way, the programmes organisations have developed in relation to ESC rights, and pitfalls that newcomers may encounter. This section is particularly valuable for South African activists working on ESC rights as it includes strategies on monitoring and data collection, education and mobilisation, policy work, legislative advocacy and litigation as well as some information on work with intergovernmental organisations.

The book concludes with a bibliography of selected resources that are useful for developing an understanding of ESC rights, conceptual issues, international human rights mechanisms as well as further information on the strategies that have been used by various organisations to enhance the protection of ESC rights.

Ripple in Still Water is highly recommended for activists and NGO's working in the field of development, economic and social justice and human rights. It provides simple, clear and accurate information on a conceptual framework for the realisation of these rights as well as the strengths and shortcomings of strategies that have been used by organisations to ensure the realisation of ESC rights.

Further information about this publication can be obtained from:

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Roundtable and consultations on ESR's

On 25 March 1998, Sandy Liebenberg participated in a roundtable discussion organised by the UN High Commissioner for Human Rights, Mary Robinson, in Geneva entitled, *Setting Benchmarks for the Realisation of Economic, Social and Cultural Rights*". Topics covered at the roundtable included the right to primary health care, education, the right to work as well as the role of courts, national human rights institutions and national action plans in developing benchmarks. Sandy also participated in two days of consultations convened by the Office of the High Commissioner for Human Rights on incorporating economic, social and cultural rights in the UN's Technical Assistance Programme on human rights. For further information contact Sandy at (021) 959 3708 or e-mail: sliebenberg@uwc.ac.za.