

ESR REVIEW

Economic and Social Rights in South Africa

Ensuring
rights
make
real
change

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Editorial

This is the fourth issue of the *ESR Review* for 2008.

While the judicial enforcement of socio-economic rights is assured, the actual implementation of court orders relating to these rights remains questionable.

Christopher Mbazira assesses the extent to which the government has implemented court orders in socio-economic rights cases. Mbazira argues that had the government fully implemented the *Grootboom* decision, it would have avoided subsequent litigation in the areas of housing, health and social security. He identifies strategies that would be useful in ensuring effective compliance with court orders.

Jeff Rudin argues for an increase in the basic amount of water provided by the government to 94.5 litres per person per day, which is above the Witwatersrand High Court's standard of 50 litres. Rudin relies on the recognised uses of water to arrive at the proposed amount and argues that the standard is in fact feasible and affordable. He notes that South Africa faces an acute water shortage that will result in a water crisis if not addressed.

Mira Dutschke reviews a recent decision of the High

Court (Durban and Coast Local Division) on the administration of social assistance grants. She observes that the failure to administer social grants has resulted in increased litigation. She further notes that the Court's practice directive should assist in realising the constitutional right to social security as it provides guidance on how to improve the process of the administration of social grants to the poorest and most vulnerable.

This issue includes two updates. The first is a summary of a report of the South African Department of Education on the quality and accessibility of compulsory education for children with special needs, presented to the parliamentary Joint Monitoring Committee on Children, Youth and Persons with Disabilities. The second is a summary of part of the report of the United Nations Special Rapporteur on the right to food, which deals with national strategies for realising that right.

Rebecca Amollo then reviews the XVII International AIDS Conference. She notes that it marked

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the midpoint of the 2010 Global Target on Universal Access to HIV/AIDS treatment, prevention, care and support. After summarising the key issues discussed at the conference, Amollo concludes that human rights principles influenced the tone of the conference and underpinned the proposals for dealing with the stigma and discrimination associated with HIV/AIDS and the challenges posed by this epidemic.

In this issue, we also provide an update on recent publications of the Community Law Centre. The first, by Lilian Chenwi, is on relevant international and national standards on evictions. The second, by Sibonile Khoza, is

aimed at increasing awareness of the right to food and how it can be claimed. The Socio-Economic Rights Project has also published two research series: one on enforcing court orders, by Christopher Mbazira, and another on social security in South Africa, by George Mpedi.

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

Lilian Chenwi is the editor of the ESR Review.

Non-implementation of court orders in socio-economic rights litigation in South Africa

Is the cancer here to stay?

Christopher Mbazira

Over 12 years have elapsed since the South African Constitution was adopted, and the jurisprudence on socio-economic rights has increased considerably. Yet a majority of the population remain entrapped in poverty.

The failure of socio-economic rights litigation to lead to rapid socio-economic transformation can be attributed in some measure to the failure of the government to implement fully the court orders made in a number of socio-economic rights cases (Andrews, 2006: 65).

The government's record in complying with court orders - especially those concerning socio-economic rights - has hardly been

satisfactory (AfriMap & Open Society Foundation of South Africa, 2005: 17).

Non-compliance with court orders could therefore be described as a major stumbling block in the way of the realisation of socio-economic rights. Successful litigants have been rendered hopeless and the judiciary helpless in the face of the government's recalcitrance. Not only does the government's failure to imple-

ment court orders undermine the rule of law and the legitimacy of the judiciary, it also impairs the dignity of the successful litigants and impedes access to justice [*Nyathi v MEC Department of Health, Gauteng, and Another*, Case CCT 19/07 (2008), para 43].

This paper assesses the extent to which the government has complied with court orders in socio-economic rights litigation and sets out to devise strategies for their effective implementation. Although it uses the case of *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) (*Grootboom* case) as the point of departure because of its centrality to socio-economic rights, there are a number of other cases whose orders have met with a similar response from the government.

A legacy of non-implementation of court orders?

The recent death of Mrs Irene Grootboom while still waiting for formal housing proves that successful litigation does not necessarily result in tangible goods and services for the poor. Mrs Grootboom and others successfully petitioned the Constitutional Court to enforce the right of access to adequate housing for themselves and other members of their community. The fruits of their struggle were multifaceted. They were able to obtain a negotiated settlement resulting into an interlocutory order by which the government was ordered to improve the living conditions of the Wallacedene community. A recent survey by Marcus and Budlender provides evidence

that the government had still failed to comply with this order almost eight years after it was made (Marcus & Budlender, 2008: 61).

The other outcome of *Grootboom* was the general declaration that the government's housing programme was unreasonable because, among other things, it did not provide for the needs of the most vulnerable. This case is also important because of the principles it laid down for assessing the extent to which the government has discharged its constitutional obligations to realise socio-economic rights.

It is argued that had the government fully implemented the decision in *Grootboom*, it would have avoided subsequent litigation in the areas of housing, health and social security.

Housing policy and actual access to housing

The report of the UN Special Rapporteur on adequate housing, Miloon Kothari, following his mission to South Africa details the deficiencies in the housing policy and access to adequate housing in the country (Kothari, 2008: paras 35-53). The report provides evidence of failure to respond to the housing needs of the poor, to coherently implement housing laws and policies, and to halt forced evictions. The bleak reality is that the government's progress on the provision of housing to poor South Africans has not improved much since the *Grootboom* decision (Wickeri, 2004: 6-7).

However, it must be acknowledged that there have been some positive changes in both housing policy and case

law. For example, the judgment provided the impetus and basis for communities to resist forced evictions and to demand better housing conditions. It forced the government to adjust its housing programme to accommodate the needs of those living in intolerable conditions and those threatened with eviction (Budlender, 2004: 18). New policies that have directly resulted from *Grootboom* include the National Housing Programme: Housing Assistance in Emergency Circumstances (Emergency Housing Programme), adopted in April 2004, and the Upgrading of Informal Settlement Programme (UISP), adopted in October 2004.

The main objective of the Emergency Housing Programme is to provide temporary assistance in the form of municipal grants to enable municipalities to provide secure access to land and/or other basic municipal services and shelter in emergency situations.

The UISP allows municipalities to apply for a community-based or area-based subsidy that is not linked to individual households but is based on the actual cost of improving an informal settlement. Municipalities are discouraged from relocating informal settlements from expensive or unsuitable land to new housing developments on the outskirts of cities and towns. Instead, they are encouraged and empowered to make already occupied land habitable even if it is deemed to be technically and economically unsuitable.

These programmes represent noble efforts to implement the *Grootboom* judgment. However, concerns abound as to the compre-

hensiveness of these programmes and the reasonableness of their implementation. Wickeri, for example, has argued that

[d]espite the order of the Court, ... which required the implementation of policy to deal with persons living in crisis, there has been no revolutionary change in either the availability or delivery of housing for South Africa's urban poor (Wickeri, 2004: 6).

Even at a policy level, one cannot say with confidence that the current policies on housing comprehensively cover all vulnerable people in need of housing. There is, for instance, no coherent and comprehensive policy at the national level on housing for people with special housing needs. Special needs groups include "women (especially abused women), people living with HIV/AIDS, the aged, children, people with disabilities and the poor" (Chenwi, 2007).

As to the impact of the case on access to housing, one need look no further than the following cases: *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), *Rudolph and Another v Commission for Inland Revenue and Others* 1996 (2) SA 886 (A) and *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC) (*Olivia* case). The facts and issues in these cases are similar in many respects to those in the *Grootboom* case, and the question of the implementation of the principles in *Grootboom* was raised in these cases. It is clear from the cases that if the *Grootboom* judgment had been implemented fully, further litigation would have been averted.

It is important to note that though the implementation of

the agreement in the *Olivia* case has thus far been successful (see below), this is the exception rather than the rule.

Right of access to health care services

The impact of the *Grootboom* case on the right of access to health care services can be assessed by first examining the case of *Minister of Health and Others v Treatment Action Campaign 2002 (5) SA 721 (CC)* (*TAC* case). This case was a challenge to the government's policy on the prevention of mother-to-child transmission of HIV/AIDS on the ground that it was inconsistent with the right of access to health care services. The Court found that the government's policy was unreasonable as it excluded the most vulnerable, "those who cannot afford to pay for medical services" (para 70).

Of concern in this case is the extent to which the judgment has been implemented and the extent to which it has influenced changes, as it should have, in the general response to the problem of HIV/AIDS. The Treatment Action Campaign (*TAC*) has consistently castigated the government for its failure to distribute antiretroviral (*ARV*) medication. Like *Grootboom*, the *TAC* case demonstrates a reluctance on the part of the government - in this case, to overhaul the health system to extend HIV/AIDS treatment to all deserving patients. Indeed, in some provinces the implementation of the mandatory interdict issued in the judgment came only after threats of contempt of court proceedings (Heywood, 2003: 7-10).

The most recent case illustrating the government's failure to observe the principles emerging in the *Grootboom* case is *EN and Others v Government of RSA and Others (Westville case)* [2007 (1) BCLR 84 (D)] (discussed in *ESR Review* 7(2), July 2006). This concerned access to *ARV* treatment for HIV-positive prisoners. The recalcitrance of the government in this case is reflected in its failure to comply with a consent agreement between the parties. It instead chose to engage in adversarial litigation. As a result, the judge issued a structural interdict requiring the government to file a plan within two weeks on how it intended to implement the court order (paras 32-3).

The most interesting aspect of the *Westville* case is that even after judgment was handed down condemning the government's programme as unreasonable, the government was not willing to abide by the directions of the Court. The attitude of the government in this case was proof of lack of respect for the rule of law. Rather than implement the court order, the government chose to appeal on the technical point that the judge had erred in refusing to step down because one of the counsel for the applicants was his daughter. The government also applied to stop the implementation of the orders of the High Court pending the appeal. At the conclusion of this application, Judge Nicholson found that irreparable harm would be suffered by the prisoners if the interim order was set aside. The harm that the prisoners would suffer, he argued, was not comparable to the inconvenience likely to be suffered by the government.

Although in the end the government did file a plan, a lot of damage had already been done. The reputation of the Department of Correctional Services and the Minister of Health had been damaged and the case almost led to a breakdown in the relationship between the executive and the judiciary.

In spite of some shortcomings implicit in the department's plan, it represents a more systematic effort to address the issue of HIV/AIDS, including access to ARV treatment (Berger, 2006). Recent reports also indicate that the department is taking the issue of providing ARVs to prisoners more seriously than it did before. Access to ARV treatment by prisoners has increased considerably. The projection is that access will have increased by 76% by the end of 2008 (Sapa, 2008).

Social assistance cases *Despondency in the Eastern Cape*

The Eastern Cape provincial government is notorious for disobeying court orders in cases in which it was found to have violated the right to social security and assistance and the right to just administrative action [see, for example, *Eastern Cape Provincial Government and Another v Ngxusa and Others* (2001 (10) BCLR 1039 (SCA) (Ngxusa case)].

In *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* [2000 (2) SA 849 (E);

2000 (7) BCLR 728 (E)] (*Bushula case*), the applicant, who had been receiving the disability grant for over five years, was verbally informed of its termination. The Court found that the termination violated the provisions of the Social Assistance Act and its accompanying regulations, which authorised the suspension of the grant after notification to the beneficiary but did

not recognise the power of cancellation of a grant.

One would have expected the provincial government to apply the *Bushula* case to all similarly situated persons. Unfortunately, this is not what happened. The government did not reinstate the grants that had been cancelled. This precipitated further litigation, the most immediate case being *Ngxusa*. This was followed by *Njongi v MEC, Department of Welfare, Eastern Cape* (Case CCT 37/07 [2008] ZACC 4). Ms Njongi had successfully applied for the reinstatement of her grant, but the application was determined 18 months after its submission. The issue was whether she was entitled to arrears. The Constitutional Court castigated the provincial government for not reinstating the cancelled grants immediately after the *Bushula* case was decided. The Court confirmed the holding in the *Bushula* case to the effect that the termination of the social grants was unlawful and unconstitutional, and ordered the retrospective reinstatement of the

applicant's grant and payment of all the arrears due with interest (para 92). It remains to be seen whether this decision will be respected.

These cases are just the tip of the iceberg. They illustrate the magnitude of the problem of political commitment to implementing socio-economic rights and underscore the urgency of the need to devise strategies to ensure compliance with court orders. The next section describes some of the strategies that could be adopted in this regard.

Strategies for effective compliance

The reluctance of government officials to comply with court orders does not arise from mere obstinacy. There appears to be an entrenched belief among some government officials that the courts overstep their boundaries when adjudicating socio-economic rights. Evidence of this can be found in the attitude exhibited by the Minister of Health during the hearing of the *TAC* case; the reaction of the Department of Correctional Services to the judgment in the *Westville* case; and the recent outburst by the mayor of the City of Johannesburg, Amos Masondo, in response to the judgment in *Mazibuko and Others v City of Johannesburg and Others* [High Court of South Africa (Witwatersrand Local Division) Case No 06/13885]. The mayor is quoted as saying:

Judges are not above the law. We don't want judges to take the role of Parliament, the role of the national council of provinces, the role of the legislature and the role of this council. Judges must limit their role (Shoba, 2008).

While one may fault the *Mazibuko* judgment, to the extent that it prescribes 50 litres of water on the basis of the concept of the minimum core, the reaction of the mayor is unbecoming and a misconception of constitutional democracy (De Vos, 2008). It also clearly undermines the fundamental principle of the rule of law (Liebenberg, 2008). A public official with such an attitude would definitely ignore any order lawfully made by the court in cases of this type. This perception should be kept at the back of one's mind when assessing the extent to which court orders have been implemented.

The recent invalidation of section 3 of the State Liability Act by the Constitutional Court should be lauded (see *Nyathi v MEC, Department of Health, Gauteng CCT 19/07*). This judgment opens up space for enforcing court orders against the government in the same way that orders are enforced against private litigants. In spite of this, it is important to note that, ultimately, the successful implementation of court orders is largely dependent on the political will of the state. The government could still undermine the state by exempting a wide range of properties from execution, something sanctioned by the Constitutional Court (para 51).

What needs to be done is to inculcate and entrench a culture of constitutionalism and respect for the rule of law in public officials. It is important that state officials understand that judicial processes are not hostile to state functionaries but merely play a complementary role. As

Liebenberg points out (*Business Day* 20 May 2008):

Instead of viewing the courts' role in enforcing these [socio-economic] rights as an unwelcome intrusion, ... [the state] should understand that this is part of the "constitutional conversation" between courts, the government and civil society on how best to realise human rights. Rather than detracting from democratic politics, the judicial enforcement of human rights enriches constitutional democracy.

It is also important to cultivate inter-institutional trust between the courts, the executive and civil society. This can be achieved by promoting alternative dispute resolution and amicable settlement, not only as an alternative to litigation but also as part of the litigation process. This is a course that the Constitutional Court has already embarked on in the *Olivia* case. In the course of hearing the case, the CC ordered what could be described as an "interim structural interdict". The parties were ordered "to engage with each other meaningfully ... in an effort to resolve the differences and difficulties aired in this application".

The parties were also ordered to file reports, by way of affidavits, on the outcome of the engagement before the Court on or before 3 October 2007. The Court reasoned that this order would help to resolve the dispute amicably, and it did. The parties reached an agreement, which resulted in the relocation of over 450 people without an eviction.

Promoting institutional dialogue and amicable settlements, as was done in the *Olivia* case, also has the advantage of obtaining meaningful enforcement of court orders while minimising court involvement. Amicable dispute resolution "is far more effective than establishing an antagonistic relationship in which the government waits for specific court instruction and is unwilling to go beyond the bare minimum required by those specific orders" (Ray, 2008: 26).

Role of social mobilisation

South Africa has a long history of grassroots struggles led by political organisations, trade unions, social movements, religious organisations and NGOs (see Ballard, 2005). While these organisations have relied on litigation to challenge certain socio-economic policies by reminding the government of its socio-economic rights obligations, some have appreciated the limitations of litigation and combined it with social mobilisation, protests,

demonstrations and public campaigns. They have also used the Constitution and the language of rights to legitimise their social mobilisation activities (Ballard, 2005: 88). In the process, they have not only influenced the development of the law, but also broken oppres-

sive laws by, for instance, advocating civil disobedience (Heywood, 2005: 181).

The South African experience has shown that litigation and social mobilisation are mutually

The government could still undermine the state by exempting a wide range of properties from execution.

reinforcing. Social mobilisation prior to litigation has been used not only to force the government into submission, thus rendering litigation unnecessary, but also to illustrate the problems and extent of the violations that necessitated recourse to litigation. This “means that a court deciding a conflict does so in the knowledge of the expectations and lives that depend on the outcome” (Heywood, 2005: 210).

There is thus a need to intensify social mobilisation after successful litigation to ensure the implementation of court orders. As a matter of fact, social mobilisation has the potential to promote the implementation of court orders in the same way that it has promoted substantive litigation on socio-economic rights.

Conclusion

One of the challenges to realising socio-economic rights in South Africa lies in the reluctance by the

government to implement and respect court orders. This reluctance has partly arisen from the perception that courts are illegitimately overstepping their boundaries in social policy. South African courts have the power to adjudicate socio-economic rights and are therefore entitled to deal with questions concerning the reasonableness of social policies. However, to minimise concerns about the role of courts in social policy, courts should encourage the negotiated settlement of disputes in socio-economic rights cases. This will in turn improve the chances of the implementation of court orders arising from such settlements.

The *Olivia* case is a success story and has opened the horizon for this strategy. The decision in the *Nyathi* case, which invalidated section 3 of the State Liability Act, has also widened the opportunities for enforcing court orders involving liquidated damages. This case exposes the

state to the same consequences of litigation as those that private litigants face as far as money orders are concerned.

To cover the gaps that are still left, this paper has emphasised the need to inculcate a culture of respect for the rule of law in state officials and raise awareness of the role of the judiciary in the context of the separation of powers. Moreover, civil society and other stakeholders should combine litigation with other strategies of realising socio-economic rights. Based on the experiences of such organisations as the TAC, social mobilisation is a formidable tool for bringing about social change and holding the state accountable.

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Extending the minimum essential amount of water

Going beyond the High Court's standard

Jeff Rudin

The South African Constitution recognises the right of access to water [section 27(1)(b)], health care services [section 27(1)(a)], food [section 27(1)(b)], dignity [section 10] and life [section 11].

In assessing whether the government was fulfilling its obligations in terms of the right to water, the Witwatersrand High Court took a doubly bold move in its recent judgment in *Lindiwe Mazibuko and Others v The City of Johannesburg and Others* [Case No 06/13865 (WPD)] (*Phiri* case). In this case, the Court ruled on the constitutionality of both the amount of free water provided by the City of Johannesburg and the City's use of prepayment water meters. The City provides free water to everyone, amounting to 25 litres per person per day or 6 000 litres per household per

month as stipulated in regulation 3(b) of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water (the National Standards Regulations).

The Court not only recognised the validity of the minimum core obligations concept - that everyone must have access to minimum essential levels of each socio-economic right - but also shed light on the minimum water requirements. The Court observed that it understood the Constitutional Court's reasoning in the case of *Government of the Republic of South Africa and*

Others v Grootboom and Others 2001 (1) SA 46 (CC) and *Minister of Health and Others v Treatment Action Campaign* 2002 (5) SA 721 (CC) to mean that determining the minimum core in the context of the right to housing poses difficulties, and that it may be possible to determine the minimum core if sufficient information is placed before a court. This, as noted by the Court, did not amount to a rejection of the principle (paras 131 & 133). The Court further observed that "[t]he diverse needs presented by the right to adequate housing do not ... arise in the context of the right to water" (para 34).

Though the Court's reasoning with regard to minimum core is plausible, a closer look at the actual decision paints a less optimistic picture. In reaching its decision to increase basic water to 50 litres per person per day, the Court held that the City of Johannesburg's free basic water allocation of six kilolitres per household per month was inadequate for a household of eight occupiers. It also accepted that the average household size in Phiri was 16 persons and that a single yard represented by a single water account holder often had multiple households (paras 168-9).

However, the Court did not say how it arrived at the figure of 50 litres per person per day. This amount too is manifestly inadequate.

The most accurate way of establishing the minimum essential levels of water is to identify the various water uses that are necessary for survival, or qualify as "basic uses", and measure the amount of water needed to meet these basic uses.

Assigning amounts to recognised water uses

The various purposes for which water is used include personal and household hygiene, drinking, food preparation, washing clothes and subsistence farming. The amount of water needed for each of these uses can be quantified reasonably precisely and verified objectively. However, there is also an unavoidable subjective component that arises when determining the minimum amount of water required for each particular usage. How much

water, for example, does a "basic" bath require? Different answers are possible even in terms of the objectivities of health. Dignity is also involved, which brings further subjectivity. There will therefore be a small degree of unavoidable variation due to differences in judgement as to what constitutes a proper minimum.

In assigning amounts to each of the recognised water uses, three main sources have been considered: expert opinion, information made available by the City of Cape Town and measurements carried out by the South African Municipal Workers' Union (SAMWU). Unless otherwise indicated, the measurements in the table below are SAMWU's. It is assumed that all households have both a shower and a bath. The results are given below, in litres per person per day in a household of eight people (using the government's standard).

It should be noted that the estimates below exclude the special needs of children, the old and the sick. Given the high incidence of HIV/AIDS in South Africa, it is worth noting that over 50% of these patients have intractable water-related diarrhoea, and handwashing reduces the incidence of diarrhoea among children by 53% (DWAF, nd). Also excluded from the 94.5 litre standard are the extra water needs of 40% of the population who are unemployed and in many instances no longer seeking work, and thus spend more time at home than employed people.

The total amount, even though based entirely on very conservative figures, might seem unreasonable because it is higher than both the government's standard of 25 litres per person per day and the High Court's standard of 50 litres per person per day. However, that conclusion would be inaccurate if based even partly on the presumption that it would not be feasible for the government to supply such an amount. It is argued here that the proposed increase is feasible.

Is the proposed increase feasible?

The question that must now be addressed is whether there is sufficient water in South Africa to allow for this 378% increase.

The first thing to acknowledge is that South Africa faces an acute water shortage and that failure to act on this reality will eventually produce a water crisis. However, it is the authorities themselves - in particular the Department of Water Affairs (DWAF), which adduces water scarcity to legitimise its adherence to the standard of 25 litres per person per day - that both ignore the law on water usage and tolerate extravagant water consumption, especially by the wealthy.

The National Water Act 36 of 1998 makes it clear that people's water needs, together with ecological needs, have first call on the national water supply. The Act refers to the amount of water required to satisfy domestic needs as the "reserve". It defines the "reserve" as:

<p>Hands – 6 washes per day (3 before meals plus 3 after toilet use) at 1.5 litres per wash</p> <ul style="list-style-type: none"> • Hand washing makes an enormous contribution to health – even without soap. Moreover, the quantity of water is, within limits, more important than the quality (see Haffejee et al, 2007). • Highlighting the variability of even objective criteria, health experts differ about the amount of time hands should be washed under running water: 10, 15 and 20 seconds are all listed as minimum times [by LeTexier, 2008; Centers for Disease Control and Prevention, 2002; Health Promotion Agency for Northern Ireland, 2004, respectively]. The intermediate time of 15 seconds has been used here. • Water flow while washing is a critical variable. So too is whether or not liquid soap is used and the quality of the soap. These soap variables determine the amount of water required to get the soap to lather and to rinse the soap from one's hands. No allowance has been made for drying hands before turning off the tap, a practice strongly recommended by Canadian public health authorities (Centers for Disease Control and Prevention, 2002). • North American public health authorities allow for between 2.075 litres and 2.375 litres per wash, ie between 12.45 litres and 14.25 litres per day (U.S. Green Building Council, as specified by the U.S. Environmental Protection Agency's Energy Policy Act of 1992, and the Canada Green Building Council [www.cagbc.ca], respectively). 	9 litres
<p>Teeth – Morning and night at 0.25 litres per wash</p>	0.5 litres
<p>Face – Morning or night at 0.5 litres per wash</p> <ul style="list-style-type: none"> • The presumption is that a face wash, using soap, will be combined with a daily shower or bath, which will occur either first thing in the morning or last thing at night. Thus only one face wash has been allowed. • The City of Cape Town allows 1 litre per indigent person (City of Cape Town, 2006). 	0.5 litres
<p>Drinking</p> <ul style="list-style-type: none"> • Tea/coffee consumption is included in this amount, even though Gleick makes no reference to this form of liquid intake (Gleick, 2006). • Variables such as gender, age, pregnancy/lactation, geography and type of work make averaging difficult (Gleick, 2006) 	5 litres
<p>Food preparation (Gleick, 2006)</p>	10 litres
<p>Washing up – Morning and night</p> <ul style="list-style-type: none"> • As part of its Level 2 water restrictions introduced in October 2004, designed to achieve a 20% reduction in water used for drinking, Cape Town set a “water wise” limit of 30 litres per wash-up in a household of 4 (City of Cape Town, 2004). • The assumption here is that households have sufficient kitchen and eating utensils to allow for a twice-daily wash up. 	7.5 litres
<p>Clothes – 4 per week at 100 litres</p> <ul style="list-style-type: none"> • The City of Cape Town allows 7.5 litres per indigent person (City of Cape Town, 2006). • As part of its Level 2 water restrictions introduced in October 2004, and designed to make a 20% reduction in potable water, Cape Town set a “water wise” limit of 62 litres per wash for a 4 people 4 times a week (City of Cape Town, 2004). 	7.5 litres
<p>General house cleaning</p>	3 litres
<p>Bathing</p> <p>Shower: 5 per week at 24 litres per shower + bath: 2 per week at 90 litres per bath = 305 ÷ 7</p> <ul style="list-style-type: none"> • These are Cape Town's “water wise” amounts as specified above, plus 5 litres for 2 hair washes a week while showering. • Implicit in Cape Town's “water wise” allocation for baths is the acknowledgement that baths are acceptable even during periods of severe drought. • Johannesburg Water allows 150 litres per bath. 	44 litres
<p>Fruit/vegetable garden</p> <ul style="list-style-type: none"> • According to research carried out by the Food and Allied Workers Union (FAWU) 30 litres is the minimum requirement in Gauteng to support two 2.64-metre-square “low water use” stands planted with leafy vegetables for a household of 4 (Information based on personal communication with FAWU). • The City of Cape Town allows 15.5 litres per indigent person for garden and other uses but it does not specify what “other” covers. 	7.5 litres
<p>TOTAL</p>	94.5 litres

the quantity and quality of water required -

- (a) to satisfy basic human needs by securing a basic water supply ... for people who are now or who will, in the reasonably near future, be -
 - (i) relying upon;
 - (ii) taking water from; or
 - (iii) being supplied from,
 the relevant water resource; and
- (b) to protect aquatic ecosystems in order to secure ecologically sustainable development and use of the relevant water resource [section 1 (xviii)].

It could be argued that a generous water allocation to the “reserve” would be counterproductive if insufficient water was left for industrial, commercial, mining and agricultural use. In this event, people would have water sufficient for their personal basic needs but economic activity would be severely constrained. DWAF’s own practice, however, shows that, except when it uses water scarcity to restrict the amount of free basic water to the poor, it pays no attention to the problem of water scarcity. The same goes for provincial and municipal authorities. All three spheres of government allow scarce water to be used for such luxurious and self-gratifying purposes as swimming pools and golf courses.

Conclusion

The government has failed to acknowledge the gross inadequacy of its free water policy. The Minister of Water Affairs and Forestry, Lindiwe Hendricks, for instance, has repeatedly said there is no water resource crisis. Most recently, at the Municipal Water Indaba on 11 September 2008, which was attended by

this author, she also observed that the dams were overflowing with water.

The Constitution’s injunction to government to take reasonable measures, within its available resources, to achieve the progressive realisation of sufficient water for everyone [section 27(1)(b) and 27(2)] requires the government to identify some priorities - and priorities are usually political. It has taken 12 years and a court case to double the amount of free water, which suggests that water has not been a priority for the government. This article has also shown that the amount of free basic water provided by the government is grossly inadequate. Although the High Court was very bold in doubling the amount, it too is insufficient. A more accurate estimate of the basic amount of water needed for survival is around 94.5 litres per person per day.

The question, then, is whether the state can afford the cost of providing the water needed to give proper meaning to the Constitution’s guarantee of sufficient water. According to DWAF, eliminating water backlogs would cost R28.795 billion (Ambe, 2008: 7). The City of Johannesburg argued in the *Phiri* case that it could not afford the cost of providing the water required. The Court rejected this argument.

However, the example of golf courses, for instance, can be used to challenge this argument. Golf courses are huge consumers of water, using between 1.2 million and 3 million litres of water per day. It should be noted that even during the height of the 2004-2005 drought in Cape

Town, when the municipality required a 20% reduction in domestic water consumption, no action was taken against any of the golf courses, which, on the basis of the current 25 litres per person per day, were devouring an amount of water that could have served from four million to ten million people.

Furthermore, it would be hard to sustain the proposition that South Africa does not have the financial resources to extend the minimum core of sufficient water. There is ample evidence that finance is available from numerous sources, both currently and potentially. The Public Investment Corporation, for instance, has several hundred billion rands of public money that is probably the largest and most readily available source of finance.

It is worth noting that the politics of priorities illuminates the availability of the state’s actual resources. In the same way that golf courses highlight national priorities regarding the use of water, other priorities suggest that money invariably follows political will, especially in countries as rich as South Africa. Hence, extending the minimum core of human rights is at once both a legal and a political challenge. As Judge Dennis Davis has observed, “unless we can close the gap between the Constitution and daily reality, we are indeed in deep trouble” (Joubert, 2008).

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Improving the administration of social assistance services

Mira Dutschke

There has been continued concern about the administration of social assistance grants to the poor, the needy and the disabled in South Africa. This led to the establishment of the South African Social Security Agency (SASSA). SASSA is responsible for the administration and payment of social assistance grants in terms of the Social Assistance Act 59 of 1992 (1992 Act) and its successor, the Social Security Act 13 of 2004 (2004 Act).

This development was also meant to transfer administrative responsibilities from the provincial to the national level as a solution to the backlog of social assistance cases. To the disappointment of many, although the 2004 Act

has been in operation for nearly two years, and the draft regulations were drafted three years ago, the Department of Social Development (DSD) has to date not finalised and promulgated the regulations.

The 2004 Act includes the right to appeal against unsatisfactory decisions, but no independent tribunal has been appointed to consider appeals, creating a backlog of 5 000 cases. Thus the changes

Cele v The South African Social Security Agency and 22 related cases 2008 (7) BCLR 734 (D) (*Cele* case)

introduced have not yet made a difference.

In delivering his judgment in the *Cele* case (High Court, Durban and Coast Local Division), Judge Wallis expressed concern over the administration of social assistance, including the incompetence of the authorities, the backlog of applications for and payments of social assistance grants, incessant legal challenges and the high legal costs involved. The most important contribution of this case was the practice directive which the Court issued.

The facts

This was a consolidated case which dealt with multiple applications. Three of them sought orders to expedite the consideration of long-overdue applications for grants (a social grant, a child support grant and a disability grant). Fifteen were directed at procuring the hearing of appeals in cases where applications for disability grants had been turned down. Three sought reasons for the discontinuation of the grants (two child support grants and a disability grant). One sought an order for the reinstatement of a grant. All in all, these applications raised the following common problems:

- inordinate delays in considering applications for social grants;
- a failure to make arrangements for the hearing of appeals against decisions on social grants; and
- the unlawful cancellation of social grants (para 3).

In each case, an alternative order was sought for payment of

the grant in question, arrears and a claim for costs. The claims before the court related either to the 2004 Act or the 1992 Act.

The decision

The Court observed that it was not easy to identify which Act applied to the claims made in these cases because none of the applications, or the supporting affidavits, identified the relevant statutory provisions on which they relied (para 4). In this regard, the Court blamed the attorneys representing the litigants because they could have done better and clarified their pleadings (para 8). The Court then emphasised the necessity for lawyers to be thoroughly familiar with the applicable legislation and to ensure that applications were made in a coherent form (para 11).

It also noted that the inability of the authorities to administer the system had spawned a plethora of unopposed court applications brought by aggrieved persons. This had also spawned a mini-industry of legal practitioners providing legal assistance to unskilled and impoverished persons. Such litigation resulted in huge cost to the state (paras 20-1).

The Court pointed out that application papers needed to identify the relief sought, the statutory provisions and the facts relied on. They should set out the circumstances of the applicants, the basis for their claim, the history of their applications and the attempts made on their behalf to resolve their claims. Where the issue related to an appeal, the applicant should show that they had made an application, were dissatisfied with the result and

had lodged notice of the appeal, including the grounds on which the appeal was brought. When a grant was withdrawn, the papers should show that the grant should have remained in force. Where the claim was in relation to grants that had lapsed, the papers should at least mention Regulation 24 in GN R 418, which dealt with lapsing grants, and the fact that the facts did not fall within the circumstances described in that regulation (see paras 53-4).

The Court also pointed out that SASSA had a constitutional obligation to progressively realise the right to social security and strive to overcome the existing difficulties in the administration of social assistance (para 26). It expressed concern at the fact that the application did not refer to the Promotion of Administrative Justice Act 3 of 2000 (PAJA). This, the Court said, created difficulties in both the form and substance of the applications (para 47). In this regard, the *amici curiae* (advocates Broster SC and Annandale, who were appointed by the Court) submitted that cases founded upon inaction by SASSA or the Minister did not fall within PAJA. The Court rejected this line of argument, reasoning that inaction could constitute administrative action and was therefore reviewable under PAJA, as had been pointed out in *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs* 2004 (7) BCLR 687 [2004(4) SA 490 (CC)].

The practice directive

Invoking its inherent powers under section 173 of the Constitution to protect and regulate its

own process, the Court issued a practice directive in which it laid down some rules that should be followed in cases dealing with social grants. This practice directive is applicable to the Court's area of jurisdiction, KwaZulu-Natal, until further notice. It follows the example of the Eastern Cape, where similar problems had occurred and a similar practice directive was issued. The Court's practice directive in this particular case is in the following terms:

Before an applicant may issue application papers out of the Registrar's office in an application seeking relief relating to or arising from an application for a social assistance grant in terms of the 2004 Act or its predecessor they shall be obliged to deliver a notice to the State Attorney's office in KwaZulu-Natal marked for the attention of the officer appointed by the State Attorney for that purpose and containing the following details:

- (a) the name and identity number of the applicant for relief;
- (b) the type of grant to which it relates;
- (c) where the grant relates to a person other than the applicant, as in the case of a child support grant, the name of that other person and their identity number and where a child support grant is sought in respect of a child who is not the child of the applicant a brief description of the relationship between the applicant and the child and the reason why the applicant claims a child support grant in respect of that child;
- (d) where the applicant is seeking a disability grant the nature and anticipated duration of the disability;
- (e) the administrative centre where the application for the grant was lodged and where possible the date of the application as well as proof of that application in the form of the receipt issued to the applicant in terms of regulation 8(3)(b) of the regulations in GN

R418 or failing that other information that will enable the State Attorney to identify the application in the records of SASSA;

- (f) where the complaint is that an appeal has been lodged and no appeal conducted a copy of the notice of appeal must be furnished;
- (g) the nature of the applicant's complaint, such as that an application has been made and not processed; an application has been refused and the grounds of the refusal or an appeal (or both) are sought; or that a grant originally made has been withdrawn and the applicant seeks reasons for the withdrawal or the reinstatement of the grant (or both) or any other complaint;
- (h) a copy of the letter of demand addressed to SASSA or the Minister of Social Development as the case may be, with proof of delivery and a copy of any response; and
- (i) the name of the attorney representing the applicant (para 34).

The Court stated that the reason for involving the office of the State Attorney at the pre-litigation stage was to explore the opportunity for an out-of-court settlement. However, it observed that the involvement of the State Attorney did not remove the obligation of the applicants to give notice to SASSA or the Minister of Social Development of any proposed proceedings and to seek an amicable settlement (para 34).

On receipt of the notice, as stated by the Court, the case must be entered into a register and assigned a case number. In liaison with the SASSA or the DSD, in the case of appeals, an attempt must be made to respond to or

resolve the issue. If no satisfactory response is forthcoming within one month of the receipt of the notice, when the case is against SASSA, or two months, when it is against the DSD, the matter can go to court. The Court added that the notice and response should form part of the papers to be filed in the court, which must be accompanied by a certificate signed by the applicant's attorney stating that there has been no response or an inadequate response to the notice (para 35).

Concerned that this procedure could further extend the waiting times for claims, the Court indicated that the State Attorney's office should review the waiting period once the system was up and running (para 36).

The Court further suggested in this regard that an officer dealing with these issues should be appointed within the State Attorney's office within one week of the judgment and that the firms involved in these cases should

be informed of the directive and the new officer (para 37). Registrars, the Minister and the Director-General of Social Development and the heads of SASSA had to be furnished with a copy of the judgment; and the State Attorney

had to report to the Deputy Judge President on the implementation of the directive (para 37).

In addition, the Court stated that in cases where application papers had already been served but have not yet been placed

The practice directive issued by the Court may assist in realising the constitutional right to social security.

on the Court's roll, the practice directive should be complied with before a notice to set down the case was served (para 39). With regard to cases already set down, attorneys could by notice remove them from the roll and then follow the practice directive (para 40).

To ensure that any problems identified in the implementation of this practice directive are addressed, its operation requires ongoing supervision by the court (para 37). Accordingly, the Court required the State Attorney to provide a report to the Deputy Judge President on the implementations of the practice directive, any problems arising from its terms and suggestions to address the problems, as well

as its effectiveness in resolving complaints relating to social assistance grants. This has to be done at intervals of not less than three months, commencing on 30 June 2008 (para 37).

This directive was approved by the Judge President, the Deputy Judge President and the judges on duty in Durban in March 2008 before it was issued. It will therefore be followed in the Durban and Coast Local Division and the Natal Provincial Division until further notice.

Conclusion

The failure to administer social grants has resulted in increased litigation and, in turn, cost the government considerable sums in legal

costs. The High Court in the *Cele* case was bold enough to use its constitutional prerogative to come up with suggestions that could be used to resolve the problem of the backlog of cases, emphasising in particular the involvement of the state before the commencement of litigation concerning social assistance. The practice directive issued by the Court may assist in realising the constitutional right to social security, in so far as it provides guidance on how to improve the process of the administration of social grants to the poorest and most vulnerable members of our society.

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Access to education for children with special needs in South Africa

Agreement on a definition of "children with special needs" (CSNs) has been elusive. For some, CSNs are children who have a chronic disease or disability that requires educational services, health care or related services of a type or amount beyond those required by other children generally (see, generally, Bartlett & Wegner, 1987).

Special needs can be physical, developmental, behavioural and/or emotional. Some definitions go beyond condition or diagnosis to look at the child's risk of developing a condition or the effect of a condition on the child's ability to carry out everyday tasks. Others have also argued that a definition based on condition or diagnosis is limited because of variability in the severity, degree of impairment and service need. Further, it has been argued that measuring the level of disability leaves out children who maintain their ability to perform daily activities because of medication

or special equipment (see, generally, Bartlett & Wegner, 1987). Given this definitional difficulty, the expression is often used contextually.

On 1 August 2008, the South African Department of Education (DOE) briefed the parliamentary Joint Monitoring Committee on Children, Youth and Persons with Disabilities on the quality and accessibility of compulsory education for children with special needs, including children with disabilities, street children and children awaiting trial. This update provides a summary of what the report contained, including the issues

that arose from the meeting and recommendations made.

Issues covered in the Department of Education report

Several issues relating to the education of children with disabilities, street children and children awaiting trial came up during the presentation and discussion of the report. The Deputy Director-General of Education, Ms Palesa Tyobeka, presented the report. She revealed that the DOE wanted to provide access to special schools

for those with severe special needs. Children with less severe disabilities, who could be accommodated by the ordinary schools and needed minimal additional resources, would be integrated into the mainstream education system wherever possible.

The DOE's audits revealed that there was poor infrastructure and overcrowding in special schools, teachers and caregivers were underprepared or unprepared to deal with the conditions of the learners and essential assistive devices were in short supply or unavailable. The report also revealed that there were teachers in schools for the deaf who did not know how to sign, and in schools for the blind who could not teach or read Braille. However, about 1 600 teachers had been trained and the training was continuing, according to the report. Other factors that limited access to education included high fees and shortage schools in rural areas.

The report further revealed that full-service schools were being developed under the "30-30-30 programme": 30 districts had been identified to test the policy and 30 special schools and 30 mainstream schools had been upgraded to full-service schools. With regard to full-service schools, the DOE had focused on building proper physical infrastructure (like ramps and toilets suitable for all) and human resource development. A screening support document had been developed for screening children to identify and assess what their exact needs were and thus determine appropriate placement and support. The DOE reported that 10 mainstream schools would open in 2009, and that 20 more schools would be upgraded in 2009 and open in 2010.

The lack of communication between the general public and the DOE had been noted as a major problem. The cost of further education and training (FET) schools was very high because of teacher salaries and equipment expenditure. It further emerged that there had been a lack of monitoring and evaluation of the programmes pursued so far. There was also concern that disabled students

were not accessing FET colleges and that people were not aware of the existing bursary schemes.

Schools for the deaf went up to only Grade 9, an issue that the DOE felt should be addressed. The disparity between the levels of advancement in predominantly white and predominantly black schools was noted, as was the fact that many special schools were being closed down and children were not being promoted to higher grades. Sexual abuse, it was reported, was rampant in special schools. Furthermore, some children with disabilities had skills in areas such as sports that were being ignored. Most principals were better trained in administration than in student or interpersonal skills. Transport, nutrition and discrimination issues were also raised. An interview with a group of disabled students from the University of the Western Cape showed that most universities were still preoccupied with developing their own policies as opposed to implementing national policies.

It was noted that many youths were in detention awaiting trial, with no knowledge of their exact dates of trial. There were also no active learning programmes for them. These were the findings of the joint monitoring committee from a visit to Pollsmoor prison. The committee questioned the DOE on its relationship with the Department of Correctional Services (DCS). The DOE responded that it had been working with the DCS. However, this had been on a limited scale, in the sense that there seemed to be a general understanding at the national level of what needed to be done, yet reports from the provinces showed that matters were not working out as planned. About access to education for children living on the streets, the DOE reported that it had not focused on them in terms of the special schools policy.

Undertakings by the department

The DOE undertook, among many other things, to enhance communication among and within all the departments and conduct campaigns to educate parents about the choices available for disabled children, starting in September 2008. The department proposed compulsory early education for disabled children

and the development of learner profiles to establish whether the learners were actually benefiting from the educational programmes. Nutrition schemes were also suggested. The feeding programme would prioritise the poor, and it was suggested that an agency be put in charge of the programme.

Conclusion

The Constitution of South Africa protects the rights of children with disabilities. It also provides that everyone has the right to a basic education, including adult basic education, and to further education, which the state, through reasonable measures, must make progressively available and accessible [section 29]. Moreover, it provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including disability [section 9 (3)]. These provisions are accompanied by the tripartite obligations of the state to respect, protect and fulfil human rights [section 7]. The DOE's briefing shows that there are still many outstanding issues regarding the education of children with disabilities. It is hoped that the DOE will attune its policies and implementation to its constitutional obligations, taking into consideration the best interests of the child as encapsulated in section 28(2) of the Constitution.

This summary was prepared by **Rebecca Amollo**, a doctoral candidate at the University of the Western Cape and an intern in the Socio-Economic Rights Project.

The report of the briefing by the Department of Education is available at www.pmg.org.za/report/20080801-access-education-children-special-needs-birth-certificates-and-id-doc.

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National strategies for realising the right to food

The right to food has received increasing attention internationally and nationally following drastic increases in food prices and widespread protests against these increases in more than 40 countries this year (FIAN International, 2008: 2-3). This global food crisis is endangering millions of the world's most vulnerable and threatens to reverse critical gains made towards reducing poverty and hunger as outlined in the Millennium Development Goals (CFA, 2008: executive summary, para 1). The Comprehensive Framework for Action (CFA) was developed by the High-Level Task Force on the Global Food Crisis, established by the United Nations (UN). It proposes actions to promote a comprehensive response to the global food crisis.

In a recent report to the UN Human Rights Council, the UN Special Rapporteur on the right to food, Olivier de Schutter (2008), analyses the global food crisis. He also explains why a human rights framework should be used in identifying the measures needed to respond to that crisis. Such an approach would target the most vulnerable segments of the population - those most severely affected by the crisis or those who may least benefit from the remedies (para 2).

The report emphasises the need for governments to develop national strategies for the realisation of the right to food in order to

- (a) identify, at the earliest stage possible, emerging threats to the right to adequate food, by adequate monitoring systems;
- (b) assess the impact of new legislative initiatives or policies on the right to adequate food;
- (c) improve coordination between relevant ministries and between the national and subnational levels of government, taking into account the impact on the right to adequate food, in its nutritional dimensions, of measures taken in the areas of health, education, access to water and sanitation, and information;
- (d) improve accountability, with a clear allocation of responsibilities, and the setting of precise time frames for the realization of the dimensions of the right to food that require progressive implementation; and

- (e) ensure the adequate participation, particularly of the most food-insecure segments of the population (para 14).

The national strategies listed in the report include: adopting measures based on an adequate mapping of food insecurity and vulnerability, ensuring accountability for violations of the right to food, improving the protection of the rights of land users and strengthening the protection of women's rights.

Mapping of food insecurity and vulnerability

Guideline 13 of the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (Voluntary Guidelines) recommends the establishment of food security and vulnerability mapping systems (FIVIMS) to identify groups that are food insecure. These guidelines were adopted in 2004 by the member states of the General Council of the Food and Agricultural Organization to elucidate how the right to food can be implemented in practice.

Relying on the Voluntary Guidelines, the Special Rapporteur notes that a human rights approach requires that states develop policy responses based on an adequate mapping of food insecurity and vulnerability, identify how interventions should be targeted and assess the impact of the right to

food (para 16). This would help states to identify the scope of the problem and the development of appropriate policies. The Special Rapporteur further notes that impact assessments can significantly improve the quality of law- and policy-making (para 16). The Voluntary Guidelines contain recommendations on conducting impact assessments of the right to food (Guideline 17).

Ensuring accountability for violations of the right to food

Since mapping food security alone is not enough to deal with the food crisis, the Special Rapporteur also recommends improving accountability by establishing mechanisms through which rights holders can claim their right to food. Hence, in addition to ensuring that people have access to adequate food, states must ensure that they have legal claims against those whose actions or inactions impact on their situation (para 17). The Special Rapporteur therefore proposes that states should adopt framework legislation to render the right to food justiciable domestically and thus empower the courts to monitor compliance with the right to adequate food (para 18). Such accountability mechanisms, observes the Special Rapporteur, will ensure the identification at an early stage of macroeconomic or social policies that are misguided or not well targeted (para 18).

The Special Rapporteur notes that the CFA does not have such accountability mechanisms.

Improving the protection of the rights of land users

The Special Rapporteur remarks that responses to the global food crisis pay very little attention to the rights of land users and, to the extent that they emphasise increasing food production, they could lead to new threats to security of land tenure (paras 20 & 21). He recommends that developing countries be encouraged to ensure security of tenure for all land users (para 21), to avoid excessive concentration of land and, where possible, to accelerate agrarian reform to ensure that those who depend on land for their livelihood have access to it. The Special Rapporteur also recommends that special attention be paid to the removal of all obstacles to the equal enjoyment of land rights by women (para 22).

Strengthening the protection of women's rights

Respect for women's rights is important to the enjoyment of the right to adequate food, principally in its nutritional aspects. Accordingly, as noted by the Special Rapporteur, there is a high degree of consensus on the need to strengthen women's rights. States should therefore be encouraged to make women's rights an explicit component of their national strategies to respond to the food crisis (para 23).

Conclusion

The report of the Special Rapporteur also deals with the obligations not to pursue policies that have a negative impact on the right to adequate food, using the example of agrofuels (paras 25-34); to protect the right to adequate food by controlling private

actors (paras 35-8); and to cooperate internationally in order to contribute to the fulfilment of the right to food (paras 39-40).

The Special Rapporteur concludes by making a number of recommendations, calling on the UN Human Rights Council to

- continue monitoring the initiatives adopted by governments, the private sector and international agencies in response to the global food crisis, ensuring that it focuses attention on the human rights dimensions of the crisis and the effective participation of rights holders;
- encourage states to build national strategies for the realisation of the right to adequate food, which should take into account the need to strengthen the protection of the human rights of the most vulnerable groups, including land users whose land tenure is insecure, landless labourers, women, the displaced, indigenous people, minorities, the disabled and the rural and urban poor;
- encourage the development of an international consensus on agrofuels, to avoid the negative impact of the development of agrofuels on the international price of staple food commodities, and ensure that the production of agrofuels is consistent with human rights and does not result in distorted development in producer countries;
- insist that all states ensure that third parties do not interfere with the right to adequate food, and clarify how the private sector can contribute to the shaping of a just food production and distribution system;
- request further studies on the role of international cooperation in combating the negative effects of non-commercial speculation on the price of primary agricultural commodities; and
- examine the contribution that the establishment of a global reinsurance

fund could make to the realisation of the right to adequate food.

A summary of the responses of the international community to the global food crisis of 2007-2008 is annexed to the report (Annexure II), as is an account of the impacts of agrofuels production on the right to adequate food (Annexure II).

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

The Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security is available at www.fao.org/righttofood/en/highlight_51596en.html.

The Comprehensive Framework for Action is available at www.un.org/issues/food/taskforce/Documentation/CFA%20Web.pdf

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The XVII International AIDS Conference 2008

Rebecca Amollo

The International AIDS Conference is convened annually by the International AIDS Society (IAS), the world's leading independent association of HIV professionals, with more than 10 000 members from 185 countries. The XVII International AIDS Conference was held from 3 to 8 August 2008 in Mexico City. The partners for this year's event included the Federal Government of Mexico, the Government of Mexico City and local scientific and community leaders. Other institutional partners for the conference included the Joint United Nations Programme on HIV/AIDS and its co-sponsors, the World Health Organization (WHO) and World Food Programme, the International Council of AIDS Service Organizations, the Global Network for People Living with HIV/AIDS, the International Community of Women Living with HIV/AIDS, the World YWCA and the Asian Harm Reduction Network.

With more than 24 000 participants from over 190 countries, this year's event was the second-largest in the history of the International AIDS Conference. It was also the first to be held in Latin America. The conference theme was "Universal Action Now". Its central message was the need for continued urgency in the worldwide response to HIV/AIDS, and for action on the part of all stakeholders.

The conference marked the midpoint of the 2010 Global Target on Universal Access to HIV/AIDS treatment, prevention, care and support. The 2010 target flows from the July 2005 meeting in which leaders of the Group of Eight (G8) countries (Canada, France, Germany, Italy, Japan, Russia, the United Kingdom and the

United States) pledged to ensure universal access to antiretroviral (ARV) treatment worldwide by 2010 (See Outcome Document from the 2005 World Summit). This shaped the development of the AIDS 2008 programme and messaging.

Issues discussed

Several issues surrounding HIV/AIDS treatment, care and support were discussed, as was scientific evidence from research and community experiences on these issues. The conference reiterated that stigma and discrimination continue to undermine the prevention and treatment of HIV/AIDS. Most of the presentations dealt with these two obstacles to HIV/AIDS care, treatment and

support. Other issues explored included: the strengthening of health systems, service models, integration with tuberculosis, sexual and reproductive health, co-infections, maternal health, long-term care, mental health, palliative care, drug resistance, harm reduction, primary health care and hepatitis C. Attention was also given to specific regional issues such as stigma, setting regional policy agendas, sharing experiences and information among regions, the synergy of treatment and prevention, treatment as a tool for prevention, and respect and the promotion of human rights and gender equality as a framework for all aspects of the response to the pandemic.

Tuberculosis

The conference highlighted the intersection between HIV and tuberculosis (TB). TB was discussed as the leading cause of death

The conference reiterated that stigma and discrimination continue to undermine the prevention and treatment of HIV/AIDS.

among people living with HIV. It was found that at least one-third of the 33 million people living with HIV/AIDS worldwide were also infected with TB and that these individuals had up to a 15% risk of developing active TB every year. In this regard, it was suggested that in order to reduce the burden of TB in those living with HIV, people living with HIV should take greater responsibility for implementing the three "I's": intensified case finding, isoniazid preventive therapy and TB infection control. The emerging threat of multidrug-resistant and extensively drug-resistant TB was discussed and attributed largely to inadequate infection control practices in health care settings.

Community experiences in prevention

Using the experience of female sex workers mobilised in India, Chile and France, one of the presenters proposed a "triple therapy" strategy to combat HIV in concentrated epidemics. These are epidemics where HIV prevalence is below 1% in the general adult population, but over 5% in at least one group at higher risk. In other words, these are epidemics where HIV is concentrated in certain groups, such as female and male sex workers (including transgendered men), homosexuals, injection drug users, prison inmates and migrant workers. The triple therapy strategy is a response to the stigma attached to HIV and fights for greater acceptance of people living with HIV, the improvement of laws and policies to protect those most vulnerable to

infection, and the implementation of prevention programmes that incorporate community mobilisation and peer support.

Prevention fatigue

The conference also discussed the issue of prevention fatigue. Pragmatic solutions were suggested in this regard, including risk reduction programmes adapted to individual and community needs. It was also noted in this light that access to ARV therapy and perceived good health had a positive impact on consistent condom use among people living with HIV/AIDS. It was also stressed that HIV testing, including routine testing with opt-out options, was important.

Criminalisation of HIV

One of the issues that featured strongly during the conference, to the extent that it affected prevention efforts, was the criminalisation of HIV, which was said to have a stigmatising and discriminatory effect. It was reported that the criminalisation and criminal prosecutions of the transmission of or exposure to HIV had become widespread. The countries involved include the United States, Sierra Leone and Singapore. It was further argued that prosecutions always singled out already vulnerable groups of society, such as sex workers, homosexuals and, in European countries, black males. These laws tended to victim-

ise women and expose them to assault, ostracism and further stigma. Far from being approved of as contributing to prevention efforts, the criminalisation of the transmission of HIV/AIDS was instead criticised for aggravating suffering.

Women, gender and violence

The conference discussions also brought to light the issue of the relationship between gender inequality and HIV/AIDS. It was argued that gender inequalities had a negative impact on prevention, in that fear of violence and discrimination prevented women from seeking testing and treatment and, at the same time, placed them at risk.

Tackling gender-based violence was highlighted as a priority as were ensuring the sexual and reproductive health rights of women and investing in women.

Tackling gender-based violence was highlighted as a priority in responding to the epidemic, as were ensuring the sexual and reproductive health rights of women and investing in women organisations as important means of ensuring that women participate effectively in decisions that affect their lives.

Strengthening health care through resources and involvement of people living with HIV

The conference also underlined the importance of investing more in prevention and allocating more financial resources to health systems generally, and in particular

to those that penetrate rural and other hard-to-reach areas. The need to simultaneously scale up AIDS programmes and strengthen health systems in poor countries was underscored. Experts warned of the global shortage of health care workers.

As part of strengthening health systems, the role of involving people living with HIV/AIDS was emphasised. Greater involvement of people living with HIV/AIDS, it was suggested, could be a key component

of efforts to strengthen the fragile health systems in low- and middle-income countries (LMICs). Such involvement should be rooted in their existing capacities and skills, and not used merely to fill quotas. This, it was argued, should entail ensuring that people living with HIV/AIDS had multidimensional roles as advocates, watchdogs and managers, and were active participants in decision-making bodies responsible for the planning, implementation, monitoring and evaluation of health programmes.

Health as a human right

Delegates were called upon to join the campaign for “health for all”, which involves the provision of comprehensive primary care to all who need it and is a central tenet of the Alma-Ata Declaration adopted by WHO member states

30 years ago. The Alma-Ata Declaration underlined the importance of primary health care and

expressed the need for urgent action by all governments, all health and development workers, and the world community to protect and promote the health of all the people of the world. The conference also echoed the need for a new covenant between communities, governments,

UN agencies, academics, health care workers and scientists to harness the gains made in the battle against HIV/AIDS thus far to make health not a privilege for a few, but a fundamental human right for all.

Sex workers

The conference deliberated on the issue of sex workers and condemned strategies that ignored the realities of sex workers. Sex workers must be seen as a part of the solution and their rights must be fully recognised. It was observed that current efforts to reduce HIV prevalence among sex workers were hampered by inadequate funding and misdirected investment in programmes that did

not meet the population’s actual needs. Good practices were cited from South America, where sex work is recognised as “work” and sex workers’ organisations receive direct support. It was argued that such practices were successful in fighting stigma and discrimination against sex workers.

Children and families

The point was made that while affected children were highly visible in photo opportunities and headlines about HIV/AIDS, their real needs were ignored. Children were affected through the illness and death of their parents or caregivers, emotional distress, material deprivation and lack of access to treatment, support, basic health services and education. It was therefore suggested that resources be devoted to this cause. It was mentioned that

90% of the 2.1 million children living with HIV in 2007 were from sub-Saharan Africa and had been infected through mother-to-child transmission. The substantial increase in access to ARVs to prevent mother-to-child-transmission was noted. The development of family-centred approaches to address the needs of all children af-

ected by HIV/AIDS was stressed. Such approaches would include

Greater involvement of people living with HIV/AIDS could be a key component of efforts to strengthen the fragile health systems in low- and middle-income countries.

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social protection services that supported families and communities in caring for children and gave economic assistance.

Men who have sex with men (MSM)

Another issue that came through strongly related to homosexual relations. It was highlighted that there were hidden epidemics among homosexual partners in LMICs, and that factors increasing HIV risk and vulnerability varied across cultures. Community-based intervention was cited as an example of an effective prevention strategy, including greater involvement of homosexuals in the planning of national AIDS policies and prevention programmes. A call was made for the decriminalisation of sexual behaviour between consenting adults and for greater commitment from donors to funding programmes that address the special concerns and needs of this group of people relating to HIV/AIDS.

Youth

The conference noted that 40% of new infections worldwide were among young people and lamented the fact that HIV prevention and treatment programmes were failing to reach them effectively. The conference highlighted the need for actions and policies that engaged the youth, especially those

living with HIV/AIDS, as respected partners in developing and implementing programmes to address their needs and diversity.

Scientific programmes

Challenges concerning vaccine and microbicide research were noted, but it was emphasised that these should not serve as an excuse to abandon efforts to find other means of preventing new infections. Other issues

Political complacency and inadequate human and financial resources were cited as common obstacles to effective HIV/AIDS prevention and treatment and global health.

discussed under this heading included the long-term impact of ARV treatment on brain function, heart attack risks in patients taking ARVs, the emergence of HIV resistance and new studies on the relative efficacy of various treatment regimes. Other topics included the use of non-physician and other medical personnel to provide HIV care, the current status of HIV vaccine and microbicide research, how best to approach HIV prevention in both generalised and concentrated epidemics, the use of ARV therapy as a prevention strategy, and the legal and ethical implications of laws to criminalise transmission.

Scaling up treatment and prevention

The conference came up with several suggestions that could lead to the scaling up of treatment and prevention, such as leadership,

male circumcision, increased access to HIV testing and counselling, services for the prevention of mother-to-child transmission, and paediatric care and treatment. Political complacency and inadequate human and financial resources were cited as common obstacles to effective HIV/AIDS prevention and treatment and global health.

Conclusion

It is evident that human rights tenets influenced the tone of the conference and underpinned the proposals for dealing with the stigma and discrimination associated with HIV/AIDS and resolving the many challenges presented by this pandemic. This was succinctly articulated by Pedro Cahn, the IAS president and AIDS 2008 co-chairperson:

The voices of those who bear the brunt of this epidemic have been loud and clear in Mexico City ... If the world does not heed the call to ensure the human rights and dignity of every person affected by HIV, we will not achieve our goal of universal access.

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More information regarding the conference is available at www.aids2008.org

The Outcome Document from the 2005 World Summit is available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement>

Publications from the Community Law Centre 2008

Lilian Chenwi, 2008.
Evictions in South Africa: Relevant international and national standards. Community Law Centre, University of the Western Cape

The courts in South Africa have tried to enforce the housing rights of people facing eviction. However, though legislation and policies offer protection as well, evictions are a regular occurrence that at times result in homelessness and often occur in a way that is incompatible with respect for human rights.

Many poor and vulnerable people are evicted without being given an opportunity to oppose their eviction or put their case in court, without adequate notice of when the eviction order will be carried out and, in some instances, without being given suitable alternative accommodation. More often than not, those facing eviction are not aware of their rights or confront obstacles in enforcing them through the legal system.

The publication *Evictions in South Africa: Relevant international and national standards*, by Lilian Chenwi provides useful and accessible information on the substantive and procedural standards in international and national law relating to evictions. It aims to raise awareness of these standards so that people can have the relevant information

to advance housing rights. It is a useful guide for non-governmental organisations, academics, students, paralegals and legal practitioners assisting those facing eviction and advocating reform in housing rights and evictions.

Sibonile Khoza, 2008.
Knowing & claiming your right to food. Community Law Centre, University of the Western Cape

South Africa recognises the importance of food. It has a Constitution that specifically guarantees the right to sufficient food. However, this right has received little attention compared to the other socio-economic rights (eg health, housing and water). Few people know that this right is protected in the Constitution. They also do not know what it means and how to claim it. Although it is one of the most violated rights, there has not been any court case on it yet.

This updated booklet by Sibonile Khoza explains what the "right to food" means and how it is protected in the Constitution and in international law, describes the obligations it places on the state, provides information about government policies and programmes and how to get access to them, and suggests ways and means to promote the right to food.

The booklet is available in four languages: English, Afrikaans, isiXhosa and isiZulu.

Christopher Mbazira, 2008.
You are the "weakest link" in realising socio-economic rights: Goodbye – Strategies for effective implementation of court orders in South Africa. Community Law Centre, University of the Western Cape

The justiciable place of socio-economic rights in the South African Constitution is being undermined by non-compliance with court orders issued in court processes involving the enforcement of these rights. This has, in some cases, left successful litigants stranded and unable to benefit from the orders arising from their victories.

This research paper by Christopher Mbazira (published as Research Series 3 of the Socio-Economic Rights Project) reviews a number of socio-economic rights judgments and discusses the extent to which the orders granted in those cases have been complied with. It also sketches the courts' approach to interpreting the substance of socio-economic rights. The paper goes on to suggest the best strategies for implementing court orders in socio-economic rights cases.

George Mpedi, 2008.
Pertinent social security issues in South Africa. Community Law Centre, University of the Western Cape

South Africa has a fairly evolved system of social security for a developing country, but that system nevertheless remains seriously deficient in a number of respects.

This is particularly clear when one considers the socio-economic challenges facing the country, such as poverty and inequality, HIV/AIDS and unemployment. In addition, a closer examination of specific components of the social security system - the legislative framework, the institutional and administration structure, the scope of coverage and the adjudication and enforcement mechanisms - leads one to the conclusion that it needs an urgent overhaul.

This research paper by George Mpedi (published as Research Series 4 of the Socio-

Economic Rights Project) provides some perspectives on the South African social security system, including the South African Social Security Agency. The paper first analyses the social and political context of poverty in South Africa. It then proceeds with a theoretical discussion of the concepts of social security and comprehensive social protection. This is followed by an exploration of the South African social security framework - the legal, institutional and administrative framework, the scope of social security coverage, and social security adjudication and enforcement. Finally, the paper

identifies gaps and challenges within the social security system, assesses the opportunities for developing a comprehensive social security system in South Africa, and provides some recommendations as to how the social security system might be improved.

Download these publications from our website: www.communitylawcentre.org.za/Socio-Economic-Rights/publications.

For printed copies, contact the Socio-Economic Rights Project on +27 21 959 3708/2950 or serp@uwc.ac.za

CALL FOR CONTRIBUTIONS TO THE *ESR REVIEW*

The Socio-Economic Rights Project of the Community Law Centre at the University of the Western Cape welcomes contributions to be published in the *ESR Review*.

The *ESR Review* is a quarterly publication that aims to inform and educate politicians, policy-makers, NGOs, the academic community and legal practitioners about key developments relating to socio-economic rights at the national and international levels. It also seeks to stimulate creative thinking on how to advance these rights as a tool for poverty alleviation in South Africa and abroad.

Contributions

- should reflect contemporary debate or spark new debate;
- should be opinion pieces or serve an advocacy function, rather than simply stating legal principles or being descriptive in nature;
- should not be on a topic already published in the *ESR Review*,

unless they take the debate forward;

- should not be a marketing exercise for a particular project or programme; and
- should be written in a simple, clear style that avoids technical language and legal jargon where possible, taking into account that the *ESR Review* is read by both legal practitioners and grassroots human rights organisations.

Send contributions in electronic format (MSWord) to serp@uwc.ac.za or lchenwi@uwc.ac.za. Provide your full name and present position. Titles and qualifications are not necessary.

If the article has already been published elsewhere, give full details, including whether it has been shortened, updated or substantially changed for the *ESR Review* and whether the required authorisations have been granted.

Length

Contributions should be no longer than 3 000 words, except contributions for the Events section (1 500 words) and the Publications (Book Review) section (1 000 words).

References and notes

- No footnotes. Rather try to work explanations into the text.
- Use the abbreviated Harvard style of referencing, for example: "Child abuse is rising (Author, 1999: 10)," or "According to Author (1999: 10), child abuse is rising."
- Keep references to the absolute minimum - preferably only for publications from which direct quotes have been taken.
- Provide a list of the key references.

This and previous issues of the *ESR Review* are available online: www.communitylawcentre.org.za/Socio-Economic-Rights/esr-review.