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Ensuring rights make real change

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DULLAH OMAR INSTITUTE
FOR CONSTITUTIONAL LAW, GOVERNANCE AND HUMAN RIGHTS

Editorial

This is the third issue of the *ESR Review* in 2015. It includes three feature articles that discuss various areas of socio-economic rights.

Enoch MacDonnell Chilemba analyses various incidents of evictions that took place in South Africa in 2014. There were also court challenges, applications and decisions relating to evictions. The article highlights issues relating to the legality and frequency of evictions.

Fola Adeleke and Rachel Ward highlight the interrelatedness of human rights norms and the right of access to information. They argue that it is important to view access to information as an enabling condition for other rights, particularly socio-economic rights and development.

Ebenezer Durojaye provides a commentary on the recent decision by the Committee on International Covenant on Economic, Social and Cultural Rights (CESCR) in *IDG v Spain* (Communication No. 2/2014). This is the CESCR's first decision after the entry into force of the Optional Protocol to the Covenant on Economic, Social and Cultural Rights in May 2013. The author highlights the positive aspects of this decision as well as its shortcomings.

This *ESR Review* includes a brief update on the report of the Special Rapporteur on Extreme Poverty and Human Rights on the World Bank and human rights.

A brief outline of a workshop on the socio-economic rights of older persons and the launch of a project on enhanced civic understanding and engagement concludes this issue.

In October 2015, the United Nations celebrated its 70th year of existence since its founding in 1945. This was an opportune time to reflect on the work and impact of this global was also a time to craft the way forward to continuing to enhance humanity. Through its agencies, funds and programmes, it continues to seek global solutions to global challenges. Apart from being the guardian of international peace and security, the United Nations has also pursued the enhancement of socio-economic, cultural and humanitarian cooperation among nations, through the promotion of human rights justice and respect for international law and treaty obligations.

Gladys Mirugi-Mukundi, Co-editor

Evictions in South Africa during 2014

An analytical narrative

Enoch MacDonnell Chilemba

Itroduction

The South Africa Constitution and pertinent legislative frameworks recognise the right of access to housing. This right extends to people who live in informal settlements, where they erect shacks and other structures. These people also include persons that take occupation of places/settlements 'illegally,' although they are not expected to resort to illegal means in exercising their right. Due to a lack of access to housing people often erect shacks or other structures on land for which they do not have legal occupation. Such persons occupy lands belonging to private persons or entities, government and local municipalities. As a result, South Africa continues to witness cases and incidents of forced evictions whereby persons who are in illegal occupation of land are forcefully removed from it. In addition, people are evicted for reasons to do with urban development and planning.

South Africa witnessed a number of eviction incidents during 2014. There were also court challenges, applications and decisions relating to evictions. This paper is a narrative of the summary of the research conducted by the author on behalf of the Socio-Economic Rights Project (SERP) of the Community Law Centre at the University of Western Cape on the status of evictions in 2014. It looked into a number of eviction incidents and court cases that took place during 2014. The narrative first outlines the conceptual legal framework that is applicable in the context of evictions in South Africa. Thereafter, it discusses particular eviction incidents that occurred or that were prevented. It also analyses the court cases and applications relating to evictions that were litigated in 2014. Lastly, it makes observations, draws out the findings and suggests possible recommendations.

Conceptual legal framework on evictions in South Africa

The study looked at evictions of individuals from premises that they occupied illegally. The applicable law is set out in the South Africa Constitution, 1996, and in a number of pertinent pieces of legislation. The Constitution is applicable in any eviction. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, Act 19 of 1998 (hereafter PIE) is applicable in the context of illegal occupations. The pertinent legal framework addresses rights and duties of owners of private property, the state and the individuals facing an eviction. The law requires that the rights of owners of premises must be balanced against rights of occupiers, who should not be left homeless by evictions. In this regard, South Africa's Constitution protects the right to property by prohibiting deprivation of property or its use except as per the law of general application in section 25. On the other hand, in section 26(3) the Constitution also protects individuals from being evicted from their homes or having their homes demolished without a court order made after considering all the circumstances.

In addition, South Africa has put in place legislation that provides safeguards in evicting people who occupy premises illegally. PIE gives effect to the contents of section 26(3) of the Constitution by providing a comprehensive description of the circumstances in which illegal occupiers may be evicted by a court order. The Act requires a court deciding an eviction application to take into consideration a number of factors.

Thus there are a number of guidelines informing the court in its quest to determine whether an eviction is just and equitable. That decision must be made after considering all pertinent circumstances. The courts must further consider the length of time the occupiers have been in occupation, the availability of alternative accommodation (to be provided by the state where occupiers are unable to find their own accommodation), and whether the occupiers fall within groups defined a vulnerable – the elderly, child- or female-headed households and persons with disabilities.

The applicable law is also discussed in a number of court decisions emanating from the Constitutional Court and other courts. Any illegal occupiers who are threatened by eviction or by demolition are guaranteed constitutional protection against this, without a court order issued after considering all the circumstances. It is thus relevant to look at some of the eviction incidents that occurred in 2014 and make critical observations thereon in the light of the conceptual framework discussed in this section.

Eviction incidents in 2014

The Marikana informal settlement, Philippi East: 7–8 January 2014

The eviction was from private land owned by Mrs Irish Fischer. It was carried out by the Anti-Land Invasion Unit (ALIU),

which demolished 47 shacks. The eviction gave rise to a number of court applications for interdict by Mrs Fischer, the City of Cape Town and the occupants (shack dwellers).

Cato Crest evictions – Madlala Village, Lamontville: 13 February 2014
The lands involved belonged to the eThekwini Municipality. The evictions were carried out pursuant to a court order obtained by the KwaZulu-Natal MEC for Human Settlements and Public Works around 28 March 2013. The shack dwellers challenged the order's interpretation and the matter went all the way to the Constitutional Court. Nonetheless, the evictions continued while the matter was still in court.

Lwandle/Nomzamo evictions, Cape Town: 1–2 June 2014
The evictions were from land privately owned by the South Africa National Roads Agency Limited (Sanral) that had been earmarked for rerouting the N2 national road. The evictions were done pursuant to a court order obtained by Sanral. However, an inquiry by national government found that Sanral did not use an eviction order.

General Johannesburg evictions: pending by 9–10 June 2014
Over 1 000 occupiers of several inner city Johannesburg buildings faced eviction. The City of Johannesburg suspended 30 evictions pending the creation of an eviction model that conformed to the requirements of the law

Zandspruit and Honeydew, Johannesburg: 7–9 July 2014
These were evictions from townhouses that formed a building complex and the removal of shacks and structures erected on the land. The Honeydew land belonged to a private entity. Owners used the Red Ants to carry out the evictions.

Erf 149, Philippi East, Cape Town: 10–11 August 2014
The evictions were carried out by the ALIU following the City of Cape Town's own criteria for the demolitions of 'uncompleted' or 'vacant' dwellings.

Sisonke Village, Durban: 30 September 2014
The ALIU evicted about 30 families.

Nellmapius, east of Pretoria: 9 November 2014
The eviction incident stemmed from 'land grab' practices by people tired of waiting for RDP houses, who erected structures on the land.

Botshabelo section, Alexander, Johannesburg: 14 November 2014
The evictions involved the removal of people who had moved into flats that were part of a municipal housing project and which had been vacant for two years.

Malemaville evictions, Pretoria: 25 November 2014
The City had a court order to demolish buildings/shacks that had been built as part of the 'land grab' tactic (explained above).

Lenasia evictions: 'on an ongoing basis'
These were evictions and demolitions carried out by Department of Local Government in the Gauteng Province, on an 'on-going basis'. They were attributed to the illegal sale of government land to the community.

General evictions in eThekwini municipality
These comprised a series of 'routine' evictions. They stemmed from a practice by illegal invaders who erected shacks at a faster rate than the eThekwini Municipality could demolish them. In addition, newcomers to eThekwini were also occupying land earmarked for low-cost housing for local people who had waited for many years, and also had to be evicted.

Eviction cases and applications in 2014

Rustenburg Local Municipality v Mdango and Others: 30 May 2014
This case related to the eviction of people from an area in Rustenburg. The residents invaded RDP houses in Seraleng Township that were meant for allocation to applicants approved by the municipality. The Supreme Court reiterated that an eviction order should only be granted after pertinent parties have been heard. These include the MEC for Human Settlements, who should provide information on alternative suitable accommodation; and the municipality, which should indicate steps taken to provide alternative accommodation before the eviction.

Zulu and 389 Others v eThekwini Municipality and Others: 6 June 2014
The case hinged on the interdict used for the Durban evictions listed above which was obtained by MEC for Human Settlements and Public Works on 28 March 2013. The Court observed that the order was meant to prevent illegal occupations from that date onwards so it could not be used to remove people who took occupation before then. The Constitutional Court referred the matter back to the High Court.

Rand Leases Properties v Occupiers of Vogelstruisfontein and Others: 22 August 2014
The case relates to an intention to evict over 200 people who lived on private land in the Marie Louise informal settlement. The High Court issued an order requiring the City and the occupiers to carry out 'meaningful engagement' on the eviction and alternative accommodation plans, during which the parties agreed that the Court should issue a 'consent' order for the City to relocate the residents to a Rugby Club Site and provide them with basic services.

De Clerq and Others v Occupiers of Plot 38 Meringspark and Others: 8 October 2014
This was an eviction application by private farm owners. The High Court issued a structural order postponing the eviction application until 9 February 2015 and required City to set up a steering Committee to look into and carry out an engage process on a relocation plan and site.

Fischer and City of Cape Town v Ramahlele and 46 Others: 27 Nov 2014

This case emanated from evictions carried out by the ALIU at Marikana informal settlement on Mrs Irish Fischer's land in Philippi. Mrs Fischer had obtained an order restraining occupations and there was a huge likelihood that the interdict could be used to evict the occupants. On their part, the occupants applied for an order against evictions. The Court ruled that people who were already in occupation by 27 November 2014 could not be evicted; only those who came after that date would be affected.

Observations and conclusions

The narrative sought to paint a picture of the state of evictions in South Africa during 2014. A number of observations can be made regarding the legality and frequencies of the evictions. First, a majority of the evictions surveyed for the purposes of this study might not have been legal. For example, with regard to the Sanral Lwandle evictions: there was no court order authorising eviction and no alternative accommodation was provided. Second, the evictions were rather frequent. For example, according to SERI, evictions took place 'constantly' in Gauteng. In Cato Crest in eThekwini, whenever shacks were demolished the process of erecting new shacks would start again and by June 2014 similar evictions had taken place 12 times. Similarly, there were 'more than 24 evictions' in Sisonke Village, Durban by early 2014, whilst three major evictions took place in Cato Crest alone. There were 'between 10 and 20 evictions a month' in the inner city of Johannesburg. The study found that evictions occurred every month from January until November 2014.

The study also brought forth a number of findings. First, with regard to the numbers of people/families evicted, it was found that the Lwandle evictions displaced about 800 families whilst the Cato Crest eviction on 2 June resulted in the demolition of more than 100 shacks and the displacement of 300 people. The Zandspruit evictions saw 114 shacks being demolished and about 350 residents being removed. Other evictions involved the relocation of communities. The evictions thus affected many people and families. Furthermore, it was found that there were at least nine major evictions in Gauteng, five in Kwazulu-Natal and seven in the Western Cape. In addition, there were at least 16 major evictions from government-owned land and about eight from privately-owned land. In terms of the eviction agents used, in Gauteng the private security firm Red Ants were used, while in the Western Cape it was the ALIU and in KwaZulu-Natal the Land Invasion Control Unit.

A number of critical findings can also be extrapolated from the study. First, certain evictions were done 'through the back door', wherein state agencies and property owners tried to carry out evictions without obtaining eviction orders. Instead, they used an interdict aimed at preventing (prospective) illegal occupations. Second, there were deliberate 'land-grab tactics', whereby people tired of waiting for land/housing allocations from the state deliberately took illegal occupation of land. Third, certain evictions disregarded people's plight and rights. For example, some evictions destroyed homes, shacks and personal property; others were carried out without sufficient notice being given to the occupiers; some were carried out during very cold winter weather and while children were sitting for examinations; and finally, some evictions took place while occupiers were at work. Fourth, there was violence and protests during evictions, causing death and injuries. Finally, there was an abuse of the duty of government relating to the provision of alternative accommodation: private landowners were able to carry out illegal evictions with no alternative accommodation being provided since, in terms of the law, government would be held accountable for the provision of such accommodation.

Therefore, although the Constitution and PIE provide protection against wrongful evictions, the events that occurred in 2014 suggest that such safeguards did not protect a majority of illegal occupiers from facing rights violations as well as illegal evictions. The occupants often had to rely on court orders in order to enjoy the protection afforded by PIE and the Constitution. Accordingly, in trying to explore the way forward for 2015 and beyond, a number of suggestions can be considered. First, there is a need to emphasise that state and private actors, especially municipalities, must follow the law when pursuing an eviction. Second, there is an urgent need to try and resolve the complicated and chaotic state of housing waiting lists, since it might be argued that frustration leads to illegal occupations as evidenced by the land-grab tactics. Third, measures should be taken to deal with the underlying issues of proper, adequate planning for informal settlements and for the opening up of land. Fourth, the issue of promoting the right to have access to adequate housing requires looking into.

Finally, emphasis should be placed on carrying out lawful or legal evictions, including ensuring meaningful engagement before an eviction. This can be achieved if, among other things, evictions are only carried out after obtaining an eviction order from the court. This is because the courts will only issue an eviction order if it is fair, just and equitable to effect an eviction. Indeed, South Africa has the required legal framework to put a stop to these unfortunate incidents. Thus the crucial step is to follow the applicable law.

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The interrelation between human rights norms and the right of access to information

Fola Adeleke and Rachel Ward

Over the last twenty years, the rise of constitutional democracy in Africa has raised hopes for socially responsive governments. An emerging trend in the package of constitutional rights now found in new constitutions in Africa is the inclusion of the right of access to information (ATI).

The importance of the right of ATI is well established globally, with clearly articulated principles on the nature of the right in different international agreements. In giving effect to this right in some of the African regional instruments, the African Commission on Human and People's Rights recently adopted a model law on ATI, the first of its kind in Africa. African states are also beginning to recognise the importance of this right in promoting transparency in government. By 2015, 17 African countries had ATI laws (Angola, Burkina Faso, Côte d'Ivoire, Ethiopia, Guinea, Liberia, Mozambique, Niger, Nigeria, Rwanda, Sierra Leone, South Africa, South Sudan, Sudan; Tunisia, Uganda and Zimbabwe), although with varying degrees of success for the domestic advancement of ATI. A further six African nations have drafted ATI Bills that are at various stages of consideration by their Cabinets and Parliaments.

The move in Africa over the past decade to consider and pass domestic ATI laws arguably constitutes some sort of recognition from African leaders of the centrality of this concept to democratic governance. Whether the realisation of the right of ATI by African states is a genuine attempt to be transparent or is rather paying lip service to openness and accountability is beyond the scope of this paper.

In South Africa, the Constitution of 1996 recognises the right of ATI in section 32, which compels both public and private bodies to provide access to information upon request. Section 32 further provides that national legislation should give effect to the right, hence, the passage of the Promotion of Access to Information Act 2 of 2000 (PAIA). One of the most important understandings of the right of ATI, dubbed as the right to know, is that it can make a material, tangible difference to the lives of vulnerable people, and thereby contribute to social and economic justice. The argument follows that ATI creates a mechanism through which individuals and communities can gather information relating to the activities of the government in realising their socio-economic rights, and can therefore use this information to hold government accountable. Indeed, as Mukelani Dimba puts it, 'freedom of information creates the conditions in which decisions about the allocation of resources can be challenged' (Dimba 2008).

The understanding of ATI as an enabling condition for other rights, particularly for socio-economic rights and development, has been acknowledged under international law. For instance, the Rio Declaration on Environment and Development notes in Principle 10:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate *access to information* concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy shall be provided (author's emphasis).

Principle 10 was ground-breaking in many ways. Appearing in 1993, this UN Declaration went far further than many other international human rights instruments in promoting and protecting the right of ATI. Although Principle 10 is concerned with environmental issues and does not couch ATI in the language of a right, it accords the concept a certain and significant value insofar as it provides that ATI is a non-negotiable condition set down for all states parties to make available, and that mechanisms should be established for 'redress and remedy' should access not be forthcoming. The latter point in fact affords ATI the status of a right in so far as it is justiciable.

Further, Principle 10 articulates another significant aspect of ATI, namely, that it facilitates meaningful participation between the state and its citizens, or between a powerful private entity and the local community. Indeed, engagement and dialogue with the people affected is one of the most important components of the delivery of socio-economic rights, and one which is only achieved through granting the right of ATI. This was determined by the Constitutional Court of South Africa in the case of the *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*, where the Court stated that meaningful engagement was a two-way process whereby the government and the persons involved consulted with one another in order to achieve a pre-determined objective. And further, in the case of *Government of South Africa v Grootboom*, the Court, in recognising the inter-connectedness of civil and political rights and socio-economic rights, demonstrated

> ATI can be used to confirm the existence of an established policy and hold a government agency accountable to that policy

the justiciability of socio-economic rights.

In addition, recent court cases on PAIA are beginning to show the utility of the right of ATI for the enforceability of socio-economic rights in South Africa. In *Vaal Environmental Justice Alliance (VEJA) v Company Secretary of Arcelor Mittal*, a community in the Vaal wanted Arcelor Mittal to close its disposal site because they alleged that the company was dumping hazardous waste. To achieve this, the community sought access to the company's environmental impact assessment documents that proved their allegations. The information request was denied and the community appealed to the High Court. The High Court affirmed that community-based civil society organisations are entitled to monitor, protect and exercise the rights of the public by seeking information to assess the impact of various activities on the environment (Paragraph 16). Because the request for ATI had been submitted to Arcelor Mittal, a private company, it was necessary to state what right the community wanted to protect with the information sought, as stipulated by section 32 and the PAIA. The community stated that the information was needed to protect the right to an environment that is not harmful to health or well-being, as guaranteed under section 24 of the Constitution.

The question of whether information is required for the exercise and protection of a right has been the subject of litigation in South Africa. According to the court in *My Vote Counts v Parliament of South Africa*:

> "required" in the context of section 32(1)(b) does not denote absolute necessity. It means "reasonably required". The person seeking access to the information must establish a substantial advantage or element of need. The standard is accommodating, flexible and in its application fact-bound. (Paragraph 61)

In the *VEJA* case, the High Court granted the appeal and directed the company to release the documents. This decision was upheld by the Supreme Court of Appeal when Arcelor Mittal appealed. The *VEJA* case demonstrates the value of ATI in exercising and protecting other constitutional rights. It also demonstrates the significance of community action in the fight for socio-economic rights, and the value ATI can bring to bear.

Indeed, for Colin Darch, 'the emerging practice and theory of change in the developing world, which sees ATI as less an individual right and more a collective right to be used to advance community interests against more powerful actors' (Darch 2013). Further, through developing ATI mechanisms, not just in terms of legislative reform but other policy initiatives based on promoting the availability of state information into the public domain, the state can begin the process of meaningful engagement with citizens and communities. This constitutes an accepted perquisite for the delivery of socio-economic right services.

The significance of meaningful engagement to the realisation of socio-economic rights has been recognised in international law. Although speaking specifically to the right to work, the General Comment 18 from the Committee on Social Economic and Cultural rights asserts that:

> the formulation and implementation of a national employment strategy should involve full respect for the principles of accountability, transparency, and participation by interested groups. The right of individuals and groups to participate in decisionmaking should be an integral part of all policies, programmes and strategies intended to implement the obligations of States parties under article 6.

In promoting the involvement of individuals and communities in decision-making some degree of open access to government spending and planning is necessary, which can be fulfilled through the exercise of the right of ATI. There are also other ways through which this right can be used to enforce socio-economic rights. One is to use ATI to challenge public officials about policy choices, confirm the existence of an established policy, and to hold a government agency accountable to that policy. Developing open budgeting practices accessible to communities to understand the role of budgets in socio-economic delivery is a practical way of achieving this.

Another way of ensuring socio-economic rights enforcement is through the collection of evidence to establish a pattern or practice in government, in order to challenge or justify the practice. For the realisation of the effectiveness of PAIA in aiding the realisation of other human rights, civic education is required. This highlights the important role that civil society organisations can play in helping the public to make these linkages and use the law efficiently. In addition, civil society organisations can show how ATI can serve as a platform to occupy political spaces through engaged public participation. These are crucial roles that must be played by interested stakeholders to achieve the objective of using access to information to enforce socio-economic rights.

At an international level, reporting on state duties to comply with the International Covenant on Economic, Social and Cultural Rights (ICESCR) is about the provision of information that can enable various stakeholders to measure compliance by states with their commitments and analyse the extent to which states are fulfilling their obligations under the ICESCR. States have the obligation to submit reports on measures that they have adopted and the progress made in achieving obligations assumed in the ICESCR. The failure to provide information or to provide access to certain information constitutes a violation

of obligations that the State agreed to fulfil. The reporting requirement under the ICESCR and the obligations to respect, protect and fulfil are important requirements, and it is recommended that there should be an integration of the right of ATI in treaty-monitoring processes dealing with the realisation of socio-economic rights.

ATI, as an enabling right for the realisation of other rights and specifically socio-economic rights, is perhaps one of the most powerful ways the concept has been imagined. It is also an important prerequisite for community engagement and public participation, both of which requires an active citizenry. As demonstrated in this article there exists, therefore, a relatively robust framework in Africa under which to promote the realisation of socio-economic rights and, implicitly, the right of ATI as an enabling right. Indeed, this understanding of ATI, as an enabler for the fulfilment of socio-economic rights, in fact incorporates within it both the broader understanding of ATI as a human right, as well as ATI as a function of participatory democracy insofar as it enables individuals and communities to engage with states to ensure better access to socio-economic services.

The spread of constitutionalism in African states is occurring at a time when there is an increasing demand for open democracy. The spread of new constitutional ideas given effect to these concepts has no doubt been facilitated by these developments. To sustain this momentum, civil society organisations play an important role in holding African governments accountable to constitutional obligations in order to keep the political will of the government strong in promoting open government.

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Bringing justice to the disadvantaged

A commentary on CESCR's decision in *IDG v Spain* (Communication No. 2/2014)

Ebenezer Durojaye

Introduction

This is the first decision of the Committee on International Covenant on Economic, Social and Cultural Rights (CESCR) after the entry into force of the Optional Protocol to the Covenant on Economic, Social and Cultural Rights in May 2013. The Optional Protocol was adopted in 2008 to allow for individual communication to the CESCR. It is believed that individual access to the CESCR will not only strengthen accountability mechanism to realize socio-economic rights, but will also give hope to the hopeless (Chenwi: 2010).

The applicant brought an action against the government of Spain to challenge the procedure adopted to enforce a mortgagee transaction, which did not ensure proper services of court notices, as constituting a violation of her right to adequate housing as guaranteed under article 11 of the Covenant. The facts of the case relate to a homeowner, Ms. I.D.G, whose home was auctioned when she fell behind on payments during the economic crisis in Spain. Ms. I.D.G only became aware of the case against her after a judgment was handed down, when the sheriff delivered a letter notifying her of the impending auction of her home. When she took the matter to the Spanish Constitutional Court as a housing rights violation, her case was dismissed. She then took the matter to the CESCR. The Committee found that state parties must ensure effective remedies for homeowners who have defaulted on mortgage payments, and must ensure that appropriate measures are taken to ensure personal notification of foreclosure proceedings.

Deconstructing the right to adequate housing

It is of great interest to note that the first case the CESCR will have to adjudicate on deals with the very complex and controversial issue of a mortgage transaction. The relationship between a mortgagor and a mortgagee is often viewed as strictly contractual in nature and as such is outside the scrutiny of human rights principles and standards. This is so despite the power imbalances existing between the mortgagor and mortgagee as the former is nearly almost at the receiving end, without avenues for redress. The CESCR notes that while this case raises some procedural issues, its main focus is to examine the human rights issues that arise from the way and manner in which the process for the enforcement of the mortgage transaction was carried out. In the CESCR's view, the major question was whether the applicant's right to adequate housing was violated as a result of a mortgage enforcement process that did not afford the applicant adequate opportunity to defend the case. In determining this issue, the CESCR explores the meaning and content of the right to adequate housing under article 11 of the Covenant. Its explanation was guided by its earlier General Comments Nos. 4 and 7. According to the CESCR, appropriate and due process constitute essential elements of all human rights, particularly in relation to forced eviction.

More importantly, the CESCR notes that procedural protection should include provision by the state of adequate and reasonable notice for all affected persons prior to eviction and in addition the provision of legal aid for their defence. This is a broad interpretation of the right to housing which has not been accorded much attention. While attention has been given to the issue of state sponsored evictions by national courts and regional human rights bodies, the same cannot be said of individual displacements as a result of enforcing mortgage transactions. Therefore, the Committee can be said to be breathing fresh air into the conceptualization of the right to adequate housing.

In the case involving Ms. I.D.G, the CESCR notes that states have the obligation to take reasonable measures with a view to ensuring that service of notice of the most important acts and orders in any administrative or judicial process is properly and effectively carried out, so that the affected person is given an opportunity to participate in the process. While the CESCR observes that public posting of a notice may be an acceptable way of notifying a party of a legal action, such a procedure should be used as a means of last resort in cases involving violations of the right to adequate housing. In some Common Law jurisdictions, proper service of court notices is *sine qua non* to assuming jurisdiction by the court. Where evidence abounds to show that services have not been properly carried out, the court will decline jurisdiction. For instance, the Nigerian Supreme Court in *Skenconsult Ltd. v Godwin Ukey* (1981) noted that failure to properly serve a party court notices goes to the root of the case and would render the court incompetent to assume jurisdiction of the case.

In arriving at its decision, the CESCR made reference to decisions of national courts and regional human rights bodies on this issue. In particular it was influenced by the decision of the South African Constitutional Court in cases

such as *Gundwana v Steko Development* (2011), where the Court held that there must be judicial oversight over cases of foreclosure against residential property; and *Kubyana v Standard Bank of South Africa Ltd* (CCT 2014), where the Constitutional Court found that banks must make every reasonable effort to ensure that a debtor is properly notified about his/her default in payment before execution of judgment.

By this observation, the CESCR would seem to be expanding states' obligations to protect the right to adequate housing. In essence, beyond preventing unlawful eviction, states are also obligated to ensure that an individual facing forced eviction as a result of a mortgage transaction has recourse to a fair and just administrative or judicial system. Put another way, forced eviction is not limited to physical acts, but also includes the failure to ensure redress and access to justice for victims of forced eviction. By so holding the CESCR should not be seen as creating additional obligations, but rather as clarifying the nature of obligation imposed in relation to forced eviction whether by state agents or private actors. Given that this case centres around a mortgage transaction between an individual and a bank (a non-state actor), the CESCR would seem to be invoking the due diligence doctrine to hold the government of Spain responsible for its failure to protect its citizen from forced eviction occasioned by the enforcement of a mortgage transaction by a non-state actor. Moreover, the CESCR would seem to hold that the negative obligation imposed in relation to the right to adequate housing can be shared by both states and non-state actors. This would seem to coincide with the reasoning of the South African Constitutional Court in *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC), wherein the Court noted that both the state and private parties have a duty not to interfere unjustifiably with any person's existing access to adequate housing. The Court noted further that any measure that permits a person to be deprived of existing access to adequate housing, unless justified by the law, will amount to a limitation of the rights protected in section 26(1).

The CESCR observed that its duty is not to determine whether domestic procedural rules have been properly complied with but rather to identify socio-economic right violations that might have occurred as a result of improper application of such procedures. Sometimes drawing the line between domestic application of procedural rules and human rights violations is not an easy task. In some jurisdictions, the issue relating to proper service of notice is largely procedural, which is dealt with by applicable domestic rules. Given that this case raises both procedural and human rights issues it becomes difficult to draw the line between the two. Perhaps a plausible explanation could be that if applying domestic procedural rules will lead to manifest injustice, as this case would seem to suggest, then the CESCR is justified to intervene in such a situation.

While the CESCR acknowledges efforts made to personally notify the applicant about the enforcement of the mortgage order, it reasons that other options (such as leaving an advice note in the letter box) could have been explored to put the applicant on notice. It is not clear what the CESCR means here. If a rule of procedure stipulates various ways of notifying a party to a suit and one of such means has been carried out diligently, should that not suffice as proper notice? In some jurisdictions, especially Common Law jurisdictions, if physical service of court processes cannot be achieved the other options recognised include the public posting of a notice (if the suit concerns an individual) and the placing of advertisements in newspapers (if it concerns a corporate or governmental institutions).

> Forced eviction is not limited to physical acts

The significance of this case is the crucial role played by civil society organizations in making a strong submission to the CESCR. In line with article 8 of the Optional Protocol, the ESCR-Net represented by organizations such as the Center for Economic and Social Rights (CESR), the Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), and the Socio-Economic Rights Institute of South Africa (SERI) were admitted as third-party interveners. The submissions by these organizations would seem to have enriched the quality of the CESCR's decision. This would seem to suggest that article 8 of the Optional Protocol was properly thought through by its drafters.

Also, this case has shown that the CESCR occupies a pivotal position in not only clarifying the content of the Covenant but also in providing hope and remedy for vulnerable and disadvantaged groups. The CESCR reiterated the indivisibility and interrelatedness of human rights, noting that denial of access to justice and fair administration process is essential to the realisation of socio-economic rights, such as the right to adequate housing.

This case seems to have broadened the meaning of the right to housing under article 11 of the Covenant. By this decision, the CESCR seems to suggest that the right to adequate housing does not merely impose positive and negative obligations on states, but also requires states to ensure effective judicial remedies for vulnerable and marginalized groups in order to assert their socio-economic rights. More importantly, this case seems to imply that non-state actors have the duty to respect the right to housing and that mortgage transactions will be carefully scrutinized so that their enforcement in the event of default will not undermine an individual's right to adequate housing.

It should be noted that the applicant involved in this case is a woman, which raises the gender dimension of a mortgage foreclosure. In most societies women are histor-

ically disadvantaged and often do not have same access to property or land as their male counterparts (Fareda 2005; Durojaye 2013). Thus, the effect of a mortgage foreclosure for a struggling woman, such as the applicant in this case, can be devastating. Unfortunately, the CESCR omitted to consider the gender dimension to this case. This is a missed opportunity for it to reinforce equality in the enjoyment of socio-economic rights, paying attention to the plight of women who often form part of vulnerable and disadvantaged groups in society. Hopefully, this omission will be corrected in future cases.

It is fair to state that the CESCR has started on a good note in its first decision since the entry into force of the Optional Protocol in 2013. As of August 2015, about 21 countries have ratified the Protocol, including three African countries – Niger, Gabon and Cape Verde – while another 45 countries have signed. Given that the Protocol provides the CESCR with great opportunity to clarify the provisions of the Covenant and ensure accountability in the enjoyment of socio-economic rights at the national level, countries (particularly African countries) that are yet to ratify the Optional Protocol should do so without further delay (African Commission 2012).

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Report of the Special Rapporteur on Extreme Poverty and Human Rights on the World Bank and human rights

Ebenezer Durojaye

In his report to the UN General Assembly in October 2015, the Special Rapporteur on Extreme Poverty and Human Rights, Prof. Phillip Alston, (hereafter the Special Rapporteur) presented a report in which he examined the various approaches of the World Bank to human rights. The Special Rapporteur noted that the Bank needs a new approach that will serve the interests of the people and explored the options available to the Bank.

The Special Rapporteur noted that the existing approach of the World Bank is incoherent, counter-productive and unsustainable. In his view, the Bank has tended to treat human rights like an 'infectious disease' rather than 'universal values and obligations'. The biggest obstacle preventing the Bank adopting an appropriate approach is the out-dated and inconsistent interpretation of the 'political prohibition' contained in its Article of Agreement. This prohibition prevents the Bank from engaging meaningfully with international human rights frameworks or assisting member countries from complying with their human rights obligations. This has prevented the Bank from taking note of the social and political economy of its work, thereby undermining the consistent recognition of the relationship between human rights and development. It further prevents the Bank from implementing the outcome of some of its research, which has emphasized the interrelatedness of human rights and core development issues.

The Special Rapporteur argues for 'a transparent dialogue designed to generate an informed and nuanced policy that will avoid undoubted perils, while enabling the Bank and its members to make constructive and productive use of the universally accepted human rights framework.' The report notes that whether or not the Bank changes its current approach to human rights, it is crucial that its policy should be 'principled, compelling and transparent.' The report then makes recommendations for the way forward.

The full report is accessible here: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/274

Events

Workshop on the socio-economic rights of older persons

The Socio-Economic Rights Project of the Dullah Omar Institute hosted two seminars on advancing the socio-economic rights of older persons, one at the Nelson Mandela Foundation in Houghton, Johannesburg, on 5 August 2015 and another at the School of Public Health, University of the Western Cape, on 11 September 2015.

The aim was to highlight the current state of socio-economic rights of older persons in South Africa. These rights play an important role in poverty alleviation and the challenges faced by older persons in the enjoyment of their rights are often linked to socio-economic rights deprivations.

The presentations at the seminar provided an overview of the problems and challenges experienced by older persons in South Africa as well as the national and international legal framework that protects them. They addressed issues such as access to decent housing, health care, nutrition and food security as well as financial and social security. The participants ranged from representatives of civil society organisations, academia and research institutions, to those from as state institutions and government departments. The events were generously funded by Foundation for Human Rights.

Project launch

Project on Enhanced Civic Understanding and Engagement

On 15 October 2015, the Cape Town Refugee Centre (CTRC), in partnership with the Dullah Omar Institute and the KwaZulu-Natal Christian Council (KZNCC) launched the Enhanced Civic Understanding and Engagement Project at an event hosted by the Mayor of the City of Cape Town. The goal of the project is to simultaneously strengthen refugees' awareness and participation in democratic processes in host communities, and enhance local government capacity for participative governance, in order to promote tolerance and social cohesion in the Western Cape and KwaZulu-Natal provinces.

The project recognizes that asylum seekers and refugees generally lack knowledge of their rights and responsibilities as set out in the Bill of Rights and the Refugees Act, leaving them without access to basic services such as health, education and social services. Lacking knowledge also provides a disincentive for asylum seekers and refugees to participate in community-based governance processes and structures. The absence of a national strategy for local integration further negatively impacts on the ability of both refugees and local government to achieve social cohesion. The aim of the project is to establish a platform for constructive engagement between refugees and South Africans.

This is a two-year project that is generously funded by the European Union funding envelope provided under the National Development Policy Support Programme for South Africa: Citizens in Action.