ESR REVIEW
Economic and Social Rights in South Africa
vol 6 no 1 May 2005

Editorial

Sibonile Khoza

Welcome to the first issue of the *ESR Review* for 2005. We plan to produce four issues this year.

This issue contains four articles and a book review.

The feature article by Kevin Iles analyses the emerging trend towards private sector involvement in the provision of basic services. He contends that it is mostly this trend (among others) that has influenced South Africa's move towards policies and laws encouraging private sector involvement in service delivery. This move, though, raises numerous concerns for various stakeholders. For example, he warns that private companies have a tendency not to extend the coverage of services to the poor because it undermines their commercial interests.

Godfrey Odongo examines the inclusion of socio-economic rights as justiciable norms in the Kenya's Draft Constitution. He applauds this inclusion as a progressive development that affirms the liberal notion that socio-economic rights are of equal status to civil and political rights. He observes that the draft Constitution drew inspiration both from South Africa's 1996 Constitution and from its jurisprudence on socio-economic rights. However, he also cautions that, when interpreting these rights, the Kenyan courts should not only use the guidance of comparative and international jurisprudence but should also take special heed of the unique textual provisions of the Draft Constitution.

The United Nations (UN) continues to engage various stakeholders in the process of adopting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. Anthony Ravlich highlights the debates on the legal nature of socio-economic rights that emerged during the recent meetings of the UN's open-ended working group. He particularly critiques New Zealand for its passive position and reluctance to take sides in these debates while it could play an important role in advocating the adoption of the Optional Protocol.

Gabrielle Watson discusses the

CONTENTS

ESR REVIEW
Economic and Social Rights in South Africa

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

Editor-in-Chief
Sibonile Khoza

Co-editor
Christopher Mbazira

External editor
Danwood Mzikenge Chirwa

Contact the Socio-Economic Rights Project

Address
Community Law Centre
University of the Western Cape
New Social Sciences Building
Private Bag X17, Bellville, 7535
Tel (021) 959 2950; Fax (021) 959 2411

Internet
www.communitylawcentre.org.za

ESR Review online
www.communitylawcentre.org.za/ser/esr_review.php

Project staff
Sibonile Khoza: skhoza@uwc.ac.za
Christopher Mbazira: cmbazira@uwc.ac.za
Gaynor Arie: garie@uwc.ac.za

ESR Review
ESR Review is produced by the Socio-Economic Rights Project of the Community Law Centre. The Project, through the Centre, receives supplementary funding from the Ford Foundation. The views expressed herein do not necessarily represent the official views of the Ford Foundation.

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

strengths and weakness of the various initiatives that have been undertaken to compel private actors to adhere to human rights standards.

She examines the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Corporations and the UN Norms and Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. She identifies the non-binding nature of the UN Norms and the failure of the OECD Guidelines to include a wide range of human rights as some of their weaknesses.

Lastly, this issue reviews selected articles in the 2004 *Human Rights Quarterly*, dealing with the debate on advocacy and monitoring strategies for advancing socio-economic rights.

On staffing, the Project bids farewell to Annette Christmas, a researcher and co-editor of the *ESR Review*. We are appreciative of her contributions to the Project and wishes her all the best in her future endeavours. We are pleased to welcome her re-placement, Lilian Chenwi, who will start working with us in May this year.

We wish to thank all the contributors to this issue. We trust you will find it invigorating and useful in promoting and protecting socio-economic rights.

Private sector involvement in basic service delivery

Kevin Iles

Basic services in South Africa have typically been plagued by a large backlog in payments. Despite some significant steps forward since 1994, in many rural and township areas substantial proportions of the population still have little or no access to basic services. For those that do receive a service in these areas, its quality is often low.

In addition, meeting new, increasingly stringent regulations—such as those governing the quality of drinking water and wastewater effluent standards—often pose a challenge to small- and medium-sized municipalities, which may lack the expertise and/or capital to upgrade or operate their plants to meet these requirements. Many public services, such as sewage disposal, electricity supply and the supply of water, require large capital investments to operate efficiently. Such capital and expertise are in the hands of private service providers.

Private service providers have significant economies of scale so that the ordinary consumer and community are almost entirely reliant on a well-regulated monopolistic supplier.

In such natural monopoly situations, there is no incen-tive for service providers to adhere to high service standards. They are free of the normal market competition and there is little that people can do to hold them to account for poor service levels.

These and related issues present a problem in the provision of service delivery, in particular for the poor.

International trends

There is an increasing international trend towards private sector involvement in service delivery. Private sector participation in water supply has been initiated in Argentina, Bolivia, China, Chile, England, Indonesia, Morocco, the Philippines, Poland, Spain, Thailand, Turkey and the Netherlands. It has taken a number of forms, ran-ging from the opening of the water supply industry to private-public partner-ships to the creation of water banks and mar-kets.

In the last two decades, over 100 cities in developing countries have given the management of their water supply systems over to private entities. The majority of these arrangements (or contracts) have been concessions in which the private entity obtains the exclusive right to operate the water supply infrastructure for an extended period. The entities involved in these contracts are typically a handful of multinational companies partnered with a local private company.

Internationally, the scale of involvement of multi-utility, multinational companies in water privatisation is unprecedented and the amount of finance being mobilised through these private companies and multilateral lending agencies is considerable. The way in which this finance is mobilised is such that private companies receive both ideological and financial support from the key international mediators of finance, such as the World Bank, International Monetary Fund and the International Finance Corporation.

It was arguably in this context that South Africa, through the *White Paper on Municipal Services Partnerships* (April 2000) and several other policy documents and pieces of legislation, moved towards a policy of encouraging private sector involvement in service delivery. This led to concerns among consumers, certain state organs and trade unions, which have resulted in fierce consumer resistance and mobilisation in some places. Consequently, the national government has now ostensibly slowed its privatisation agenda.

Restructuring services may cause broader social impacts than the obvious consequences of poor service delivery.

Concerns around private sector involvement in service delivery

Service delivery can be an important factor in decisions people make about where they wish to live. Any restructuring of a basic or municipal service may therefore cause broader social impacts than the immediate and obvious consequences of poor service delivery.

Communities' concerns about private sector involvement in the provision of basic services could include:

- increases in the cost of the service;
- the quality of the service;
- the impact private sector involvement will have on existing channels of communication and the airing of grievances; and
- the transparency of decision-making processes and opportunities to participate in them.

There may also, depending on the service, be concerns around the long-term sustainability of the service and its environmental impact.

Trade unions may be concerned about the welfare of the workforce and possible job losses.

The state (and local governments, in particular) may also have concerns about loss of control over services. However, according to the South African Constitution (notably sections 152, 154 and the Schedules to the Constitution), and a battery of policy documents and legislation on water services provision, the state can never fully transfer accountability to a private operator for the reliable provision of a basic service. In any event, if a private operator fails to deliver a service that meets with the public's expectations, the public will be more likely to complain to public officials than to the private operator.

Local governments could therefore be concerned about the recourse that will be available to them if the private sector fails to operate in the way that was originally envisaged. This means that private sector involvement in service delivery will only be a net political gain for local governments when the associated cost reductions and service delivery improvements more than compensate for loss of control over that service.

Another concern for city administrators may be the possible loss of revenues to the general treasury and, with loss of service functions, to other departments or to other public amenities like parks and hospitals.

Furthermore, local governments may also be reluctant to involve the private sector because of the expense and time involved in the pre-paration of contracts and the hiring of the necessary outside legal and engineering expertise. The review of multiple bids

received during a tendering process can also be costly.

Private sector involvement in service delivery is only as effective as the best tender received. The tender process may make some private sector entities reluctant to compete in the municipal services sector. Preparation of detailed cost and technical proposals for contract operation of a major utility system is a costly exercise. The involvement of private financing requires the arrangement of appropriate lines of credit.

Private sector involvement in service delivery is only as effective as the best tender received.

Some requests for proposals may even require holding companies to stand as guarantors of performance. Thus, private contractors must consider the probability that the awarding process will be fair to all parties, that a contract will be signed and that they will be permitted to earn a profit.

In some instances, private entities fear that municipal requests for proposals have been issued with no intention of entering into a contract, but rather as a means of gauging public managers' performance, or for winning concessions from unions on staffing.

Another concern of private operators is gaining timely access to accurate condition assessments and maintenance records during their preparation of technical and cost proposals.

Providing efficient and quality services outweighs financial gains

When the private sector becomes involved in service delivery it is important to ensure that corners are not cut on long-term investments in an attempt to enhance short-term profits. Nor should service providers be permitted to ignore important conservation programmes or tolerate lower service quality in favour of improving financial returns.

It is also critical that a model of private sector involvement is chosen that will ensure an efficient and equitable programme of service delivery, as private entities do not necessarily operate any more efficiently than public ones, nor do they always deliver on their promises.

Private sector involvement vs. competition and commercialisation

There is a tendency to equate private sector involvement with competition. However, introducing private sector involvement does not introduce competition into service delivery. Competition exists only in that limited period when competitive bids are being put forward. Granting a contract to one private entity necessarily excludes all others from involvement in that sector. It is only the monitoring and enforcement of the contractual terms that can guarantee the expected level of performance, not competition.

Similarly, private sector involvement should not necessarily be equated with commercialisation. Publicly owned companies can be run along entirely commercial lines, while public-private partnerships (especially in developing countries) may make concessions towards non-commercialisation in the form of direct or cross subsidies to poorer consumers.

Providing water services

Water is a special municipal service in several ways. Not only does it have a natural monopoly character, but it also has a peculiar cultural and symbolic importance as a partially non-substitutable resource that is essential for life.

It has territorial and political importance, too. Water resources flow across borders and have to be shared for multiple uses, such as agriculture, industry and drinking. Urbanisation requires the mobilisation of large volumes of water at high cost relative to the economic value generated. A lack of access to water has severe and well-documented hygiene, health and environmental impacts.

While private sector involvement in water services provision may offer many potential benefits, such as economies of scale, technical expertise and capital investment in infrastructure expansion, experience has shown that private companies tend not to extend coverage to the poor. Instead, they often cherry-pick wealthy neighbourhoods and consumer classes. High prices and poor service levels (rather than commitment to improving people's lives) are protected by the natural monopoly character of water services provision.

Water: An economic good or a human right?

There are contrasting views about water. On one hand, it is treated as an 'economic good' by both the Dublin Statement on Water and Sustainable Development (known as the Dublin Principles, and adopted by numerous international, multi-national and bilateral agencies, including the World Bank, at the International Conference on Water and the Environment held in Dublin in January 1992), and the Hague Declaration (adopted at the World Water Forum held at the Hague

in March 2000). Both documents argued that only by treating water as an economic commodity will it be managed efficiently and offer greater numbers of people access to safe and sufficient supplies.

On the other hand, under international law water is regarded as a human right, not as an economic commodity. This view is found in a number of legally binding and non-binding documents, for example:

- the General Comment No.15 (2002), "The right to water" (articles 11 and 12 of the Covenant of the United Nations Committee on Economic Social and Cultural Rights;
- the 50.mission statement of the Water Supply and Sanitation Collaborative Council (entitled Vision 21);
- the Cochabamba Declaration, a 'people's charter' on water rights adopted by Bolivian, Canadian, American, Indian and Brazilian citizens and activists in December 2000, in response to the water situation in Cochabamba; and
- the Group of Lisbon's Water Manifesto, adopted in 1998.

Fortunately, in South Africa this debate is settled. The Constitution entrenches the right of access to sufficient water in section 27(1) (b). Also, according to certain judicial decisions of the High Courts, Constitutional Court dicta and legislation on water services provision, the Constitution obliges local governments to provide basic services as a matter of entitlement.

Financial self-sustainability as a goal in water service delivery

There are several basic services for which financial self-sustainability in South Africa is not an immediately realisable goal. Few utilities are able to recover sufficient funds to cover the full cost of service provision, let alone to invest in the improvement or extension of services and infrastructure within their delivery area.

Although cost-cutting measures can and should be taken, it is doubtful whether municipalities will ever be able to provide completely self-sustaining services of sufficient quality without the input of an external subsidy from government sources. Economic sustainability is a permissible goal of service delivery but it can never be the primary goal, nor can it be pursued at the expense of the right of everyone to have access to essential services.

In developing societies, service provision should therefore not be viewed as an economic commodity wherein costs are to be fully recovered, but rather as a socio-economic right to which every person is entitled to have access and that should therefore be subsidised by the state.

Kevin Iles is a candidate in the Masters of Law programme at Duke University and a former researcher in the Socio-Economic Rights Project, Community Law Centre, UWC.

See also *ESR Review* vol. 4 no. 4 November 2003, which is a special edition on the privatisation of basic services and socio-economic rights.

Socio-economic rights in the draft Constitution of Kenya

Prospects for their judicial enforcement

Godfrey Odongo

Socio-economic rights have now become a feature of most African constitutions, including, for example, those of South Africa, Malawi, Uganda, Nigeria, Namibia, and Ethiopia.

These rights can be entrenched as justiciable norms (amenable to judicial adjudication), or as non-justiciable 'directive principles of state policy' (not directly enforceable in the courts).

The increasing recognition of socio-economic rights in domestic constitutions reinforces the principle of the interdependence, inter-relatedness and indivisibility of all rights as proclaimed in the United Nations (UN) Vienna Declaration on Human Rights (1993).

However, the recognition of these rights in the non-justiciable form continues to perpetuate the misconception that they are not amenable to judicial enforcement. Opponents of socio-

economic rights argue that they are vague in their scope and content and enjoin positive action on the part of the state entailing huge budgetary and policy implications. The argument is thus made that the judiciary is not suitable and institutionally competent to adjudicate on matters relating to these rights.

Recent developments in international and regional human rights law, domestic decisions and the work of many scholars demonstrate that socio-economic rights are not as different from other rights as is often supposed and that they can also be judicially enforced. In addition, the UN Commission on Human Rights is in an advanced stage of adopting an Optional Protocol to the International Covenant on Economic Social and Cultural Rights (ICESCR), which will empower the Committee on Economic Social and Cultural Rights (CESCR) to receive and determine individual complaints.

The draft Constitution of Kenya, 2004, (the Draft Constitution), protects socio-economic rights as justiciable norms. While their recognition has received wide support from the human rights community, their provisions must be analysed against the backdrop of the practical challenges in enforcing economic and social rights, as highlighted by experience in South Africa.

The Draft Constitution and inter-dependence of all rights

The Draft Constitution awaits completion of the final process of enactment that will involve both the National Assembly and the holding of a public referendum. At a political level, unresolved differences remain over certain sections of the document, such as the form and structure of regional devolution of state power and the introduction of the post of the Prime Minister (Chapter 14, sections 206–235 and Chapter 12, sections 172–181).

Apart from these and other differences, the bulk of the Draft Constitution (including Chapter Six on the Bill of Rights) is uncontested.

The Bill of Rights affirms the inter-dependence of all rights—civil, political, economic, social and cultural. In particular, article 30 deals with the implemen-tation of all rights and free-doms in the Bill of Rights without distinguishing be-tween, or categorising, the rights guaranteed. Article 30(1) imposes generic obligations on the state "to respect, protect, promote and fulfil the rights and freedoms" in the Constitution.

Recent developments show that socio-economic rights are not as different from other rights as is often supposed.

The limitation clause in article 33 applies without distinction to all the rights guaranteed in the Draft Constitution. Article 33(1) sets out three key instances where a right can be limited. Firstly, a right can be limited by an internal qualifier expressly contained in the right in question. Secondly, it can be restricted by law of general application. Thirdly, it can be limited to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equal-ity and freedom.

Direct protection

The socio-economic rights contained in the Draft Constitution are directly enforceable. They are found in articles 60–66 and include the rights to:

- *Social security:* Article 60 provides for every person's right to social security and the state's "duty to provide appropriate social security to persons who are unable to support themselves or their dependants".
- *Health:* Article 61 states that "every person has the right to health" which includes "the right to healthcare services and reproductive healthcare". It also provide for the right to emergency medical treatment.
- *Education:* Article 62 provides that "every person has the right to education" and obliges the state "to institute a free pre-primary and primary school education pro-gramme to realise the right of every child in this regard". It also obliges the state to "pay particular attention to children with special needs" (article 62(2)). The same article imposes "the progressive duty of the State to make secondary and post-secondary education progress-ively available and accessible". It is notable that the right to pre-primary and primary education is not qualified by reference to 'progressive availability', which applies to secondary and post-secondary education. This arguably supports an interpretation that the obligation to implement this right is immediate. In the same vein, the Draft Constitution acknowledges "a right" of every person (individuals and corporations) to establish and maintain independent educational institutions, provided they "comply with the requirements of this Constitution, and meet standards laid down in legislation" (art 62(4)).

- *Housing:* Article 63 provides that "every person has the right to accessible and adequate housing".
- *Food:* Article 64 states that "every person has the right to be free from hunger and to adequate food of acceptable quality".
- *Water:* Article 65 provides that "every person has the right to water in adequate quantities and of satisfactory quality".
- *Sanitation:* Article 66 provides that "every person has the right to a reasonable standard of sanitation".

In addition, specific provisions are made for the rights of specific groups. Persons held in custody have the right "to accommodation and facilities that satisfy the standards of decent clothing, housing, food, health, and sanitation and their right to education and work" (articles 75(c), (d) and (e)). Every child has the right to "adequate nutrition, shelter, basic health care services and social services" (articles 40(6) (f)).

The Kenyan Draft Constitution, like the South African Constitution, however, fails to provide for the right to work.

Indirect protection

The inclusion of socio-economic rights as enforceable norms alongside civil and political rights creates room for an 'integrated approach' to enforcing them. Provisions relating to civil and political rights in the Draft Constitution, such as the right to equality (article 35), will therefore offer an alternative basis upon which to enforce socio-economic rights indirectly. This will most often be the case in instances involving unfair discrimination in accessing social services.

However, comparative jurisprudence from South Africa suggests that courts may not be inclined to rely on civil and political rights in order to give effect to a particular socio-economic claim if it can be addressed under a specific and relevant socio-economic provision in the Constitution. For example, in *Soobramoney v Minister of Health, KwaZulu / Natal*, 1997 (12) BCLR 1696, the South African Constitutional Court refused to hold that a seriously ill patient asking the state to provide him with life-saving treatment could rely on the right to life (section 11), arguing that this claim fell squarely under a more relevant right of access to healthcare facilities also recognised under the South Africa Constitution.

State obligations under the Draft Constitution

The above socio-economic rights provisions of the Draft Constitution are similar to their counterparts in the South African Constitution (sections 26, 27, 28(c) 29 and 35(2)(e)). The main differences between the two documents in this respect relates to their wording on the state's obligation in enabling people to fulfil these rights.

Article 30(2) of the Draft Constitution provides that "the State shall take legislative, policy and other measures to achieve the progressive realisation" of economic and social rights. This provision applies to all socio-economic rights recognised in articles 60–66 above.

Interestingly, in defining the obligations of the state in relation to these rights, the Draft Constitution does not use phrases like 'appropriate measures' (used in the ICESCR) or 'reasonable measures' (used in the South African Constitution). It simply requires the state to take legislative, policy and other measures. Nor does the Draft Constitution subject these measures to the availability of resources.

The usual qualifier to these rights of the availability of resources is not found in article 30(2), but only in a separate provision—article 29(5). The latter provides that when interpreting and applying a particular right or freedom, a court or tribunal should be guided by two principles in instances where the state claims that it does not have the resources to implement the right or freedom. Firstly, the Draft Constitution enacts the principle that in such instances "it is the responsibility of the State to show that the resources are not available" (article 29(5)(a)). Secondly, that, "in allocating resources, the State has an obligation to give priority to ensuring the widest possible enjoyment of the right having regard to prevailing circumstances, including the vulnerability of the groups or individuals claiming the violation of their right" (article 29(5) (b)). By its general nature, this provision is applicable to all rights guaranteed in the Draft Constitution, socio-economic rights included.

Thus, while this article expressly acknowledges that resource constraints will affect the realisation of socio-economic rights, it places the burden of showing that the available resources have been well used on the state. It enacts the principle that the guaranteed rights—including socio-economic rights— must benefit a significant part of the society. Furthermore, it requires the state to prioritise the implementation of the rights of certain vulnerable groups.

However, article 29(5)(c) provides that a court "may not interfere with a decision by a state organ concerning the allocation of available resources,

solely on the basis that the court, tribunal or forum would have reached a different conclusion". This provision will limit the extent to which a court would inquire into budgetary and policy issues. It is clearly intended to protect the constitutional doctrine of separation of powers. But it will be up to the courts to develop a balance between acceptable interference in state policies in order to ensure that these policies conform to constitutional standards, on one hand, and deference to other branches of government, on the other.

Prospects for a Kenyan jurisprudence on socio-economic rights

It is expected that the final Constitution will be adopted in the near future. One problem that Kenyan courts will face when interpreting the socio-economic right provisions is the lack of jurisprudence on these rights. Thus, they will have to gain inspiration from the jurisprudence of the CESCR, as developed through General Comments, and the recommendations following the examination of state reports. In particular, article 30(6) of the Draft Constitution provides that "the State shall fulfil all its international obligations in respect of human rights…(including)…the comments and recommendations of international bodies relating to international obligations of the State" (article 30(7)).

Likewise, decisions of the domestic courts that have been engaged in adjudicating socio-economic rights cases will be informative to the challenge of judicial enforcement of these rights in Kenya. The example of the unique South African jurisprudence will be particularly instructive.

Thus, a future Kenyan jurisprudence should borrow a leaf from the South African courts and affirm the role of judicial review of government policy in relation to these rights, even where this may have direct budgetary implications.

The drafters of the Kenyan Draft Constitution not only borrowed from the provisions of the South African Constitution. In drafting certain provisions, they also drew inspiration from South Africa's jurisprudence on these rights (both its strengths and pitfalls). The novelty in the Draft Constitution is that it sets out the principles to be followed by the courts in adjudicating on socio-economic rights, especially where the state raises the resource constraints argument.

The first limb of this novelty is found in article 29(5) (a), which states that "it is the responsibility of the state to show that the resources are not available". The construction of this provision leads to a conclusion that all that a litigant needs to do is prove that a violation has occurred without bearing the burden of proving that resources are indeed available to satisfy the social and economic right(s) claimed. In other words, the provision establishes a rebuttable presumption that the state will always have the necessary resources to realise the socio-economic rights.

This presumptive position is crucial in socio-economic rights litigation because it is mostly the poor and disadvantaged segments of society who institute actions against the state and naturally, they are often deprived of access to government information. This is in addition to the lack of expertise necessary to evaluate government's resources and budgetary policies.

The South African Constitution is silent about who bears the burden of proof in this respect. South Africa's jurisprudence, however, especially the reasonableness test, is criticised by many human rights scholars as overburdening the litigants in that it seems to impose on the latter the burden of proof that government's actions or inactions are unreasonable.

The second limb of the Draft Constitution's novelty is contained in article 29(5) (b), which states that:

> in allocating resources, the State has an obligation to give priority to ensuring the widest possible enjoyment of the right having regard to prevailing circumstances, including the vulnerability of the groups or individuals claiming the violation of their right.

This provision is drawn from South Africa's reasonableness test, which requires that, for a government measure to be reasonable, attention should be paid to the urgent needs of those living in desperate situations and that a service in question must reach "a wider and larger number of people" [*Government of the Republic of South Africa and Others v Grootboom and Others*, (11) BCLR 1169 (CC) paras 39 and 46].

Conclusion

The inclusion of socio-economic rights as justiciable norms is a significant aspect of the Kenyan constitutional dispensation, given that the current Bill of Rights does not recognise these rights.

For socio-economic rights to have an impact on the process of alleviating poverty, which afflicts a significant part of the Kenyan society, an active engagement of courts in adjudicating these rights will be crucial, alongside stakeholders' involvement in advancing them. Judicial decisions will not only assume an importance in affording remedial measures to persons who

come before courts, but also in laying a broad policy framework for defining the obligations on the state that these rights engender.

Owing to the dearth of jurisprudence on the adjudication of these rights and based on the provisions of the Draft Constitution, which invite the role of international law, it will be crucial that Kenyan courts seek interpretative guidance from the jurisprudence developed by CESCR and domestic courts like the South African Constitutional Court.

In resorting to such comparative jurisprudence it will, however, be important that Kenyan courts pay due attention to the unique textual provisions of the Draft Constitution and the local socio-economic and political context.

Godfrey Odongo is a research intern at the Children's Rights Project, Community Law Centre, UWC, and a doctoral candidate in law at UWC.

The Kenyan Draft Constitution, 2004, is available on line at <www.kenyaconstitution.org>

Division in the UN over a complaints procedure for socio-economic rights

New Zealand's reluctance to take sides

Anthony Ravlich

At the recent United Nations (UN) open-ended working group meeting (OEWG), New Zealand maintained its distance from the American camp, which is opposed to the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (the Optional Protocol) providing for a complaints procedure for violations of economic, social and cultural rights (ESC rights). It is envisaged that the UN Committee on Economic, Social and Cultural Rights (CESCR) will have the competence to receive and determine these complaints once domestic remedies have been exhausted.

At least 76 countries attended the first day of the second session of the OEWG, which met from 10–21 January 2005 in Geneva. The OEWG was mandated by the UN Commission on Human Rights (HRC) "to consider options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (ICESCR). The report of the OEWG will be presented at the sixty-first session of the HRC from 4 March–22 April 2005. The mandate of the OEWG is expected to be renegotiated at a session of the HRC in 2006.

New Zealand ratified both the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR in 1978 and acceded to the Optional Protocol to the ICCPR rights in 1989.

The ideological clash between rich and poor countries

The main opposition to the Optional Protocol came primarily from developed countries—the United States (US), Australia, the United Kingdom (UK), Canada and Japan. India, Egypt and Saudi Arabia also opposed it. Countries from the poorer regions of South America, the Caribbean and Africa were the most supportive of the Optional Protocol.

According to the NGO Coalition for the Optional Protocol (NGO Coalition), Canada, the US, Japan, the UK and Australia took the position at the OEWG that the Optional Protocol should not be adopted because ESC rights were different from civil and political rights and not suitable for judicial enforcement. In contrast, many of the poorer countries considered civil and political rights and ESC rights as being of equal status. This position has always been held by the UN, at least in terms

of rhetoric (cf. the Vienna Declaration, 1993).

Jillian Dempster of New Zealand's permanent mission at the UN said, in response to questions from the Human Rights Council Inc., that New Zealand "firmly believed" in the equal status of both sets of rights but did not wish to be seen to be aligned with either camp. As a result, New Zealand said little at the OEWG. Dempster stated:

> We were in listening mode as our position is still not firm in one direction or the other—to assert a firm position could have been misconstrued that we had made up our minds and could be counted in one camp or the other, either for or against.

This seemingly ideological split between the two camps (i.e. developed and developing countries) is reminiscent of, although not nearly as extreme as, the debate at the time the ICCPR and the ICESCR were being adopted. That debate was influenced largely by the Cold War—the West championed civil and political rights (which favour the middle class, professional sector) and the East European communist countries promoted ESC rights (which, in contrast, favour the working class and the most disadvantaged).

Since then, ESC rights have been marginalised and enjoy lesser protection than civil and political rights. Mary Robinson, the former UN High Commissioner for Human Rights, for example, remarked at the fiftieth anniversary of the Universal Declaration of Human Rights, 10th December 1998, that:

> We must be honest and recognise that there has been an imbalance in the promotion at the international level of ESC rights and the right to development, on one hand, and of civil and political rights, on the other.

She added that this imbalance was not only evident at the international level but also at the regional and national levels.

In recent years, because of the growing global concern for social justice, attention has been re-focused on ESC rights. These rights would provide people with a belief system, with international credibility, which would enable them to fight for social justice in a world where, according to J Kelsey (2000), "free market policies have increased inequality within and between countries and in the case of the poorer countries, have condemned millions to entrenched, life threatening poverty".

A piecemeal approach would represent a failure to recognise the interdependence of these human rights.

On 18 January 2005, Phil Goff, the New Zealand Minister of Foreign Affairs and Trade, stated that New Zealand takes a cautious approach to treaties but even when they are 'optional', it always tries to become a party to all international human rights treaties. He said:

> Given the complex nature of the issues concerned, and the clear lack of international consensus on the way forward, we consider that further discussion is warranted before any decision is taken to begin negotiations on a new instrument [consequently] New Zealand opposes immediate drafting of an Optional Protocol.

At last years' working group meeting, New Zealand was described as a "light" opposition by Maria Graterol, a representative of the International Women's Rights Action Watch Asia Pacific, because it was against drafting of the Optional Protocol immediately but happy to continue with discussions.

The dangers of a piecemal (a la carte) approach for the disadvantaged

A concerning development at the OEWG was the suggestion to open discussion on whether states could be allowed to choose to be bound by certain rights or obligations in the Covenant. This is what in the debates has been referred to as the 'a la carte' (or piecemeal) approach as opposed to a comprehensive approach. In my view, such a choice would represent a failure to recognise the interdependence of these human rights. It would allow states to misrepresent the Covenant to their people, as well as the possibility of elite interests being favoured over the interests of the most disadvantaged.

By comparison, a comprehensive approach would require that states treat all human rights and layers of obligations equally and implement them accordingly. According to the NGO Coalition, all the experts in the first two days of the working group supported the comprehensive approach.

A piecemal approach received particular support from the European Union countries who pointed to the European Social Charter as a useful precedent. According to the NGO Coalition, this approach is being suggested by a number of delegations as a means of finding consensus between the opposing camps.

Bernard Robertson provides another example of an a la carte approach in his 1997 study for the New Zealand

Business Round Table, entitled *Economic, social and cultural rights—Time for a reappraisal*. Robertson advocates the removal of the duty of government to fulfil, which would have ensured employment, fair wages, health, etc. He states that many rights enumerated in the ICESCR can only be achieved at the expense of restricting corresponding individual liberties (civil and political rights).

However, while dismissing the duty to fulfil, Robertson agrees that a state could be enjoined to comply with the obligation to respect and protect (e.g. non-discrimination in employment, etc.) because these are applied fairly whereas the duty to fulfil requires targeting certain groups, for example, the most disadvantaged. He considers that government should respect individual choice. Therefore, he views the minimum wage rates as discouraging individuals and business from making work available.

Likewise, he considers that the government should refrain from interfering in working relations irrespective of any considerable disparity in the power relationship. Furthermore, he maintains that:

> …the right to continuous improvement in living conditions presumably means that the government should not take any decision deliberately aimed at reducing the living conditions of any group. This would entail not levying discriminatory taxation on any group even if the aim were redistributional, since the rich are as entitled to this right as anyone else.

This approach seems only likely to provide protection to those who are in a position to enjoy ESC rights and may make the situation much worse for the most disadvantaged. Robertson fails to see that fulfilling ESC rights would ensure that people have sufficient choices. His approach is an extreme example of how ESC rights can be manipulated to serve elite interests rather than the interests of those who are disadvantaged, oppressed and exploited.

The NGO Coalition holds that the state's duties to respect, protect and fulfil economic, social and cultural rights has received widespread acceptance in the international human rights arena. They also reported that the majority of delegates agreed that ESC rights had core obligations that deal with extreme situations such as starvation, poor heath care, homelessness etc.

Neither the piecemal approach proposed in the OEWG nor that of Robertson would serve the interests of vulnerable groups. The piecemeal approach would enable governments to cut back on welfare for a considerable proportion of the most disadvantaged. The anti-welfare rhetoric of such leaders as President Bush of the US, and Don Brash, leader of New Zealand's major opposition party, the National Party, demonstrates that this is certainly possible.

Other contentious issues

International co-operation was also a contentious issue at the OEWG. According to the NGO Coalition, developing countries argued that the Optional Protocol must include provisions on international co-operation while 'Western' states argued that that international co-operation must not be amenable to adjudication.

There were differences between states on whether international co-operation [Article 2(1), ICESCR] constituted a moral or a legal obligation. However, it seems to me that international co-operation is key to helping poorer countries to realise ESC rights and reduce the existing inequalities alluded to above.

There was also a concern among some states regarding the justiciability of ESC rights. Some countries wish to prioritise civil and political rights over ESC rights, thus maintaining the conventional position that the former are more important than the latter.

According to the NGO Coalition, the obligation to fulfil was regarded by some states as not justiciable. However, some countries (Norway, Finland and South Africa) have ESC rights as justiciable norms in their constitutions. In the case of South Africa, courts are actively engaged in adjudicating on these rights, thus affirming their judicial competence over such cases.

Other states objected to ESC rights, arguing that, unlike civil and political rights, there is a lack of international jurisprudence on them. However, in my view, while awaiting the development of this jurisprudence the suggestion made by Paul Hunt that courts make use of negative judicial review could be applied in the interim. Hunt states:

> In April 1991, the New Zealand government introduced cuts in welfare. According to the Human Rights Commission, the reduced rates brought some beneficiaries below the Treasury's own 'income adequacy' level. If New Zealand law provided that individuals have a right to an adequate standard of living, why could a court not declare that the cuts were unlawful because they violate this right?

Negative judicial review could guard against further welfare cuts.

Following New Zealand's periodic report to the CESCR in May 2003, the

CESCR expressed concern over the non-recognition of ESC rights as justiciable rights. To my knowledge, this is still New Zealand's position and there are no ESC rights included in New Zealand law.

Conclusion

It seems that many of the differences at the OEWG stem from the failure of a number of countries, particularly from the West, to fully recognise that ESC rights have the same status as civil and political rights.

If the massive violations of ESC rights which are occurring world-wide are to be effectively dealt with, there needs to be a revolution in consciousness, particularly in the West. Otherwise, global inequalities in wealth and living standards are likely to widen with serious consequences for everyone.

New Zealand could play a pivotal role in advocating for the adoption of the Optional Protocol. Its adoption, which is gaining momentum at the UN, can be seen as an attempt to build bridges between rich and poor (and the powerful and the powerless) both within and between countries.

Anthony Ravlich is Chairperson of the Human Rights Council Inc., Auckland, New Zealand.

The latest action plans of various countries can be found on the website, <www.unhchr.ch / html / menu2 / plan_action>.

Assessing the human rights impact of foreign investments

Emerging tools

Gabrielle Watson

Globalisation has highlighted diverse inadequacies in the mechanisms for protecting and enforcing human rights. Non-state actors such as private corporations, multilateral institutions such as the World Trade Organisation (WTO) and the European Union (EU), and international financial institutions (IFIs) such as the World Bank and the International Monetary Fund (IMF) have increasingly usurped some of the functions of states. There is therefore a need for a broader human rights framework that acknowledges the increasing influence of non-state actors on vital international and domestic socio-economic policies.

Such a framework would require a set of common, minimum human rights standards as well as compliance mechanisms that are relevant to international business practice. It would provide a normative basis for, and predictability to, business and policy choices. It would clarify the legal obligations of state and non-state actors and provide mechanisms for their enforcement, including monitoring and complaints procedures aimed at preventing and redressing violations. However, for it to be effective the obligations of various actors (including host governments, home states and private enterprises) need to be clarified. We are far from this point. What we have are a multitude of efforts based on different premises, using different standards and relying on different implementation strategies and levers for securing compliance. As we progress, some will rise to the surface while others recede.

This article reviews the emerging human rights standards for foreign investments and businesses generally. It suggests criteria for assessing their merits and applies these criteria to two promising tools: the Organisation for Economic Co-operation and Development Guidelines for Multinational Corporations (OECD Guidelines) and the United Nations (UN) Norms and Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms).

An overview of existing standards

In the past decade there has been a proliferation of initiatives to develop

some form of human rights standards for businesses. This has come from all corners, including international agencies such as the UN and the International Labour Organisation, the international private banking sector, business associations, non-governmental organisations (NGOs), trade unions and private investors. These initiatives can be classified as international standards, national standards, international voluntary initiatives and corporate codes of conduct.

Criteria for assessing their merits

This section offers some criteria for assessing the merits and demerits of the emerging standards and mechanisms applicable to foreign investments and other business activities.

- *Levers for claiming rights*: Is the framework legally binding or grounded in laws, instruments or institutions that have legal application or widely accepted authority?
- *Specificity and precision*: Are the standards clear, specific, and unambiguous? Are the provisions clear enough to detect and pinpoint a violation?
- *Breadth of rights*: Do the standards cover a wide range of rights and impacts on people or business activities?
- *Implementation structure*: Does the initiative or standard have a sound implementation mechanism? Can the standard be easily 'operationalised' for businesses?
- *Compliance mechanisms*: Do the compliance mechanisms make provision for self and independent monitoring, a complaints procedure, and the power to impose sanctions?
- *Authority and legitimacy*: Does the initiative or standard enjoy wide recognition, acceptance and use? If based on an international legal instrument, is the instrument widely ratified or do its norms form part of customary international law? Is the document, process or institution promoting the initiative seen as legitimate and held in high esteem by a wide range of private and public actors? How widely supported is the initiative by corporations? How widely applicable is the initiative?

Spotlight on the OECD Guidelines and UN Norms

This section uses these criteria to evaluate the effectiveness and / or potential contribution of the UN Norms and the OECD Guidelines. The latter enjoy relatively broad recognition while the former have received wide acclaim from civil society organisations. Both incorporate standards that are broader in scope and include a wider range of international human rights norms.

The UN Norms

The UN Norms apply to Transnational Corporations (TNCs), while recognising that states have the primary responsibility to ensure, protect and promote human rights. The Norms call on corporations to adopt voluntary internal rules of operation and emphasise the role of national courts and international tribunals in enforcing human rights obligations. The UN Sub-Commission on the Promotion and Protection of Human Rights has been actively working on these Norms since 2001.

The UN Norms envisage that companies will be subjected to periodic indepement monitoring and a complaints mechanism.

They cover a wide range of human rights with specific sections on non-discrimination, security arrangements, workers' rights, corruption and basic good corporate behaviour regarding environmental protection and product safety.

The envisaged implementation and monitoring mechanisms call for companies to adopt internal rules for their own operations and for their contractors and suppliers. They also envision that companies will be subjected to periodic independent monitoring and a complaints mechanism. However, the structure and body that will exercise these functions is not yet clear. States are required to establish legal and administrative frameworks to ensure the implementation of the Norms and to ensure that TNCs make reparations if found to be in violation of them.

Strengths

The UN Norms are arguably the most comprehensive codification of human rights, environment, labour and ethical norms applicable to the private sector. They draw on a wide body of international human rights law and are the product of years of expert input and debate. The specific provisions of the UN Norms can easily be converted into a template for assessing corporate behaviour by reframing them as questions. They are already being 'road tested' by the Business Leaders' Initiative on Human Rights. They also enjoy a high degree of credibility among some governments, businesses, legal practitioners, community-based organisations and civil society groups.

As they have not yet been adopted as a treaty, the UN Norms are not binding on either states or non-state

actors. But they can be regarded as soft-law norms of international law and can lead to the development of binding norms in the near future.

Weaknesses

Despite their strong endorsement from many quarters, the Norms have been strongly criticised by some members of the international business community and key states such as the US. Some of the documents that the Norms draw on are clearly non-binding, thereby raising doubts about the authority of the Norms themselves. But, as mentioned above, they can be regarded as soft-law norms of international law.

The reporting, monitoring, and complaints mechanisms described in the Norms do not differ materially from other human rights reporting structures that have had little proven success in deterring violations.

OECD Guidelines

The OECD Guidelines are non-binding recommended standards and principles for corporate practice with regard to human rights, core labour rights, information disclosure and corruption. They apply to 30 countries—primarily northern industrialised nations belonging to the OECD—and eight adhering non-member states. First developed in 1976, they were reviewed and substantially revised in 2000 to broaden their scope and strengthen their implementation procedures.

According to the Trade Union Advisory Committee, since the 2000 revision more than 50 cases have been brought before the National Contact Points (NCPs), which monitor the implementation of the Guidelines in adhering states. Half were still unresolved at the end of September 2004. The OECD Guidelines are considered as the most comprehensive, multilaterally endorsed normative standards for multinational enterprises.

Strengths

The Guidelines are international in scope and enjoy broad acceptance and backing in the key 'sending' countries for foreign investments. They are straightforward and relatively easy to apply. Like the UN Norms, they are sufficiently specific to be used as a template for assessing compliance with their provisions.

In particular, the OECD Guidelines are well developed with regard to workers' rights.

They have a fairly well developed mechanism for monitoring implementation and also make provision for the submission of complaints to NCPs. These complaints can be used to gain media attention around the issue in dispute and force the offending party to redress the issue.

They also make provision for export credit agencies such as the US EXIM Bank and the UK's ECGD to ensure that investments meet their provisions.

Weaknesses

The Guidelines do not incorporate a wide range of human rights. They focus primarily on industrial relations, bribery, consumer rights and competitive behaviour. They are particularly weak in economic, social and cultural rights, indigenous rights, women's rights and environmental norms.

Moreover, national support for the OECD Guidelines and the effectiveness of the NCPs varies widely. Significantly, they do not provide for independent monitoring or the imposition of sanctions. If the parties are not able to agree to a resolution when a complaint

Resources

Report of the Sub-Commission on the Promotion and Protection of Human Rights (Advance Edited Version of 15 February, 2005),: <www.ohchr.org / english / bodies / chr / docs / 61chr / E.CN.4.2005.91.doc>

Official UN Norms document: <www.unhchr.ch / huridocda / huridoca.nsf / (Symbol) / E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument>

Business and human rights web site for up-to-date information and commentary on the Draft UN Norms process: <www.business-humanrights.org / Home>

Official OECD Guidelines site: <www.oecd.org / department / 0,2688,en_2649_34889_1_1_1_1_1,00.html>

OECD Watch: OECD Watch is an international network of NGOs promoting corporate accountability. Its purpose is to inform the wider NGO community about policies and activities of the OECD's Investment Committee and to test the effectiveness of the OECD Guidelines. <www.oecdwatch.org / >

is brought, there is no possibility for making reparations. This makes the Guidelines more promotional than protective.

Conclusion

Standards and benchmarks for assessing the impacts of foreign investment projects and other business activities are emerging. The UN Norms and the OECD Guidelines are the most promising in this regard. The value of these standards largely depends on the legitimacy they gain through their use and recognition by a broad array of actors. In the struggle to create rights-based standards and mechanisms for foreign investments, communities must be allowed to assert their own truths and claim their rights. The ideal standards must therefore not only recognise a wide range of human rights but also make provision for their effective enforcement and provision of remedies where they are violated.

Gabrielle Watson is an independent consultant based in Boston and a former co-Director of the Centro de Derechos Económicos y Sociales (Center for Economic and Social Rights) in Quito, Ecuador.

Do socio-economic rights require different monitoring and advocacy strategies from other rights?

A review of selected articles in the *Human Rights Quarterly*

Sibonile Khoza

In the last decade, many human rights organisations (internationally and nationally) have increasingly shifted their advocacy and monitoring functions from civil and political rights to socio-economic rights. Previously, most organisations were preoccupied by, and trapped in, the traditional misconceptions that labelled civil and political rights as more important than socio-economic rights. They accordingly focused their work on advancing the former at the expense of the latter category of rights.

It is arguable that the social realities brought about by the continuing prevalence of poverty and underdevelopment in many parts of the world, especially in developing countries, has influenced this shift in focus.

A variety of strategies and methods have been used by different human rights organisations to protect and promote socio-economic rights. However, there is a tendency for them to criticise or undermine each others' strategies or methods. Some activists regard their organisations' methods as more effective and more important than those of other organisations. Regrettably, this tendency undermines the effectiveness of their work. It also undermines the fact that advancing socio-economic rights requires implementing diverse advocacy and monitoring strategies in different contexts.

In 2004, two editions of the *Human Rights Quarterly* [Vol. 26, Issues (1) and (4)] featured articles capturing the debate on the effectiveness and pitfalls of different methods adopted by human rights non-governmental organisations (NGOs) in protecting and promoting socio-economic rights. The first article, entitled *Defending economic, social and cultural rights: Practical issues faced by an international organisation,* by Kenneth Roth, the Executive Director of Human Rights Watch (HRW), ignited the debate [26(1), 2004, pp 63–73].

Roth discusses his organisation's experience using the 'naming and shaming' methodology to protect socio-economic rights. He suggests that this approach is the most effective in advocating compliance with human rights, and makes three interrelated points: firstly, while other approaches may work well for other types of human rights groups, the main strategy and objective of the HRW is to "investigate, expose and shame", hold government officials accountable and generate public outrage. Secondly, the shaming method is most effective when there is relative clarity about the "violation, violator and remedy". Without this clarity, the HRW's capacity to shame diminishes significantly. Thirdly, the nature of the violation, violator and remedy is clearest when the misconduct is portrayed as arbitrary or discriminatory, rather than a matter of distributive justice. He therefore argues that the voices of international human rights NGOs will be relatively weak if all that they can do is to argue for an increase

in budget spending in favour of advancing socio-economic rights.

Leornard Rubenstein, Executive Director of Physicians for Human Rights, responded to Roth in an article entitled *How international human rights organisations can advance economic, social and cultural rights: A response to Kenneth Roth*, published in another issue of the same journal [26(4), pp 845–865]. While agreeing with Roth that naming and shaming is an important methodology for redressing certain socio-economic rights violations, he takes issue with him for placing too much weight on it and ignoring other strategies.

He proposes three other strategies that NGOs can adopt. Firstly, international NGOs, in collaboration with other organisations in developing countries, should engage in analysis, advocacy and lobbying to influence the design of systems (like institutions) of services for the fulfilment of socio-economic rights. This strategy entails building capacity for national and local human rights NGOs to better protect and promote these rights.

He warns that failure to engage with relevant institutions on socio-economic rights issues may have dire consequences such as bad social programmes, human rights violations and wasted financial resources, which may not all be remedied through naming and shaming.

Secondly, he recommends that "international human rights organisations need not be concerned with advocating trade-offs among competing socio-economic rights because fears of limited resources—a zero sum game—are overblown". Thirdly, he proposes that international NGOs should premise their monitoring activities (such as naming and shaming) on specific state obligations, rather than misconduct of an arbitrary or discriminatory nature. The latter will ensure that attention is paid "to some of the most serious, chronic violations of socio-economic rights".

In the same issue (pp. 873–878), Roth responds to Rubenstein. He provides clarify on some of the arguments that he feels Rubenstein misunderstands. Firstly, he acknowledges that there are other methodologies for advancing socio-economic rights and lists some. However, he stresses that his article merely highlights that the HRW has been most effective in ensuring compliance with human rights through "investigating, exposing and shaming" the violations and the perpetrators.

His other responses to Rubenstein provoked a further reply from the latter, also in the same issue (pp. 878–881). In the end, they both agree on the following: firstly, methods to protect socio-economic rights must not only include, but also go beyond, naming and shaming. Secondly, international human rights NGOs who use naming and shaming can and should also challenge decisions that are arbitrary or discriminatory.

However, they also disagree on certain points. These include the use of (only) the arbitrariness standard (rather than specific state obligations in relation to socio-economic rights) for shaming, and the use of tradeoffs in advocating competing claims in the context of scarce public resources.

Mary Robinson, Executive Director of The Ethical Globalization Initiative, and former UN High Commissioner on Human Rights, closed the debate in her article entitled *Advancing economic, social and cultural rights: The way forward* (pp. 867–872). She regards the debate as timely and significant because too little attention has been paid to socio-economic rights in the past and because it "will help energise the human rights community that has felt battered and bruised by the erosion of international standards protecting civil and political rights in our post-September 11 world".

After summarising the debate between Roth and Rubenstein, Robinson appears to support most of the latter's views. Most importantly, she argues that international NGOs must move beyond their traditional role of naming and shaming to finding "new and imaginative ways" of advancing human rights.

She also agrees with Roth that naming and shaming can be quite effective in promoting socio-economic rights when the issue does not relate to allocation of resources, but rather when misconduct of government officials is arbitrary and discriminatory.

Robinson ends her contribution with an instructive statement –"Let the debate continue". She is certainly right. The debate should continue not only at the international level but also at the national level. NGOs need to engage in the debate by showcasing their successes and challenges in using different strategies for protecting socio-economic rights. International and national networks and alliances can also make a significant contribution here too.

Surely, there is 'no single road' to realising socio-economic rights. As argued earlier, there is need for different strategies to ensure that socio-economic rights are realised in different contexts. These strategies may also complement each other in achieving a particular outcome.

Sibonile Khoza is the Project Co-ordinator and a Senior Researcher in the Socio-Economic Rights Project, Community Law Centre, UWC.